



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

ORDER P-641

Appeal P-9200839

Ministry of Transportation



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ORDER

BACKGROUND:

The Ministry of Transportation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documentation relating to a proposed project known either as Transportation Place or the Ontario International Landport.

The Ministry located a total of 98 records that were responsive to the request. The Ministry then granted access in full to 42 of the records, denied access in part to 36 documents and withheld the remaining 20 records in their entirety. These documents were withheld pursuant to the exemptions contained in sections 12(1), 13(1), 17(1), 18(1)(a), (c), (d) and (g), 19 and 21 of the Act. The requester appealed the Ministry's decision.

During mediation, the Ministry disclosed an additional 30 records to the appellant in whole or in part. Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and to a company identified as an affected person to the appeal. Representations were received from the Ministry only.

The 42 records which remain at issue in this appeal are described in Appendix A which is attached to this order.

PRELIMINARY ISSUE:

In her original letter to the Ministry, the appellant specified that her access request should "have effect for the two year period provided ... in section 24(3)". The Ministry denied this request for continuing access. In the Notice of Inquiry, the parties were invited to make representations on this subject.

Section 24(3) of the Act states that:

The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

In its representations, the Ministry submits that the records at issue in this appeal are not the type intended to fall within the scope of this provision. To support this proposition, the Ministry relies on the comments made by former Commissioner Sidney B. Linden in Order 164 where he addressed the application of section 24(3) in the following fashion:

I am of the view that subsections 24(3) and (4) are intended by the Legislature to apply to the kind of record which is likely to be produced and/or issued in series; for example, the results of public opinion polls which are conducted by an

institution on a regular basis. These subsections are not intended to provide ongoing access to the kind of record of which only one edition is produced, as in the present case.

I agree with this interpretation. I am satisfied that the documents at issue are not records that are likely to be produced or issued in series and, accordingly, I find that section 24(3) of the Act does not apply in the circumstances of this appeal. I would point out that the appellant is free to file an additional access request should she believe that the Ministry has created new records respecting the subject matter of this appeal.

ISSUES:

The issues remaining to be addressed are:

- A. Whether the discretionary exemption provided by section 19 of the Act applies to Record 75.
- B. Whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in Record 63.
- C. Whether the mandatory exemption provided by section 12 of the Act applies to Records 41, 42, 43, 44, 73, 73A, 77 and 78.
- D. Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 41A, 42A, 46, 50, 51, 53, 54, 64, 66, 67, 73, 74, 74A, 75A, 76A, 80, 81, 83, 84, 87 and 88.
- E. Whether the mandatory exemption provided by section 17(1) of the Act applies to Records 41A, 48, 50, 51, 52, 61(3), 64, 66, 70, 73A, 79, 82, 85, 86 and Slide 1.
- F. Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d) and (g) of the Act apply to Records 50, 54, 64, 69 and to Slides 2 and 3.

EXEMPTIONS AND TESTS:

I will now more fully describe the exemptions which the Ministry has claimed in conjunction with the tests developed by the Commissioner's office to determine when these exemptions will apply to particular record categories.

Cabinet Records - Section 12

Section 12 of the Act reads, in part, 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) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees,
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (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;
- (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 term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of an Executive Council or its committees (not just the types of records listed in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) (Orders P-376, P-529 and P-604).

In addition, it is possible that a record which has never been placed before an Executive Council or its committees may qualify for exemption under the introductory wording of section 12(1). This result will occur where a Ministry establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees (Orders P-424, P-529 and P-604).

Advice to Government - Section 13(1)

Section 13(1) of the Act states that:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356 and P-529).

Third Party Information - Section 17(1)

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, the institution and/or the affected person involved in the appeal must demonstrate that each component of the following three-part test has been met:

- (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
- (2) the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
- (3) the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in sections 17(1)(a), (b) or (c) will occur.

[Order 36]

If any part of the test is not satisfied, the exemption under section 17(1) will not apply to the record.

To satisfy the third part of the test, the institution and/or affected person must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in sections 17(1)(a), (b) or (c) could occur if the information were disclosed.

Economic Interests of the Ministry - Section 18(1)

To qualify for exemption under section 18(1)(c) of the Act, the record in question must contain information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution (Order P-581).

The phrase "could reasonably be expected to" has been considered in a number of previous orders dealing with various sections of the Act which use the same terminology. This phrase has been interpreted as requiring that there exist a reasonable expectation of probable harm. The

mere possibility of harm is not sufficient. At a minimum, the Ministry must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Orders M_202, P-555 and P-581).

Section 18(1)(d) of the Act allows an institution to withhold information where its disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or to the ability of the Government of Ontario to manage the economy (Order P-219). In order to qualify for exemption under section 18(1)(g) of the Act, an institution must establish that a record:

- (1) contains information including proposed plans, policies or projects; **and**
- (2) that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied for the exemption to apply (Order P-229).

In all cases where a claim for exemption is made under section 18 of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by the institution must be detailed and convincing. In the absence of sufficient evidence to support a claim under section 18, the records should be released to the appellant (Orders P-441, P-454 and P-581).

Solicitor - Client Privilege - Section 19

Section 19 of the Act states that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Invasion of Privacy - Sections 2(1) and 21

Under section 2(1)(h) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Section 21(1)(f) of the Act prohibits an institution from releasing the personal information of an individual except where such disclosure would not constitute an unjustified invasion of that individual's personal privacy.

SUBMISSIONS/CONCLUSIONS:

I will now consider the exemptions claimed by the Ministry in light of the tests and interpretations which I have set out to determine whether the exemptions apply to the records at issue.

ISSUE A: Whether the discretionary exemption provided by section 19 of the Act applies to Record 75.

Following a careful review of Record 75, I find that this document constitutes a written communication of a confidential nature between a solicitor and his client which relates to the provision of legal advice. On this basis, the record qualifies for exemption under section 19 of the Act. As this section is a discretionary exemption, I have considered the Ministry's representations on its exercise of discretion in favour of not disclosing the record and find nothing improper in the determination which has been made.

ISSUE B: Whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in Record 63.

The information at issue in Record 63 consists of the name of an individual other than the appellant. This name appears in conjunction with other information about the individual and, thus, qualifies as this individual's personal information for the purposes of section 2(1)(h) of the Act.

Section 21 of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates except in certain circumstances listed under section 21(1). The only representations which have been provided to me weigh in favour of finding that the section 21 mandatory exemption should apply in the present case. Consequently, I find that the one word withheld from Record 63 is exempt from disclosure pursuant to section 21 of the Act.

ISSUE C: Whether the mandatory exemption provided by section 12 of the Act applies to Records 41, 42, 43, 44, 73, 73A, 77 and 78.

I have reviewed the eight records for which the section 12 exemption has been claimed, along with the representations provided by the Ministry. Based on the tests which I have previously outlined, I find that Records 73A (except for the covering memorandum), 77 and 78 and the information which the Ministry has withheld in Records 41 and 44 are exempt from disclosure pursuant to section 12 of the Act. I find, however, that only the third paragraph of Record 42 falls within the ambit of this exemption. I have also concluded that section 12 does not apply to Record 43 since this document does not reveal the substance of the deliberations of an Executive Council or one of its committees.

The Ministry has also claimed that both section 12(1)(e) and the introductory wording of section 12(1) apply to exempt Record 73 from disclosure. I have carefully examined the memorandum in question and find that neither its author nor its recipient were Cabinet Ministers, nor does this record indicate that its contents were actually prepared to brief a minister of the Crown. For these reasons, I find that the Ministry cannot rely on section 12 of the Act to withhold this document from disclosure.

The Ministry has also indicated that it considered section 12(2)(b) of the Act and determined not to seek Cabinet consent to disclose the records for which the section 12(1) exemption was applied. I have reviewed the Ministry's reasons to support this decision and find nothing improper in the determination which has been made.

ISSUE D: Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 41A, 42A, 46, 50, 51, 53, 54, 64, 66, 67, 73, 74, 74A, 75A, 76A, 80, 81, 83, 84, 87 and 88.

I have carefully evaluated the 21 records for which the advice to government exemption has been claimed, along with the representations provided by the Ministry. I find that the portions of Records 42A and 67 which the Ministry has withheld from the appellant qualify for exemption under section 13(1) of the Act.

I also find that the information contained in the following records qualifies for exemption under section 13(1):

- (1) The third bullet point under the heading "Proposed Position" on page 1 and the second bullet point on page 2 of Record 41A.
- (2) The last sentence of the "Issue" section on page 1 and the "Options" on pages 2, 3 and 4 of Record 46.
- (3) The last sentence of the first paragraph on page 1 and the last sentences of paragraphs 1 and 3, respectively, on page 2 of Record 51.
- (4) Part of the third line of the first paragraph on page 1 of Record 53.
- (5) The paragraph under the heading "Suggested Response" on page 1 of Record 64.
- (6) The bottom half of page 2 following the statement about "basic options" and the last sentence of the first paragraph on page 3 of Record 66.
- (7) The last three lines of the first paragraph on page 1 and the last paragraph on page 3 of Record 73.
- (8) The portion of Record 74 between the opening paragraph and the signature.
- (9) The paragraph lettered (a) at the bottom of page 2 and the lettered paragraphs (b) through (e) inclusive on page 3 and the paragraph immediately following paragraph (e) on page 3 of Record 74A.

- (10) The sixth bullet point on page 1 of Record 75A.
- (11) Part of the suggested response to the first question on page 1 and the suggested response to the first question on page 2 of Record 76A.
- (12) The last point form paragraph of Record 80.
- (13) The top bullet point on page 2 of Record 84.
- (14) The last sentences of paragraphs 1, 2 and 4 and all of paragraph 5 on page 2 of Record 87.

It is also my conclusion that Records 50, 54, 81, 83 and 88 do not fall within the scope of this provision.

Since I have determined that section 13(1) applies to certain records or parts of records, I have also reviewed the list of mandatory exceptions contained in section 13(2) of the Act. I find that none of them apply in the circumstances of this appeal. Because section 13(1) is a discretionary exemption, I have also considered the Ministry's representations regarding its decision to exercise discretion in favour of not disclosing the records in question and I find nothing improper in the determination which has been made.

ISSUE E: Whether the mandatory exemption provided by section 17(1) of the Act applies to Records 41A, 48, 50, 51, 52, 61(3), 64, 66, 70, 73A, 79, 82, 85, 86 and Slide 1.

In its representations, the Ministry submits that the release of the 15 records for which the section 17(1) exemption has been claimed could "prejudice significantly" the competitive position of the affected person or result in undue loss to that company. Although invited to do so, the affected person chose not to provide the Commissioner's office with any representations on this subject.

I have independently reviewed the records at issue in conjunction with the representations provided by the Ministry. In my view, the submissions do not contain the detailed and convincing evidence necessary to establish a reasonable expectation that the harm set out in sections 17(1)(a) or (c) could occur if the information contained in these records were disclosed. I find, therefore, that the third part of the section 17(1) test has not been met with the result that the Ministry cannot rely on this provision to exempt Records 41A, 48, 50, 51, 52, 61(3), 64, 66, 70, 73A, 79, 82, 85, 86 and Slide 1 from disclosure.

ISSUE F: Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d) and (g) of the Act apply to Records 50, 54, 64, 69 and to Slides 2 and 3.

I have considered the records for which the section 18(1) exemptions have been claimed in conjunction with the representations provided to me and the tests previously outlined in this order.

Based on my evaluation, I find that the section 18(1)(d) exemption applies to the third bullet point on page 2 of Record 50; part of the last sentence of paragraph 2 on the first page of Record 54; the first bullet point on page 2 of Record 64; the last bullet point on Slide 2 and to Slide 3 in its entirety.

I further conclude that the first point form sub-paragraph under paragraph 2 on page 1 as well as paragraph 3 on page 1 of Record 69 are exempt from disclosure pursuant to section 18(1)(g) of the Act.

I have considered the Ministry's representations regarding its decision to exercise its discretion under section 18 in favour of not disclosing the records and I find nothing improper in the determination which has been made.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 73A (except the covering memorandum), 75, 77, 78 and Slide 3 in their entirety and the information withheld from Records 41, 42A, 44, 63, 67 and Slide 2 and portions of Records 41A, 42, 46, 50, 51, 53, 54, 64, 66, 69, 73, 74, 74A, 75A, 76A, 80, 84 and 87.
2. I order the Ministry to disclose to the appellant Records 79, 81, 83, 85 and 88 in their entirety, the information withheld from Records 43, 48, 52, 61(3), 70, 82, 86 and Slide 1 and parts of Records 41A, 42, 46, 50, 51, 53, 54, 64, 66, 69, 73, 73A (covering memorandum only), 74, 74A, 75A, 76A, 80, 84 and 87 in accordance with the highlighted copies of the records provided to the Ministry with this order. The highlighted portions identify the parts of the records which should **not** be disclosed.
3. I order that the records identified in Provision 2 be released to the appellant within thirty_five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.
5. In the event that the Ministry has any questions respecting the portions of the records which should be disclosed, I may be approached for further direction.

Original signed by: _____
Irwin Glasberg

_____ March 3, 1994

Assistant Commissioner

APPENDIX A

INDEX OF RECORDS AT ISSUE			
A. RECORDS ORIGINALLY EXEMPTED IN PART BY THE MINISTRY			
RECORD NUMBER	DESCRIPTION	ORDER DISPOSITION	EXEMPTION APPLIED
41	Letter dated April 10/92	partly disclosed	12(1)
41A	Minister's Briefing Note dated December 18/91	partly disclosed	13(1)
42	Letter dated March 31/92	partly disclosed	12(1)
42A	Memo dated January 28/92	partly disclosed	13(1)
43	Letter dated March 18/92	fully disclosed	
44	Memo dated February 21/92	partly disclosed	12(1)
46	Deputy Minister's Briefing Note dated December 16/91	partly disclosed	13(1)
48	Letter to Minister dated November 5/91	fully disclosed	
50	Minister's Briefing Note dated October 31/91	partly disclosed	18(1)(d)
51	Letter dated October 24/91	partly disclosed	13(1)
52	Letter dated October 29/91	fully disclosed	
53	Memo dated September 20/91	partly disclosed	13(1)
54	Memo dated September 19/91	partly disclosed	18(1)(d)
61(3)	Memo dated August 3/90	fully disclosed	
Slide 1	Overhead slide	fully disclosed	
Slide 2	Overhead slide	partly disclosed	18(1)(d)
Slide 3	Overhead slide	not disclosed	18(1)(d)
63	Letter dated September 21/90	partly disclosed	21
64	Minister's Briefing Notes dated June 21/90	partly disclosed	13(1), 18(1)(d)
66	Memo dated April 26/90	partly disclosed	13(1)
67	Memo dated April 11/90	partly disclosed	13(1)
69	Memo dated December 18/89	partly disclosed	18(1)(g)

INDEX OF RECORDS AT ISSUE			
A. RECORDS ORIGINALLY EXEMPTED IN PART BY THE MINISTRY			
RECORD NUMBER	DESCRIPTION	ORDER DISPOSITION	EXEMPTION APPLIED
70	Fact Sheet regarding Toronto Region Sufferance Warehouses	fully disclosed	
75A	Briefing Note dated August 14/92	partly disclosed	13(1)
82	Letter dated November 3/91	fully disclosed	
86	Note to File regarding meeting dated April 18/90	fully disclosed	
B. RECORDS ORIGINALLY EXEMPTED IN FULL BY THE MINISTRY			
73	Memo dated August 15/91	partly disclosed	13(1)
73A	Memo dated February 19/92	partly disclosed	12(1)
74	Memo dated November 27/89	partly disclosed	13(1)
74A	Memo dated January 24/92	partly disclosed	13(1)
75	Memo dated April 29/92	not disclosed	19
76A	Questions and Answers	partly disclosed	13(1)
77	Cabinet Minute dated March 4/92	not disclosed	12(1)
78	Memo regarding Cabinet Minute dated March 16/92	not disclosed	12(1)
79	Letter dated December 16/91	fully disclosed	
80	Memo dated November 15/91	partly disclosed	13(1)
81	Memo dated November 25/91	fully disclosed	
83	Memo dated September 19/91	fully disclosed	
84	Memo dated September 19/91	partly disclosed	13(1)
85	Transportation Place Proposal	fully disclosed	
87	Memo dated October 27/89	partly disclosed	13(1)
88	Draft Letter undated and unsigned	fully disclosed	