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

ORDER 22

Appeal 880008

Management Board of Cabinet

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Appeal Number 880008

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 January 6, 1988, the Management Board of Cabinet (the "institution") received a request from the appellant for:

   "All records pertaining to the decision to extend government financing to separate schools from June, 1983 to June, 1985 including:

   - reviews of the financial, political, educational and social impact of extension of government financing; and

   - any polls which included a question or questions dealing with extension of (sic) separate schools; and

   - correspondence with other ministries".

2. On January 28, 1988, the institution advised the requester by letter that it did not have any polls in its custody

which included a question or questions dealing with the extension of funding to separate schools. In addition, the institution informed the requester that it did not have any records containing reviews of the political, educational and social impact of extension of financing. Accordingly, access was denied on the basis that the records did not exist.

The institution further stated that the request for correspondence with other ministries had been transferred to the Ministry of Education pursuant to section 25 of the Act, and the portion of the request concerning financial impact was transferred in part to the Ministry of Treasury and Economics pursuant to the same section of the Act.

Access to the institution's record concerning the financial impact of extension of government financing was denied under subsection 12(1)(e) of the Act.

3. On February 7, 1988, the requester wrote to me appealing the institution's denial of access. Notice of the appeal was sent to the institution.

4. Between February 7, 1988 and April 13, 1988, the records in question were examined by representatives of my office, and efforts were made by an Appeals Officer to settle the case.

5. By April 13, 1988, it was clear that settlement was not possible, and I gave notice on that date to the institution and the appellant that I was conducting an inquiry to review the decision of the head. Representations were invited from each party.

6. On May 5, 1988, written representations were received from the institution.

7. By letters dated June 10, 1988 and June 13, 1988 to the institution and appellant respectively, I advised the parties that an oral inquiry would be held in order to further address the issues raised in the appeal.

8. On June 30, 1988, I held an oral inquiry which was attended by the appellant, his counsel, and a representative for the institution.

It should be noted at the outset that the purpose of the Act as defined in subsection 1(a) is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Further, section 53 of the Act provides that the burden of proof that the record or a part of the record falls within one of the specified exemptions in the Act lies with the head.

The issues arising in this appeal are as follows:

A. Whether the record in question falls within the subsection 12(1)(e) mandatory exemption.

B. Whether the institution 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).

C. Whether the severability requirements of subsection 10(2) apply to the record in question.

ISSUE A: Whether the record in question falls within the subsection 12(1)(e) mandatory exemption.

Subsection 12(1)(e) reads as follows:

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

The institution submits that the record in question, dated June 29, 1985, is a document prepared to brief the Chairman of Management Board of Cabinet on matters that were proposed to be brought before Management Board, a committee of Cabinet, and the Executive Council. In the institution's view, the record contains matters that were the subject of consultation between the Chairman of Management Board and the Minister of Education relating to a government decision and the formulation of government policy. These matters were in fact brought before the Management Board of Cabinet on September 10, 1985, and it is acknowledged by the institution that the record in question will not be used again.

The institution argues that disclosure of the record at this time would reveal the substance of deliberations of Management

Board with respect to the financial implications of the extension of separate school funding, and as such falls within the definition of Cabinet records under subsection 12(1) of the Act. It is further submitted that disclosure would reveal the government's decision with respect to the timing for review of the financial implications of the decision by Management Board, and as such the record should be protected from release.

The appellant submits that the exemption provided by subsection 12(1)(e) is temporary in nature and expires after the record has been presented and dealt with by Cabinet. In the opinion of the appellant, the use of the present tense in subsection 12(1)(e) precludes its application to a record which has already been presented to Cabinet. In his view, had the Legislature intended the exemption to continue after consideration by Cabinet, the proper tense would have been used.

I accept the appellant's argument, and find that the record at issue does not fall within the exemption provided by subsection 12(1)(e). The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

However, this finding with respect to subsection 12(1)(e) is not determinative of the issue of disclosure of the record in question. Consideration must be given to the proper interpretation of the introductory wording of subsection 12(1).

The introductory text of subsection 12(1) reads:

> 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 ... (emphasis added).

The proper interpretation of this subsection is dependent on the meaning of the word 'including' at the end of the text. Are the subparagraphs that follow 'including' an exhaustive list of the types of documents that meet the requirements of subsection 12(1), or are they an additional list of specific types of records deemed to qualify as exempt Cabinet records?

Interpretation of the word 'including' has been the subject of discussion by both jurists and academics. In Dreidger, Construction of Statutes, 2nd ed. (1983) at page 18, the author states:

> "The standard guide for draftsmen is that 'means' restricts and 'includes' enlarges. This is what Lord Watson had to say in Dilworth v. Commissioner of Stamps:
>
> The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of a statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

At page 21 the author also makes reference to a decision in the case of Re Atlantic Sugar et al (No. 2) wherein Hughes C.J.N.B said:

> "Including instead of limiting has the opposite effect. In Re Grindlay Master, J.A., adopted the meaning of 'including' accepted by Mulock, C.J.O., in

delivering the judgment of the Ontario Court of Appeal in Phillips v. Joseph, which I think is applicable...:

> "The word 'including' ...in my opinion means something in addition... The weight of authorities I think show that the word 'including' is ordinarily construed as an enlargement of what had preceded it ... [It] is not a word of limitation. Rather it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it."

In my opinion, the use of the word 'including' in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption, regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for the exemption; any record where disclosure would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

Applying my interpretation of subsection 12(1) to the facts of this case, and having considered the representations of both parties to this appeal, I am satisfied that the record at issue meets the definition of an exempt Cabinet record.

The record was in fact reviewed by the Management Board of Cabinet, which is a statutory committee of the Executive Council, pursuant to subsection 3(1) of the Management Board of Cabinet Act, R.S.O. 1980, c. 254 as amended, and the contents of the record, if disclosed, would reveal the substance of deliberations of this Cabinet committee.

In his submission, the appellant points out that the only exemption relied upon by the institution in its notice of refusal was subsection 12(1)(e), and argues that it is not open for the institution to seek the benefit of a different exemption during the appeal process. Although I have some reservations in seeing the broader application of subsection 12(1) as a different exemption, I do accept that it is an argument that was presented to the appellant for the first time during the appeal process.

In my Order in Appeal Number 880010 released on September 8, 1988, I addressed the issue of new or different grounds for refusing access to records being introduced at the appeal stage. At page 3 of my Order I stated:

> "I expect that the introduction of new or different grounds for refusing access to records at the appeals stage will be the exception rather than the rule... [I]t slows the process down. However, I understand and accept that the parties may not always be aware, at the first instance, of all arguments they will eventually want to make".

As I pointed out in Appeal Number 880010, when a new or different issue is introduced, it is my responsibility as Commissioner to ensure that all parties are made aware of the issue and given an opportunity to respond to it. In this case, the appellant was aware of all grounds argued by the institution, and his counsel addressed the issue of the availability of other exemptions and the proper interpretation of subsection 12(1) during his submissions.

ISSUE B: 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 submits that it is incumbent upon the head to seek consent of the Cabinet before deciding whether or not to disclose the record. He argues that one of the central purposes of the Act is to disclose as much government information as possible, and that a narrow interpretation of subsection 12(2)(b) is inconsistent with this purpose.

The institution submits that subsection 12(2)(b) does not create an absolute requirement to seek consent of the Executive Council in all cases involving Cabinet records. The head points out that the wording used in subsection 12(2)(b) does not impose an explicit statutory obligation on the head to seek consent, and he goes on to identify the practical difficulties in seeking consent for the release of a record prepared for a previous Executive Council. The institution further submits that the reason for including subsection 12(2)(b) in the Act was to provide the Executive Council with the ability to release a record that would otherwise be barred from release, due to the mandatory nature of the subsection 12(1) exemption, for a period of 20 years.

I considered the issue of Cabinet consent under subsection 12(2)(b) in my Order in Appeal Number 880006. On page 9 of that Order, I outline my reasons for deciding that the subsection

"...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 based my decision on the grounds that:

> "...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."

In my opinion, the circumstances of each case must dictate whether or not the head seeks Cabinet consent. However, as stated on page 11 of my Order in Appeal Number 880006:

> "...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 discussions 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 record 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 C: Whether the severability requirements of subsection 10(2) apply to the record in question.

Subsection 10(2) provides:

> 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.

I also addressed the issue of severance in my Order in Appeal Number 880006. At page 13 of that Order I stated:

> "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. As I found in Appeal Number 880006:

> "...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) severance 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".

I have reviewed the record 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 document and provided to the requester without disclosing information that legitimately falls within the subsection 12(1)(e) exemption.

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