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

ORDER 60

Appeal 880244

Ministry of Education

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

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 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. By a form dated June 7, 1988 and addressed to the Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the Ministry of Education (the "institution"), the requester asked for the following information:

> For the past year, the ministry's finance branch has been studying the effects of pooling _ a plan that would collect industrial and commercial assessment taxes from school boards and distribute them equally to all boards. The recommendations for the new financing scheme came from a report called the McDonald (sic) Commission. The ministry has run so_called impact studies on how pooling will affect boards but has refused to release the results. I would like to see the impact studies on the effects of pooling. I would also like to see the impact studies done regarding other recommendations in the McDonald (sic) Commission.

2. In response, the institution wrote to the requester on July 6, 1988 and advised that access was refused pursuant to subsection 12(1)(b) of the Act.

3. On August 3, 1988 the requester wrote to me appealing the institution's decision and I gave notice of the appeal to the institution on August 15, 1988.

4. The Appeals Officer assigned to this case contacted the Co_ordinator on August 24, 1988, and requested a copy of the relevant records.

5. By letter dated September 12, 1988, the Co_ordinator outlined the institution's position that only the Commissioner himself had the authority to examine Cabinet records exempted pursuant to section 12 of the Act, and that this authority could not be delegated to an Appeals Officer. Notwithstanding this position, the Co_ordinator advised that the institution was prepared to accept a written delegation from the Commissioner allowing examination of the record by the Appeals Officer, on condition that the examination be conducted at the institution's premises and that no copies of the records be made.

6. In response to the institution, I wrote to the Deputy Minister on September 20, 1988 outlining my differing interpretation of the powers of delegation provided to me under the Act.

7. In order to avoid further delay in processing the appeal, I instructed the Appeals Officer to attend at the institution

to review the records in question. This examination was conducted on October 20, 1988.

8. While examining the records, the Appeals Officer was advised by the Co_ordinator that the appellant had received whatever information he required concerning the impact studies on other recommendations contained in the MacDonald Commission report, and had narrowed his request to include only those impact studies which related to pooling. The scope of this appeal was reduced accordingly.

9. Efforts by the Appeals Officer to mediate a settlement between the parties were unsuccessful, as both parties maintained their respective positions.

10. By letters dated November 3, 1988 I gave notice to the parties that I was conducting an inquiry to review the decision of the head. Enclosed with each letter was 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 paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations to me, need not limit themselves to the questions set out in the report. It also advises that if a relevant new issue is raised during the inquiry, each party will be advised and given the opportunity to make representations.

11. Written representations were received from both parties.

12. In my view, the institution's representations did not address all issues raised in the Appeals Officer's Report, and also raised new issues which required clarification. As a result, I invited representatives from the institution to attend at my office to discuss these matters. At this meeting the institution cited subsection 12(1)(c) as an additional basis on which to support its decision to withhold the requested records.

13. The appellant was advised of the new exemption claimed by the institution, and invited to attend at my office to make further representations. I did meet with the appellant in my office on April 26, 1989 at which time he made further representations.

14. I have considered all representations from both parties in making this Order.

The purpose of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the 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. Subsection 1(b) sets out the counter balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that the record of part of the record falls within one of the specified exemptions of the Act lies upon the head.

The issues arising in this appeal are as follows:

A. Whether the records at issue in this appeal are exempt from disclosure pursuant to subsection 12(1)(b) or (c) of the Act; and

B. If the answer to Issue A is in the affirmative, whether any of the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

Before addressing these issues, I think it would be helpful to provide some background information relevant to this appeal.

The Commission on the Financing of Elementary and Secondary Education in Ontario (the MacDonald Commission) was set up to consider various funding options for the provincial education system. The Commission issued its Report in March of 1986.

Although the Report included a number of recommended changes to current funding methods, it also recommended that the province engage in on_going research into various alternative methods of funding. In particular, the Commission advised the province to study various methods of pooling or sharing industrial and commercial assessment taxes, and the impact these pooling or sharing methods would have on school boards and municipalities

across the province. These impact studies are the records at issue in this appeal.

These impact studies consist of 12 computer_generated, multi_page charts or matrices, produced between March 1987 and August 1987. With the exception of titles and column headings, the charts contain only numbers. These charts reflect the statistical impact various funding options or formulae would have on school boards throughout the province, if adopted.

ISSUE A: Whether the records at issue in this appeal are exempt from disclosure pursuant to subsections 12(1)(b) or (c) of the Act.

Subsections 12(1)(b) and (c) read 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 decisions are made and implemented;
>
> ...

In its representations, the institution pointed out that the Cabinet asked the institution to study all aspects of education financing in Ontario, and to identify the funding options. As part of its study, the institution conducted impact studies on several of the recommendations contained in the MacDonald Commission report. The institution submitted that:

> (T)he analysis is an ongoing process which includes updating and bridging to past analysis. These simulations and impact analysis reflect the conditions around various funding options now under consideration by Cabinet... A series of meetings have (sic) been held with the Policy and Priorities Executive Committee of Cabinet where these options and related recommendations from this study and identified by the analysis, have been discussed... Funding options, including those detailed in the record exempted, were and will be the topic of these presentations.

The appellant argued that the records in question are merely "number_crunching" and are meaningless without some accompanying interpretation. He submitted that if these records could be considered "background explanations or analyses" for the purposes of subsection 12(1)(c), then virtually any record could qualify under this subsection. The appellant also argued that the records themselves, given their nature, are not likely to be presented to Cabinet or its committees for consideration.

The appellant further submitted that the issue of sharing industrial and commercial assessment taxes between school boards is a long_standing matter, considered by several different Education Ministers and Cabinets. The failure of Cabinet to articulate a policy in this area, in the appellant's view, could itself be regarded as a decision, thereby removing the record from the scope of subsection 12(1)(c).

During the course of my inquiry, I asked for and received a copy of a recent submission to the Policy and Priorities Committee of Cabinet. On examining this document I observed under the

heading "Key Issue" the words "How to implement a fair sharing of commercial/industrial assessment among school boards...". This document considers various options available to Cabinet, and contains impact studies as appendices to the submission. These appendices are part of the section of the document headed "CABINET SUBMISSION_ANALYSIS", and contain information provided to support the conclusions and recommendations made by the Minister of Education.

Accordingly, on the basis of the information before me, it is my view that the records under appeal do not contain policy options or recommendations, and therefore fall outside the scope of subsection 12(1)(b) of the Act. While it could be argued that the titles of the impact studies and their column headings alone reflect some of the options available for consideration, in my view, this information by itself, is not sufficient to satisfy the requirements for exemption under subsection 12(1)(b). Accordingly, I do not uphold the head's claim for exemption under subsection 12(1)(b).

I share the concerns raised by the appellant regarding an institution possibly taking too broad an interpretation of the words "background explanations or analyses" used in subsection 12(1)(c) of the Act. In my view, to meet the requirements of this subsection, an institution must establish that a record contains background explanations or analyses, and that the record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in

making decisions. The subsection does not properly apply, in my view, unless the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees. Also, the protection provided by the subsection is not open_ended; the institution is precluded from relying on this exemption after the decision at issue has been made and implemented.

In this case, I personally examined the records at issue and considered the representations of both parties, and until May 17, 1989, it was my view that the requested impact studies did in fact meet the requirements for exemption under subsection 12(1)(c). These impact studies did contain background analyses; they were in fact presented to a committee of Cabinet; they related to a matter under active consideration; and a decision of this matter had not yet been made and implemented. The Government announcements on May 17 and May 18 have changed my view. It is clear from the wording of the Budget Speech and the subsequent announcement by the Minister of Education that a decision on this matter has now been made and implemented, and as a result the records at issue in this appeal no longer qualify for exemption under subsection 12(1)(c). I therefore order the release of the requested records in their entirety.

Before leaving this matter, I believe it is important for me to comment on the unique procedure for dealing with Cabinet records in Ontario's Freedom of Information and Protection of Privacy Act, 1987. In other jurisdictions which have freedom of information legislation, generally a certificate or an affidavit from a senior Cabinet official is sufficient to identify a document as a "Cabinet record". This certification is sufficient to remove that record from the purview of the

Commissioner, and in some instances even the court's power to review. Under Ontario's Act, on the other hand, the Commissioner has the power to require the production of Cabinet records for his examination in order to satisfy himself that the exemption has been properly claimed. This is a significant and important feature of the Ontario Act. As Ontario's Commissioner, I intend to exercise my independent authority to review Cabinet records to ensure that the underlying principles of the legislation are being upheld. Over a period of time, experience and precedent will enable us to define what should properly be considered a "Cabinet record" and the Information and Privacy Commissioner will play an important role in the

development of that definition. Given the relative newness of the Act, I understand the institution's initial reluctance in this case to produce the requested Cabinet records for examination by my office. However, in the future, I fully intend to exercise my statutory authority if necessary, to ensure that I have access to all requested records to enable me to discharge my responsibilities under the Act.

In his representations, the appellant stressed the importance "...for the public to be properly informed on the issue of pooling. The financial scheme could have a dramatic impact, not only on the taxes of homeowners but, more importantly, on the education of their children." This statement raises the possible application of section 23 of the Act, the so_called "public interest over_ride". Section 23 reads as follows:

> 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.

It is clear from the wording of section 23 that it does not apply to over_ride a valid exemption under section 12. Accordingly, even if there had been a compelling public interest which outweighed the purpose of the section 12 (Cabinet record) exemption in the circumstances of this appeal, I would not have had the authority under the Act to order the institution to disclose the record on that basis.

ISSUE B: If the answer to Issue A is in the affirmative, whether any of the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

Having found under Issue A that none of the records at issue in this appeal are exempt from disclosure, it is unnecessary for me to consider the possible application of subsection 10(2) of the Act.

In summary, I therefore order that the records be disclosed in their entirety to the appellant within twenty (20) days of the date of this order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure of the records, of the date on which disclosure was made.

Original signed by: May 18, 1989
Sidney B. Linden Date
Commissioner