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

ORDER P-1390

Appeal P_9600365
[Reconsideration]

Ministry of Finance

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BACKGROUND:

This order sets out my decision regarding a reconsideration request made by the Ministry of Finance (the Ministry) with respect to Order P-1351, issued by Inquiry Officer Donald Hale on February 25, 1997. To facilitate my analysis of the issues in this reconsideration, I will begin with a brief outline of the history of this matter.

The appellant is a representative of the City of Toronto Urban Development Services Department. On behalf of the City of Toronto, he submitted a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records relating to "the implementation of market value assessment or actual value assessment on neighbourhoods and/or individual properties in the City of Toronto". Specifically, the appellant sought access to any studies on the "distribution of tax increases or decreases along with any other impact studies which have been prepared".

The Ministry denied access to the impact studies which it prepared as part of the "Golden Report", claiming the application of section 22(a) of the Act, as these records are publicly available in a CD-ROM version from Publications Ontario.

The Ministry also denied access to three additional impact studies which it prepared, under the Cabinet records exemptions contained in sections 12(1)(c) and (d) of the Act.

The appellant appealed the Ministry's decision to deny access to the three impact studies under section 12(1), and also submitted that additional records responsive to his request should exist. In this order, I will refer to the three additional impact studies, which are the records at issue in this appeal, as "the impact studies" or "the records at issue".

Order P-1351 dealt with the issue of whether section 12(1) applied to the impact studies, and whether the Ministry had conducted a reasonable search for responsive records. In that order, Inquiry Officer Hale upheld the application of the exemption provided by section 12(1) of the Act, but included two provisions in the order relating to the consent of the Executive Council under section 12(2)(b). This section states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> > the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The order provisions which relate to this section appear on page 5 of the order. They state as follows:

1. I order the Ministry to outline the relevant fact situation to the Premier (as head of the Executive Council) or his designate, in writing, to determine whether the Executive Council would be prepared to consent under section 12(2)(b) of the Act to the release of the records. I further order that the

response given by the Executive Council is to be provided to the appellant no later than **March 27, 1997**.

2. I order the Ministry to provide me with a copy of the response of the Executive Council mentioned in Provision 1 of this order no later than **April 1, 1997**. This document should be sent to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

In addition, Inquiry Officer Hale found that the Ministry's search for responsive records was reasonable, and he dismissed that aspect of the appeal.

The following is a summary of the submissions made by the Ministry in its letter requesting that the order be reconsidered.

(1) The Executive Council only had two scheduled meetings during the month of March, 1997. The first was on March 5, 1997. Since the order was issued on February 25, there was insufficient time for the Minister to review the order and have the matter placed on the agenda for that meeting. The second meeting was on March 31, 1997, which was too late to comply with order provision 1.

(2) The Ministry submits that neither the Minister of Finance, nor the Inquiry Officer, nor the Information and Privacy Commissioner, has the authority to require the Executive Council to place an item on its agenda, nor to impose a deadline on the Executive Council's determination of a matter.

(3) The Ministry submits that the inquiry process was lacking in procedural fairness because the Inquiry Officer did not provide the Ministry with an opportunity to comment on the order conditions imposing an obligation on the Ministry to place the matter before Executive Council, nor on the timing imposed by this condition (as discussed above under item (1)), nor on the five factors which (according to the Ministry) the Inquiry Officer relied on as evidence of "changed circumstances" on pages 3-4 of the order.

(4) The Ministry disputes the statement in the order to the effect that the head must determine whether or not to bring the matter before the Executive Council for the purposes of section 12(2)(b) based on the circumstances of the individual case and the nature of the records at issue (see page 3 of the order). The Ministry submits that there is no statutory basis from which it can be inferred that the head has a reviewable discretion whether or not to seek the Executive Council's consent to disclosure of a record which would otherwise be exempt under section 12(1). As well as disagreeing substantively with the Inquiry Officer's interpretation on these points, the Ministry also submits that it should have been provided with an opportunity to make submissions on these issues.

The reconsideration request does **not** relate to the finding in Order P-1351 to the effect that section 12(1) applies to the impact studies, nor to the Inquiry Officer's finding that the Ministry's search for responsive records was reasonable, and I will therefore not review these aspects of the order. Accordingly, the finding that section 12(1) applies (unless consent is obtained under

section 12(2)(b)), and the Inquiry Officer's dismissal of the appeal relating to the existence of additional records, will remain in effect no matter what determination is reached in the present order.

The IPC's policy on reconsiderations provides as follows.

> When an application for reconsideration of an order is received, the order should be reconsidered only where:
>
> 1. there is a fundamental defect in the adjudication process (for example, lack of procedural fairness) or some other jurisdictional defect in the order, or;
>
> 2. there is a typographical or other clerical error in the order which has a bearing on the decision or where the order does not express the manifest intention of the decision maker.
>
> An order should not be reconsidered simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the inquiry.

Because the Ministry raised a substantive jurisdictional issue, I invited the appellant and the Ministry to make submissions on the reconsideration request. After outlining the grounds advanced by the Ministry and the IPC's reconsideration policy statement, as set out above, I specifically invited the parties to submit representations on the following issues:

(1) Based on the IPC's reconsideration policy, quoted above, should the discussion of section 12(2)(b) of the Act on pages 3 and 4 of Order P_1351, and order provisions 1 and 2 on page 5, be reconsidered?

(2) If the answer to question (1) is yes, should the discussion and interpretation of section 12(2)(b) which the Ministry has objected to, or the contents of order provisions 1 and 2, be changed, and if so, how?

Both parties submitted representations in response to this invitation.

DISCUSSION:

The appellant's representations are brief and simply indicate that, in the appellant's view, there is no reason for me to reconsider Order P-1351. The appellant submits that "the Premier and Executive Council were to assume direct responsibility for deciding whether to release the impact studies we have requested".

The Ministry's representations essentially reiterate the grounds for the reconsideration request as described in the "Background" section, above, with additional emphasis on the issue of procedural fairness. On the latter point, the Ministry takes the position that it should have been afforded an opportunity to comment on the "changed circumstances" listed on pages 3 and 4 of Order P-1351, the proposed order provisions, and Inquiry Officer Hale's view that the head must

decide whether to refer the matter to the Executive Council for possible consent under section 12(2)(b) when applying section 12(1).

I will return to the issue of procedural fairness later in this discussion. However, in my view, the major substantive issue in this case is whether the Inquiry Officer had the necessary jurisdiction to support provisions 1 and 2 of Order P-1351 (reproduced above), and accordingly, I will begin my analysis by considering this issue.

Before analysing the relevant statutory provisions and other applicable law, it will be helpful to consider what, in fact, is the meaning and effect of these two order provisions. In this regard, I am of the view that the final sentence of provision 1 is of particular importance. This sentence reads:

> I further order that the response given by the Executive Council is to be provided to the appellant no later than **March 27, 1997**. [original emphasis]

In my view, the clear implication of this sentence is that, although not explicitly stated, the order **requires** the Executive Council to consider the issue of consent and provide a response by a certain date.

I will now review the provisions of the Act which have a bearing on the jurisdiction of the Commissioner (and his delegated Inquiry Officers) in an inquiry. The Commissioner's jurisdiction under the Act to review a matter on appeal is established by means of sections 50(1) and 52(1) of the Act, which state:

> 50(1) A person who has made a request for,
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> (a) access to a record under subsection 24(1);
>
> (b) access to personal information under subsection 48(1); or
>
> (c) correction of personal information under subsection 47(2),
>
> or a person who is given notice of a request under subsection 28(1) may appeal **any decision of a head under this Act** to the Commissioner. [emphasis added]
>
> 52(1) The Commissioner may conduct an inquiry to review **the head's decision** if,
>
> (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
>
> (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected. [emphasis added]

In addition, since we are dealing with order provisions, section 54(3) of the Act is also relevant. This section states:

> Subject to this Act the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

Based on sections 50(1) and 52(1), it is clear that the Commissioner and his delegates only have the power to review a decision of a head under the Act. If the head has not made a decision under the Act, either expressly or by necessary implication, then the Commissioner has no jurisdiction to conduct an inquiry, and therefore to grant a remedy under the Act.

Therefore, it is necessary to determine whether a head's decision to refer, or not refer, the matter to the Executive Council for possible consent under section 12(2)(b), where section 12(1) would otherwise apply, is a "decision of a head under this Act". In my view, in order to determine this, it is helpful to consider how, in fact, section 12(2)(b) could be expected to come into play.

It is, of course, possible that the Executive Council would somehow become aware of an access request under the Act, decide to consent to disclosure and communicate this decision to the institution in question. However, given that most requests under the Act would be unlikely to come to the attention of the Executive Council without some action by the institution which receives the request, if this is the only way in which section 12(2)(b) comes into play, it would be a highly ineffectual statutory provision. In effect, such an interpretation would render section 12(2)(b) essentially meaningless.

In my view, the far more likely basis for consideration of possible consent by the Executive Council under section 12(2)(b) is a request by the head of an institution to do so. Therefore, in order to give effect to section 12(2)(b), my conclusion is that the head is required to make a discretionary decision to refer (or not refer) the matter to the Executive Council for possible consent in situations where section 12(1) would otherwise apply. A decision to exercise this discretion by **not** referring the matter to the Executive Council is therefore, in my view, a "decision by the head under this Act", which is therefore subject to review by the Commissioner (or his delegated Inquiry Officers) on appeal.

Moreover, this interpretation is consistent with the purposes of the Act as expressed in sections 1(a)(i) and (iii). The view that section 12(2)(b) obliges the head to make a discretionary decision about referring the matter to the Executive Council for possible consent is consistent with the principle in section 1(a)(i) that "information should be available to the public". In addition, the conclusion that this discretionary decision is a "decision by the head under this Act" and therefore reviewable on appeal is consistent with the principle in section 1(a)(iii), that "decisions on the disclosure of government information should be reviewed independently of government".

In this case, the Ministry has indicated that it considered the possibility of seeking the consent of the Executive Council, and decided not to, as mentioned on page 3 of Order P-1351. Based on the foregoing discussion, I find that this constitutes a decision of the head under the Act within the meaning of sections 50(1) and 52(1).

The next question is whether, in an inquiry, the Commissioner (or his delegated Inquiry Officers) have jurisdiction, express or implied, which would support order provisions 1 and 2.

It could be argued that section 54(3), in and of itself, is sufficiently broad to support the Inquiry Officer's jurisdiction in relation to order provisions 1 and 2. In my view, however, the broad nature of section 54(3) works against this interpretation, in view of the fact that the import of these order provisions, as discussed above, is to require the Executive Council to consider a particular matter at a particular time. This is a highly unusual tribunal power, and in my view, it would require more express statutory language than section 54(3) to confer it. No other provision of the Act expressly confers this power. Accordingly, I must now consider whether there exists an implied remedial power of the Commissioner and his delegates which would support order provisions 1 and 2.

The Supreme Court of Canada commented on implied tribunal powers in Bell Canada v. Canada (Radio-television and Telecommunications Commission) (1989), 60 D.L.R. (4th) 689 at 706_707:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities though judicial law-making, they must also avoid sterilizing these powers through overtly technical interpretations of enabling statutes.

In Reference re National Energy Board Act (Canada) (1986), 29 D.L.R. (4th) 35 (Fed. C.A.), leave to appeal refused (1986), 23 Admin. L.R. *xxi* (note) (S.C.C.), the Court developed two criteria for the application of the "implied powers doctrine":

> (i) the implied power must be required as a matter of practical necessity for the tribunal to accomplish its statutory mandate; and
> (ii) the question of the implied power must not be one to which the legislature clearly addressed its mind as evidenced by explicit provisions in other statutes or contrary provisions in the statute in question.

As noted in the foregoing discussion, I am of the view that the head's exercise of discretion as to whether or not to refer the matter to the Executive Council for possible consent under section 12(2)(b) is a decision of a head under the Act. This exercise of discretion would therefore be the reviewable aspect of a decision in relation to section 12(2)(b).

Based on the cases just cited on implied tribunal powers, I must consider whether order provisions 1 and 2 flow from a power or jurisdiction which exists "by necessary implication" of the statutory provisions I have referred to, or as a matter of "practical necessity" for accomplishing the Commissioner's statutory mandate under the Act.

Order 58, made by former Commissioner Sidney B. Linden, provides a useful consideration of the Commissioner's role in reviewing an exercise of discretion by a head. Specifically, the former Commissioner commented on his role where the head of an institution under the Act had decided to exercise his or her discretion by not disclosing a record, where a discretionary exemption had been found to apply. He stated:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. **While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly.** [emphasis added]

In considering whether section 12(2)(b) presents an appropriate occasion for the Commissioner or his delegates to substitute their discretion for that of a head on appeal, I note that the Act does not expressly confer this power. I also note that courts are generally very reluctant to substitute their discretion for that of an initial decision-maker who has exercised a discretionary power.

In addition, I note that, where a head has exercised discretion by not disclosing information that is subject to a discretionary exemption under the Act, section 54(2) indicates that it is not open to the Commissioner or his delegates to substitute their discretion for the head's. In effect, this prevents the Commissioner and his delegates from usurping the discretionary power given to the head under the Act in relation to discretionary exemptions. In my view, a discretionary decision not to refer a matter to the Executive Council for possible consent under section 12(2)(b) is similar to a discretionary decision not to disclose a record where a discretionary exemption applies. A finding that the Commissioner and his delegated Inquiry Officers may not substitute their discretion for the head's under section 12(2)(b) would therefore be consistent with section 54(2).

Most importantly, the approach suggested by former Commissioner Linden of ordering a head to reconsider the exercise of discretion where "it has not been done properly" allows the Commissioner, or a delegated Inquiry Officer, to conduct a meaningful review and impose a remedy, where appropriate, without substituting his or her discretion for the head's. I have therefore concluded that the power to substitute the discretion of the Commissioner or a delegated Inquiry Officer for the head's in relation to section 12(2)(b) does not arise by necessary implication, or as a practical necessity, in order to carry out the Commissioner's mandate to conduct inquiries and issue orders under the Act. Therefore, it is not an "implied power" of the Commissioner, and order provisions which exercise this power would be outside the jurisdiction of the Commissioner and his delegated Inquiry Officers.

As noted previously, order provision 1 **requires** the head, via the Premier, to arrange for the Executive Council to consider the issue of consent under section 12(2)(b) and provide a response by a certain date. Similarly, order provision 2 requires the Executive Council's response to be sent to Inquiry Officer Hale.

In my view, order provisions 1 and 2 do, in effect, substitute the Inquiry Officer's discretion for that of the head, and therefore are outside the Inquiry Officer's jurisdiction as a delegate of the Commissioner. For this reason, I have decided to reconsider order provisions 1 and 2, and to rescind them.

An additional reason for reaching this conclusion arises from constitutional conventions about responsible government. According to these conventions, the Cabinet (or Executive Council) is the supreme executive authority, which formulates and carries out all executive policies, and is

responsible for the administration of all the departments of government. In the provinces, including Ontario, the Premier presides over Cabinet. Although in most matters Cabinet is the supreme executive authority, the Premier has certain powers which he does not share with the other members of Cabinet, including the power to select, promote, demote or dismiss cabinet ministers. In addition, as noted in P.W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992), at pages 9-10, the Premier "calls the meetings of cabinet, settles the agenda, and presides over the meetings".

In view of the reference to the Premier in order provision 1, and the fact that order provisions 1 and 2 in effect require the Executive Council to consider the issue of consent under section 12(2)(b) and make a decision in that regard by a particular date, I have concluded that these order provisions impinge on the Premier's conventional powers in relation to the agenda of the Executive Council. While this would be permissible if authorized under a statute, I have concluded, above, that no express power granted by the Act, nor any implied power, confers jurisdiction on the Commissioner or his delegates to make order provisions of this kind. Accordingly, in my view, the effect of order provisions 1 and 2 would also be contrary to the convention relating to the powers of the Premier.

For this reason as well, I have decided to reconsider order provisions 1 and 2, and to rescind them.

The question remains as to what, if any, order provisions to substitute. This, in turn, depends on (1) whether the head's exercise of discretion is proper, and (2) what remedial powers the Commissioner and his delegates have if they determine that the exercise was defective in some way.

In exercising discretion as to whether or not to refer the matter to the Executive Council for possible consent under section 12(2)(b), the head is, in my view, exercising a discretionary administrative (as opposed to judicial or quasi-judicial) power. In Principles of Administrative Law, 2nd edition (Carswell, 1994), by Jones and de Villars, the authors state as follows (at page 78):

> Although it was previously thought that no procedural safeguards were required for the exercise of merely administrative powers, Administrative Law has now developed the "duty to be fair" in the method used to exercise even a merely administrative power.

The same text says the following about the limits of discretionary power (at page 146):

> Nevertheless, unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. ... **The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters**. [emphasis added]

In Order P-1351, Inquiry Officer Hale summarized the submissions of the Ministry as to its reasons for not referring the matter to the Executive Council for its possible consent under section 12(2)(b), as follows:

> The Ministry has provided an affidavit from its delegated head, the Freedom of Information and Privacy Co-ordinator. There, the Co-ordinator indicates that he considered whether to seek the consent of Cabinet to disclose the requested records. Elsewhere in its submissions, the Ministry submits that because of the sensitivity of the information contained in the records, there was "no likelihood of the consent being given". For this reason, the Ministry indicates that it did not seek the consent of Cabinet.

The Inquiry Officer went on to note that, in his view, the following factors not mentioned by the Ministry ought to be considered in this regard:

(1) The legislation which enacts the new property assessment scheme was tabled after the Ministry made the decision not to disclose this information and not to seek Cabinet consent to its disclosure.

(2) Similar types of statistical information appear in the appendices to the Golden Report, albeit based on other, earlier data.

(3) The Cabinet for whom the records was created is still in place.

(4) The records at issue are not the entire Cabinet Submission. Rather, they are discrete documents which were appended to the submission. They are easily separated from the submission and are limited to the statistical information prepared by the Ministry.

(5) The information would be of significant interest to hundreds of thousands of property owners across the Greater Toronto Area.

In its submissions on this reconsideration, the Ministry has indicated that, in its view, it ought to have been invited to comment on the relevance of these factors and that the failure to do so constituted a breach of procedural fairness. As I have already reconsidered the order and rescinded provisions 1 and 2, I do not need to address this argument in that context. However, the question may have a bearing on whether or not I am entitled to rely on these factors in this order.

In this reconsideration, the Ministry **has** been given an opportunity to comment on all the aspects of Order P-1351 with which it disagrees, including these factors, and it has done so. In my view, therefore, there can be no argument in the context of this reconsideration that there was any defect of procedural fairness in this regard.

The Ministry's substantive arguments concerning these factors appear to be based on the view that the Inquiry Officer ought not to have relied on them as the basis for order provisions 1 and 2. In particular, the Ministry submits that Bill 106, the Fair Municipal Finance Act, 1997, referred

to in factor (1), could be altered in committee before third reading occurs. My own view is that factors (2) through (5) existed at the time of the Ministry's original decision not to refer the matter to the Executive Council for possible consent, and were in fact relevant circumstances which ought to have been considered. While factor (1) did not exist at that time, it is my view that the existence of Bill 106 adds weight to factor (5), which was relevant when the original decision was made, making it an even more pressing concern today.

Therefore, I find that factors (2) through (5), identified by the Inquiry Officer Hale, are relevant factors which, according to the information provided to me, were not considered when the original decision was made. Therefore, I find that the head made the decision not to refer the matter to the Executive Council for possible consent under section 12(2)(b) without considering relevant factors. Based on the criteria from Jones and de Villars, quoted above, I find that this represents a defective, and reviewable, exercise of discretion.

This leads to the question of what remedial order I can make that is properly within my jurisdiction. In the preceding discussion, I have already concluded that order provisions 1 and 2 exceeded the jurisdiction of the Inquiry Officer in connection with the review of an exercise of discretion because, in effect, they substitute the discretion of the Inquiry Officer for that of the head.

However, since I have found that this is a reviewable exercise of discretion, it follows that, in order to make the review meaningful in some way, I must have some kind of implied remedial power. As mentioned above, former Commissioner Linden observed, in Order 58, that if he was not satisfied that discretion had been properly exercised, he would order the head to reconsider the exercise of discretion.

In my view, it would be reasonable to conclude that "practical necessity" or "necessary implication" would support an implied power under the Act such as that proposed by former Commissioner Linden with regard to a head's exercise of discretion in connection with section 12(2)(b). In the circumstances of this case, I have therefore concluded that the appropriate remedy would be to order the head to reconsider the exercise of discretion, taking the relevant factors into account, and to issue a new decision as to whether or not to place the matter before the Executive Council to determine whether it would consent to disclosure.

I note that, in its representations, the Ministry submitted that it ought to have been given an opportunity to comment on the proposed order provisions in Order P-1351, and that failure to do so constituted a lack of procedural fairness. I have already decided to rescind order provisions 1 and 2 on other grounds, and therefore I need not consider this submission in that regard. However, it may have a bearing on the provisions to be included in this order.

In my letter to the parties inviting their representations on the grounds raised by the Ministry in its reconsideration request, I invited the parties to comment on whether the contents of order provisions 1 and 2 should be changed, and if so, how. The Ministry did not suggest any provision which should be substituted for them; rather, the Ministry sought to have the provisions removed.

In my view, generally speaking, it is not necessary for purposes of procedural fairness that the Commissioner or a delegated Inquiry Officer preview proposed order provisions with a party or parties to an appeal before issuing an order. Moreover, in view of the invitation to make submissions on what should be substituted for the order provisions that the Ministry disagreed with, I believe that any requirements of procedural fairness in this regard have been satisfied.

ORDER:

1. Order provisions 1 and 2 of Order P-1351 are rescinded.

2. I order the head to reconsider the Ministry's decision not to refer the matter to the Executive Council for its possible consent to disclosure of the records at issue under section 12(2)(b), bearing in mind factors (2) through (5) on page 10 of this order, and any other relevant factors, and to notify the appellant of the head's decision in that regard in writing, by sending the decision to the appellant by **May 29, 1997**.

3. I further order the Ministry to provide me with a copy of its decision referred to in Provision 2 by sending a copy to me, c/o Information and Privacy Commissioner/Ontario, Suite 1700, Toronto, Ontario, M5S 2V1, when it sends the decision to the appellant.

Original signed by: May 8, 1997
John Higgins
Inquiry Officer