



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

ORDER P-664

Appeal P-9300141

Ministry of Health



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

ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records located in specific areas of the Ministry relating to the following topics:

- (a) Secure/Forensic Treatment in Ontario
- (b) Services for Mentally Disordered Offenders
- (c) Lack of Medium Secure Beds in Psychiatric Hospitals
- (d) Secure/Forensic Psychiatric Care in Ontario

The requester indicated that his request was limited to those records created between January 1, 1988 and December 8, 1992.

The Ministry provided access in full to two reports (Records 1 and 2) but withheld access to the remaining 16 records based on the exemptions found in sections 12(1)(b), (c) and (e), 13(1) and 22(a) of the Act.

The requester appealed the Ministry's decision to deny access to the documentation and also took the position that additional records responsive to his request should exist. Finally, the appellant submitted that the Ministry official who signed the decision letter did not have a proper delegation of authority under the Act to permit him to deny access to a portion of the records.

The 16 records at issue in this appeal and the exemptions claimed by the Ministry for each document are described in Appendix "A" which is attached to this order.

PRELIMINARY ISSUE:

The appellant submits that the Director of the Mental Health Facilities Branch of the Ministry, who was responsible for the Ministry's decision on access, lacked the delegated authority under section 62(1) of the Act to withhold the records from disclosure.

This statutory provision reads as follows:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

Along with its representations, the Ministry has provided the Commissioner's office with a copy of the Ministry's Delegation of Authority document which was in effect at the time that the relevant decision was issued. This document indicates that the various Directors within the Ministry have, among other powers, the delegated authority to grant access to records in part and to apply the exemptions found in sections 12 through 22 and 49 of the Act.

In its representations, the Ministry goes on to state that:

... Directors have been delegated the authority to authorize full and partial disclosure ... It is the Ministry's position that the severance of an entire document where there is a disclosure of other documents constitutes a decision of partial access to which the Director has the delegated authority.

I accept this interpretation and find that the Director of the Mental Health Facilities Branch had the requisite delegated authority to apply the exemptions contained in sections 12, 13 and 22 of the Act to deny access to individual records or to parts of these records.

ISSUES:

The remaining issues to be canvassed in this appeal are the following:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 3.
- B. Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 3 to 16.
- C. Whether the discretionary exemption provided by section 22(a) of the Act applies to Records 17 and 18.
- D. Whether the search undertaken by the Ministry for records responsive to the request was reasonable in the circumstances of the appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 3.

The Ministry claims that section 13(1) of the Act applies to all of Record 3, a 23-page document, which contains various memoranda pertaining to forensic issues and a proposal respecting a named psychiatric facility.

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 many 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 record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have carefully reviewed Record 3 and find that pages 16 and 17 of this document, as well as those portions of pages 3 to 7, 10, 11, 15, 18 to 20, 22 and 23 which have **not** been highlighted in yellow contain advice and recommendations for the purposes of section 13(1). This information, therefore, is not subject to disclosure. I find, however, that pages 1, 2, 8, 9, 12, 13, 14 and 21 do not contain information which falls into these categories.

I have also reviewed the list of mandatory exceptions contained in section 13(2) of the Act and find that none of them apply in the circumstances of this appeal. Because section 13(1) is a discretionary exemption, I have considered the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption and I find nothing improper in the determination which has been made.

ISSUE B: Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 3 to 16.

The Ministry claims that Records 3 to 16 are exempt from disclosure in their entirety by virtue of the introductory wording of section 12(1) of the Act or pursuant to sections 12(1)(b), (c) or (e). The Ministry also submits that pages 12 to 19 of Record 3 qualify for exemption under section 12(1)(e) of the Act. It should be noted that Record 5 is a duplicate of pages 12 to 18 of Record 3. My decision regarding the application of section 12(1) to the relevant pages of Record 3 will apply equally to Record 5.

Section 12(1) of the Act states, in part, that:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the 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;

- (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;

...

- (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 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).

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 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.

I will now consider whether section 12(1) of the Act applies to each of the records for which this exemption has been claimed.

Record 3 - Section 12(1)(e)

The Ministry claims that pages 12 through 19 of Record 3 qualify for exemption under section 12(1)(e) of the Act. Under Issue A, I found that pages 16 and 17 in their entirety and portions of pages 15, 18 and 19 are exempt from disclosure pursuant to section 13(1) of the Act. Accordingly, only pages 12, 13, 14 and the remaining parts of pages 15, 18 and 19 must be considered for the purposes of section 12(1)(e) of the Act.

In order to qualify for exemption under this provision, the record in question 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.

In its representations, the Ministry submits that there existed an intention to bring this document before the Executive Council or one of its committees. There is no evidence on the face of the document, however, that the record was prepared for this purpose. I further find that this document did not form the subject of consultation among ministers for the purposes of section 12(1)(e). I find, therefore, that this provision does not apply to the record at issue.

I will now consider whether any other parts of section 12 might apply to these pages of Record 3. In my view, neither page 12 (which consists of a covering letter to the proposal document), page 13 (which is the title page of the document), nor those portions of pages 15, 18 and 19 not previously withheld under section 13(1) of the Act qualify for exemption under any other part of section 12(1) of the Act.

I find, however, that the last four paragraphs of page 14 are exempt from disclosure under the introductory wording of section 12(1). These documents, if released, would reveal the substance of deliberations of an Executive Council.

To summarize, based on the combined application of sections 12(1) and 13(1) of the Act, pages 16 and 17 are exempt from disclosure in their entirety while pages 3, 4, 5, 6, 7, 10, 11, 14, 15, 18, 19, 20, 22 and 23 are exempt in part.

Records 4 and 6 - Section 12(1)(b)

Records 4 and 6 are Cabinet Submissions, dated March 27, 1991 and May 30, 1990, respectively.

Section 12(1)(b) establishes two criteria which must be satisfied in order for a record to qualify for exemption under this provision. The record must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or one of its committees.

Having reviewed Records 4 and 6 and the representations of the Ministry, I am satisfied that these Cabinet Submissions qualify for exemption under section 12(1)(b) of Act.

Records 7 to 16 - Section 12(1)(c)

Records 7 to 16, which originate from various sources both within and outside the Ministry, consist of a work plan for a forensic services proposal and the comments received from various government officials on the proposal. In its representations, the Ministry states that these documents were prepared as background materials to explain or analyze a series of issues pertaining to the most recent Cabinet Submission.

The Ministry then submits that these records are exempt from disclosure under section 12(1)(c) of the Act. For a document to qualify for protection under this provision, the record must contain background explanations or analyses of problems and it must have been 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 addition, it is necessary for the document, itself, to have been submitted or prepared for submission in this fashion (Order 188).

Having reviewed Records 7 to 16, I find nothing which leads me to believe that these documents were submitted or prepared for submission to these bodies. On this basis, I find that the records fall outside the ambit of section 12(1)(c) of the Act.

I must now consider whether any other parts of section 12(1) apply to the ten records in question. Based on the representations provided by the Ministry and my independent review of the documentation, I find that Records 10 to 15 fall within the introductory wording of section 12(1) in their entirety and that the information contained in Records 7 to 9 and 16 qualify for exemption under section 12(1), except for those portions which I have highlighted in yellow in the copy of the records provided to the Ministry's Freedom of Information Co-ordinator.

ISSUE C: Whether the discretionary exemption provided by section 22(a) of the Act applies to Records 17 and 18.

Records 17 and 18 consist of two Forensic Services Manuals which are used in Ontario psychiatric facilities.

Under section 22(a) of the Act, an institution may refuse to disclose a record where the document, or the information contained in the document, has been published or is currently available to the public in another form. Where an institution relies on this provision, it must inform the requester of the specific location of the documentation and identify or provide the requester with a description of the records or information in question.

The Ministry submits that the two manuals in question are available for viewing in the Forensic Unit of each of the ten psychiatric hospitals in the province and that any member of the public (including a resident of such a facility) can view these manuals by making a request to the Hospital Director or Unit Director.

Based on the evidence before me, I am satisfied that the two manuals are available to the public for the purposes of section 22(a) of the Act. Because section 22(a) is a discretionary exemption, I have also considered the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption and I find nothing improper in the determination which has been made.

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

In his representations, the appellant indicates that he believes that other records should exist which were not identified by the Ministry. He then goes on to describe five specific documents which he considers to be responsive to the request.

In the Inquiry Status Report which was sent to the parties to the appeal, the Ministry was asked to provide evidence, in affidavit form, setting out the details of the search undertaken for responsive records. This affidavit was to include information about the person(s) who conducted the search, the locations and particular files checked and the identities of other individuals consulted during the course of the search. The Ministry was also asked to indicate whether records, which may once have existed, had been destroyed as part of the Ministry's records retention policy.

The Ministry's representations did not include an affidavit. Instead, it provided the following comments respecting its search for responsive records:

The Ministry access request file contains a memo from the Director of the Mental Health Facilities Branch and a memo from the Director of the Community and Mental Health Branch. These memoranda state explicitly that only 18 documents responsive to the request were found to exist.

The Ministry therefore respectfully submits that the search was properly carried out and that all records responsive to the request were provided.

Where a requester provides sufficient details about the records which he or she is seeking and a Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that a Ministry prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In my view, the evidence provided by the Ministry falls short of what would be expected to establish the reasonableness of its search for responsive records.

I would note that the memoranda described in the Ministry's representations were not provided to the Commissioner's office. On this basis, there is no evidence before me to indicate how the 18 records were actually identified, by whom the search for relevant materials was undertaken or the program areas or types of files searched.

I would also point out that the five documents which the appellant has referred to form part of the 18 records which the Ministry has indicated are responsive to the request. Because, however, the Ministry neither described these documents in sufficient detail in its decision letter nor provided the appellant with a records index, he was not in a position to know that these specific records had been located.

Although the appellant's specific concerns about the five records have been resolved, I still lack sufficient evidence to persuade me that the search for responsive records conducted by the Ministry was reasonable in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose to the appellant pages 1, 2, 8, 9, 12, 13 and 21 of Record 3 in their entirety, those portions of pages 3 to 7, 10, 11, 14, 15, 18, 19, 20, 22 and 23 of Record 3 and those portions of Records 7, 8, 9 and 16 in accordance with the yellow highlighted copy of these records provided to the Ministry's Freedom of Information Co-ordinator with a copy of this order. The highlighted portions are those which **should** be disclosed.

2. I uphold the Ministry's decision not to disclose:

Pages 16 and 17 of Record 3 in their entirety and those portions of pages 3 to 7, 10, 11, 14, 15, 18, 19, 20, 22 and 23 of Record 3 which are **not** highlighted in yellow on the copy of these pages provided to the Ministry's Freedom of Information Co-ordinator.

Records 4, 6, 10 to 15, 17 and 18 in their entirety, and those portions of Records 7, 8, 9 and 16 which are **not** highlighted on the copy of these records provided to the Ministry's Freedom of Information Co-ordinator.

3. I order the Ministry to disclose to the appellant the records referred to in Provision 1 within 15 days of the date of this order.

4. 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 request.

5. I order the Ministry to conduct a further search for responsive records and to notify the appellant by letter as to the results within 30 days of the date of this order.

6. If, as a result of the further search, the Ministry identifies any additional records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, considering the date of this order as the date of the request, without recourse to a time extension.

7. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the letter referred to in Provision 5 of this order within 35 days of the date of this order. This notice 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:
Irwin Glasberg
Assistant Commissioner

April 27, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE			
RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTION(S) CLAIMED	DECISION ON RECORD
3	Several memoranda relating to forensic issues and a proposal respecting a named psychiatric facility	12(1)(e) and 13(1)	Disclosed in Part
4	Cabinet Submission dated May 30, 1990 respecting secure forensic psychiatric care in Ontario	12(1)(b)	Withheld
6	Cabinet Submission dated March 27, 1991 respecting the delivery of forensic care services in Ontario	12(1)(b)	Withheld
7	Work plan for the forensic services proposal	12(1)(c)	Disclosed in Part
8	Comments on proposal from Ministry of Health staff	12(1)(c)	Disclosed in Part
9	Comments on proposal from Ministry of Health staff	12(1)(c)	Disclosed in Part
10	Comments from the Minister of Correctional Services on the proposal	12(1)(c)	Withheld
11	Comments on the proposal from Management Board of Cabinet	12(1)(c)	Withheld
12	Comments from the Psychiatric Patient Advocate Office on the proposal	12(1)(c)	Withheld
13	Comments from the Acting Director of the Mental Health Facilities Branch on the proposal	12(1)(c)	Withheld
14	Comments from Ministry of Health staff on the proposal	12(1)(c)	Withheld
15	Comments from Ministry of Health staff on the proposal	12(1)(c)	Withheld
16	Comments from Ministry of Health staff on the proposal	12(1)(c)	Disclosed in Part