



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

ORDER P-320

Appeal P-900629

Ministry of the Environment



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ORDER

BACKGROUND :

The Ministry of the Environment (the "institution") received a request for access to Minutes of any Division Heads Committee and Management Committee meetings held between September 1, 1989 to present (September 17, 1990) "in which the discharge of N,nitrosodimethylamine (NDMA) from or to the Elmira S.T.P. or by [named company] was considered and any reports, memoranda or other documents reviewed or discussed at such meetings". The request, if granted, was to continue to have effect to November 30, 1990.

The institution provided partial access to all responsive records covering the period September 1989 to October 31, 1990, subject to severances pursuant to sections 13(1), 18(1)(g) and 19 of the Freedom of Information and Protection of Privacy Act (the Act). Additional severances were made to withhold information not responsive to the request. During the course of this appeal, the institution also identified responsive records covering the period November 1, 1990 to November 30, 1990, which were released to the appellant in their entirety.

The requester appealed the institution's decision to deny access to the severances which related to the cited exemptions only. Notice of the appeal was sent to the institution and the appellant.

During the course of mediation, the institution reconsidered the severances, and released more information to the requester. The institution also abandoned its claim under section 19. The severances that remain at issue and the exemptions claimed by the institution are:

1. Document 7 - "Note for discussion" at the bottom of page 4 and the top of page 5 of a draft ORDER OF THE DIRECTOR [section 13(1)];
2. Document 7 - Alternate Water Supply information in paragraphs 8(a), (b), (c), 9(a) and (b) on page 11 of a draft ORDER OF THE DIRECTOR [sections 13(1) and 18(1)(g)];
3. Document 8 - Alternate Water Supply information in paragraphs 8(a), (b), (c), 9(a) and (b) on page 4 of the DRAFT CONTROL ORDER [sections 13(1) and 18(1)(g)];

4. Document 21 - "DISCUSSION" on page 1 of the minutes of Management Committee dated February 21, 1990 pertaining to the alternate water supply [sections 13(1) and 18(1)(g)];
5. Document 23 - paragraph number 9 on page 2 of the Action Plan presented to Management Committee on January 4, 1990 pertaining to the alternate water supply [sections 13(1) and 18(1)(g)];
6. Document 25 - Alternate Water Supply information in paragraphs 8(a), (b), (c), 9(a) and (b) on page 11 of the DRAFT ORDER OF THE DIRECTOR [sections 13(1) and 18(1)(g)].

Because further mediation was not possible, the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with the Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Representations were received from the institution. The appellant chose to rely on the submissions made when he filed his appeal.

ISSUES:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to any severed parts of the records.
- B. Whether the discretionary exemption provided by section 18(1)(g) of the Act applies to any severed parts of the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to any severed parts of the records.

Section 13(1) of the Act states:

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.

"Advice", for the purposes of section 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order 118].

Severance 1 contains a recommendation by a public servant regarding the issue of alternative water supplies and advice on how to present the issue. The severance also contains the public servant's advice on the position the institution should take in draft Orders of the Director issued under the Environmental Protection Act. I find that this severance satisfies the requirements for exemption under section 13(1).

Severances 2, 3 and 6 are clauses contained in draft Orders of the Director. In my view, these clauses are a formal embodiment of the advice contained in Severance 1. Release of these severances would reveal the advice in Severance 1, and I find that they are properly exempt under section 13(1).

Severance 4 is a statement of an apparent short and long term solution to the provision of water supply to Elmira, and Severance 5 is part of an Action Plan on the NDMA contamination problem in Elmira-Grand River, dealing with the reactivation of consideration of options regarding providing Grand River municipalities with alternative water supplies. In my view, neither of these two severances contain information that could properly be considered "advice" for the purposes of section 13(1), and I find that severances 4 and 5 do not satisfy the requirements for exemption under this section.

Because the section 13 exemption is discretionary, it is my responsibility to ensure that the head of an institution has properly exercised his or her discretion when deciding not to grant access to a record. In the circumstances of this appeal, I have found nothing improper in the head's exercise of discretion.

ISSUE B: Whether the discretionary exemption provided by section 18(1)(g) of the Act applies to any severed parts of the records.

Because I have found that Severances 1, 2, 3, and 6 are properly exempt under section 13(1), I will restrict my discussion of section 18(1)(g) to the remaining two severances.

Section 18(1)(g) of the Act states:

A head may refuse to disclose a record that contains,

information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Broadly speaking, section 18 is designed to protect certain interests, economic and otherwise, of the Government of Ontario and/or other institutions covered by the Act. Section 18(1)(g) provides an exemption for types or classes of records, and also takes into consideration the consequences which would result to an institution if a record was released [Orders 141, P-229].

In order for a record to qualify for exemption under this section, the institution must establish that a record:

1. Contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
 - i) premature disclosure of a pending policy decision, or
 - ii) undue financial benefit or loss to a person.

[Order P-229]

"Plan", for the purposes of section 18, means a formulated and especially detailed method by which a thing is to be done; a design or scheme [Order P-229].

In its representations, the institution indicates that it has not yet made a decision or policy respecting the issue of alternative water supply, and that "the Ministry will release its policy to the public, once the policy has been finalized". I have reviewed the contents of Severances 4 and 5 and, in my view, they cannot properly be characterized as "plans, policies or projects". At most, the severances outline the issue about which the institution will, in the future, make a decision.

It should also be noted that the information in Severance 5 is also contained in another record which was released by the institution during the course of the appeal.

Accordingly, I find that the institution has failed to establish the first part of the test for section 18(1)(g), and that Severances 4 and 5 should be disclosed to the appellant.

ORDER:

1. I uphold the head's decision to exempt Severances 1, 2, 3 and 6 under section 13(1) of the Act.
2. I order the head to disclose Severances 4 and 5 to the appellant within fifteen (15) days from the date of this order and to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.
3. In order to verify compliance with the provisions of the order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: _____

June 22, 1992

Tom Mitchinson
Assistant Commissioner