



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

# **ORDER P-226**

**Appeal 890174**

**Ministry of Consumer and Commercial Relations**



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## O R D E R

### INTRODUCTION:

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act, a right to appeal any decision of the head to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. A request was received by the Ministry of Consumer and Commercial Relations (the "institution") for access to:

Any memoranda, briefing notes, backgrounders, letters, consultants studies or reports circulated internally or externally by the ministry on the subject of the prohibition of funeral homes being located on or operated in conjunction with cemeteries as well as the prohibition of operational connections between funeral homes and cemeteries.

2. By letter, the institution advised the requester that:

... access is denied pursuant to sections 12(1) (b), (c) and (e) of the FOI Act. These

provisions apply because the records in question were prepared to brief the Minister and for submission to Cabinet.

3. The requester appealed the institution's decision and notice of the appeal was sent to the institution and the appellant.
4. The appeal was assigned to an Appeals Officer who attempted to mediate a settlement. In the course of mediation, the appellant narrowed her request to five specific records, which consist of 364 pages. One of these five records is an appendix to another, but was considered by the institution and the appellant to be a separate record.
5. During mediation, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to the appellant and advised that access would be granted to one of the five records in its entirety. This record consists of 232 pages of background information which was responsive to the request. The institution also informed the appellant that access continued to be denied to the remaining four records (132 pages) and provided the appellant with a revised list of exemptions. The Appeals Officer attempted mediation with regard to the remaining records, but was unable to effect settlement.
6. Notice that an inquiry was being conducted to review the decision of the head was sent to the institution and the appellant. The Notice of Inquiry was accompanied by an Appeals Officer's Report. The Appeals Officer's Report

outlines the facts of the appeal and sets out questions which paraphrase the sections of the Act which appear to the Appeals Officer or any of the parties to be relevant to the appeal. The Appeals Officer's Report is intended to assist the parties in making representations concerning the subject matter of the appeal. It further indicates that in making representations, the parties need not limit themselves to the questions set out in the Report.

7. Written representations were received from the appellant and the institution.
8. I have considered all representations and supporting documents in making this Order.

The following records, which have been withheld from disclosure in their entirety, are at issue in this appeal.

- Record 1** A 29 page record, entitled "Section 13(1) of the Funeral Services Act: Issues and Options: Legislative Review Project".
- Record 2** A 69 page record, entitled "Cemetery-Funeral Home Combinations in Ontario: Issues and Recommendations" prepared by Hill Sloan Associates Inc.
- Record 3** A 23 page record, entitled "Analysis: "The "Hill" Report on Cemetery/Funeral Home Combinations".
- Record 4** An 11 page record, entitled "Appendix B: The Impact of Cemetery/Funeral Home Combinations in the Western Provinces".

**PURPOSES OF THE ACT/BURDEN OF PROOF:**

One of the purposes of the Act, as outlined in subsections 1(a), is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Furthermore, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

**ISSUES/DISCUSSION:**

The issues arising in this appeal are:

- A. Whether the head properly applied the mandatory exemption provided by section 12 of the Act to exempt Records 1-4 from disclosure.
- B. Whether the head properly applied the discretionary exemption provided by section 13 of the Act to exempt Records 1-4 from disclosure.
- C. Whether the head properly applied the discretionary exemption provided by section 15 of the Act to exempt Record 4 from disclosure.
- D. Whether the head properly applied the mandatory exemption provided by section 17 of the Act to exempt Record 2 from disclosure.

**ISSUE A: Whether the head properly applied the mandatory exemption provided by section 12 of the Act to exempt Records 1-4 from disclosure.**

In its representations, the institution has claimed subsection 12(1) of the Act as the basis for exempting Records 1-4. Further, the institution has claimed subsection 12(1)(d) to exempt Records 2 and 4, and subsection 12(1)(e) to exempt Record 1.

I will first deal with the introductory wording of subsection 12(1) of the Act which 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,

For the purposes of this appeal, I adopt former Commissioner Sidney B. Linden's interpretation of subsection 12(1) contained in Order 22 (Appeal Number 880008), dated October 21, 1988. At page 6 of that Order, Commissioner Linden stated:

... the use of the word 'including' in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption,

regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for exemption; any record where disclosure would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

The appellant, in her representations stated:

Given the titles of the documents which I have requested, it would appear that they are clearly consultants reports to the government.... it is unlikely that these documents would have been circulated at Cabinet (s. 12(1)).

At page 8 of Order 72 (Appeal Number 880159), dated July 11, 1989, Commissioner Linden offered the following interpretation:

Can records that are incorporated into a Cabinet submission or records that are used as a basis for developing a Cabinet submission, if disclosed, reveal the "substance of deliberations" of the Cabinet or its committees?

In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet, as required by the wording of subsection 12(1). Documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary exemption provided by subsection 13(1) of the Act.

I concur with this interpretation and adopt it for the purposes of this appeal.

In its representations, the institution stated that although the records themselves never went to an Executive Council or its

committees, parts of the records were incorporated into a submission which was the subject of Cabinet deliberations.

Therefore, the institution submits, the disclosure of the records would reveal the substance of the deliberations of an Executive Council or its committees. In support of this claim, the institution provided a copy of part of its Cabinet submission dated June 23, 1988, and a copy of "Ministry Responses to Death Care Submissions" dated June 28, 1988.

In order for a record which has never been placed before an Executive Council or its committees to qualify for exemption under subsection 12(1), the institution must establish that disclosure of the record would "reveal the substance of deliberations of an Executive Council or its committees". In the context of the subsection 17(1) exemption, I have stated that the disclosure of information contained in a record would reveal information supplied by another party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [See Order 203 (Appeal 890131), dated November 5, 1990 at p.13].

In its representations and supporting documents, the institution has provided me with evidence that parts of Records 1-4 had been reviewed by several ministers and were incorporated into the submission to the Cabinet Committee on Justice on July 18, 1988, to the Cabinet Committee on Social Policy, on August 11, 1988, to the full Cabinet, on December 6, 1988, and to the Cabinet Committee on Legislation, on May 25, 1989. Having reviewed the records at issue in this appeal, the representations and the supporting documents, I am satisfied that disclosure of Records 1-4 would permit the drawing of accurate inferences with respect



to the substance of deliberations of an Executive Council or its committees. Therefore, in my view, Records 1-4 qualify for exemption under subsection 12(1) of the Act.

As Records 1-4 satisfy the requirements for exemption under subsection 12(1), it is unnecessary to determine whether subsections 12(1)(d) or 12(1)(e) apply or to consider Issues B, C, and D.

**ORDER:**

I uphold the head's decision.

Original signed by:  
Tom A. Wright  
Assistant Commissioner

March 26, 1991  
Date