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

ORDER 40

Appeal 880026

Ministry of Transportation

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O R D E R

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) a right to appeal any decision of a head to the Information and Privacy Commissioner.

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

1. On January 19, 1988, the Ministry of Transportation (the "institution") received a request from the lawyer for the Ontario Motor Vehicle License Issuers Association (OMVLIA), for access to "...all documentation and correspondence relating to the issue of compensation for the OMVLIA to and from the Minister and the Licensing and Control Branch and any other officers or employees of the Ministry of Transportation and all memoranda and correspondence between the Ministry of Transportation and Management Board of Cabinet with respect to Issuer Compensation from September 1986 to the present date (January 14, 1988)."

2. By two letters dated February 5, 1988, the institution requested a deposit for the fee estimated to produce the record, and advised the requester of a time extension under section 27 of the Act in order to complete the required search through a large number of records.

3. The requester paid the required deposit, but was advised by letter on February 26, 1988 that the institution was

refunding the deposit and denying the request for access, citing the exemptions provided by subsections 12(1) and 13(1) of the Act.

4. On March 4, 1988, the requester wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.

5. Between March 8, 1988 and April 14, 1988 the records in question were examined by an Appeals Officer, and efforts were made to settle the case. A settlement was not effected, however the institution did provide a more detailed description of the records to which access was being denied.

6. On May 12, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. An Appeals Officer's Report accompanied this notice.

7. On June 15, 1988 and August 24, 1988 respectively, I sent letters to both parties, inviting them to submit written representations to me on the issues arising from the appeal.

8. Written representations were received from both the appellant and the institution. In its representations, the institution relied on additional sections of the Act not referred to in the original denial. I requested and received clarification of some of the institution's representations.

9. On August 24, 1988, I wrote to the appellant advising him of the institution's reliance on these additional sections of the Act, and invited further representations regarding the application of these sections. Additional representations were received from the appellant.

10. By letter dated October 27, 1988, I requested further representations from the institution with regard to the issue of consent of the Executive Council under subsection 12(2)(b) of the Act. A response was received on November 8, 1988.

11. I have reviewed all representations received from the appellant and the institution and have considered them in making my Order.

It should be noted, at the outset, that the purposes of the Act as set out in subsections 1 (a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> (i) information should be available to the public,
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> (ii) necessary exemptions from the right of access should be limited and specific, and
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> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

The institution refused access to the following records for the reasons indicated:

#1 A copy of a "Minister's briefing" was denied under subsections 12(1)(e), 13(1) and 18(1)(c) and (e).

#2 A copy of an "Application and Report to Management Board _ MB20" was denied under subsections 12(1)(a), (b) and (c) and 18(1), (c) and (e).

#3 A copy of a "Cabinet submission" (4 pages) was denied under subsections 12(1)(a), (b) and (c) and 18(1), (c) and (e).

#4 A copy of a second "Cabinet submission" (9 pages) was denied under subsections 12(1)(a), (b) and (c) and 18(1)(c) and (e).

#5 A copy of the Minister's briefing notes was denied under subsections 12(1)(e), 13(1) and 18(1)(c) and (e).

#6 A copy of an internal memorandum (1 page) was denied under subsections 12(1)(a), (b) and (c) and 18(1)(c) and (e).

#7 A copy of a second internal memorandum (1 page) was denied under subsections 12(1)(a), (b) and (c) and 18(1)(c) and (e).

The issues arising in this appeal are:

A. Whether the records in question fall within the mandatory exemptions set out in subsections 12(1)(a), (b), (c) and (e) of the Act.

B. If the answer to Issue A is in the affirmative, whether the head has a duty under subsection 12(2)(b) to seek the consent of the Executive Council before denying access to a record where an exemption is claimed under subsection 12(1).

C. If the answer to Issue A is in the negative, whether the records in question fall within the exemptions provided by subsections 13(1) and/or subsections 18(1)(c) and (e) of the Act.

D. Whether the severability requirements of subsection 10(2) apply to the records in question.

ISSUE A: Whether the records in question fall within the mandatory exemptions set out in subsections 12(1) (a), (b), (c) and (e) of the Act.

Subsection 12(1)(a) 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,
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> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees.

Records #6 and #7 are both titled "Memorandum" and contain minutes of Cabinet meetings that took place on two different dates in August, 1987.

After reviewing these records, I am satisfied that they are records of minutes of the deliberations and decisions of the Executive Council, and as such fall squarely under subsection 12(1)(a) of the Act.

Subsection 12(1)(b) 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,
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> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees.

The institution has claimed this exemption with respect to records #2, #3, and #4.

Record #2 is titled "Application and Report to Management Board _ MB20" and can be categorized as a document prepared by the institution in order to recommend a certain course of action to Management Board of Cabinet, a committee of the Executive Council. I am satisfied, after reviewing the contents of the record, that much of it consists of policy options or

recommendations submitted or prepared for submission to one of the committees of the Executive Council, and therefore fits within the mandatory exemption of subsection 12(1)(b). The remainder of the record is dealt with below in my discussion of subsection 12(1)(c).

As far as records #3 and #4 are concerned, they are both submissions to Cabinet as opposed to Management Board, but otherwise the reasoning outlined above with respect to record #2 applies: much of the records contain policy options or recommendations for Cabinet and therefore fall under subsection 12(1)(b); the balance is dealt with under my discussion on subsection 12(1)(c).

Subsection 12(1)(c) of the Act 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,
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> (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 decisions are made and implemented.

As noted above, much of the content of records #2, #3 and #4 consists of policy options or recommendations prepared for submission to Cabinet or a committee of Cabinet. The balance of these records is made up of background explanations and analyses of problems that were submitted to the Executive Council for consideration in making decisions. The institution argues that the exemption provided by subsection 12(1)(c) applies to all portions of these records not falling under subsection 12(1)(b).

The appellant submits that the wording of subsection 12(1)(c) allows the institution to claim the exemption only "before decisions are made and implemented" by the government. Because a decision on the new method of compensation for the OMVLIA has been made and implemented, the appellant argues, the records containing background explanations and analyses used to reach this decision no longer fall within the subsection 12(1)(c) exemption and should be released.

The institution contends that "...while it is correct to say that the specific decision on the new method of compensation has been made and communicated to the Issuers, the question of compensation levels is an ongoing issue, with future increases to be granted to the Issuers on an annual basis each July." As such, the institution submits, the exemption provided by subsection 12(1)(c) continues to apply.

Without deciding which interpretation is correct, I will state that the appellant's argument appears to be the more persuasive one in view of the commonly accepted meaning of the phrase "made and implemented." However, even if I were to decide that the specific wording of the subsection 12(1)(c) exemption had not been satisfied, this finding would not be determinative of the issue of disclosure of these records; consideration must be given to the proper interpretation of the introductory wording of subsection 12(1).

The introductory text of subsection 12(1) reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, <u>including</u> ... (emphasis added).

The proper interpretation of this subsection is dependent on the meaning of the word "including" at the end of the text. I considered this issue in my Order in Appeal Number 880008, released on October 21, 1988. At page 6 of that Order I found that:

> "...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 the 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)."

Applying this reasoning to the circumstances of the present appeal, even if I accept the appellant's argument that subsection 12(1)(c) does not apply where the decision at issue has already been made and implemented, the records would still be exempt if they fall within the ambit of the introductory part of subsection 12(1).

I must now determine whether or not disclosure of records #2, #3 and #4 fall within the meaning of the introductory text; i.e. whether their release "...would reveal the substance of deliberations of an Executive Council or its committees".

The appellant submits that the "deliberations" referred to in the introductory portion of subsection 12(1) should be understood to be "...the deliberations of the Executive Council

and not the Ministry of Transportation... The mere fact that the Cabinet Submission Analysis might be a record containing recommendations does not make it exempt unless it would reveal the substance of the deliberations of the Council and not the substance of the deliberations of the Ministry that prepared it."

I am unable to accept the appellant's very able argument on this point, as it makes too fine a distinction between the Executive Council that considers the records and the institution that prepares the records for consideration. In my view, if records #2, #3 and #4 went before the Executive Council or any of its committees (which they did), and decisions were subsequently made by the Executive Council about the subject matter contained in them (which they were), then disclosure of these records would necessarily reveal the substance of deliberations of an Executive Council or its committees and therefore meet the requirements for exemption under subsection 12(1). I therefore find that records #2, #3 and #4 fall within the scope of the subsection 12(1) mandatory exemption.

Turning now to subsection 12(1)(e) of the Act, that subsection 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,
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> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to

> government decisions or the formulation of government policy.

The two records for which the institution claims an exemption under this subsection are records #1 and #5.

Record #1 is titled "Minister's Briefing on Issuer Compensation for 1987/88". It can be described as a document prepared by the institution to brief the Minister on the compensation issue prior to his meeting with the Executive Council. Record #5 is headed "Minister's Briefing Notes" which, as the institution points out, contains "...strategy options and recommendations to the Minister... (which were) ...presented to brief the Minister on the compensation issue prior to his meeting with the Executive Council. Also, they were used to brief the Minister for his consultation discussions with other Ministers."

The appellant argues that the use of the present and future tenses in subsection 12(1)(e) precludes the application of the subsection to records which have already been presented to and dealt with by the Executive Council or its committees. Because the records relate to the 1987_88 negotiations between the OMVLIA and the government, the appellant submits that they are not "before or ... proposed to be brought before the Executive Council or its committees" and therefore not covered by subsection 12(1)(e). I agree with the appellant's interpretation, however, as with the application of subsection 12(1)(c), this finding alone does not determine whether or not the records in question should be disclosed. The introductory wording of subsection 12(1) must be considered.

In my view, the legislative intent of subsection 12(1)(e) was to include records within the purview of the subsection 12(1) exemption which would otherwise fall outside the scope of the introductory wording of the subsection. In other words, records containing information not yet dealt with by Cabinet could not be said to "reveal the substance of deliberations", and only warrant inclusion under the exemption due to the addition of subparagraph (e). However, a record which does not meet the requirements of subparagraph (e) is still subject to the mandatory exemption under subsection 12(1) if its disclosure

fits within the introductory wording of the subsection. If records #1 and #5 in the present appeal would have legitimately fallen under the scope of subparagraph (e) prior to a final determination by Cabinet (which is not disputed by the appellant), it is difficult for me to see how they could possibly fall outside the scope of subsection 12(1) after final determination by the Executive Council. In my view, records #1 and #5 meet the requirements for exemption under subsection 12(1).

In summary, I find that records #1_#7 all fall within the mandatory exemption provided by subsection 12(1).

ISSUE B: If the answer to Issue A is in the affirmative, whether the head has a duty under subsection 12(2)(b) to seek the consent of the Executive Council before denying access to a record where an exemption is claimed under subsection 12(1).

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

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

I considered the interpretation of subsection 12(2)(b) in my Order in Appeal Number 880006, released on October 21, 1988. On page 9 of that Order, I outlined my reasons for deciding that the subsection "...does not impose an absolute requirement on the head to seek the consent of the Cabinet in all cases where an exemption under subsection 12(1) is contemplated by the institution". I reached my decision for the following three reasons:

> "...the Act imposes no clearly defined absolute requirement for the Cabinet to consider all subsection 12(1) rulings; it would be impractical to impose an absolute requirement; and it would be inappropriate in some circumstances to require a head to seek Cabinet consent."

As I went on to point out in my Order in Appeal Number 880006 at page 11:

> "...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 the request for subsection 12(1) records."

In the circumstance of this appeal, the head indicated that he exercised his discretion in favour of not seeking Cabinet consent for the following reasons:

(1) the documents all contain policy options, which, if disclosed would reveal the nature of Cabinet discussions and deliberations;

(2) the issuers' compensation matter is the subject of a continual discussion process between the issuing agents and the Government; and

(3) disclosure of the records could also disadvantage the Government in any further discussions on issuer compensation by displaying discussions and strategies.

Having examined the record and reviewed the reasoning contained in his submissions, I find nothing improper or inappropriate with the exercise of discretion by the head and would not alter his decision on appeal.

ISSUE C: If the answer to Issue A is in the negative, whether the records in question fall within the exemptions provided by subsections 13(1) and/or subsections 18(1)(c) and (e) of the Act.

Having answered Issue A in the affirmative, it is not necessary for me to consider the application of subsections 13(1) or 18(1)(c) and (e) to the records at issue in this appeal.

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

Subsection 10(2) provides:

> 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 also addressed the issue of severance in my Order in Appeal Number 880006. At page 13 of that Order I stated:

> "The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that 'necessary exemptions from the right of access should be limited and specific' (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release."

The key question raised by subsection 10(2) is one of reasonableness. As I went on to point out in my Order in Appeal Number 880006:

> "...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. 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 reasonable severances could be made that would provide the requester with any meaningful information without disclosing information that is exempt from disclosure under subsection 12(1) of the Act.

As Commissioner, I have the right to view all records for which a Cabinet record exemption is claimed, and to satisfy myself that the records fall within the terms of the exemption. That is precisely what I did in this appeal. As an independent officer of the Legislature, I am not bound to accept an institution's decision that a record qualifies for an exemption. The Act gives me a mandate to obtain and review the records, as well as a responsibility to exercise my own judgement in each appeal. That is what I have done in this case.

In summary, I order that the head's decision in this case be upheld.

Original signed by: February 27, 1989
Sidney B. Linden Date
Commissioner