



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2241

Appeal PA-030218-1

Management Board Secretariat



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NATURE OF THE APPEAL:

A lawyer representing two clients submitted a request to Management Board Secretariat (MBS) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning the abolition of the Coroner's Council in 1998. The requester explained that his clients had made a complaint to the Council in 1995, which was not considered prior the Council's abolition. In submitting the request under the *Act*, the requester hoped to learn more about how the recommendation to abolish the Council came about, and:

... any connection that there may have been between information that may have been discovered during any research related to the recommendations coming about and the fact that my clients were the only ones apparently with a complaint that was still waiting to be heard by the Council.

Accordingly, the requester made the following request:

We wish to make both a general request as well as a specific request for the release of information relating to the abolishment of the Coroner's Council of Ontario and more specifically the Red Tape Commission's role in bringing that about. This would encompass any information relating to an investigation of the existing role of the Council prior to its abolishment. Therefore, we would specifically ask for production of any and all notes, memos, correspondence, research, recommendations or other documentation made by members of the Red Tape Commission or any such similar documentation that was obtained by them from other sources or Ministries within the Government, that relate in any way to the role of the Council and the recommendations for its proposed abolishment or that contain any information in which my client's names are mentioned or referred to.

MBS conducted a search in the Agency Relations Unit of the Corporate Policy Branch and identified three responsive records. None of the records mention or refer to the requester's clients.

One record, a copy of a press release, was disclosed in its entirety. MBS denied access to the remaining two records (5 pages), claiming that they qualify for exemption under section 12(1) (Cabinet records) and/or section 19 (solicitor-client privilege) of the *Act*. MBS also explained that both records contain information that is not responsive to the request, which was withheld on that basis.

The requester, now the appellant, appealed the decision.

During mediation, the appellant accepted that the non-responsive portions of the records fell outside the scope of the request, but took the position that more responsive records should exist.

Mediation was otherwise not successful, and the file was transferred to the adjudication stage. I began my inquiry by sending a Notice of Inquiry to MBS setting out the issues in the appeal and

seeking written representations. MBS responded with representations, which were then shared with the appellant.

After submitting its representations, MBS conducted a further search and located 11 additional responsive records. MBS issued a new decision letter to the appellant, disclosing four of these records in part. The remaining records and partial records were withheld either on the basis that they contained non-responsive information or that they qualified for exemption under section 12(1). The appellant did not appeal this new decision.

The appellant submitted representations in response to the Notice of Inquiry.

RECORDS:

There are two records at issue in this appeal, referred to by MBS as Record #2 and Record #3.

Record #2 is a report dated May 16, 1996 titled "Government Task Force on ABCs, Review of Advisory Agencies", and Record #3 is an appendix to Record #2. Both records consist of recommendations made by the Task Force following its review of a number of advisory agencies, including the Coroner's Council. The only portions of each record responsive to the appellant's request are the sections dealing specifically with the Coroner's Council.

DISCUSSION:

CABINET RECORDS

MBS claims that both records qualify for exemption under the introductory wording of section 12(1), as well as section 12(1)(b). These provisions read:

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;

Introductory wording of section 12(1)

Previous orders have established that the use of the word "including" in the introductory language of section 12(1) means that any record that would reveal the substance of deliberations of Cabinet or its committees, and not just the types of records enumerated in the various subparagraphs of 12(1), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570].

The MBS submits:

Records #2 and #3 are a report, prepared by the Government Task Force on Agency, Boards and Commissions (“the Task Force”), dated May 16, 1996. Staff in the MBS Agency Relations Unit, of the Corporate Policy Branch has advised that this report was prepared by the Task Force for submission to the Management Board of Cabinet, a committee of Cabinet. MBS submits that on page one of the report, it is evident that the report has been prepared at the direction of Management Board of Cabinet. The report outlines the Task Force findings and recommendations regarding government advisory agencies. MBS submits that it is clear on the face of the record that it was prepared for submission to Management Board of Cabinet, further to the direction of that Cabinet Committee. Staff in the MBS Corporate Policy Branch advise that they believe this record was submitted in May 1996 to Management Board of Cabinet. Consequently, MBS submits that the information contained in the record would have formed the basis of the deliberations of the Executive Council, and is accordingly exempt under the introductory wording of subsection 12(1).

The appellant suggests a possible distinction between the contents of the records and the substance of the deliberations made by Cabinet:

The [appellant] submits that there is a distinction to be made between the substance of contents (e.g. policy recommendations, etc.) contained in a record or report, and the substance of the deliberations actually made by the Executive Council or its committees. It is not clear from the response of the MBS, Legal Services Branch, that it is necessarily aware of what in fact the substance of the deliberations of the Executive Council with respect to the Records #2 and #3 were, but in any case, the [appellant] submits that the deliberations themselves may well have been, or could be, distinct from the contents of the record or report which forms Records #2 and #3.

In order to qualify for exemption under the introductory wording of section 12(1), the actual substance of the deliberations of Cabinet must be reflected in or inferred from the contents of a record. I have carefully reviewed the information contained in Records #2 and #3 here, and I find that its disclosure would reveal the actual deliberations that took place by Management Board of Cabinet during the course of its review of various advisory agencies in 1996. The portions of the two records dealing with the Coroner’s Council contain specific recommendations as well as various implications and requirements necessary to implement these recommendations. In my view, it is reasonable to conclude that this information formed the basis of the deliberations of the Cabinet Committee, as submitted by MBS. Accordingly, I find that the responsive portions of Records #2 and #3 qualify for exemption under the introductory wording of section 12(1).

Section 12(1) is a mandatory exemption, subject only to the exceptions outlined in section 12(2), which read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Clearly section 12(2)(a) is not relevant in the circumstances of this appeal. As far as section 12(2)(b) is concerned, MBS submits that the head considered whether or not to seek Cabinet's consent to disclose the exempt information and decided not to. Among the considerations taken into account by the head in this regard is the fact that there is now a new government and therefore it is not "practical or feasible to seek the consent of the Executive Council for which records #2 and #3 were prepared, because that Council no longer exists".

I have reviewed MBS's submissions on section 12(2)(b) and find nothing improper in the head's decision not to seek the consent of Cabinet in the circumstances [Order P-1146].

Because I have determined that the records qualify for exemption under the introductory wording of section 12(1), it is not necessary for me to consider the section 12(1)(b) or section 19 exemption claims.

ADEQUACY OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In its representations, MBS outlines the steps taken to locate responsive records in its Corporate Policy Branch. MBS explains that this Branch is responsible for reviewing submissions to Management Board of Cabinet, and includes a specific unit within the Branch, the Agency Relations Unit, which is responsible for managing corporate relations with various agencies,

boards and commissions. The three records initially identified by MBS were located in the Corporate Policy Branch. MBS also states that it conducted a search in the Archives of Ontario, but found no responsive records.

MBS also states in its representations:

The records the appellant is seeking would have likely been developed during the time the Task Force was reviewing the status of advisory agencies, including the former Coroner's Council. Staff in the corporate policy branch have advised that the Task Force review of advisory agencies took place in the Spring of 1996. In order to ensure that the ministry has located all responsive records, ministry staff, under the guidance of the ministry FOI coordinator, are presently undertaking a further search in the ministry's records storage facility. The ministry expects to complete this review expeditiously. No fees will be charged to the appellant with respect to this further search and any records that are found to be responsive to the request.

These further searches located the 11 additional records that were the subject of the second decision to the appellant, as described earlier in this order.

The appellant received the second decision before submitting his representations in this appeal. In his representations, the appellant questions why records were located at the latter stages of the appeal process, and submits:

... One possible inference that could be made is that MBS has not conducted itself in a diligent and efficient manner in regard to responding to the [appellant's] initial request for release of information and quite possibly has not even at this stage done all that is necessary to conduct the search required. It is, of course, possible, that the portions of the records that have been held back under Sections 12 and 19, both now and in the initial response back in May contain the very information which the [appellant] is seeking, however, the delay does lead to the conclusion or at least the perception that MBS has not done what it has to do.

The [appellant] notes in addition that the [initial] search was restricted to the place the Ministry thought most likely to contain responsive records, that is, the corporate policy branch of MBS. The new information contained in [second decision], above note, apparently comes from a different branch, that of the Program Management and Estimates Division, and again, as noted, contains 11 records. The [appellant] does not know how many divisions there are in MBS, or their names. The new information suggests, however, that there may yet be other areas, for which MBS has presumed that there is not reasonable information to be found there, in which there may in fact be further responsive records.

In my view, MBS has now made reasonable efforts to locate all records responsive to the appellant's request. In reaching its first decision, MBS restricted its searches to the branch most

likely to house records dealing with agencies, boards and commissions of the Ontario government, as well as the Archives of Ontario. On reflection, and given the particular time period when the Coroner's Council was under review, MBS decided that responsive records may have been sent to storage and conducted additional searches. More responsive records were found, and the second decision was issued to the appellant. The appellant takes the position that identifying new records during the course of the appeal itself calls into question whether even more records exist. I do not accept this position. The appellant has provided no reasonable basis for his position that yet more records should exist, and I find that the efforts made by MBS in responding to the initial request and subsequently during the course of this inquiry are sufficient to discharge its responsibilities under section 24 of the *Act*.

ORDER:

I uphold MBS's decision and dismiss the appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 16, 2004 _____