



Information and Privacy
Commissioner/Ontario

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

ORDER P-1408

Appeal P_9700056

Ministry of Community and Social Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to records concerning the future of sheltered workshops for people with developmental disabilities, as well as the Ministry's plans with respect to its Vocational Rehabilitation Services (VRS). The Assistant Deputy Minister to whom the request was directed advised the requester that she did not have any records responsive to the first part of the request in her office. Records responsive to the second part of the request were located and, following the payment of a fee by the requester, access to them, in whole or in part, was provided.

The Ministry claimed the application of section 12(1)(b) (Cabinet records) to the undisclosed portions of Records 8-12, 18, 23-24 and 27-35 and section 13(1) (advice or recommendations) to the undisclosed portions of Records 2, 3 and 23-24. The requester, now the appellant, appealed the Ministry's decision. The records are numbered by consecutive page numbers. For example, Record 8-12 is one five-page record. In this order, I will continue to use the page numbering system referred to by the Ministry.

During the mediation of the appeal, the Ministry advised the appellant that records responsive to the first part of her request in fact exist and that, upon payment of a fee, they would be disclosed to her, subject to any exemptions which might apply. The appellant indicated that she did not require the Ministry to conduct an additional search for such records. Accordingly, this portion of the appellant's request is no longer at issue.

The Ministry also advised the appellant that it intended to rely on the section 13(1) exemption to deny access to Records 8-12, 18 and 27-35, in addition to the exemption in section 12(1)(b). I will address the Ministry's ability to do so as a preliminary issue below.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from the Ministry only.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

On March 4, 1997, the Commissioner's office provided the Ministry with a Confirmation of Appeal indicating that an appeal from the Ministry's decision had been received. The Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry had 35 days from the date of the confirmation, until April 10, 1997, to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period by the Ministry.

The policy referred to in the Confirmation of Appeal was initially brought to the attention of the Ministry in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions

During an Appeal” which was sent by the Commissioner’s office to all provincial and municipal institutions in January of 1993.

On May 5, 1997, the Ministry issued another decision letter to the appellant in which it claimed the application of section 13(1) to Records 8-12, 18 and 27-35. In the Notice of Inquiry which followed shortly after this decision, the Ministry was asked to include in its representations the reasons why it is claiming a discretionary exemption beyond the date provided in the Confirmation of Appeal and the reasons why the discretionary exemption should apply. The Ministry has not provided me with any explanation as to the reasons why it did not claim the application of section 13(1) to these records before the expiration of its opportunity to do so.

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

The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced.

In this appeal, the Ministry initially claimed the exemption in question, section 13(1), but only for other records. The Ministry now seeks to extend the application of this exemption to include four additional records. In my view, the objective of the policy is equally applicable to this situation. This approach was upheld by the Divisional Court in the case of Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg (21 December 1995) Toronto Docket 220/89.

In adjudicating the issue of whether to allow the Ministry to claim this discretionary exemption at this time, I must weigh the balance between maintaining the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and the appellant in the outcome of my ruling. In the absence of any such evidence from the Ministry, and in light of the prejudice which accrue to the appellant, I conclude that this is not an appropriate case for allowing the Ministry to extend its claim to the section 13(1) exemption beyond those records for which it had originally been applied.

In my view, the Ministry had ample time to review the records and consult with counsel to confirm the discretionary exemptions on which it wished to rely as the appeal proceeded through the mediation stage of the process. I am not, therefore, prepared to consider the application of the section 13(1) discretionary exemption to the four records indicated in the Ministry’s letter of May 5, 1997.

DISCUSSION:

CABINET RECORDS

The Ministry claims that section 12(1)(b) of the Act applies to exempt the undisclosed portions of Records 8-12, 18, 23-24 and 27-35 from disclosure. This section states:

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 record containing policy options or recommendations submitted, or prepared for submissions, to the Executive Council or its committees;

In order for the exemption in section 12(1)(b) to apply to a document, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees.

The Ministry submits that each of these records contain information which was included in a submission made to Cabinet on March 17, 1997. Specifically, it argues that Record 8-12 is an opinion received from the Ontario Public Service Employees Union (OPSEU) in response to a series of questions posed by a Ministry official. The Ministry indicates that OPSEU was consulted as part of the policy work undertaken internally prior to the submission to Cabinet being prepared. The undisclosed portion of Record 18 refers “to plans made in the submission” according to the Ministry. Similarly, Record 23-24 discusses the proposals made to Cabinet in the submission and Record 27-35 deals with the proposals and discussions incorporated into the submission. In summary, the Ministry submits that each of these records contain policy options and/or recommendations. I have not, however, been provided with any evidence that these documents were either submitted or prepared for submission to Cabinet or one of its committees.

I have reviewed each of the records carefully and make the following findings:

1. Records 8-12 and 18 do not contain policy options or recommendations and were not submitted or prepared for submission to Cabinet or one of its committees. These documents do not, accordingly, qualify for exemption under section 12(1)(b).
2. The undisclosed portions of Records 23-24 and 27-35 contain information which may properly be characterized as policy options or recommendations for the purposes of section 12(1)(b). I have not been provided with any evidence to indicate that these documents have been submitted or were prepared for submission to Cabinet or one of its committees. While each of these records contains information which falls within the section 12(1)(b) definition of policy options or recommendations, the Ministry has not met its obligation to provide sufficient evidence for me to find that it was prepared for or was submitted to Cabinet or a Cabinet committee. They are not, therefore, exempt from disclosure under section 12(1)(b).
3. Because section 12(1) is a mandatory exemption, I will also consider whether the information contained in Records 8-12, 18 and 27-35 falls within the ambit of the introductory wording to the section. In my view, the disclosure of these records would not reveal the substance of deliberations of the Executive Council or one of

its committees. These records are not, accordingly, exempt from disclosure under the introductory wording to section 12(1).

4. As no other exemptions have been claimed and no other mandatory exemptions apply to Records 8-12, 18 and 27-35, they should be disclosed to the appellant.

ADVICE OR RECOMMENDATIONS

The Ministry claims that the undisclosed portions of Records 2, 3-4 and 23-24 are exempt from disclosure under section 13(1) of the Act. This section states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any 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 records 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 Sidney B. 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”.

The Ministry submits that the undisclosed portions of the records contain information which qualifies as a communication between public servants advising and/or providing options on the policy work which would be included in the Cabinet Submission. It argues that the suggested course of action provided in each document was accepted and included in the submission. The Ministry indicates that the release of this information would inhibit the free flow of advice and recommendations within the deliberative process of government decision making and policy making.

I have reviewed the documents to which the Ministry has applied section 13(1) and find that the portions of Records 2, 3 and 23-24 identified by the Ministry contain information which qualifies for exemption under section 13(1). Each of these passages reveals a suggested course of action which will ultimately be accepted or rejected by the recipient of the recommendation during the deliberative process.

Accordingly, these portions of the records are exempt under section 13(1).

ORDER:

1. I order the Ministry to provide the appellant with copies of the undisclosed portions of Records 8-12, 18 and 27-35 by **July 11, 1997**.

2. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 2, 3 and 23-24.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ June 20, 1997