



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-944

Appeal P-9500026

Ministry of Municipal Affairs



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## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Municipal Affairs (the Ministry) for access to all records relating to the enactment of Bill 171, "An Act Respecting Certain International Bridges". She was particularly interested in receiving all correspondence, background reports and briefing materials relating to this subject. The requester is a lawyer who represents a client with an interest in this piece of legislation.

The Ministry identified a total of 90 records that were responsive to the request and agreed to release 73 of these documents to the requester in their entirety. The Ministry decided, however, to withhold the remaining 17 records, either in whole or in part, based on the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

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

During the course of the appeal, the requester/appellant indicated that she did not wish to receive access to a passage in Record 9 which contained the personal information of a named individual. The result is that this document in its entirety is no longer at issue in this appeal. In addition, the Ministry subsequently advised the Commissioner's office that it had disclosed Record 14 to the appellant in its entirety.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from both parties. In its submissions, the Ministry indicated that it was now prepared to disclose Record 38. This document should, therefore, be released to the appellant. The Ministry also stated that it would no longer be relying on section 12(1) of the Act to exempt Record 83 from disclosure.

Fourteen records remain at issue in this appeal. These documents, which I shall to as Records 2, 3, 13, 15, 28, 29, 32, 35(A), 42, 43, 45, 62, 83 and 84, consist of eight memoranda, a letter, a briefing note, an untitled document containing maps and notes, a draft order, a status report and a summary of a Cabinet submission. The records are described more fully in Appendix "A" which is attached to this order.

## **DISCUSSION:**

### **THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS**

Upon receipt of the appeal, the Commissioner's office provided the Ministry with a Confirmation of Appeal notice. This notice indicated that, based on a policy issued by this office, the Ministry would have 35 days

from the date of the notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in its decision letter. No additional exemptions were raised during this period.

In its representations, the Ministry indicated for the first time that it wished to rely on section 13(1) of the Act (the advice or recommendations exemption) to deny access to Records 3, 13, 83 and 84. By this time, the expiry date provided in the Confirmation of Appeal had passed by over three months.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg applied this line of reasoning and refused to consider a discretionary exemption raised late in the appeals process. I have also decided to adopt this approach for the purposes of the present appeal.

In this case, the Ministry was advised of this office's policy on the subject yet decided to rely on a new discretionary exemption over three months after the Confirmation of Appeal was issued. Since the Ministry has failed to advance any arguments to indicate why the 35-day time limit should not apply in the present appeal, I will not consider the application of the section 13(1) exemption in this order.

Since there are no other exemptions which the Ministry has claimed for Record 83, I order that this document be disclosed to the appellant.

## **THE PURPOSES OF THE ACT**

In determining whether an appellant should receive access to a record, it is important to take into account the objects of Ontario's freedom of information scheme as set out in sections 1(a)(i) and (ii) of the Act. There, it is stated that the purposes of the legislation are:

to provide a right of access to information under the control of institutions in accordance with the principles that, (i) information should be available to the public and (ii) necessary exemptions from the right of access should be limited and specific.

Section 10(2) of the Act, which establishes the principle of severance, is another important provision to consider. This section requires that an institution disclose as much of a record as can reasonably be severed without releasing the information which properly falls within a statutory exemption.

I will be applying each of these legislative provisions in determining whether the Ministry is entitled to withhold the 13 records now at issue from disclosure.

## **CABINET RECORDS**

The Ministry claims that either the introductory wording of section 12(1) of the Act and/or section 12(1)(b) apply to exempt Records 2, 3 and 13 from disclosure in their entirety. Since section 12(1) is a mandatory

exemption, I will also consider the potential application of section 12(1)(e) of the Act to Record 3. The relevant provisions in section 12(1) state 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;

...

- (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 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.

I will now apply these statutory provisions to the three documents for which the Cabinet records exemption has been claimed.

Record 2 is a summary of a Cabinet Submission dated November 21, 1980. In its representations, the Ministry indicates that this document was submitted to Cabinet and was used to develop the International Bridges Municipal Payment Act, 1981. I have carefully reviewed the Cabinet Submission and find that the disclosure of this record would reveal the substance of deliberations of the Executive Council under section 12(1) of the Act.

Record 3 is entitled "Minister's Briefing Notes on International Bridges". Based on its contents, I find that this document constitutes a record prepared to brief a minister of the Crown in relation to matters that are proposed to be brought before the Executive Council for the purposes of section 12(1)(e) of the Act.

Record 13 is a memorandum authored by the Director of the Municipal Finance Branch, Ministry of Intergovernmental Affairs (MIA) to the Minister of Intergovernmental Affairs. This document, which is entitled "International Bridges", is dated November 24, 1980. I have carefully reviewed Record 13 and find that the disclosure of the last three paragraphs would reveal the substance of deliberations of the Executive Council. These paragraphs (which I have highlighted in yellow on the copy of the document to be sent to the Ministry's Freedom of Information and Privacy Co-ordinator) must not be released to the appellant.

I find, however, that the remainder of the memorandum does not qualify for exemption under any part of section 12(1). Since there are no other exemptions which apply to this part of the record, the non-highlighted portions must be disclosed to the appellant.

Accordingly, the Ministry is entitled to rely on the Cabinet records exemption to withhold Records 2 and 3, as well as the highlighted paragraphs of Record 13, from disclosure.

### **ADVICE OR RECOMMENDATIONS**

The Ministry also claims that the advice or recommendations exemption found in section 13(1) of the Act applies to exempt Records 15, 28, and 29 from disclosure. Each of these documents is a memorandum authored by a government official. Section 13(1) 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 just information. To qualify as "advice" or "recommendations", the information found 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.

I have carefully reviewed the representations of the parties in conjunction with the records at issue. I find that certain parts of the three memoranda contain background information or the author's analysis of issues. Consequently, these passages do not qualify as, nor would they reveal, advice or recommendations for the purposes of the Act.

I find, however, that several other passages found in Records 28 and 29 outline suggested courses of action which the recipients of these documents were either free to accept or reject as part of the government's decision and policy-making processes. On this basis, these portions of the records constitute advice or recommendations for the purposes of section 13(1) of the Act. I also find that the disclosure of the first paragraph of Record 15 would reveal recommendations of this nature.

The result is that the passages in question, 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, may be withheld from the appellant.

### **SOLICITOR-CLIENT PRIVILEGE**

**{ IPC ORDER P-944 / JUNE 22, 1995 }**

The Ministry claims that the solicitor-client privilege exemption found in section 19 of the Act applies to exempt Records 32, 35(A), 42, 43, 45, 62 and 84 from disclosure. These documents variously consist of memoranda, opinions and a draft order.

Under section 19 of the Act, a Ministry may refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1 of the exemption); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2 of the exemption).

The Ministry indicates that it is relying on both branches of section 19 to exempt the entire contents of Records 32, 35(A), 62 and 84 from disclosure and that the release of certain paragraphs in Records 42, 43 and 45 "may reveal the substance of the legal opinion contained in Record 62".

For a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record either constitutes a written or oral communication of a confidential nature between a client (or the client's agent) which relates directly to seeking, formulating or giving legal advice, or that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel and that the record was prepared (1) for use in giving legal advice, (2) in contemplation of litigation or (3) for use in litigation.

I have carefully examined the records at issue in light of the representations provided by the parties. I find that Records 32, 35(A) and 62 qualify for exemption under the first branch of the exemption. These documents constitute written communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice.

Record 84 consists of a covering memorandum and a draft order respecting the payment of back taxes to a particular village under the Ontario Unconditional Grants Act, 1975. These documents were authored by a Ministry solicitor for transmittal to an official within the MIA. I have carefully reviewed these records and find that the documents were "prepared for use in giving legal advice" for the purposes of Branch 2 of the section 19 exemption.

I will now consider the other three records for which this exemption has been claimed. I find that the excerpt from Record 42 simply constitutes a factual statement about the relationship between two pieces of legislation and does not qualify as legal advice.

In addition, with respect to the information at issue in Records 42, 43 and 45, the Ministry has not provided me with any evidence to establish that the passages either (1) qualify as confidential communications between a legal advisor and his or her client, (2) were created or obtained especially for a lawyer's brief for existing or contemplated litigation or (3) were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. I also find that the excerpts from the three records would not reveal the substance of the legal opinion outlined in Record 62.

The result is that the portions of Records 42, 43 and 45 which the Ministry has withheld are not subject to section 19 of the Act. These excerpts must, therefore, be released to the appellant.

### **EXERCISE OF DISCRETION**

In this order, I have determined that the Ministry is entitled to rely on section 13(1) of the Act to exempt portions of Records 15, 28 and 29 from disclosure and that it may also apply section 19 to withhold Records 32, 35(A), 62 and 84 in their entirety. Both sections 13(1) and 19 are discretionary exemptions.

The seven records which I have listed were created many years ago. Six of them were authored between 1980 and 1981 while the seventh, a legal opinion, was issued in 1974. It is highly unusual for the Commissioner's office to consider records which are so dated.

The appellant submits that the Ministry ought not to be permitted to rely on a discretionary exemption to withhold documents created 14 to 21 years ago. She argues that, given their age, the sensitivity of these records would be largely non-existent.

The Ministry, for its part, acknowledges that the records at issue are dated. It states, however, that the issues addressed in these documents remain controversial and have not yet been fully resolved.

The Ministry notes, in this respect, that only four of the province's 13 international bridges are subject to the International Bridges Municipal Payment Act, 1981. It also points out that there has been ongoing litigation in one municipality to resolve a bridge assessment issue and that the Ministry has been approached to help resolve the matter. The Ministry then indicates that officials from several ministries are meeting to develop a common approach for the assessment of all international bridges in Ontario.

Finally, the Ministry points out that it has not applied sections 13(1) and 19 in an arbitrary fashion and has disclosed many records for which it could have claimed these exemptions.

To resolve this issue, I will first consider the relevant provisions of the Act which pertain to older records. Section 13(3) of the Act stipulates that an institution cannot rely on the advice or recommendations exemption where the record is more than 20 years old. Since the three documents for which the Ministry has claimed section 13(1) were authored in 1980, section 13(3) is not applicable. A provision analogous to section 13(3) does not exist with respect to the solicitor-client privilege.

The result is that the provisions of the Act do not expressly preclude the Ministry from relying on sections 13(1) and 19 to withhold the seven records from disclosure.

I must now consider whether the decision to apply these two exemptions to records that are 14 to 21 years of age represents an inappropriate exercise of discretion. To address this issue, I will briefly review the process that the head of an institution must follow before deciding to apply a discretionary exemption to a particular record.

Previous orders have established that a head must exercise his or her discretion in full appreciation of the facts of the case and after having considered both the legal principles established for the exercise of discretion and the purposes of the Act.

In deciding whether to apply a discretionary exemption to a particular record, the head will typically consider the contents of the document, the significance of the record to the institution and the circumstances in which the document was created. Within this framework, the age of the record is a relevant consideration.

In situations where the record at issue is dated, the Commissioner's office will look very carefully at the head's reasons for deciding to withhold the document. In the present case, the head has provided cogent reasons for his decision to apply sections 13(1) and 19 to the seven records in question.

Based on these considerations, I find that the head's decision to apply sections 13(1) and 19 to these records was exercised in accordance with established legal principles. On this basis, I am not prepared to interfere with this determination in the circumstances of this appeal.

## **ORDER:**

1. I uphold the Ministry's decision to deny access to Records 2, 3, 32, 35(A), 62 and 84 in their entirety and to the those portions of Records 13, 15, 28 and 29 which I have **highlighted** in yellow on the copy of these records which I have 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 38, 42, 43, 45 and 83 in their entirety as well as the portions of Records 13, 15, 28 and 29 which I have **not highlighted** in yellow within fifteen (15) days of 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: \_\_\_\_\_ June 22, 1995 \_\_\_\_\_ Irwin Glasberg  
Assistant Commissioner

**APPENDIX "A"**  
**INDEX OF RECORDS AT ISSUE**

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
2	Summary of a Cabinet Submission dated November 21, 1980	12(1) and 13(1)	Withheld
3	Document entitled "Minister's Briefing Notes on International Bridges"	12(1) and 13(1)	Withheld
13	Memorandum to the Minister of Intergovernmental Affairs from the Director of the Municipal Finance Branch, MIA dated November 24, 1980	12(1) and 13(1)	Disclosed in Part
15	Memorandum to file from an official of the MIA dated October 20, 1980	13(1)	Disclosed in part
28	Memorandum from the Director to the Municipal Finance Branch, MIA to the Executive Director of the Local Government Division, MIA dated September 3, 1980	13(1)	Disclosed in part
29	Memorandum from a public servant to an official of the Economic Policy Office, Ministry of Transportation and Communications (MTC) respecting the assessment of international bridges dated July 30, 1980	13(1)	Disclosed in part
32	Memorandum from legal counsel for the Ministry of the Attorney General (MAG) to an official of the MTC on the taxation of bridges dated March 28, 1980.	13(1) and 19	Withheld
35(	Memorandum from an official of the Local Government Organization Branch, MIA to legal counsel on the subject	19	Withheld

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
A)	of international bridges dated February 22, 1980		
38	Memorandum from the Executive Director, MIA to the Minister of Intergovernmental Affairs on the subject of Niagara Bridges dated February 22, 1980	12(1)	Disclosed
42	Untitled package of documents containing maps and notes relating to the status of international bridges	19	Disclosed
43	Status report prepared by an MTC official regarding the Niagara Falls Bridge Commission dated February 13, 1980	19	Disclosed
45	Letter from the Minister of Intergovernmental Affairs to the Minister of Transportation and Communications dated December 31, 1979 to which are attached two other correspondence	19	Disclosed
62	Legal memorandum dated June 6, 1974 on the subject of international bridges	13(1) and 19	Withheld
83	Memorandum from an Assistant Deputy Minister in the Ministry of Municipal Affairs and Housing (MMAH) to his Minister respecting the settlement of back taxes due to the Village of Point Edward.	12(1)(d) and(e) and 13(1)	Disclosed
84	A covering memorandum and a draft order respecting payment of back taxes to the Village of Point Edward authored by a solicitor and directed to an official of the Municipal Finance Branch, MIA dated July 29, 1981	19	Withheld