



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

INTERIM ORDER P-1205

Appeal P-9500611

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of the following records:

1. any memoranda from persons who prepared Ontario Regulation 293/92 which accompanied the regulation as it was sent to the Minister or to Cabinet for approval;
2. any memoranda or other documents accompanying Regulation 293/92 or “associated with it after its preparation, referring to any association between any fees in the regulation and the “NON-TAX REVENUE STRATEGY”;
3. the contract between the Ministry and Treasury Board dealing with the court fees and probate fees covered by Regulation 293/92.

Ontario Regulation 293/92 deals with an increase in the Court Tariff of Fees under the Administration of Justice Act.

After some correspondence between the Ministry and the requester, the Ministry identified 313 pages comprising 46 responsive records, which it described in an index sent to the requester with the decision letter. The Ministry granted access to one record (Record 43), a three-page excerpt from the Ontario Gazette. The Ministry claimed the following sections of the Act to deny access to the remaining 45 records:

- cabinet records - section 12(1)
- advice and recommendations - section 13(1)
- solicitor-client privilege - section 19

The requester (now the appellant) appealed the Ministry’s decision to deny access, and also identified eight additional records which he believed were in the custody or control of the Ministry but had not been identified in the decision letter. Five of these records were subsequently located by the Ministry and disclosed to the appellant. The remaining three records could not be located, and the adequacy of the Ministry’s search for these records will be addressed in my order.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

After receiving the Notice of Inquiry, the Ministry changed its decision regarding Records 31, 32 and 33, and disclosed these records to the appellant.

RECORDS

In its representations, the Ministry states that Record 42 is not responsive to the appellant’s request because it is a draft of what became Regulation 295/92, not 293/92. According to the Ministry, this record was placed in the file in error. Because of the clarity of the appellant’s

request, I am prepared to accept the Ministry's position, and I find that Record 42 falls outside the scope of the appellant's request and I will not consider it further in this order.

Three of the records at issue in this appeal (Records 44, 45 and 46) are currently the subject of a judicial review application in the context of another order of this office (Order P-920).

Consequently, I have decided to deal with all other records in this interim order. As soon as the judicial review in Order P-920 has been completed, I will issue a final order relating to Records 44-46.

The index created by the Ministry and sent to the appellant with the original decision letter omitted reference to Records 16, 17 and 18. This omission was drawn to the Ministry's attention by the appellant. These three records are all memoranda from legal counsel to staff of the Ministry's Program Development Branch, dated March 8, 10 and 13, 1992. The Ministry claims section 19 of the Act as the basis for denying access to all three records, and I find that these records fall within the scope of this appeal.

In summary, the records which are at issue for the purposes of this inquiry are Records 1-30 and 34-41.

DISCUSSION:

CABINET RECORDS

Section 12 of the Act provides, 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;
- ...
- (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; and
- (f) draft legislation or regulations.

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 under the various parts of section 12(1)), qualifies for exemption under section 12(1).

The appellant did not address section 12 in his representations.

Section 12(1)(f)

The Ministry claims section 12(1)(f) as the basis for exempting Records 20, 27, 28 and 35-41.

I have examined all of these records, and I find that, with the exception of a two-page attachment to Record 35, they are draft regulations, and are properly exempt under section 12(1)(f) of the Act.

The attachment to Record 35 appears to be a draft and final version of an "Information Sheet for Regulations", which provides certain explanatory details about the regulation to which it refers. I find that these two pages are not part of the actual regulation, and therefore do not qualify for exemption under section 12(1)(f).

Section 12(1)(e)

The Ministry claims that Records 11, 25 and 26 qualify for exemption under section 12(1)(e).

Records 11 and 25/26 (which are duplicates), are draft and final versions of an "Information Sheet for Regulations" which the Ministry states must accompany all draft regulations being considered by the Legislation Committee of Cabinet. (The attachments to Record 35 are the same type of records, although the Ministry has not claimed section 12(1)(e) as a basis for exempting Record 35.)

To satisfy the requirements of this exemption claim, the Ministry must establish that the record itself has 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 states that Records 11 and 25/26 were used to brief the Minister on the proposed changes to the fee tariff regulations. Record 25/26 was used to brief the Minister and was submitted to the Legislation Committee with the draft of what became Regulation 293/92. The Ministry explains that Record 11 was prepared to accompany the first draft of a regulation that dealt only with probate fees. The regulation was sealed and signed by the Minister and put on the agenda of the Legislation Committee. According to the Ministry, a

decision was subsequently made to include the fee increase in a larger package of fee increases and, as a result, it was withdrawn from the agenda.

In Orders 22 and 40, former Commissioner Sidney B. Linden, in addressing the proper interpretation to be placed on the wording of section 12(1)(e), stated:

The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

Applying this reasoning, I find that Records 11 and 25/26 do not qualify for exemption under section 12(1)(e), because these records have either already been presented to and dealt with by Cabinet or are no longer the subject of ongoing consultations among Ministers.

However, the disclosure of Records 11 and 25/26 would reveal the contents of the draft regulations which I have found to be exempt under section 12(1)(f), and on this basis, I find that these records are properly exempt pursuant to the introductory wording of section 12(1) of the Act. I also find that the two-page attachment to Record 35 is exempt under the introductory wording of this mandatory exemption for the same reasons.

Section 12(1)(a)

The Ministry claims that section 12(1)(a) applies to Record 4, which is a certified extract of the minutes of the April 7, 1992 Treasury Board meeting. At that time Treasury Board was a committee of Cabinet comprised of several senior Ministers.

Having reviewed this record, I find that it reflects a decision of Treasury Board made at the April 7, 1992 meeting with respect to amendments to Regulation 393/90, and as such, falls squarely within the requirements for exemption under section 12(1)(a).

Section 12(1)(b)

The Ministry claims section 12(1)(b) as the basis for exempting Records 1, 2, 3, 5 and 25/26. I have found that Record 25/26 qualifies for exemption under the introductory wording of section 12(1), so I will restrict my discussion of section 12(1)(b) to the other four records.

Inquiry Officer Anita Fineberg found that records identical to Records 1 and 2 qualified for exemption under section 12(1)(b) in Order P-920, and that records identical to Records 3 and 5 qualified under this same exemption in Order P-1021.

The two criteria which the Ministry must satisfy in order to exempt a record under this section are:

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.

In Order P-920, Inquiry Officer Fineberg makes the following statements with respect to the records which are identical to Records 1 and 2 in this appeal.

The Ministry states that it prepared Record 1 and its attachment, Record 2, for a submission to Treasury Board to obtain approval for the proposed increase in court tariffs of fees. Treasury Board is a committee of Cabinet comprised of several senior ministers. The submission, with the spreadsheet analysis attachment, was in fact presented to Treasury Board on April 7, 1992 and considered on that date.

The submission itself contains various "proposals" which I find to be recommendations to Treasury Board as to the amounts of the fee increases. In addition to containing other information, the spreadsheet analysis contains recommendations with respect to the specific proposed dollar figures for each fee tariff.

As far as Records 3 and 5 in this appeal (Records 1 and 2 in Order P-1021) are concerned, Inquiry Officer Fineberg stated:

The Ministry submits that Record 1 was prepared by Ministry officials in the Courts Administration Division for submission to Treasury Board. The Ministry further states that it was in fact presented to Treasury Board on April 7, 1992, at which time Treasury Board considered the submission and accepted its recommendations. Record 2 was also prepared by the Ministry's Courts Administration Division. It was reviewed by Cabinet on April 1, 1992 and approved on that date. Thus, I find that both Records 1 and 2 were submitted to the Executive Council (Cabinet) or one of its committees, in this case, Treasury Board.

In its submissions, the Ministry details the policy options and/or recommendations which it states are found in Records 1 and 2. The Treasury Board submission, Record 1, contains a specific recommendation regarding probate fees. The Cabinet submission, Record 2, contains numerous sections setting out various proposals, recommendations, policy options and analyses related to the government's 1992/1993 reallocation review as applied to the court system.

Thus I find that the Ministry can rely on section 12(1)(b) to exempt Records 1 and 2 from disclosure.

Having reviewed these records and the representations of the Ministry in this appeal, I agree with Inquiry Officer Fineberg, and find that Record 1 contains various proposals which constitute recommendations to Treasury Board as to the amounts of the fee increases, and Record 2, the

spreadsheet analysis, contains recommendations with respect to the specific proposed dollar figures for each fee tariff. I also accept the Ministry's submission that Records 1 and 2 were presented to Cabinet on April 7, 1992, and therefore I find that these two records satisfy both of the requirements for exemption under section 12(1)(b).

As far as Records 3 and 5 are concerned, I again agree with Inquiry Officer Fineberg's finding that these records contain policy options and/or recommendations regarding probate fees and analyses related to the government's 1992-93 reallocation review process, which were discussed by Treasury Board (Record 3) and Cabinet (Record 5). However, unlike the appeal which led to Order P-1021, the representations provided by the Ministry in the current appeal do not contain evidence to establish that Records 3 and 5 were actually presented to Treasury Board and Cabinet. I have reviewed these records, and find that they were both signed by the Minister and Deputy Minister which, in my view, is sufficient evidence to establish that they were "prepared for submission to the Executive Council or its committees". Therefore, I find that Records 3 and 5 also qualify for exemption under section 12(1)(b) of the Act.

In summary, I find that Records 1-5, 11, 20, 25-28, and 35-41 are properly exempt under section 12(1) of the Act.

ADVICE OR RECOMMENDATIONS

In its representations, the Ministry withdrew its section 13(1) exemption claim for all records, with the exception of Record 6.

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

In Order 94, former Commissioner Linden commented on the scope of the exemption under section 13(1) of the Act. He stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy making".

Record 6 is a memorandum summarizing a number of proposed amendments to various regulations. The Ministry claims that the record describes and makes a number of recommendations about several amendments to various regulations that were being proposed. I have reviewed Record 6 and, in my view, its disclosure would reveal advice or recommendations regarding the content of the proposed amendments to the regulations, and I find that this record qualifies for exemption under section 13(1) of the Act and should not be disclosed.

SOLICITOR/CLIENT PRIVILEGE

The Ministry claims that Records 7-10, 12-19, 21-24, 29, 30 and 34 qualify for exemption under section 19 of the Act, which reads as follows:

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.

Section 19 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); 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).

The appellant did not make representations on section 19.

In its representations, the Ministry states that because none of the records relate to litigation, it is relying solely on Branch 1.

In order to qualify for exemption under Branch 1, the Ministry must establish the following four requirements:

1. a written or oral communication; **and**
2. the communication must be of a confidential nature; **and**
3. the communication must be between a client (and his agent) and a legal advisor; **and**
4. the communication must be directly related to seeking, formulating or the giving of legal advice.

[Order 49]

The Ministry submits that Records 7, 8, 9, 13, 16, 18, 19 and 29 are communications between counsel who was responsible for drafting the regulations, and two Ministry staff who were responsible for developing proposals for tariff increases. Record 23 is a communication between one of these internal clients and counsel from the Office of Legislative Counsel, which is responsible for ensuring that all regulations are drafted in an acceptable legal format. Records 10, 12, 14, 15, 17, 21, 22, 23, 24, 30 and 34 are communications between counsel responsible for drafting the regulations and counsel from the Office of Legislative Counsel.

The Ministry states that since draft regulations are subject to the mandatory exemption found in section 12(1)(f) of the Act, it is reasonable to conclude that all records created in the context of developing these regulations are confidential in nature. The Ministry also states that the first group of records, including Record 23, are clearly communications between a solicitor and her clients. As far as the second group of records is concerned, the Ministry argues that counsel for the Ministry was acting as the conduit for requesting and receiving legal advice for her clients from the Office of Legislative Counsel, and is properly characterized as a agent of her internal Ministry clients when conducting this business.

Having reviewed the records and representations, I agree with the Ministry's position with respect to Records 7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 21, 22, 24, 30 and 34, and I find that all of these records are communications of a confidential nature between the clients (or their agent) and their legal advisors, in the circumstance of this appeal. I also find that these records contain information directly related to the seeking, formulating or the giving of legal advice. Therefore, the Ministry has established all four requirements for exemption under Branch 1 of the common law solicitor-client privilege for these records, and I find that they qualify for exemption under section 19 of the Act.

However, I find that the Ministry has failed to establish that Records 10, 16, 23 and 29 qualify for exemption under section 19. These four records are all covering memoranda between one of the Ministry clients, her legal counsel and/or counsel for the Office of Legislative Counsel which simply refer to attached draft regulations. In my view, these records do not contain information directly related to the seeking, formulating or the giving of legal advice, and I find that they do not qualify for exemption under section 19 and should be disclosed.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that further records do not exist, it my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

After receiving a response to his original request, the appellant informed the Ministry that he believed eight additional records existed. Having reviewed the correspondence and representations provided by the appellant during the course of this appeal, in my view, the appellant's concerns regarding the adequacy of search are restricted to the steps taken by the Ministry to locate these eight records.

The Ministry located five of the records referred to by the appellant and disclosed them in their entirety. The three remaining records are:

1. Non-Tax Revenue Committee Terms of Reference, dated November 1, 1991
2. Non-Tax Revenue Committee Briefing Note, dated October 31, 1991
3. Non-Tax Revenue Committee Communication Message, dated October 31, 1991

As part of its representations, the Ministry provided two affidavits sworn by the Assistant Co-ordinator of the Ministry's Freedom of Information and Privacy office who was responsible for assembling the records in response to the appellant's request. In the first affidavit, the Assistant Co-ordinator outlines the steps she took and the branches of the Ministry she contacted to attempt to locate responsive records, both at the time of the request and after receiving additional correspondence from the appellant and this office. These searches included the files of the Ministry's staff representative on the Non-Tax Revenue Committee.

The Assistant Co-ordinator's second affidavit outlines the steps taken in a subsequent search to locate the three remaining records. She retrieved additional files of the Ministry's staff representative on the Non-Tax Revenue Committee, which had been sent to off-site storage. None of the identified records were found in this file.

Having reviewed the representations of the Ministry, I am satisfied that its various searches for the remaining three records were reasonable in the circumstances of this appeal.

ORDER:

1. The Ministry's efforts to identify and locate responsive records were reasonable.
2. I uphold the decision of the Ministry to deny access to Records 1-9, 11-15, 17-22, 24-28, 30 and 34-41.
3. I order the Ministry to disclose Records 10, 16, 23 and 29 by sending copies of these records to the appellant by **July 5, 1996**.
4. In order to verify compliance with this interim order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant in accordance with Provision 3.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

June 14, 1996