



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

ORDER P-468

Appeal P-9200683

Management Board of Cabinet



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/Téléco: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Management Board of Cabinet (the Board) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) to:

"information that relates to the possible conversion of management and excluded civil service positions with the bargaining unit represented by the Ontario Public Service Employees Union".

Specifically, the requester sought:

"copies of any correspondence and minutes of all meetings between the Premier of Ontario, Ministers of the Crown, other Government officials and Mr. Fred Upshaw, President of OPSEU or his designate".

The Board located 111 records responsive to the request and, following mediation, agreed to disclose the majority of them to the requester. Access to the remaining records was denied in whole or in part by the Board on the basis of the exemptions contained in sections 12, 13, 18 and 21 of the Act. The requester appealed the denial of access.

Further mediation was not possible and notice that an inquiry was being conducted to review the decision of the Board was sent to the Board, the appellant and to one individual whose interests might be affected by disclosure of the information (the affected person). Representations were received from the Board only.

In its representations, the Board chose to withdraw its reliance on section 18 of the Act with respect to Record 17. The Board has also taken the position that the information withheld on page 2 of Record 50, and in paragraphs four and five on page 2 of Record 85 is not responsive to the appellant's request and is, accordingly, outside the scope of this appeal. I agree with that position.

It should be noted that Records 102 and 103 are essentially identical except that Record 103 has attached to it a facsimile cover page indicating that it was sent on a specified date to a named individual. In my view, the fax cover page contains no substantive information and, therefore, is also not responsive to the appellant's request. For the purposes of this Order, any references to Record 103 will also include Record 102.

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 6, 8, 10, 11, 16, 42, 44, 49, 53, 92, 95, 96, 104, 105 and 106 as well as to pages 7 to 10 of Record 37.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 105 and to the information withheld in Records 40, 102, 103 and pages 4 to 6 of Record 37.
- C. Whether the discretionary exemption provided by section 18(1)(e) of the Act applies to Records 8, 11, 16, 37, 42, 44, 49, 53, 85, 88, 92, 95, 96, 102, 103, 104 and 106 as well as the information withheld in Records 40, 85 and 102.
- D. Whether the information which was not disclosed in Record 101 may be characterized as "personal information" as defined in section 2(1) of the Act.
- E. If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to the information which was withheld in Record 101.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 6, 8, 10, 11, 16, 42, 44, 49, 53, 92, 95, 96, 104, 105 and 106 as well as to pages 7 to 10 of Record 37.

The Board has claimed that either the exemption contained in the preamble (introductory wording) to section 12(1) of the Act and/or sections 12(1)(a) or (b) apply to the records described above.

Section 12(1) of the Act reads, in part, as follows:

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,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees,
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

...

I propose to deal with the application of section 12(1) for each of the records at issue. In its representations, the Board maintains that these records were prepared for submission to various committees of the Executive Council, specifically, the Management Board of Cabinet, the Cabinet Committee on Economic and Labour Policy and the Policy and Priorities Board of Cabinet.

Record 6

This 11 page document dated February 1, 1991, deals with various issues surrounding the reform of the Crown Employees Collective Bargaining Act (the CECBA). The record sets out proposals as to how the Government of Ontario should proceed in its bilateral negotiations with public sector unions and was presented to the Cabinet Committee on Economic and Labour Policy on February 7, 1991. In my view, this record falls within the exemption described in the preamble to section 12(1) of the Act as its disclosure would reveal the substance of deliberations of a Committee of the Cabinet.

Records 8, 10 and 16

Records 8 and 16 represent two earlier drafts of Record 10. Record 10 consists of a submission made to the Cabinet Committee on Economic and Labour Policy on March 28, 1991, and later to the full Cabinet on the subject of the policy direction to be taken during consultations with public sector unions on the reform of the CECBA. I find that disclosure of the three records would "reveal the substance of deliberations of the Executive Council or its committees" and, therefore, qualify for exemption under the preamble of section 12(1).

Record 11

Record 11 is an agenda for a meeting of the Cabinet Committee on Economic and Labour Policy held on March 28, 1991 to which is appended a number of supporting documents. I find that this record is properly exempt under the preamble of section 12(1).

Records 42 and 44

These records are two copies of a Cabinet submission presented on September 9, 1991 to Management Board of Cabinet (the committee of Cabinet responsible for the management of the Public Service and the operations of the government). The Cabinet submission outlines the Government's position in relation to the issues which form the basis for discussion with the public sector unions. In my view, Records 42 and 44 are also properly exempt under the preamble of section 12(1).

Records 49 and 53

Record 49 is an earlier draft of Record 53. Record 53, which describes the position of the Government of Ontario with respect to specific amendments to the CECBA, was submitted to Management Board of Cabinet on February 10, 1992. I find that the disclosure of either of the documents would reveal the substance of the deliberations of Management Board of Cabinet. Accordingly, both records are properly exempt under the preamble of section 12(1).

Record 92

Record 92 is a memorandum to the members of Management Board of Cabinet from the Chair of the Management Board Secretariat (which provides staff support to the Board) seeking direction from the Board. This document also states that its contents are to be discussed at the Board's meeting on April 13, 1992. In my view, the release of this record would reveal the substance of the deliberations of a committee of Executive Council and is, accordingly, exempt from disclosure under the preamble of section 12(1).

Records 95 and 96

Records 95 and 96 were prepared for the Management Board of Cabinet meeting held on April 13, 1992. Both these documents deal with proposed consultations to take place with employee groups and the anticipated questions which may be raised by those groups. Both records contain information whose disclosure would reveal the substance of the Board's deliberations on that date. I find that they are properly exempt from disclosure under the preamble of section 12(1).

Records 104, 105 and 106

These documents represent submissions made to Management Board of Cabinet at its meetings of June 15 and 29 and August 31, 1992 on the subject of the inclusion of management group employees in the consultation phase of the reform of the CECBA. I am satisfied that these documents are properly exempt from disclosure under the preamble of section 12(1) since they would also reveal the substance of the Board's deliberations.

Pages 7 to 10 of Record 37

This part of Record 37 consists of a report made at the April 2, 1991 meeting of the Policy and Priorities Board of Cabinet. I find that these materials also qualify for exemption under the preamble of section 12(1).

I am, therefore, satisfied that Records 6, 10, 11, 16, 42, 44, 49, 53, 92, 95, 96, 104, 105, 106 as well as pages 7 to 10 of Record 37 are properly exempt from disclosure under the preamble to section 12(1) of the Act.

ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 105 and to the information withheld in Records 40, 103 and pages 4 to 6 of Record 37.

I have found under Issue A that Record 105 qualifies for exemption under section 12(1) of the Act. Accordingly, I will only consider the application of section 13(1) to the information that was withheld in Records 40, 103 and on pages 4, 5 and 6 of Record 37.

Record 103

Record 103 is a briefing document prepared prior to a meeting convened on May 20, 1992, involving the President of the Ontario Public Service Employees Union (OPSEU) and the Chair of Management Board of Cabinet. In its representations, the Board relies upon section 13(1) to withhold two recommendations and a conclusion found on page 3 of this record.

Section 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 the institution.

Section 13(1) was considered by former Commissioner Sidney B. Linden in Order 118. In that Order, he made the following comments.

In my view, 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]

I adopt this view. Based on my review of Record 103, I am satisfied that the two recommendations and the conclusion found on page 3 of this document constitute advice or recommendations of a public servant and are, therefore, properly exempt from disclosure under section 13(1).

Pages 4, 5 and 6 of Record 37

The Board has also claimed the application of section 13(1) to pages 4, 5 and 6 of Record 37. This record is a discussion paper which deals with the impact of pay equity legislation on the discussions surrounding the reform of the CECBA. The pages in question contain a series of options and a recommended course of action. After examining the contents of these pages, I am satisfied that they qualify for exemption under section 13(1). It should be noted that, in its representations, the Board has agreed to release pages 1, 2 and 3 of Record 37 to the appellant.

Record 40

Record 40 outlines the Government's strategy for a meeting held on August 28, 1991 with representatives of OPSEU. The Board has also withheld portions of the information contained in this record under section 13(1). In my view, the top part of page 1 of the record, which was not disclosed to the appellant, contains information which is not responsive to his request. I am satisfied on a review of the remaining portions of Record 40 which the Board withheld, that the disclosure of the information in question would reveal the recommendations of a public servant. On this basis, the section 13(1) exemption is also applicable to this information.

I have reviewed the provisions of section 13 (2) and, in my view, none of the exceptions to the exemption found in section 13(2) applies to the information which I have found to be exempt under section 13(1).

Because section 13(1) is a discretionary exemption, I have also reviewed the Board's representations regarding its decision to exercise discretion in favour of claiming this exemption and I find nothing improper in the determination that has been made.

ISSUE C: Whether the discretionary exemption provided by section 18(1)(e) of the Act applies to Records 8, 11, 16, 37, 42, 44, 49, 53, 85, 88, 92, 95, 96, 102, 103, 104 and 106 as well as to the information withheld in Records 40, 85 and 102.

Under Issues A and B, I found that certain records, or parts of records, were properly exempt from disclosure under either section 12(1) or 13(1) of the Act. Accordingly, I will not deal with these records again in my discussion of the Ministry's reliance on section 18(1)(e) of the Act.

Record 88

In its representations, the Board has claimed the application of section 18(1)(e) of the Act to this record. The document in question is a one page spreadsheet entitled "CECBA Reform Position Assessment: April 1, 1992". It describes, in some detail, the issues between the Government and the bargaining agent for its employees and the "bottom line" positions of both management and the union on each issue.

Section 18(1)(e) states:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

For a record to qualify for exemption under section 18(1)(e), the institution must establish that:

1. The record contains positions, plans, procedures, criteria or instructions; **and**
2. The record is intended to be applied to negotiations; **and**
3. The negotiations are being carried on currently or will be carried on in the future; **and**
4. The negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

[Order 87]

Record 88 sets out the position of the Government of Ontario with respect to a number of outstanding issues surrounding the reform of the CECBA. In my view, the contents of the record were intended to be applied to ongoing negotiations between the Government and OPSEU on the subject of reform of the legislation. Accordingly, I find that Record 88 qualifies for exemption under section 18(1)(e) of the Act.

Record 85

Record 85 consists of a three page set of notes taken following a meeting between representatives of the Board and senior OPSEU officials. I found in the Background section of this Order that paragraphs four and five on page 2 of the record are not responsive to the appellant's request.

The information contained in the first paragraph on page 3 of the record, which was withheld from the appellant, describes a position taken by the Government in its negotiations with public sector bargaining agents, including OPSEU. I am also satisfied that the information withheld contains a "position to be applied to any negotiations carried on by the Government" as contemplated under section 18(1)(e) of the Act. The statement in question clearly describes a particular position being taken by the Government of Ontario in relation to negotiations being carried on with the bargaining agents.

Record 103

The Board has also claimed the section 18(1)(e) exemption for the two paragraphs on page 1 of Record 103. This record has been described in an earlier part of this Order. The two paragraphs in question contain the opinions put forward by a public servant with respect to the union's position on a key issue which will be subject to the negotiation process.

I have carefully reviewed the record. In my view, the opinions put forward by the public servant are so interwoven with the Government's negotiation strategy that disclosure of this information would reveal the negotiation position to be taken by the Government of Ontario. On this basis, I find that the information in question is properly exempt under section 18(1)(e) of the Act.

Because section 18(1)(e) is a discretionary exemption, I have also reviewed the Board's representation regarding its decision to exercise discretion in favour of claiming this exemption, and I find nothing improper in the determination which has been made.

ISSUE D: Whether the information which was not disclosed in Record 101 may be characterized as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act defines "personal information" in part, in the following fashion:

"personal information" means recorded information about an identifiable individual, including,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(g) the views or opinions of another individual about the individual,

...

The Board has withheld access to certain information contained in paragraph 7 of page 1 of Record 101 on the basis that it contains personal information of the affected person. The paragraph in question contains a statement in which the author expresses an opinion about the manner in which the affected person is perceived. I am satisfied that this information falls within the definition of "personal information" and that, pursuant to sections 2(1)(e) and (g) of the Act, the information is the personal information of the affected person.

ISSUE E: If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to the information which was withheld in Record 101.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I find that none of the presumptions contained in section 21(3) apply to the information in question.

Section 21(2) provides a list of criteria for the head of an institution to consider in determining whether the release of information would constitute an unjustified invasion of personal privacy. In its representations, the Board takes the position that the personal information in question is "highly sensitive" pursuant to section 21(2)(f) of the Act and that its disclosure may unfairly

damage the reputation of the affected person pursuant to section 21(2)(i) of the Act. Neither the appellant nor the affected person made representations on this subject. I have carefully reviewed the record and find that the information in question is highly sensitive in nature. On this basis, I have determined that disclosure of the information would constitute an unjustified invasion of the affected person's personal privacy and, therefore, it should not be released.

ORDER:

I uphold the Board's decision to withhold access to the remaining records.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ June 4, 1993