



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER 72**

**Appeal 880159**

**Ministry of Community and Social Services**



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## ORDER

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (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 a head under the Act to the Information and Privacy Commissioner.

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

1. On February 15, 1988, the Ministry of Community and Social Services (the "institution") received a request for "...all documentation, reports, financial forecasts and recommendations relating to the closing of the Rideau Regional Centre at Smiths Falls... [and] all planning documents including cost estimates relating to the future care of patients who are presently at R.R.C. but will be displaced by the closing of this institution.
2. On March 31, 1988, the institution received a follow-up request for "...all documents, reports, studies and recommendations relating to the transfer of residents of Smiths Falls, now and in the future. I would like to receive all general documents relating to this issue for other similar institutions as well."
3. By letter dated June 7, 1988, the institution advised the requester that access would be granted to some but not all of the requested records.

The requester was denied access to the following records for the reasons indicated:

**("Record No. 1")**

1. Wage Section of Project Opportunity - Reform of Employment Training and Sheltered Employment in Ontario
  - section 12.(1) (b), (c), (d), (e) as policy options, advice to Executive Council, the premature disclosure of which would reveal the substance of deliberations of Executive Council or its committees;
  - section 13.1 and 2 (i), (j) as recommendations of a public servant and not a final plan; and
  - section 18.1 (e), (f), (g) as positions or plans to be applied to any negotiations carried on, on behalf of an institution or the Government of Ontario; plans relating to the management of personnel; or information that, if prematurely disclosed, might result in undue financial benefit or loss to a person.

**("Record No. 2")**

2. 1987-88 Multi-year Plan Cabinet submission exempt under:
  - section 12.(1)(b), (c), (d), (e) as noted above.

**("Record No. 3")**

3. Revised and updated (February) proposals of the four regions which were submitted to head office for incorporation into Cabinet materials exempt under:
  - section 12.(1)(b), (c), (d), (e) as noted above;
  - section 13.(1) and (2), (i), (j), as recommendations of a public servant and not a final plan, and
  - section 18.(1) (e), (f), (g), as positions or plans to be applied to any negotiations carried on, on behalf of an institution or the Government of Ontario, plans relating to the management of personnel, or information that, if prematurely disclosed, might result in undue financial benefit or loss to a person.

3. By letter dated June 10, 1988, the requester appealed the decision of the head for the reason that "in the absence of said 'exempted' material my inquiry with respect to planning documents concerning the future care of patients presently residing at the Rideau Regional Centre cannot be adequately addressed."
4. The records in issue were obtained and reviewed by an Appeals Officer. During the investigation/mediation stage of the appeal the appellant raised his concern that in taking 82 days to respond to his request without providing a written notice of time extension, the institution had not complied with subsection 27(2) of the Act.
5. On November 4, 1988, I sent notices to the appellant and the institution that I was conducting an inquiry to review the decision of the head, and invited each of them to submit representations to me by November 25, 1988. Enclosed with this letter was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrases those 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 indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all parties affected by the subject matter of the appeal. I have received representations from the institution, but, to date, I have not received representations from the appellant.

The issues arising in this appeal are as follows:

- A. Whether the Wage Section of Project Opportunity ("**Record No. 1**") falls within the scope of the discretionary exemption provided by subsection 13(1) of the Act, and if so, whether any of the exceptions outlined in subsection 13(2) apply.

- B. Whether the 1987-88 Multi-year Plan Cabinet submission ("**Record No. 2**") and the revised regional proposals ("**Record No. 3**") fall within the scope of the mandatory exemption provided by subsection 12(1) of the Act.
- C. If the answer to Issue "B" is in the affirmative, whether the head has properly exercised his discretion under subsection 12(2)(b) of the Act.
- D. Whether the severability requirements of subsection 10(2) of the Act apply to any of the records in question.
- E. Whether there is a compelling public interest in the disclosure of any exempt record in this appeal which clearly outweighs the purpose of that exemption, as provided by section 23 of the Act.
- F. Whether the institution properly applied the provisions of subsection 27(2) of the Act in extending the time limit for responding to the appellant's request.

It should be noted at the outset that one of the purposes of the Act as set out in subsection 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. Further, section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions in the Act lies with the head.

Before discussing these issues, I would like to point out that, although the institution claimed subsections 12(1)(b)(c)(d) and (e) in its response to the appellant's original request for access, the written representations received from the institution make no reference to subsections 12(1)(d) and (e), and I have assumed that any claim for exemption under these subsections has been abandoned by the institution. Also, the resolution of Issues A and B in this Order has made it unnecessary for me to consider the institution's claim for exemption under section 18 of the Act.

**ISSUE A: Whether the Wage Section of Project Opportunity ("Record No.1") falls within the scope of the discretionary exemption provided by subsection 13(1) of the Act, and if 90/ whether any of the exceptions outlined in subsection 13(2) apply.**

The institution has cited subsection 13(1) as one of the basis for exempting both Record No. 1 and Record No. 3. I will deal with the proper disposition of Record No. 3 in my discussion of Issue B, and have restricted the discussion of the subsection 13(1) exemption to Record No. 1.

Subsection 13(1) of the Act provides:

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.

I have reviewed the contents of Record No. 1 and, in my view, the record clearly falls within the scope of the subsection 13(1) exemption. It contains advice and recommendations of a public servant on wage policy issues for disabled persons in sheltered workshops and ministry facilities.

It is important to note that the head has discretion under subsection 13(1) to release a record even if it qualifies for exemption under that subsection. In this case, the head has exercised his discretion in favour of releasing the vast majority of the "Project Opportunity" report to the appellant; everything, in fact, except the Wage Section (pages 26-37) of the report. I am satisfied, therefore, that the head has properly exercised his discretion in the circumstances of this appeal.

Having found that Record No. 1 qualifies for exemption under subsection 13(1), I must now determine if any of the exceptions outlined in subsection 13(2) apply. If they do, then all or part of the record must be disclosed.

In my view, the only exception that might apply in these circumstances is subsection 13(2)(i), which reads as follows:

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

...

- (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

...

I have been provided with evidence from the institution that the Wage Policy proposal was presented to the Cabinet Committee on Social Policy on October 27, 1988. Accordingly, this exception does not apply to Record No. 1, and the record is properly withheld from disclosure under subsection 13(1) of the Act.

**ISSUE B: Whether the 1987-88 Multi-year Plan Cabinet submission ("Record No.2") and the revised regional proposals ("Record No.3") fall within the scope of the mandatory exemption provided by subsection 12 (1) of the Act.**

The institution has claimed subsections 12(1)(b) and (c) of the Act as the basis of exempting Record No. 2 and Record No. 3. These subsections reads as follows:

12.--(1) 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,

...

- (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 decision are made and implemented;

...

The institution argues that Record No. 3 is exempt from disclosure by virtue of the introductory text of subsection 12(1). In the institution's view, disclosure of this record would "reveal the substance of deliberations of an Executive Council or its committees".

The institution has provided evidence which establishes that the four revised regional proposals which comprise Record No. 3 were prepared in response to a request by the Cabinet Committee on Social Policy for more specific analyses of certain previously submitted proposals. The institution argues that these revised reports are being used to provide information for a draft Cabinet submission, and "[Even though these documents will not be put before cabinet or one of its committees, disclosure of these records 'would reveal the substance of deliberations' of the Cabinet Committee on Social Policy on February 5, 1988 because the committee requested the information".

In my Order 22 (Appeal Number 880008) dated October 21, 1988, I discussed the proper interpretation of the introductory wording of subsection 12(1). At page 6 of that Order I 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 deliberation of an Executive Council or its committees qualifies for exemption under subsection 12(1).



What type of record would reveal the "substance of deliberations"?

"Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from ' form'" (Blacks Law Dictionary) or "essential nature; essence or most important part of anything" (Oxford Dictionary) . Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating the act of weighing and examining the reasons for and against contemplated act or course of conduct or a choice of acts or means."

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.

However, having reviewed the contents of Record No. 3, in my view, the four revised regional plans do in fact meet the requirements for exemption under subsection 12 (1). Although these records themselves have not been placed before the Cabinet committee, they were created as a direct result of the committee's request for the specific information contained in the reports, and, in my view, disclosure of their contents would "reveal the substance of deliberations" of matters which remain under active consideration by this Cabinet committee.

As far as Record No. 2 is concerned, I have reviewed its contents and, in my view, it also meets the requirements for exemption under subsection 12(1). This record is identified as a Cabinet submission, and was in fact presented to the Cabinet Committee on Social Policy on February 5, 1988. It contains background information and strategies regarding the reassessment of services provided to developmentally handicapped people, together with several policy options and recommendations for action by the Cabinet committee. Although the institution has claimed subsections 12(1)(b) and (c) as the basis for exempting this record, in my view, disclosure of the record would "reveal the substance of deliberations of an Executive Council or its committees", and thus meets the requirements for exemption under the introductory wording of subsection 12(1).

In summary, I find that both Record No. 2 and Record No. 3 qualify for exemption under subsection 12(1) of the Act.

**ISSUE C: If the answer to Issue "B" is in the affirmative, whether the head has properly exercised his discretion under subsection 12(2)(b) of the Act.**

Subsection 12(2)(b) reads as follows:

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

...

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

In my Order 24, (Appeal Number 880006), dated October 21, 1988, I addressed the issue of whether a head has a duty under subsection 12(2)(b) to seek the consent of the Executive Council before denying access to a record under subsection 12(1). While concluding that subsection 12(2)(b) does not impose a mandatory requirement, at page 11 of that Order I stated:

In my opinion, the circumstances of each case must dictate whether or not the head seeks Cabinet consent. However in all cases, it is incumbent on the head to be mindful of the option available under subsection 12(2)(b) and direct his or her mind to whether or not consent of the Cabinet should be sought. I am also of the view that the discretion of the head to seek consent must be exercised irrespective of whether the requester has asked the head to do so as part of a request for subsection 12(1) records.

In the circumstances of this appeal, there is no evidence that the head has considered the possibility of seeking Cabinet consent to the release of Record No. 2 and/or Record No. 3.

Accordingly, I order that the issue of the exercise of discretion under subsection 12(2)(b) be returned to the head for consideration as to whether to seek the consent of the Executive Council to release the Multi-Year Plan and the four regional plans. Further, I order the head to provide my office and the appellant with written notice of his decision and the reasons for the decision, within twenty (20) days of the date of this Order.

**ISSUE D: Whether the severability requirements of subsection 10(2) of the Act apply to any of the records in question.**

Subsection 10(2) states:

Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I discussed the proper application of subsection 10(2) of the Act in my Order 24, supra. At page 13, I stated:

A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the records at issue in this appeal and have concluded that no additional information that is in any way responsive to the request could be severed from the records and provided to the appellant without disclosing information that legitimately falls within the section 13 and subsection 12(1) exemptions. I note that Record No. 1, dealt with under Issue A, is actually the severed portions of the "Project Opportunity" report, the rest of which has been provided to the appellant by the institution.

**ISSUE E: Whether there is a compelling public interest in the disclosure of any exempt record in this appeal which clearly outweighs the purpose of that exemption, as provided by section 23 of the Act.**

Section 23 of the Act provides:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Because the override provisions of section 23 do not apply to records exempt under section 12 of the Act, my discussion of this issue is restricted to Record No. 1, found to be exempt under subsection 13(1).

As I have stated in a number of previous Orders, two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question. (emphasis added)

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies falls on the appellant.

In the circumstances of this appeal, the appellant has neither raised nor addressed the application of section 23. However, because I am privy to the records and the appellant is not, I reviewed Record No. 1 in the context of section 23, and, in my view, the circumstances are not sufficient to trigger the override provisions of that section.

**ISSUE F: Whether the institution properly applied the provisions of subsection 27(2) of the Act in extending the time limit for responding to the appellant's request.**

Subsection 27(2) reads as follows:

- 27.--(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,
- (a) the length of the extension;
  - (b) the reason for the extension; and
  - (c) that the person who made the request may ask the Commissioner to review the extension.

An institution has a clear obligation under the Act to provide a requester with written notice of any time extension.

The institution has confirmed that written notice was not given to the requester in this case. The institution has advised me that on March 23, 1988 (after the statutory 30-day period for responding to the request), an employee of the institution telephoned the appellant's office to explain the reasons for the delay. On May 4, 1988, a meeting was held with the appellant in an attempt to clarify his two requests, and on May 5, 1988, the

Minister of Community and Social Services apologized in the Legislature for the delay. The institution's response and all released documents were eventually provided to the appellant on June 7, 1988.

In my view, the institution is technically in violation of the provisions of subsection 27(2) of the Act. However, I am satisfied that the institution has recognized its error and I do not think it is necessary to comment further on this issue.

In summary, I uphold the decision of the head to exempt Record No. 1 from disclosure under subsection 13(1) of the Act, and I Order the head to consider the exercise of his discretion under subsection 12(2)(b) as to whether to seek the consent of Cabinet regarding the release of Record No. 2 and/or Record No. 3. I further Order the head to advise both my office and the appellant of his decision regarding the exercise of discretion, and accompanying reasons, within twenty (20) days from the date of this Order.

Original signed by:  
Sidney B. Linden  
Commissioner

July 11, 1989  
Date