



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

ORDER P-503

Appeal P-9200541

Ministry of Environment and Energy



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ORDER

BACKGROUND:

The Ministry of the Environment (now the Ministry of Environment and Energy) (the Ministry) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) for:

Any and all records, wherever situate, respecting the extension of the environmental levy to non-refillable beverage alcohol containers announced in the April 30, 1992 provincial budget to be implemented, inter alia, by amendments to Ontario Regulation 548/90 and, without limiting the generality of the foregoing, particulars of any consultations which have taken place with other provincial and federal government departments respecting the extension of the levy.

The Ministry located a number of records responsive to the request. The Ministry also transferred portions of the request to another ministry which had a greater interest in the records pursuant to section 25(2) of the Act. The Ministry subsequently granted access in whole or in part to the majority of documents in its custody. Access to certain other records, however, was denied pursuant to sections 12(1)(b), (c) and (e) and 13(1) of the Act. The requester appealed the denial of access and maintained that additional records responsive to the request should exist.

Mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and to the appellant. Representations were received from the Ministry only.

In its representations, the Ministry agreed to disclose to the appellant the documents described as Records 7, 8, 9 and 10 in the Ministry's index of records, as well as some additional correspondence received from members of the public prior to the date of the request. The records which remain at issue in this appeal may, therefore, be described as follows based on the original index numbers used by the Ministry:

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| Record 2 | A Cabinet Submission with an attached covering memorandum dated February 3, 1992 prepared by the Ministry of Consumer and Commercial Relations (MCCR). |
| Record 3 | A briefing note dated February 12, 1992 regarding the Cabinet Submission. |
| Record 4 | A further briefing note dated March 9, 1992 regarding the Cabinet Submission. |

- Record 5 A memorandum from the Deputy Minister of the Environment to the Deputy Minister of Consumer and Commercial Relations dated February 11, 1992 respecting certain matters contained in the Cabinet Submission.
- Record 6 A response from the Deputy Minister of the Environment to a second draft of the MCCR's Cabinet Submission which is undated.

ISSUES:

The issues arising in this appeal are:

- A. Whether the search undertaken by the Ministry for records responsive to the request was reasonable in the circumstances of the appeal.
- B. Whether the mandatory exemptions provided by sections 12(1)(b), (c) and (e) of the Act apply to Records 2 through 6.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 6.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the search undertaken by the Ministry for records responsive to the request was reasonable in the circumstances of the appeal.

In its representations, the Ministry provided detailed information on how the records which are responsive to the request were originally created. The Ministry has also supplied three separate affidavits sworn by staff within its Waste Reduction Office and Fiscal Planning and Economic Analysis Branch which set out the nature of the searches which the Ministry undertook after the access request was received.

The steps taken by the Ministry to locate responsive records are summarized in the affidavits as follows:

- (1) The branches of the Ministry involved with the environmental levy issue were identified.
- (2) A search was undertaken by two staff members of the Waste Reduction Office who were part of a team of four individuals within the Ministry who were responsible for reviewing waste management policy. (This search yielded Records 7, 8, 9 and 10, all of which have now been released to the appellant)
- (3) A further search was conducted within the Ministry's Fiscal and Planning and Economic Analysis Branch which located Records 1

through 6. The search was carried out in consultation with those staff members most directly involved in the formulation of the Ministry's response to the Cabinet Submission authored by the MCCR.

Based on my review of these representations, I am satisfied that the search undertaken by the Ministry to locate responsive records was reasonable in the circumstances of the appeal.

ISSUE B: Whether the mandatory exemptions provided by sections 12(1)(b), (c) and (e) apply to Records 2 through 6.

I propose to deal with the application of the exemptions claimed under section 12(1) to each record individually.

Record 2

This record consists of a Cabinet Submission with an attached covering memorandum dated February 3, 1992. Both documents were authored by the MCCR and provided to the Ministry for comment. The Cabinet Submission deals with a number of issues respecting the Ontario beer industry which were to be discussed during the February 13, 1992 meeting of the Cabinet Committee on Economic and Labour Policy. The Ministry claims that this record is exempt from disclosure pursuant to sections 12(1)(b) and (e) of the Act. Section 12(1)(b) 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,

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

In Order 73, former Commissioner Sidney Linden established a two part test that a Ministry must meet to bring a record within the ambit of section 12(1)(b) of the Act. For this exemption to apply:

1. the record must contain policy options or recommendations; and
2. the record must have been submitted or prepared for submission to the Executive Council or its committees.

The Cabinet Submission which forms part of Record 2 describes a variety of policy options available to the Government to address various issues associated with the Ontario beer industry. In addition, as indicated earlier, this Submission was tabled before the Cabinet Committee on

Economic and Labour Policy at its meeting on February 13, 1992. For these reasons, I am satisfied that the Cabinet Submission qualifies for exemption under section 12(1)(b) of the Act.

The covering memo which is attached to the Cabinet Submission is a transmittal document by which the Submission is provided to a number of Ministries. I have reviewed this document in light of the test established in Order 73 and find that the covering memorandum contains neither policy options nor recommendations. In addition, this document was neither submitted nor prepared for submission to an Executive Council or one of its committees. On this basis, I find that the covering memorandum is not subject to the section 12(1)(b) exemption.

The Ministry has also claimed that section 12(1)(e) of the Act applies to this memorandum as part of Record 2. This provision states that:

A head shall refuse to disclose a record where the disclosure could reveal the substance of deliberations of an Executive Council or its committees, including,

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 consultation among ministers relating to government decisions or the formulation of government policy.

To qualify for exemption under this provision, a Ministry must establish that the record in question was 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.

[Order 131]

The Ministry has not provided any evidence to indicate that the covering memorandum was prepared to brief a Minister in relation to matters which are either before or which are proposed to be brought before the Executive Council or that the contents of this document will form the

subject of consultations among Ministers. Rather, the covering memorandum was circulated among Deputy Ministers only. In addition, this document does not comment substantively on the Cabinet submission and, on this basis, cannot be described as a briefing document. I find, therefore, that section 12(1)(e) does not apply to the covering memorandum.

To summarize, while the Cabinet Submission is exempt from disclosure under section 12(1)(b), the covering memorandum falls within neither sections 12(1)(b) nor (e) and, hence, must be disclosed.

Record 3

Record 3 is a one page briefing note dated February 12, 1992 prepared by a Manager within the Ministry's Fiscal Planning and Economic Analysis Branch. This document provides a commentary on the MCCR's Cabinet Submission. In its representations, the Ministry states that the disclosure of this record would:

reveal the deliberations of the Cabinet committee as it outlines the Ministry of the Environment's concerns which would be discussed at the Cabinet Committee's meeting.

The Ministry's representations do not make specific reference to the introductory wording of section 12(1) to support the claim that this record should be exempt from disclosure. Since section 12(1) is a mandatory exemption, I am required to determine whether the wording in the preamble applies to this document. This provision states 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 ...

In Order P-304, former Assistant Commissioner Tom Mitchinson analyzed the introductory wording of section 12(1) in the following fashion:

The types of documents listed in sections (a) through (f) of section 12(1) are not the only ones eligible for the exemption; any record which falls within the introductory wording of section 12(1) qualifies for exemption.

Record 3 contains detailed information regarding Ontario's beer industry, much of which was extracted from the actual Cabinet Submission. In my view, the disclosure of the information contained in Record 3 would be tantamount to disclosing the substance of the deliberations of a Cabinet committee. Accordingly, I find that Record 3 is properly exempt from disclosure under the introductory wording of section 12(1) of the Act.

Record 4

Record 4 is a three page document dated March 9, 1992 which is titled "Briefing Note on Non-MOE Cabinet Submission". In its representations, the Ministry indicates that the document was prepared by a Ministry Policy Analyst:

for the purpose of briefing the Minister of the Environment prior to the Cabinet Committee's discussion of March 12, 1992 in respect of a number of beer industry issues.

The Ministry then submits that both the introductory wording of section 12(1) and sections 12(1)(b) and (e) of the Act apply to the record. That is the case, the Ministry submits, because the disclosure of the briefing note would reveal the contents of the MCCR's Cabinet Submission, background information about that Submission and the Ministry's own views on the subjects raised.

I have carefully reviewed Record 4 and am satisfied that the release of the briefing note would reveal the substance of deliberations of the Cabinet Committee on Economic and Labour Policy. On this basis, I find that Record 4 is properly exempt under the introductory wording found in section 12(1) of the Act.

Record 5

In this one page document, dated February 11, 1992, the Deputy Ministry of the Environment sets out his Ministry's views respecting the first draft of the MCCR's Cabinet Submission. In its representations, the Ministry has not stated explicitly whether the introductory wording of section 12(1) or the other parts of the section apply to this record. Following a careful review of this document, I am not persuaded that the release of this record would reveal the substance of the deliberations of a Cabinet committee or otherwise qualify for exemption under sections 12(1)(a) through (e) of the Act. For this reason, the record should be released.

Record 6

Record 6 is an undated memorandum authored by the Deputy Minister of the Environment which sets out the Ministry's views respecting the second draft of the MCCR's Cabinet Submission. The memorandum contains information taken from the Cabinet Submission which was discussed by the Cabinet Committee on Economic and Labour Policy on February 13 and March 12, 1992.

In its representations, the Ministry claims that section 12(1)(b) of the Act applies to this memorandum. I have carefully reviewed this record and, in my view, the document neither contains policy options nor recommendations, nor was it submitted or prepared for submission to the Cabinet or one of its committees. Accordingly, I find that section 12(1)(b) does not apply to Record 6.

Because section 12(1) is a mandatory exemption, I must now determine whether the introductory wording in the section applies to the memorandum in question. Record 6 makes specific reference to information which is contained in the Cabinet Submission discussed by the Cabinet Committee on Economic and Labour Policy on two separate dates. I find, therefore, that the release of the memorandum would reveal the substance of those deliberations and, consequently, that Record 6 is exempt from disclosure under the introductory wording of section 12(1) of the Act.

Because of the manner in which I have dealt with Record 6, it is not necessary for me to address the application of section 13(1) of the Act to this record.

In its representations, the Ministry indicated that the head of the institution considered whether Cabinet consent should be sought under section 12(2)(b) of the Act to release the records for which the section 12(1) exemption had been claimed. The decision reached was that such consent should not be obtained. I have reviewed Ministry's reasons to support this decision, and I find nothing improper in the manner in which the head exercised discretion in the present case.

ORDER:

1. I order the Ministry to disclose Record 5 and the covering memorandum attached to Record 2 to the appellant within 15 days of the date of this Order.
2. In order to verify compliance with this Order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

July 23, 1993