



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

ORDER P-361

Appeal P-9200330

Ministry of the Environment



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of the Environment (MOE) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) to any studies or reports, prepared by government staff or outside consultants, from 1982 to present, dealing with (a) the proposed establishment of the Ontario Water and Sewer Crown Corporation, and/or (b) the financial situation of Ontario Drinking Water Plants. Following discussions between MOE and the requester, the request was narrowed to part (a) only.

MOE granted access to a News Release introducing the corporation, and pages 4 and 5 of the 1990 Ontario Budget pertaining to the Water and Sewage Corporation. Access to two reports was denied pursuant to sections 12(1)(b), (d), (e) and 13(1) of the Act.

The requester appealed MOE's decision, and also maintained that additional responsive records created prior to the 1990 Budget announcement should exist. During the course of mediation, the appellant withdrew his claim regarding additional records.

Further mediation was not possible, and notice that an inquiry was being conducted to review MOE's decision was sent to the appellant, MOE, and the Ministry of Municipal Affairs (MMA), which had presented a Cabinet Submission which included Record 1 as an attachment. Written representations were received from MOE and MMA, but not from the appellant.

The records at issue in this appeal are described as follows:

1. "Examination Of The Need To Establish A Water And Sewage Agency", dated May 31, 1991.
2. Draft #3, "Options For The Provision of Water and Sewage Services in Ontario", dated January 15, 1991.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the mandatory exemptions provided by sections 12(1)(b), (d) and/or (e) of the Act apply to the records.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

A. Whether the mandatory exemptions provided by sections 12(1)(b), (d) and/or (e) of the Act apply to the records.

In its representations, MOE claims section 12(1)(b) and (d) of the Act with respect to both records, and section 12(1)(e) only with respect to Record 2. These sections 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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (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;
- (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;

It has been determined in a number of previous orders that the use of the word "including" in the introductory wording of section 12(1) means that the disclosure of any record, not just the types of records listed in various subparagraphs of section 12(1), which would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1) [Order 22].

In their representations, both MOE and MMA state that Record 1 was attached to two Cabinet Submissions made by MMA. The first submission was made to the Cabinet Committee on Environmental Policy (the CCEP) on June 27, 1991, and was considered again by the CCEP on August 19, 1991. The CCEP requested additional information, and a second Cabinet Submission was made to the same Cabinet committee on December 19, 1991. Both Cabinet Submissions contained Record 1.

Having reviewed the representations and Record 1, in my view, it qualifies for exemption under section 12(1)(b). It clearly contains policy options or recommendations, and MOE and MMA have established that it was submitted to the CCEP for consideration on two separate occasions.

Turning to Record 2, MOE acknowledges in its representations that this record was not submitted to Cabinet or one of its committees.

It is possible for a record which has never been placed before an Executive Council or its committees to qualify for exemption under introductory wording of section 12(1), provided the institution establishes that disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees [Orders P-226, P-293].

In its representations, MOE focuses on the introductory wording of section 12(1) and states:

The substance of [Record 2] reflects the same issues discussed by Cabinet ... The Minister of the Environment discussed the issues and made recommendations consistent with [Record 2] regarding the creation and mandate of the [proposed] corporation.

The content of [Record 2] would reflect the deliberations of Cabinet or its committees. The numerous similarities between the report and the Cabinet Submission indicate that the substance of the deliberations pertain to the same issues.

Having reviewed Record 2 and the representations of MOE, in my view, its disclosure could reveal the substance of deliberations of a committee of the Executive Council, and I find that this record is properly exempt pursuant to the introductory wording of section 12(1).

Because I have found that Records 1 and 2 both qualify for exemption under section 12(1), it is not necessary for me to consider Issue B.

ORDER:

I uphold MOE's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ November 3, 1992