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

ORDER 206

Appeal 890263

Ministry of Natural Resources

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

O R D E R

INTRODUCTION:

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (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 the head to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make orders under the Act.

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

1. On March 28, 1989, the requester wrote to the Ministry of Natural Resources (the "institution") to request access to "...copies of both the original and revised version of the provincial Crown Cottaging Study for the Crown Land Management Planning Program".

2. On April 5, 1989, the Executive Director of the Lands and Waters Group (the "Executive Director") responded on behalf of the institution and advised that "Access is denied to your request for a copy of the Crown Cottaging Study under Section 22(b) of the Act. This provision applies because

current scheduling provides for a final publishing of the study by mid June".

3. On July 21, 1989, the Executive Director again wrote to the requester and advised that "...it is apparent that the consultants will require more time to complete the Study than was envisioned when I wrote you last. It is now anticipated that the document should be completed by the end of October, 1989."

4. On August 21, 1989, the requester wrote to this office and appealed the institution's decision. Notice of the appeal was sent to the institution and the appellant on August 23, 1989.

5. In accordance with our usual practice, the appeal was assigned to an Appeals Officer who conducted an investigation into the matter. In the course of this investigation, the Appeals Officer was advised by the Manager of Crown Land Development Section, Land Management Branch, Ministry of Natural Resources, that the requested record was expected to be received by the institution in early October, 1989. The Manager anticipated that the record would be made publicly available shortly thereafter. The institution undertook to respond to the request by the end of October, 1989.

6. In a telephone conversation with the Appeals Officer on October 30, 1989, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") indicated that she and the Executive Director had reviewed the record and were of the view that no exemptions contained in the

Act applied to exempt the record from disclosure other than the possible application of subsection 22(b).

7. On November 6, 1989, the Executive Director wrote to the appellant and advised that the requested record had been received by the institution on October 5, 1989. Further, the letter indicated that access was denied pursuant to subsection

22(b) of the Act due to the time required to publish the record. This letter also indicated that, barring unforeseen setbacks, it was the institution's intent "...to release the study [the record] both publicly and to you by November 25, 1989." The institution requested a $20.00 fee to cover the costs of printing and mailing the record.

8. On November 20, 1989, the appellant remitted the $20.00 fee requested by the institution.

9. On November 30, 1989, the Appeals Officer spoke with the Co_ordinator and was advised that the institution continued to exempt the requested record from disclosure pursuant to subsection 22(b) of the Act, because the Minister had not yet determined that the record could be made publicly available. On the basis of this information, the Appeals Officer formed the opinion that a settlement of the issues arising in this appeal was not possible.

10. By letters dated December 4, 1989, notice that an inquiry was being conducted to review the decision of the head was sent to the institution and the appellant. The Notice of Inquiry was accompanied by a letter in lieu of the usual

Appeals Officer's Report. The letter outlined the facts of the appeal and set out questions which paraphrased the sections of the Act which appeared to the Appeals Officer to be relevant to the appeal. The letter was intended to assist the parties in making representations concerning the subject matter of the appeal. It further indicated that in making representations, the parties need not limit themselves to the questions set out therein.

11. On December 19, 1989, representations were received from the institution in which it stated that the entire record was now exempt from disclosure based on subsections 12(1)(b) and (c), or in the alternative, subsections 12(1)(d), 12(1)(e), or 13(1) of the Act. The institution further stated that this change in position was due to a change in Minister. The institution advised that the new Minister (appointed August 2, 1989) read the record, and decided it would be inappropriate to make it available to the public.

12. By telephone on December 13, 1990, the Appeals Officer was advised by the appellant that he had received a letter from the institution advising him that it was now relying upon new exemptions, as cited above.

13. On or about March 4, 1990, I received extensive, written representations from the appellant wherein he claimed that the entire record should be disclosed based on subsection 13(3) and sections 11 and 23 of the Act.

14. I have considered all representations and supporting documentation in making this Order.

BACKGROUND:

As part of the Crown Land Cottaging Program reinstated by the institution in July 1987, the institution retained Woods Gordon Management Consultants to conduct a detailed market and socio-economic assessment of the implications of releasing more crown land for cottaging.

The Crown Land Cottaging Study (the "Study") consists of:

a) Letter from Ernst & Young Consulting to Mr. Frank Shaw, Ministry of Natural Resources, dated October 5, 1989, 1 page;

b) Master Table of Contents, 1 page;

c) Executive Overview, Findings and Recommendations, 35 pages;

d) Main Report, 165 pages;

e) Appendices, 195 pages.

PURPOSES OF THE ACT/BURDEN OF PROOF:

It should be noted at the outset that one of the purposes of the Act, as set out 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.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

A. Whether the head properly applied the discretionary exemption provided by subsection 22(b) of the Act to the requested record.

B. Whether the head properly applied the mandatory exemption provided by section 12 of the Act to the requested record.

C. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested record.

D. Whether the head properly applied section 11 of the Act to the requested record.

E. Whether there is a compelling public interest in the disclosure of the record or parts of the record which clearly outweighs the purpose of the exemptions.

ISSUE A: Whether the head properly applied the discretionary exemption provided by subsection 22(b) of the Act to the requested record.

Subsection 22(b) of the Act reads as follows:

> A head may refuse to disclose a record where,
>
> > (b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

By letter of April 5, 1989, the institution cited subsection 22(b) as the basis for exempting the entire record from disclosure. The institution further advised the appellant that upon completion of the record, it would be provided to him.

The institution made similar remarks to the appellant in several of its letters to him and in one telephone conversation with the Appeals Officer. On November 6, 1989, the institution advised the appellant in writing that it had received the record on October 5, 1989 and was still relying upon subsection 22(b) to deny access to it. On November 30, 1989, the Appeals Officer was advised by the Co-ordinator that the institution continued to rely on subsection 22(b) but it did so because the Minister of Natural Resources had not yet determined whether the record would be disclosed.

Throughout the 260 days that the institution relied on subsection 22(b) to exempt the record from disclosure it claimed that the delay was due to the fact that the consultants had not completed the Study or the revisions thereto. In its representations, the institution stated that it continued to rely on subsection 22(b) based on its "belief" and "anticipation" that the record, once received from the consultants, would be available for publication within the time limit set out in subsection 22(b). The institution further stated that this "belief" and "anticipation" were the "reasonable grounds", that the record or information contained therein would be published within 90 days after the request was made, as required by subsection 22(b).

In my view, the institution did not properly apply subsection 22(b) of the Act as it did not have custody or control of a copy

of the Study it was prepared to publish, until October 5, 1989. Moreover, the institution improperly applied that subsection during the time that the Minister was deciding whether the Study could be released. However, I find that within 30 days of receiving the final version of the Study, the institution did properly advise the appellant of the exemptions it was relying on to withhold the record from disclosure.

ISSUE B: Whether the head properly applied the mandatory exemption provided by section 12 of the Act to the requested record.

The institution identified four subsections in section 12 as grounds for refusing to disclose the record. They are subsections 12(1)(b), (c), (d) and (e) and I will deal with each of them individually.

Subsection 12(1)(b)

Subsections 12(1)(b) of the Act 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,
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

The institution submits that the record was prepared for submission to Cabinet in order to assist Cabinet in formulating a Crown Land Cottaging policy. The institution further claimed

that the record was created at the direction of the Cabinet Committee on Economic Policy. To support this claim, the institution provided a copy of a Cabinet submission by the Ministry of Natural Resources dated March 16, 1987, a copy of the Economic Policy Committee meeting minutes dated June 3, 1987 and a copy of the Crown Land as a development tool (CLADT) implementation strategy dated January 11, 1988. Also submitted was a copy of the meeting report dated February 28, 1989 of the Cabinet Committee on Northern Development.

In Order 147 (Appeal Number 890119), dated February 15, 1989, Commissioner Sidney B. Linden stated that subsection 12(1)(b) contains two criteria which must be satisfied in order for a record to qualify for exemption: it must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council (the "Cabinet") or its committees. I agree with Commissioner Linden's interpretation of the requirements of subsection 12(1)(b) and adopt it for purposes of this appeal.

Considering the record at issue in this appeal along with the institution's representations and supporting documentation, I am not satisfied that the record itself was prepared for submission to
Cabinet or its committees, or that it was submitted to Cabinet or its committees. Accordingly, the institution's claim for exemption of the requested record pursuant to subsection 12(1)(b) has not been substantiated.

Subsection 12(1)(c)

Subsection 12(1)(c) of the Act 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
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> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

In claiming this subsection, the institution relied upon the same representations made in support of its claim for exemption based on subsection 12(1)(b) of the Act.

I adopt Commissioner Linden's interpretation of subsection 12(1)(c) of the Act in Order 60 (Appeal Number 880244), dated May 18, 1989. In that Order he stated that "to meet the requirements of this subsection, an institution must establish that a record contains background explanations or analyses, and that the record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions."

Considering the record along with the representations, I find that the institution has not satisfied me that the record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in making

decisions. Accordingly, the institution's claim pursuant to subsection 12(1)(c) of the Act, has not been substantiated.

Subsection 12(1)(d)

Subsection 12(1)(d) of the Act 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,
>
> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

By way of an affidavit made by the Deputy Minister, Mr. George Tough, dated December 15, 1989, the institution claims that the new Minister, The Honourable Lynn McLeod, read the record and decided that she intended to use the Study as a basis for consultation with some of her colleagues in Cabinet in order to formulate the policy regarding cottaging on Crown Land. In the Minister's opinion, the record was not suitable for public disclosure.

In my view, subsection 12(1)(d) is clear in its requirements that the record was actually used for or reflects actual consultation among ministers of the Crown on matters relating to the making of government decisions, or the formulation of government policy. It

does not speak to an intended use or intended consultations among ministers of the Crown. Accordingly, I find that the institution's claim for exemption based on subsection 12(1)(d) of the Act has not been substantiated.

Subsection 12(1)(e)

Subsection 12(1)(e) of the Act read 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,
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> (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 decisions or the formulation of government policy;

In claiming this subsection, the institution relied upon the same representations made in support of its claim for exemption based on subsection 12(1)(b) of the Act.

I adopt the views of Commissioner Linden contained in Order 131 (Appeal Numbers 890159 and 890160), dated December 19, 1989, regarding the requirements of this subsection. In that Order Commissioner Linden stated:

> ...in order to qualify for exemption under this subsection, the record itself must have been prepared

> to brief a Minister in relation to matters that are either:
>
> (a) before or proposed to be brought before the Executive council or its committees; or,
>
> (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

Having reviewed the institution's representations and the record, I am not satisfied that the record itself was prepared to "brief a Minister of the Crown". Accordingly, I find that the institution's claim based on subsection 12(1)(e) of the Act has not been substantiated.

In summary, I find that the institution's claims under subsections 12(1)(b), (c), (d) and (e) of the Act have not been substantiated.

Although I have found that subsections 12(1)(b), (c), (d) and (e) of the Act do not apply to exempt the record from disclosure, this finding is not determinative of the issue of disclosure of the record. As the representations of the institution appear to make reference to the possible application of subsection 12(1) of the Act, I will now consider the application of that exemption to the record.

I adopt Commissioner Linden's interpretation of subsection 12(1) contained in Order 22 (Appeal Number 880008), dated October 21, 1988. At page 6 of that Order Commissioner Linden stated:

> ...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 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 that interpretation, Commissioner Linden stated at page 8 of Order 72 (Appeal Number 880159), dated July 11, 1989 that:

> Although these records themselves have not been placed before the Cabinet committee, they were created as a direct result of the committee's request for the specific information contained in the reports, and in my view, disclosure of their contents would 'reveal the substance of deliberations' of matters which remain under active consideration by this Cabinet committee.

In the circumstances of this appeal, I am not satisfied that disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees. Accordingly, I find that the institution's claim for exemption from disclosure of the record under subsection 12(1) of the Act, has not been substantiated.

ISSUE C: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested record.

Subsection 13(1) of the Act reads as follows:

> 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.

With respect to this subsection, the institution submitted that:

> ...the record contains advice to the Government regarding the formulation of policy on 'Cottaging on Crown Land'. The opinions and recommendations are presented in the record in such a way that they are interwoven with the factual material in the report. Thus, no reasonable distinction can be drawn between the two and it is not reasonable to sever factual material contained in the report from the opinions and recommendations.

Commissioner Linden discussed the general purpose of the exemption provided by section 13 of the Act, in Order 94 (Appeal Number 890137), dated September 22, 1989. At page 5 of that Order, he stated that:

> ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

Commissioner Linden further addressed the section 13 exemption in Order 118 (Appeal Number 890172), dated November 15, 1989. At page 4 of that Order he stated that:

> In my view, 'advice' for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a future course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I agree with the views of Commissioner Linden with respect to section 13 of the Act and adopt them for the purposes of this appeal.

From a review of the record, I note that at the front of the Study there is a section entitled "Executive Overview-Findings and Recommendations". In this section, specific recommendations are made along with number references to sections in the main report containing the factual material relating to those recommendations.
A review of the main report, including the references, indicates that recommendations exist throughout the material. In light of this I am satisfied that the record contains advice or recommendations within the meaning of subsection 13(1) of the Act.

Having found that the record satisfies the requirements for exemption under subsection 13(1), I must now determine whether any of the subsection 13(2) exceptions apply. In my opinion, the record meets the requirements of subsection 13(2)(g) of the Act which reads as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (g) a feasibility study or other technical study, including a cost

> estimate, relating to a government policy or project;

Subsection 13(2)(g) is unusual in the context of the Act in that it is a mandatory exception to the application of an exemption for a type of document, a study. In other words, even if the record at issue contains advice or recommendations pursuant to subsection 13(1), the head must disclose the entire record if it is a feasibility study or other technical study, including a cost estimate, relating to a government policy or project. (Subject only to the possible application of other exemptions.)

In my view, the record at issue in this appeal qualifies as a feasibility study. The term 'feasible' is defined by The Concise Oxford Dictionary, 7th ed., as: "practicable, possible, manageable, convenient, serviceable, or plausible". In Black's Law Dictionary, 5th ed., 'feasible' is defined as: "capable of being done, executed, affected or accomplished. Reasonable assurance of success".

It is clear from the record that the consultants were to study and provide information as to the current economic role of cottaging in northern Ontario, the demand for Crown land cottage lots, the method to be used to plan for additional lots, the benefits of involving private developers and the costs and benefits associated with additional cottaging activity.

Further, both the appellant and the institution provided a supporting document entitled "Crown Land as a Development Tool (CLADT) Implementation Strategy" published January 11, 1988. At page 19, under the heading `objective', the following paragraph appears:

> To engage a consultant to conduct a detailed market assessment and socio-economic study [the record] which will examine, among other things: the demand for Crown land cottage lots; where cottage lot development should occur; the value of new cottages to local communities, regions and the province; the benefits of involving private developers; and the advantages of offering the program fully to non-residents of Ontario.

Therefore, the main purpose of the record was to advise the institution on whether various proposals regarding the sale of Crown Land for cottaging, are feasible having regard to all the factors mentioned above. Moreover, the record contains cost estimates for the various proposals.

ISSUE D: Whether the head properly applied section 11 of the Act to the requested record.

As I have ordered disclosure of the record at issue, a consideration of Issue D is not necessary.

ISSUE E: Whether there is a compelling public interest in the disclosure of the record or parts of the record which clearly outweighs the purpose of the exemptions.

As I have ordered disclosure of the record at issue, a consideration of Issue E is not necessary.

ORDER:

Although I have found that the record falls under the exception contained in subsection 13(2)(g), it is my view that part of Appendix 4 should be severed. That appendix is entitled "Results of Survey of Stakeholders Groups". The survey lists the names of individuals, numerous business organizations, municipalities, associations and other groups along with their views and opinions on such matters as development of roads,

water and sewage standards, garbage disposal standards, eligibility for Crown lots and whether they support the CLADT initiative. In my view the names of individuals listed in Appendix 4 should be severed before the record is disclosed.

1. I order the head to disclose the record at issue in this appeal to the appellant within 20 days from the date of this Order, subject only to five severances in Appendix 4. I have provided the head with a highlighted copy of certain pages of Appendix 4 and the portions which have been highlighted should not be disclosed.

2. I further order the head to advise me in writing within 5 days from the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: November 20, 1990
Tom A. Wright Date
Assistant Commissioner