



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-956

Appeal P-9400652

Ministry of the Solicitor General and Correctional Services



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BACKGROUND:

In 1986, Ontario enacted the Provincial Nuclear Emergency Plan (PNEP) in order to deal with nuclear accidents up to a certain level of severity. In the same year, following the nuclear accident at Chernobyl, the provincial government established a number of committees to consider the safety of Ontario Hydro's CANDU reactors. One such committee was designated as "Provincial Working Group #8" (the Working Group).

The objective of the Working Group, which was made up of government officials and scientists, was to review the technical basis for nuclear emergency planning in Ontario and to make appropriate recommendations to the provincial government. The report of the Working Group was circulated to many individuals and groups before being finalized in 1988. The provincial government considered the recommendations of the Working Group in developing a Cabinet Submission which was presented to the Cabinet Committee on Environmental Planning on September 30, 1993.

NATURE OF APPEAL:

The requester in this appeal, which is brought under the Freedom of Information and Protection of Privacy Act (the Act), is a member of a public interest group. He has asked the Ministry of the Solicitor General and Correctional Services (the Ministry) for access to all documents respecting possible revisions to the PNEP.

Among other things, the requester is seeking information on the requirement to pre-distribute "stable iodine" or potassium iodine to the public in the event of a nuclear emergency, the zone around each nuclear reactor to be covered by the plan and the recommendations of the Working Group on the subject of emergency planning. The requester takes the position that there exists a compelling public interest in the disclosure of this documentation under section 23 of the Act.

The Ministry located a total of 92 pages of records that were responsive to the request and released 45 of these pages to the requester in their entirety. The Ministry made the decision, however, not to disclose the remaining 47 pages, either in whole or in part, under the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- invasion of privacy - section 21(1)

The requester appealed this decision to the Commissioner's office.

A Notice of Inquiry was provided to the appellant, the Ministry and three parties with an interest in one or more of the records (the affected parties). One of these parties was Ontario Hydro while the other two were individuals. Representations were received from the appellant, the Ministry and two of the affected parties.

During the course of this appeal, the appellant indicated that he no longer wished to obtain access to the name and address of an individual mentioned on page 43 of the records (which I have designated as Record 14). On this basis, I order that this information not be disclosed to the appellant. Since the Ministry has not claimed any exemptions for the remainder of this page, I direct that these portions be released to the appellant.

Finally, the Ministry has withdrawn its reliance on the advice or recommendations exemption found in section 13(1) of the Act. Consequently, I will not make any further reference to this provision in my order.

To assist in the processing of this and a companion appeal, the Ministry agreed to provide the Commissioner's office with a copy of the Cabinet Submission to which I have previously referred. Based on the wording of the appellant's request, I have concluded that this document should also be added to the list of responsive records. I will refer to this document as Record 15 in the discussions that follow.

DISCUSSION:

There are 14 records which remain at issue in this appeal. These documents (numbered 1 to 13 and 15) variously consist of policy papers, letters, memoranda and a Cabinet Submission. The records are described more fully in Appendix "A" which is attached to this order.

OBLIGATION TO DISCLOSE A GRAVE ENVIRONMENTAL, HEALTH OR SAFETY HAZARD

The appellant takes the position that the Ministry is obliged to disclose the records at issue to the public by virtue of section 11 of the Act. This provision states that:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

In Order P-482, Inquiry Officer Holly Big Canoe addressed the potential application of section 11 to an appeal brought under the Act. She approached the matter in the following fashion:

Section 11 of the Act is a mandatory provision which requires the head to disclose records in certain circumstances. The duties and responsibilities set out in section 11 of the Act belong to the head alone. As a result, the Information and Privacy Commissioner or his delegate do not have the power to make an order pursuant to section 11 of the Act.

I agree with this interpretation and adopt it for the purposes of this appeal. It follows that I do not have the authority to review the Ministry's decision not to release the records under section 11 for the purposes of the present appeal.

CABINET RECORDS

The Ministry claims that the introductory wording of section 12(1) and/or sections 12(1)(b) and (c) of the Act apply to exempt Records 1 through 13 from disclosure. These provisions state that:

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;
- (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;

...

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 the Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

Other orders have held that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of section 12(1). This result will occur where a government organization 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.

The Ministry indicates that the records at issue in this appeal relate to a Cabinet Submission prepared by the Minister of the Solicitor General (now the Minister of the Solicitor General and Correctional Services) for transmittal to the Cabinet Committee for Environmental Planning. The purpose of this submission was to seek approval from Cabinet to change the scope of the PNEP. The Ministry states that the Cabinet Committee considered the submission on September 30, 1993 and that the matter is still before Cabinet.

The Ministry submits that each of the 13 records contains information that was either extracted directly from the Cabinet Submission or that "makes reference to information, issues or items contained in the Cabinet submission." The Ministry also indicates that these documents "provide comments, recommendations and/or advice relating to [the] Cabinet submission". Finally, the Ministry notes that the report of the Working Group formed an important component of the Cabinet Submission.

The appellant's submissions, on the other hand, focus on the information contained in the records which was provided to the Ministry by Ontario Hydro. The appellant believes that this information should not be subject to the Cabinet records exemption since Ontario Hydro is not part of the provincial government.

I will first determine whether the records at issue are exempt from disclosure under the introductory wording of section 12(1). This preamble states that an institution must refuse to release a record where such disclosure would reveal the substance of deliberations of an Executive Council or one of its committees.

Following a careful review of the representations provided by the parties and my assessment of the documents at issue (including the actual Cabinet Submission), I find that the disclosure of the following records would reveal the substance of deliberations of the Executive Council or its Committee for Environmental Planning:

- (1) Records 2, 8, 12 and 15 in their entirety.
- (2) Pages 2 and 3 of Record 1, pages 13, 14 and 15 of Record 3, and pages 79, 80, 85, 86 and 91 of Record 13 in their entirety.
- (3) Those parts of pages 1 and 4 of Record 1, page 12 of Record 3, pages 45 and 46 of Record 4, page 48 of Record 5, page 72 of Record 10, page 74 of Record 11, pages 81, 82, 83, 84, 87, 88, 89, 90 and 92 of Record 13, and page 43 of Record 14 which I have highlighted in yellow on the copy of the records that I will provide to the Ministry's Freedom of Information Privacy Co-ordinator with a copy of this order.

I find, however, that the disclosure of the remaining parts of these records would neither reveal the substance of deliberations of the Executive Council or its committees nor permit the drawing of accurate inferences with respect to such deliberations.

In forming this conclusion, I have taken into account the objects of Ontario's freedom of information scheme (which are described in sections 1(a)(i) and (ii) of the Act) as well as the institution's obligation under section 10(2) of the Act to disclose as much of a record as can reasonably be severed without releasing information which is subject to the Cabinet records exemption.

I have also considered that a good deal of the information found in the records (including pages 47 and 48 of Record 5, pages 53, 54 and 55 of Record 7, page 70 of Record 9, pages 71 and 72 of Record 10 and page 90 of Record 13) focus on the recommendations of various working groups and do not refer to the Cabinet Submission. In addition, other portions of the records simply document discussions involving Ministry staff and either officials from Ontario Hydro or a university professor. These passages neither refer to the contents of the Cabinet Submission nor would they reveal what is contained in this document.

The Ministry next claims that Records 1, 3, 6, 9, 10, 11 and 13 must be withheld under section 12(1)(b) of the Act. For this exemption to apply, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees.

I have carefully reviewed the portions of the records which I have not already found to be exempt under the introductory wording of section 12(1). There is no evidence before me to indicate that the relevant parts of these records were either submitted or prepared for submission to the Executive Council or its committees. On this basis, I find that the section 12(1)(b) exemption does not apply to the records in question.

The Ministry also claims that Records 1, 3, 4, 5, 7, 9, 10, 11 and 13 are exempt from disclosure under section 12(1)(c) of the Act. For this provision to apply, 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).

I have carefully reviewed the relevant portions of these nine records in conjunction with the representations provided by the parties. Once again, I have not been supplied with any evidence to indicate that any of these documents were actually

submitted or prepared for submission to Executive Council or one of its committees. On this basis, I find that the Ministry cannot rely on section 12(1)(c) of the Act to withhold these records from disclosure.

The appellant argues that the Ministry should not be entitled to rely on any of the section 12(1) exemption for documents which merely contain the views of third parties on possible changes to a government program. I have previously found, however, that the contents of 11 records, either in whole or in part, relate in a direct way to the deliberations of the Executive Council or one of its committees. That being the case, these documents are properly exempt from disclosure under section 12(1) of the Act.

The result is that the Ministry is entitled to rely on the Cabinet records exemption to withhold Records 2, 8, 12 and 15 from disclosure in their entirety as well as the highlighted portions of Records 1, 3, 4, 5, 10, 11 and 13.

CONSENT TO WAIVE THE CABINET RECORDS EXEMPTION

Section 12(2)(b) of the Act stipulates that, despite section 12(1), the head of an institution shall not refuse to disclose a record where the Executive Council for which the record has been prepared consents to the release of the record.

The appellant puts forward two arguments to suggest that Cabinet has implicitly consented to release all of the documents at issue. First, he submits that, since the Ministry has already released all or parts of the Cabinet Submission to one third party (Ontario Hydro), this amounts to public disclosure for the purposes of the Act.

I do not accept this proposition. I believe that, in developing the new PNEP, the provincial government had the right to obtain input from third parties on the technical issues to be addressed in the materials prepared for Cabinet. I also find that, in sharing excerpts from its Cabinet Submission and related documents with Ontario Hydro, the Ministry had no intention of placing these records in the public domain. On this basis, I conclude that the Ministry's decision to share certain written materials with a third party has not made these records publicly available.

The appellant also contends that Ontario Hydro has previously disclosed a number of the records relating to the PNEP during the course of a constitutional challenge to the Federal Nuclear Liability Act. Since the appellant has not provided me with a copy of any of these documents, I cannot state with certainty that any of them have been previously disclosed.

There is one further point that I would like to address. The appellant claims that the contents of certain other documents have been disclosed to the public unofficially -- ostensibly through information "leaks". He takes the position that this method of release represents yet another reason for not allowing the Ministry to rely on the Cabinet records exemption.

For the purposes of this discussion, I will accept the appellant's claim that some of the records at issue have been disclosed to individuals or groups without the consent of the Ministry. I consider it to be unfair, however, to preclude an institution from relying on a mandatory exemption for records that have been released without its knowledge. On this basis, I am not prepared to support the appellant's argument that the Ministry should be barred from claiming the Cabinet records exemption for the documents in question.

Previous orders issued by the Commissioner's office have held that, while the Cabinet consent provision does not impose a requirement on the head of an institution to seek Cabinet consent in every case, the head must at a minimum turn his or her mind to this issue.

In its representations, the Ministry indicates that the head considered whether Cabinet consent should be sought under section 12(2)(b) of the Act to release the records in question. The Ministry states that a decision was made not to obtain such consent because the Cabinet Submission is still before the Executive Council. The Ministry goes on to indicate that, once certain issues are addressed, the appropriate Cabinet committee will revisit the contents of the submission.

I have reviewed the reasons advanced by the Ministry to support this decision and I find nothing improper in the manner in which the head of the institution exercised his discretion in the present case.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that the records at issue could verify the proposition that the province's level of emergency preparedness to deal with a large release of radioactive materials from a nuclear reactor accident is inadequate. He also states that the operation of large nuclear generating stations in areas of high population density with what he labels as outmoded emergency plans constitutes a serious environmental and public health issue. On this basis, the appellant argues that the documents at issue in this appeal should be disclosed under the public interest override provision found in section 23 of the Act.

It is clear from the wording of section 23, however, that it only prevails over certain exemptions specifically enumerated in that provision. This list does not include the Cabinet records exemption. The result is that public interest override of the Act does not apply to the records at issue.

Despite having made this determination, I believe that the subject of emergency preparedness is a matter of considerable importance to the general public. To understand its significance, one need only reflect on the nuclear catastrophe at Chernobyl and the recent earthquake in Kobe, Japan. In my view, the issues surrounding the province's ability to prepare for a nuclear emergency are quintessentially those which should be the subject of informed public debate. In order for such discussions to take place, it is essential that the government's decision making process be open and transparent.

Were it not for the fact that the records at issue are subject to the Cabinet records exemption, I would have had no hesitation in finding that there exists a compelling public interest in the disclosure of these documents which clearly outweighs the purposes of the exemptions found in the Act.

Given the importance of the subject in question, I would encourage the Ministry to provide the appellant and the public with updated information on the state of the nuclear preparedness debate and how the government plans to address this subject in the future.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 2, 8, 12 and 15 in their entirety; pages 2 and 3 of Record 1, pages 13, 14 and 15 of Record 3, and pages 79, 80, 85, 86 and 91 of Record 13 in their entirety; and to those parts of pages 1 and 4 of Record 1, page 12 of Record 3, pages 45 and 46 of Record 4, page 48 of Record 5, page 72 of Record 10, page 74 of Record 11, pages 81, 82, 83, 84, 87, 88, 89, 90 and 92 of Record 13, and page 43 of Record 14 which I have **highlighted** in yellow on the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Records 6, 7 and 9 in their entirety and those portions of Records 1, [IPC Order P-956/July 19, 1995]

3, 4, 5, 10, 11, 13 and 14 that I have **not highlighted** on the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2 of this order.

Original signed by: _____

Irwin Glasberg

Assistant Commissioner

_____ July 19, 1995

APPENDIX "A"
INDEX OF RECORDS AT ISSUE

RECORD NUMBER	PAGE NUMBER(S)	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
1	1-4	Letter dated March 13, 1992 from the Head, Nuclear Emergency Preparedness (NEP) to the Technical Superintendent, Emergency Preparedness Section (EPS)	12(1)(b) and (c)	Disclosed in part
2	7-8	Fax transmission dated January 16, 1992 from the Head, NEP to the Technical Superintendent, EPS enclosing an outline of the proposed Cabinet Submission	12(1)(b) and (c)	Withheld
3	12-15	Letter dated January 22, 1991 from the Co-ordinator, Emergency Planning Ontario (EPO) to the Assistant Deputy Minister, Public Safety Division (ADM) to which is attached an outline of policy paper prepared by Ministry staff.	12(1)(b) and (c)	Disclosed in part
4	45-46	Memorandum dated June 5, 1990 from the Co-ordinator, EPO to the ADM, regarding the subject of nuclear emergency planning	12(1)(c)	Disclosed in part
5	47-48	Memorandum dated July 19, 1988 from the Co-ordinator, EPO to the Deputy Solicitor General regarding the Darlington Nuclear Emergency Plan	12(1)(c)	Disclosed in part
6	49-50	Duplicate of Record 5	12(1)(b)	Disclosed
7	52-56	Memorandum dated July 12, 1988, from the Head, NEP to the Co-ordinator, EPO regarding the Darlington Nuclear Emergency Plan	12(1)(c)	Disclosed
8	67-69	Discussion paper prepared by Ministry staff	12(1)(b) and (c)	Withheld
9	70	Letter dated November 26, 1993 from a	12(1)(b) and (c)	Disclosed

RECORD NUMBER	PAGE NUMBER(S)	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
		professor at the University of Toronto to the Manager, Preparedness, EPO		
10	71-73	Memorandum dated March 31, 1993 from the Scientific Advisor, Technical Advisory Committee (TAC) to the Co-ordinator, EPO	12(1)(b) and (c)	Disclosed in part
11	74	Letter dated January 14, 1991 from the Scientific Advisor, TAC to the ADM	12(1)(b) and (c)	Disclosed in part
12	76-78	Discussion paper prepared by Ministry staff	12(1)(b) and (c)	Withheld
13	79-92	Document Entitled "Basis for Cabinet Submission" dated May 24, 1990	12(1)(b) and (c)	Disclosed in part
14	43	Letter to the Ministry dated March 9, 1989	21(1)	Disclosed in part
15	---	Cabinet Submission dated September 30, 1993	12(1)(b) and (c)	Withheld