



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

ORDER P-1312

Appeal P_9600299

Ministry of Natural Resources



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BACKGROUND:

In 1968, the Lower Thames Valley Conservation Authority (the LTVCA) was formed to investigate and find solutions for flooding problems in the area south of Chatham. In 1987, the LTVCA concluded an agreement involving itself and eight municipalities for the implementation of the "Indian/MacGregor Creek Flood Control Project" (the Project).

This agreement, which was reached without the formal involvement of the Ministry of Natural Resources (the Ministry), concluded a series of ongoing legal disputes and the threat of future litigation between various municipalities. The agreement also set out a funding formula which anticipated the receipt of a grant from the provincial government under the Conservation Authorities Act. This grant would cover 80% of the implementation costs. The Project was to be undertaken in five phases.

In June 1987, the Ministry confirmed that it would be prepared to fund the first four phases of the Project but not the fifth. Following the completion of an environmental assessment in 1988, the government formally approved the release of the funds. The last of the four Project phases was completed in 1994.

A number of municipal officials continued to press for the funding of the fifth stage of the Project. In 1995, the former Minister of Natural Resources agreed to consider further options to support this undertaking.

NATURE OF THE APPEAL:

The requester, who represents one of the eight municipalities, asked the Ministry to obtain access to four categories of records under the Freedom of Information and Protection of Privacy Act (the Act). The requester specifically asked to receive:

- (1) Any document under which the LTVCA requested provincial funding for the Project and the Ministry's response(s) to such requests.
- (2) Any document (including internal memoranda) in which the Ministry considered the issue of funding for the Project.
- (3) Any document (including internal memoranda) in which the Ministry considered the issue of funding for phase five of the Project.
- (4) Any reports, memoranda or letters prepared by Ministry officials (including a named official) from January 1995 onwards which related to Project funding.

The Ministry identified a total of 142 records that were responsive to the request. Following an exchange of letters between the parties, the requester indicated that he was interested in 98 of these documents and the Ministry disclosed the great majority of these records to him. The Ministry denied access to nine documents, however, either in whole or in part, under the following exemptions contained in the Act:

- Cabinet records - sections 12(1)(b), (c) and (e)
- advice or recommendations - section 13(1)

The requester (now the appellant) appealed the Ministry's decision. The Commissioner's office opened Appeal Number P-9600115 in order to process this file.

During the mediation stage of the appeal, the Ministry located nine additional records and disclosed five of these documents to the appellant in full. It denied access to the remaining four records based on the same exemptions claimed in its original decision letter.

Given the multiple decision letters issued by the Ministry, the parties agreed to place the original appeal on hold to permit the appellant to fully review the records that he had received. The appellant subsequently indicated that he wished to reinstate his appeal and the Commissioner's office amalgamated all of the outstanding issues into a new appeal file, numbered P-9600299. At this stage, the appellant also took the position that additional responsive records should exist.

Further mediation was not successful and the Commissioner's office provided a Notice of Inquiry to the parties. The Notice contained an index which described the general nature of the 13 records at issue and the exemptions which the Ministry had applied to each document.

Following the issuance of the Notice of Inquiry, the Ministry located a further 20 responsive records and provided access to these documents in full.

The 13 records at issue in this appeal consist of briefing notes, memoranda and reports. They are generally described in Appendix A, which is attached to this order.

DISCUSSION:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On April 2, 1996, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that, based on a policy adopted by the Commissioner's office, it would have 35 days from the date of the confirmation to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were put forward during this period.

On August 27, 1996, 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 7, 8 and 9.

Based on my review of the appeal files, the Ministry did not claim that section 13(1) applied to these three documents in its original decision letter dated January 25, 1996.

It is also significant that, on May 28, 1996, the Ministry wrote to the Commissioner's office to indicate that it would be relying on section 13(1) of the Act to exempt Records 3, 4 and 5 from

disclosure. The Ministry did not state, however, that it also wished to apply this exemption to Records 7, 8 and 9.

Moreover, the Ministry did not raise the application of section 13(1) to these three records following receipt of the Notice of Inquiry sent to the parties in relation to Appeal Number P-9600115. The index which was attached to this notice clearly indicated that the Ministry had only claimed sections 12(1)(b), (c) and (e) for these records.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

Inquiry Officer Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed.

In the present case, the Ministry was advised of this policy, yet decided to rely on a new discretionary exemption almost five 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 section 13(1) to Records 7, 8 and 9.

In his representations, the appellant has raised a number of additional preliminary issues which I believe should be addressed before I consider the substantive matters in this appeal.

THE ADEQUACY OF THE MINISTRY'S DECISION LETTER

The appellant submits that the contents of the Ministry's decision letters do not comply with the requirements of section 29(1)(b) of the Act.

This provision specifies that the notice of refusal to provide access (which is contained in an institution's decision letter) must include the specific section of the Act under which access is refused, the reason that the provision applies to the record, the name and position of the person who has made this decision, and the fact that the requester may appeal this decision to the Commissioner's office.

Previous orders issued by the Commissioner's office have held that a notice of refusal must contain sufficient detail to allow a requester to make a reasonably informed decision on whether to review an institution's decision (Orders P-554 and M-457).

In his submissions, the appellant submits that the Ministry's decision letter was inadequate in that it failed to (1) provide an updated index of records that it had located, (2) identify the section of the Act used to exempt each record, (3) state its reasons for exempting these documents and

(4) identify the Ministry official responsible for this decision. He goes on to argue that such omissions have made it difficult for him to make submissions on the status of these records.

I have carefully reviewed the various decision letters which the Ministry issued to the appellant. I find that the Ministry's original letter of January 25, 1995 failed to explain the relationship between the records and the exemptions claimed for each of them. In addition, the decision letter did not identify the person responsible for making this determination and his or her position. In the circumstances of this appeal, I find that the Ministry's decision letter did not fully comply with section 29(1)(b) of the Act.

The Notice of Inquiry which the Commissioner's office provided to the parties, however, included an index which generally described the 13 records at issue. On this basis, the appellant was furnished with sufficient information to indicate the general nature of these documents. For this reason, I believe that the deficiencies which the appellant has identified have been remedied during the course of the inquiry process and that no useful purpose would be served by requiring that the Ministry issue a revised decision letter.

I would, however, encourage Ministry staff to review the June 1992 edition of "IPC Practices" published by the Commissioner's office. This document outlines the proper requirements for a decision letter under the Act.

The appellant also takes the position that the Ministry is obliged to provide him with an index not only for the records which it is withholding but also for those records which it has decided to disclose.

Section 29 of the Act does not impose any specific requirements on an institution in situations where it chooses to disclose a record. For this reason, and because the purpose of an adequate decision letter is to provide a requester with information on whether or not to appeal a decision, I can see no reason to apply section 29(1)(b) of the Act to records that a requester has already received.

THE AWARDING OF COSTS

In his representations, the appellant asks that the Commissioner's office make an award of costs in favour of his client.

In Orders P-604 and P-724, I considered the issue of whether the Commissioner's office has the legal authority to award costs to a party to an appeal. I observed that, as a general principle, an administrative tribunal possesses only those powers which it has been granted by its enabling statute, by necessary implication or through some statute of general application.

I then reviewed the relevant provisions of the Act and concluded that they do not provide the Commissioner or his delegate with either the express or implied authority to award costs to a party in an appeal. I also found that there is no statute of general application, to which the Act is subject, which provides the Commissioner with this power. I went on to conclude that the Commissioner's office does not possess the requisite authority to make an award of costs.

For the same reasons that I expressed in the previous two orders, I find that the Commissioner's office lacks the authority to award costs in the present appeal.

ADVICE TO GOVERNMENT

The Ministry claims that section 13(1) of the Act applies to exempt the last paragraph on page 1 and page 2 in its entirety of Record 10, and page 2 of Record 11 from disclosure. This is the case because these two documents set out options involving alternative courses of action along with a suggested recommendation.

Both records are issue notes prepared in 1988 by Ministry personnel for review by the Minister. Record 11 is a more recent version of Record 10. These two notes describe questions which third parties might pose to the Minister when he announces funding for the Project, as well as proposed responses to these questions. The undisclosed portions of Records 10 and 11 are entitled "Proposed Resolution" and "Proposed Response".

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 just 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 P-529, I was called upon to decide whether section 13(1) applied to a record which contained briefing materials. This record included a series of possible media questions with suggested responses prepared by a public servant for consideration by the Minister of Transportation.

In that order, I found that the majority of the "suggested responses" referred to in the document simply described decisions which the Ministry of Transportation had already made. I also determined that the remaining responses could not be said to provide advice in the sense of giving direction, which might be accepted or rejected, as part of a deliberative process. On this basis, I concluded that the section 13(1) exemption did not apply to the responses in question.

Following my review of Records 10 and 11 in the present appeal, I similarly find that the "Proposed Resolution" and "Proposed Response" sections of these records simply document the funding and related decisions which the Ministry has already made. In addition, these portions of the records do not contain advice to be used in the context of an ongoing deliberative process (that is, for policy or decision making purposes).

Since the Ministry has not claimed that any other discretionary exemption applies to these records and because I have determined that section 12(1) of the Act is not applicable, I order that the two issue notes be disclosed to the appellant in their entirety.

CABINET RECORDS

In its representations, the Ministry claims that Records 2-6, 12 and 13 in their entirety, pages 3-5 of Record 1, pages 4-7 of Record 7, pages 4-7 of Record 8, and part of page 2 and pages 3 and 4 of Record 9 are exempt from disclosure by virtue of the introductory wording of section 12(1) and/or sections 12(1)(b), (c) and (e) of the Act.

These provisions 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;
- (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 many 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.

The records at issue in this appeal cover two time periods. Records 1- 6, 12 and 13 were prepared in 1988, whereas Records 7, 8 and 9 were authored seven years later, in 1995.

The 1988 Records

I will first consider whether the records prepared in 1988 are exempt from disclosure under section 12(1)(b) of the Act and/or the preamble to this section. There are eight documents which fall into this category.

Records 1, 5 and 12 consist of three “Application and Report to Management Board” forms (or “MB-20s” for short). Records 2, 3, 4 and 13 are briefing notes which Ministry staff prepared for the Minister as the funding proposal moved through Management Board of Cabinet (which is a Cabinet Committee) and eventually to Cabinet. These notes were attached to the MB-20s when they were considered by these bodies.

For section 12(1)(b) of the Act to apply, the records must contain policy options or recommendations and they must have been submitted or prepared for submission to the Executive Council or its committees.

The Ministry submits that these documents describe various policy options relating to the Project and that each of them was considered by Management Board of Cabinet (Management Board) and eventually approved by Cabinet.

Based on my review of the records, I find that the MB-20 portions of Records 1, 2 and 13, as well as Records 5 and 12 in their entirety, contain policy options and recommendations which were, in fact, submitted to Cabinet. On this basis, I find that these documents qualify for exemption under section 12(1)(b).

It is the Ministry’s further position that Records 3, 4, 6, 7, 8 and 9, and those parts of Records 2 and 13 which I have not found to be exempt under section 12(1)(b), are protected from disclosure under the introductory wording of section 12(1) of the Act. The 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.

Records 2, 3, 4 and 13 (which are the briefing notes) describe the background to the funding proposal, the issues for Cabinet to consider and summarize the financial considerations associated with the Project. Each of these notes draws from the contents of the related MB-20. Record 6 is a memorandum exchanged between two government officials where the former discusses certain details of the Cabinet decision.

Following a careful review of these documents, I am persuaded that their disclosure would reveal the substance of the deliberations of Management Board and the full Cabinet in that they would disclose the theme or subject of the discussions of these bodies. On this basis, Records 3, 4 and

6 in their entirety, and the previously non-exempt portions of Records 2 and 13 qualify for protection under the introductory wording of section 12(1).

The result is that all of the 1988 documents (comprising Records 1 through 6, 12 and 13) fall within the ambit of the Cabinet records exemption.

The 1995 Records

Records 7, 8 and 9 comprise the three documents which fall into this category. Each record is a draft briefing note prepared by Ministry staff for the Minister. The Ministry claims that these records are exempt from disclosure under the preamble to section 12(1), as well as sections 12(1)(b), (c) and (e) of the Act.

I will first consider whether the briefing notes are exempt from disclosure under section 12(1)(e) of the Act. To qualify for protection under this provision, the records must have been prepared to brief a minister in relation to matters that are either:

- (a) before or proposed to be brought before Cabinet or its committees;
or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

In Orders 22 and 40, former Commissioner Sidney B. Linden commented on the scope of section 12(1)(e). He indicated that the use of the present tense in this exemption precludes its application to a record that has already been presented to, and dealt with by, the Executive Council or its committees.

This point was elaborated upon by Inquiry Officer Anita Fineberg in Order P-946 where she stated that:

Section 12(1)(e) is prospective, or at least meant to cover issues that are presently the subject of inter-ministerial consultations or currently before the Executive Council or its committees (Order 40). Moreover, the fact that these issues **may** be revisited is insufficient to substantiate a claim for exemption under section 12(1)(e).

I agree with these comments and adopt them for the purposes of this order.

In its submissions, the Ministry indicates that the briefing notes were prepared to familiarize the Minister with the issues surrounding the funding of phase five of the Project. It then points out that, should the recommended policy option be adopted, these new proposals would need to be considered and approved by Management Board. For this reason, it argues that the records were used to brief the Minister on matters to be brought before a Cabinet Committee.

I would note that the three briefing notes were prepared in September 1995. The Ministry's representations are dated August 1996. Despite the fact that almost a year has elapsed since the

notes were prepared, the Ministry's submissions do not include any definitive statement on when the funding issue is likely to be considered by Management Board. Nor do the records, themselves, support the notion that this issue has been clearly scheduled for Cabinet consideration.

On this basis, I draw the inference that the government has not made a decision on when this matter will be placed before Cabinet or one of its committees. It necessarily follows that this issue is not presently before these bodies and, hence, that the Ministry cannot rely on this aspect of the section 12(1)(e) exemption to withhold these records from disclosure.

Nor has the Ministry argued that the briefing notes relate to a matter which is the subject of consultation among ministers for the purposes of section 12(1)(e) of the Act (the second aspect of this exemption). The result, therefore, is that section 12(1)(e) does not apply to the three briefing notes.

I will now consider whether the records are protected from disclosure under sections 12(1)(b) and (c), as well as the preamble to section 12(1) of the Act.

For a document to qualify for protection under section 12(1)(c), the record must contain background explanations or analysis 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).

Since the Ministry has not persuaded me that the briefing notes were, in fact, submitted or prepared for submission to Management Board, I find that section 12(1)(c) cannot be applied to withhold these records from disclosure.

Because the application of section 12(1)(b) of the Act is also made conditional on the relevant records being submitted or prepared for submission to Cabinet or one of its committees, I similarly find that this exemption does not apply to the briefing notes.

I also find that the disclosure of these records would not reveal the substance of deliberations of either the full Cabinet or one of its committees. On this basis, I conclude that the preamble to section 12(1) cannot be used to protect these records from disclosure.

To summarize, I find that Records 2 through 6, 12 and 13 and the previously exempted portion of Record 1 all qualify for exemption under section 12(1) of the Act. The Cabinet records exemption does not, however, apply to Records 7, 8 or 9.

Since I have previously determined that the Ministry cannot apply section 13(1) of the Act to exempt Records 7, 8 and 9 from disclosure, I order that the Ministry release these three documents to the appellant.

REASONABLENESS OF SEARCH

In his representations, the appellant observes that the Ministry's disclosure of records to him has been incomplete and sporadic. He points out that he has received documents on an incremental

basis on seven separate occasions. On this basis, the appellant submits that the Ministry's records search has been less than thorough and that additional responsive records should exist.

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.

The Notice of Inquiry which was sent to the parties to the appeal asked that the Ministry provide details of its search for responsive records. In its representations, the Ministry's has included two affidavits for this purpose.

The Ministry official who swore the first affidavit was the individual who responded to the appellant's original request. This official outlines in considerable detail the steps which the Ministry has taken to search for records both in response to the requester's initial request and with respect to his later contention that additional records should exist.

These steps included (1) consulting with the appellant to determine if part of the request should be transferred to the LTVCA, (2) requesting that the Central Agency Liaison Section of the Ministry's Corporate Affairs Branch undertake a records search, (3) initiating a records search of the computerized correspondence tracking system found in the Minister's and Deputy Minister's office, (4) consulting with the Ministry's Program Advisor and (5) obtaining documents from the Ontario Government's Records Centre.

A Program Advisor, employed in the Ministry's Conservation Authorities Program provided the second affidavit. This individual liaised regularly with staff of the LTVCA to discuss its Project funding requirements and monitored the progress of this initiative. In her affidavit, the Program Advisor describes the extensive follow-up search activities which she undertook.

Collectively, the search efforts of Ministry staff yielded almost 150 records, most of which have been disclosed to the appellant.

Both officials also indicate that they undertook a focused records search for follow-up correspondence relating to a letter sent by a Ministry official to a named third party on June 1, 1995. They report that no new additional records were located.

I have carefully reviewed the evidence provided by the appellant and the Ministry. While it is true that the Ministry's disclosure of records to the appellant occurred in stages and in a seemingly un-coordinated fashion, I am satisfied that the search for responsive documents was undertaken by knowledgeable staff in locations where the records in question might reasonably be located.

I further find that Ministry personnel worked constructively with the appellant with a view towards locating all of the records which might reasonably respond to his request. I have,

therefore, concluded that the Ministry's search for responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1-6, 12 and 13.
2. I order the Ministry to disclose to the appellant pages 4-7 of Record 7, pages 4-7 of Record 8, the bottom paragraph of page 2 and pages 3 and 4 of Record 9, the last paragraph of page 1 and page 2 of Record 10, and page 2 of Record 11 by **January 3, 1997**.

(For greater certainty, I have highlighted those portions of Records 7 to 11 to be disclosed to the appellant in green in the copy of the records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator along with this order)

3. In order to verify compliance with the provisions of 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.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ December 6, 1996

APPENDIX A

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	Application and Report to Management Board (MB-20) (three pages)	12(1)(b), (c) and (e)	Withheld
2	Briefing note with notations dated September 22, 1988, prepared for the Minister and Deputy Minister to which is attached an MB-20 (five pages)	12(1)(b), (c) and (e)	Withheld
3	Briefing note dated September 22, 1988 to accompany an MB-20 for the Deputy Minister and Minister (same as the first page of Record 2) (one page)	12(1)(b), (c) and (e) and 13(1)	Withheld
4	Briefing note dated September 27, 1988 prepared for Minister and Deputy Minister (one page)	12(1)(b), (c) and (e) and 13(1)	Withheld
5	MB-20 dated September 26, 1988 with attachments (eight pages)	12(1)(b), (c) and (e) and 13(1)	Withheld
6	Memorandum dated October 5, 1988, from the Executive Co-ordinator, Finance and Administration Group to the Director of the Conservation Authorities and Water management Branch (one page)	12(1)(b), (c) and (e) and 13(1)	Withheld
7	Last four pages of a draft briefing note, dated April 13, 1995, entitled Funding Options (four pages)	12(1)(b), (c) and (e)	Disclosed
8	Last four pages of a draft briefing note dated September 21, 1995, entitled Funding Options (four pages)	12(1)(b), (c) and (e)	Disclosed
9	Bottom of page 2, and pages 3 and 4 in their entirety of a briefing note dated September 21, 1995, entitled Funding Options (three pages)	12(1)(b), (c) and (e)	Disclosed
10	Bottom of page 1 and page 2 in its entirety of a contentious issue note dated September 30, 1988 (two pages)	13(1)	Disclosed
11	Page 2 of a regional issues note dated November 23, 1988 (one page)	13(1)	Disclosed
12	Undated MB-20, similar to Record 1 (three pages)	12(1)(b), (c) and (e)	Withheld
13	Briefing Note dated March 24, 1988 prepared for Minister and Deputy Minister to which is attached an MB-20 (seven pages)	12(1)(b), (c) and (e)	Withheld