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

ORDER 24

Appeal 880006

Ministry of the Attorney General

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

Appeal Number 880006

O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), which gives a person who has made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On November 20, 1987, the Ministry of the Attorney General (the "institution") received a request for access to "...files on policies, practices, proposals, reports on 'whistleblowers' _ their protection, prosecution and assessment of media, union, political and other group discussions of such public employees". The requester asked the institution to "...provide this data for viewing in Ottawa as it becomes available." Although the request predated the proclamation of the Act it was processed as a formal request under the Act.

2. By letter dated February 1, 1988, the Freedom of Information and Privacy Co_ordinator for the institution advised the requester that the institution was prepared to provide access to some but not all records being requested.

The requester was sent copies of 'reports' or 'proposals' received from the public on the treatment of whistleblowers.

The requester was refused access to the following records for the reasons indicated:

(a) A copy of the report of the Ontario Law Reform Commission on Political Activity by Crown Employees was denied under subsection 22(a) of the Act on the grounds that the report was already available to the public. The requester was informed that he could order a copy of the report from the Ontario Government Bookstore, and was provided with the Bookstore's toll_free number.

(b) Clippings of various articles from newspapers and magazines on the subject of whistleblowers were also denied under subsection 22(a) of the Act.

(c) Working documents for a policy submission to Cabinet on whistleblowers in the public sector were denied under subsection 12(1)(b) of the Act

(d) A briefing note to the Attorney General on the status of policy development on the subject was denied under subsection 12(1)(e) of the Act

(e) Notes and interoffice memoranda used in preparing the documents referred to under (c) and (d), above, were denied under subsection 13(1) of the Act.

3. The requester appealed the institution's decision by letter to me dated February 8, 1988. He stated that the head had applied a "...blanket use of sections 12(1)(b), 12(1)(e) and 13(1) as means to deny [him] any information on this subject." He argued that "...[t]his is stretching and misusing these exemptions particularly ironic given the subject matter _ where a Section 11 public interest override clearly applies and where all records can hardly fall within those two exemptions."

4. The records in issue were obtained from the institution and reviewed by my staff during the course of mediation/ investigation.

5. On May 11 and May 30, 1988, I sent notices to the appellant and the institution stating that I was conducting an inquiry to review the decision of the head, and inviting each of them to submit written representations. I have received and reviewed both parties' representations.

Before identifying and addressing the issues covered by this Order, I want to deal with two preliminary matters raised at various points during the appeal process.

In the February 1, 1988, response to the original request, the institution advised the requester that it had copies of correspondence between the Premier and a member of the public concerning whistleblowing. Because the requester did not include "correspondence" in his request, the institution took the position that it was not covered by the request, and advised him that a separate request could be addressed to the Cabinet Office if these records were of interest. The appellant makes

no reference to this issue in his appeal and it is therefore excluded from the scope of my Order.

The requester's February 8, 1988, letter appealing the head's decision states that the "...section 11 public interest override clearly applies..." to the requested records. Subsequent representations received from the appellant make no further mention of section 11, and restrict discussions of a public interest override to section 23. It is clear that section 11 has no application to the circumstances of this appeal and my Order contains no discussion of that section.

Although the head's February 1, 1988, response covers decisions with respect to several records, the requester appealed only those decisions relating to the records covered by the section 12 and 13 exemptions claimed by the institution. My Order is therefore restricted to the proper treatment of these records.

The issues arising from this appeal are as follows:

A. Whether the records in question fall within the subsection 13(1) exemption claimed by the institution, and if so, whether any of the exceptions outlined in subsection 13(2) apply to require the head to disclose the records, or parts thereof.

B. Whether the records in question fall within the subsections 12(1)(b) and 12(1)(e) mandatory exemptions.

C. Whether the head has a duty under subsection 12(2)(b) to seek the consent of the Executive Council before denying

access to a record where an exemption is being claimed under subsection 12(1).

D. Whether the severability requirements of subsection 10(2) apply to any of the records in question.

E. Whether there is a compelling public interest in disclosure of the records exempted under subsection 13(1) that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

ISSUE A: Whether the records in question fall within the subsection 13(1) exemption claimed by the institution, and if so, whether any of the exceptions outlined in subsection 13(2) apply to require the head to disclose the records, or parts thereof.

Subsection 13(1) of the Act provides:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

A review of the records indicates that they contain advice and recommendations of a public servant on the issue of whistleblowing. Specifically, the interoffice memoranda discuss policy options, and the notes reflect a public servant's thoughts on policy to be developed on the subject of whistleblowing. I find that the records clearly fall within the scope of the subsection 13(1) exemption.

The head has discretion under subsection 13(1) to release a record even if it meets the test of the exemption. The head must consider the exercise of this discretion based on the

particular circumstances of each request. After reviewing the submission of the institution, I am satisfied that the head gave reasonable consideration to his options prior to deciding not to release these records, and this decision should not be disturbed on appeal.

Turning to subsection 13(2), it is necessary to consider whether the records contain any of the categories of information outlined in subparagraphs (a) through (l). If they do, the head is precluded from a strict reliance on the subsection 13(1) exemption.

It could be argued that the wording of subsection 13(2) requires the disclosure of a record in its entirety if a determination is made that it contains any of the categories of information identified under this subsection, notwithstanding that it also contains advice and recommendations as defined under subsection 13(1). I do not accept this interpretation, because to do so would defeat the purpose of the section 13 exemption. In my view, in situations where advice and recommendations and subsection 13(2) categories of information are found in the same record, the institution should consider whether or not the record can reasonably be severed under subsection 10(2), and the subsection 13(2) information disclosed. (Issue D on page 13 contains a detailed discussion of the application of subsection 10(2) to the records in this appeal.)

The head has indicated in his submission that all exceptions outlined in subsection 13(2) were considered and rejected as inapplicable.

In my view, the only subsection 13(2) exception with potential application to the circumstances of this case is subparagraph (a), which reads as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;...

What constitutes 'factual material'? In my view the overwhelming majority of records providing advice and recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2)(a). The institution submits, and I agree, that 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record. The clearest example would be an appendix or schedule of factual information supporting a policy document.

In this case, the factual information in the records is interwoven with the advice and recommendations and cannot reasonably be considered a separate and distinct body of fact. As such, it does not meet the criteria of 'factual material' under subsection 13(2)(a), and the mandatory exception provided by that subsection is not available to the requester in the circumstances of this appeal.

ISSUE B: Whether the records in question fall within the subsections 12(1)(b) and 12(1)(e) mandatory exemptions.

Subsection 12(1)(b) of the Act states:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including ...
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees; ...

The record exempted by the institution under this subsection is headed "Cabinet Submission _ Proposal and Recommendation, Cabinet Submission Analysis" and can most accurately be categorized as a working document prepared as part of a draft policy submission to Cabinet. It contains background information on the subject of whistleblowing, including the proposed direction, benefits and potential adverse consequences, alternative approaches, analysis and related concerns. The record also contains conclusions and recommendations, and outlines the arguments for and against the identified policy options.

Subsection 12(1)(e) provides an exemption in circumstances where the document in question is:

> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or <u>are proposed to be brought before</u> the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; (emphasis added)

The record exempted by the institution under this subsection is entitled "Briefing Note", and is a document prepared by a public servant on the Attorney General's staff to brief the Minister on the issue of whistleblowing, the status of legislation, and the

Cabinet's consideration of the matter. The document also contains a discussion of the issues and opinions of the author.

The institution has submitted that the issues, options and recommendations discussed in these records continue to be the subject of work within the public service directed at obtaining a Cabinet or Cabinet committee decision on the issue.
After reviewing the contents of the records in question, I am satisfied they fit squarely within the mandatory exemptions provided by subsections 12(1)(b) and 12(1)(e).

ISSUE C: Whether the head has a duty under subsection 12(2)(b) to seek the consent of the Executive Council before denying access to a record where an exemption is being claimed under subsection 12(1).

Subsection 12(2)(b) reads as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where, ...
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The appellant's position is that it is incumbent on the head to seek consent of the Executive Council in cases where a subsection 12(1) exemption is being contemplated.

The institution argues that the Act imposes no such requirement, and to do so would run contrary to the intent of the legislation.

After careful consideration of the submissions of both parties and an analysis of the issue, I have reached the conclusion that the Act does not impose an absolute requirement on the head to

seek the consent of the Cabinet in all cases where an exemption under subsection 12(1) is contemplated by the institution.

I have reached this decision for three reasons: the Act imposes no clearly defined absolute requirement for the Cabinet to consider all subsection 12(1) rulings; it would be impractical to impose an absolute requirement; and it would be inappropriate in some circumstances to require a head to seek Cabinet consent. I will elaborate on each of these reasons.

The Cabinet process and principles such as Cabinet confidentiality are firmly entrenched in our parliamentary system of government, with deep historical roots and widely accepted legitimacy. Changes in this process, if and when they occur, are fundamental to our system and require careful and deliberate consideration by our elected decision makers. In my view, there is no indication, either in the provisions of the Freedom of Information and Protection of Privacy Act, 1987, the debates of the Legislature leading to the passage of the Act, or scholarly opinion on the subject of the Cabinet record exemption, that the Act was intended to alter any fundamental aspect of the way Cabinet operates. Had the Legislature intended to impose an absolute requirement of a reference to and decision by Cabinet in relation to all classes of records to which subsection 12(1) applies, different and more explicit wording in subsection 12(2) would have been used.

In my opinion, subsection 12(2)(b) of the Act does not impose a requirement on the head to seek Cabinet consent in each instance, and to impose one would run contrary to the intent of the Legislature.

To require the head to seek Cabinet consent in all subsection 12(1) cases would also produce unreasonable and impractical results. The wording of subsection 12(2)(b) precludes one Executive Council from consenting to access for records prepared for a previous Executive Council. The practical problems of seeking consent with respect to a record prepared for a Cabinet in the early 1970s, for example, convinces me that the Legislature could not reasonably have intended to make Cabinet consideration mandatory in all subsection 12(1) cases.

In his submission, the head makes a compelling argument as to why it would be inappropriate for the head to seek Cabinet consent with respect to certain subsection 12(1) records. For example, the head points out that: "If Cabinet must consider all section 12 records, the fact that it must see the record before making a decision on its release means that it will, for this purpose, see a number of documents it would otherwise not see[,] ...such as draft Cabinet submissions, records of consultations among Ministers or briefing notes prepared for Ministers." Also, under the appellant's interpretation of subsection 12(2)(b), Cabinet would be required to see documents it would not and should not otherwise find on its agenda. The institution raises the example of a proposal prepared for presentation to Cabinet which had been either withdrawn by the institution or rejected by a Cabinet committee.

For these reasons I have concluded that subsection 12(2)(b) does not impose a mandatory requirement, but rather provides the head with discretion to seek Cabinet consent, depending on the circumstances of a particular case. This discretion allows a head to seek consent of Cabinet in cases where he or she feels a record should be released and where a reasonable expectation may exist that the Cabinet will not withhold its consent.

In my opinion, the circumstances of each case must dictate whether or not the head seeks Cabinet consent. However, in all cases, it is incumbent on the head to be mindful of the option available under subsection 12(2)(b) and direct his or her mind to whether or not consent of the Cabinet should be sought. I am also of the view that the discretion of the head to seek consent must be exercised irrespective of whether the requester has asked the head to do so as part of a request for subsection 12(1) records.

Subsection 12(2)(b) provides no express guidance on appropriate criteria for a head to consider in deciding whether to seek Cabinet consent. These criteria will develop with time and experience, but could perhaps include the following: the subject matter contained in the records; whether or not the government policy contained in the records has been announced or implemented; whether the record would reveal the nature of Cabinet discussion on the position of an institution; or whether the records have, in fact, been considered by the Cabinet. I want to emphasize that this list is by no means exhaustive or definitive and is only included in an effort to identify examples of the types of criteria I feel should be considered.

In the present case, the head has indicated that he has given due consideration to whether Cabinet consent should be sought and exercised his discretion against doing so. Having examined the records and reviewed the reasoning contained in his submissions, I find nothing improper or inappropriate with the exercise of his discretion and would not alter his decision on appeal.

ISSUE D: Whether the severability requirements of subsection 10(2) apply to any of the records in question.

Subsection 10(2) states:

> Where 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 falls under one of the exemptions.

The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific" (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. In my view, it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severence must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption. My interpretation of subsection 10(2) would appear to be supported by Associate Chief Justice Jerome of the Federal Court of Canada (Trial Division), who commented on severance in a recent case dealing with the severance provisions of the federal Access to Information Act (The Information Commissioner of Canada and Solicitor General of Canada, unreported and under appeal). At page 8 of the decision, the Associate Chief Justice states:

> ...these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released.

I have reviewed the records at issue in this appeal and have concluded that no information that is in any way responsive to the request could be severed from the documents and provided to the requester without disclosing information that legitimately falls within the subsections 12(1)(b), 12(1)(e) and 13(1) exemptions.

ISSUE E: Whether there is a compelling public interest in disclosure of the records exempted under subsection 13(1) that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

Section 23 of the Act provides that:

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

Section 23 does not apply to records falling under subsection 12(1). Therefore discussion of this issue is restricted to the records subject to the subsection 13(1) exemption.

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so_called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The appellant has submitted that "section 23 is also applicable given the subject matter involved, [a] subject that the current Attorney General publicly has said involves the public interest".

On the other hand, the head argues that "there is no compelling public interest in disclosure of advice given in the ordinary process... because the facts underlying decisions are available, the right to make submissions to government on policy (or on facts) is unharmed, and the ability to criticize the government for its decisions once made... is not hampered by failure to disclose the advice and recommendations that led to the decisions".

In my view, the purpose of the section 13 exemption is to ensure that persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure.

The appellant, who asserts the presence of a compelling public interest in disclosure, has provided no reasons or factual basis to support his contention. Although it could be argued that there is a public interest in the issue of whistleblowing by members of the public service, I am not convinced that this interest qualifies as "compelling", nor can I accept that the release of the record in question would or could clearly outweigh the purpose behind the section 13 exemption created by the Act.

In enacting the Freedom of Information and Protection of Privacy Act, 1987, the Legislature acknowledged the need for all

government records to fall within the purview of the Act. That is not the case in many jurisdictions, including our own Canadian federal system, where Cabinet records are explicitly excluded from coverage under the Access to Information Act and are not reviewable by the federal Information Commissioner. The Ontario Act, on the other hand, while creating an exempt class of records, makes any refusal subject to appeal and independent review by the Commissioner.

As Commissioner, I have the right to see all records for which a Cabinet (section 12) exemption is claimed, and to satisfy myself that the records do fall within the terms of the exemption. That is precisely what I did in this case. As an independent officer of the Legislature, I am not bound to accept an institution's decision that a record qualifies for an exemption; the Act gives me a mandate to obtain and review the records as well as a responsibility to exercise my own judgement in each appeal. That is what I fully intend to do in every case.

In the circumstances of this appeal, my Order is that the head's decision not to disclose the records at issue in this appeal is upheld.

Original signed by: October 21, 1988
Sidney B. Linden Date
Commissioner