



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

ORDER P-424

Appeal P-9200697

Ministry of Health



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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received the following access request made under the Freedom of Information and Protection of Privacy Act (the Act):

All records pertaining to the attached Ministry fact sheet, "Residency Requirements for Regular and Extended Absences", including, but not limited to, Ministry policy/position papers, cabinet submissions, all memoranda from and to the Minister's office pertaining to the residency requirements, all memoranda from and to the office of the Executive Director of the Health Insurance Division pertaining to the residency requirements, all legal opinions and advice pertaining to the residency requirements, and all memoranda from and to the Office for Seniors Issues, Ministry of Citizenship, pertaining to the residency requirements.

The Ministry identified eleven responsive records and released all but two of them to the requester. The requester appealed the Ministry's decision.

Attempts to mediate the appeal were not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Only the Ministry made representations.

The two records at issue are:

- Record 1: 44 page draft report entitled "Health Care Benefits: Residents, Travellers and Temporary Residents", dated July 17, 1989.
- Record 2: 5 page memorandum concerning whether the Ministry will pay the "out of country" expenses of a specific individual, dated April 2, 1992.

The Ministry claims that section 12(1)(b) of the Act applies to Record 1 and sections 19 and 21 of the Act apply to Record 2.

ISSUES:

The issues arising in this appeal are:

- A. Whether section 12 of the Act applies to Record 1.
- B. Whether section 19 of the Act applies to Record 2.
- C. Whether the information contained in Record 2 qualifies as "personal information" as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether section 21 of the Act applies.

SUBMISSIONS\CONCLUSIONS:

ISSUE A: Whether section 12 of the Act applies to Record 1.

Section 12(1) states, in part:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the 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;

In Order 22, dated October 21, 1988, former Commissioner Sidney B. Linden discussed the interpretation of section 12(1). At page 6 of that Order, he 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 deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

The Ministry submits that the Record qualifies for exemption under section 12(1)(b) or, alternatively, under the introductory text of section 12(1). I will consider each claim in turn.

Section 12(1)(b)

In Order 73, former Commissioner Linden stated that in order to qualify for exemption under this section:

1. the record must contain policy options or recommendations; **and**
2. the record must have been submitted or prepared for submission to the Executive Council or its committees.

Having reviewed Record 1, I am satisfied that it meets the first criterion as it contains policy options and recommendations. However, the Ministry states that Record 1 "did not go before Cabinet in its current format nor is it intended to go before Cabinet at a future date". Therefore, the second criterion has not been met as Record 1 was not "submitted or prepared for submission" to Cabinet.

Accordingly, I find that Record 1 does not qualify for exemption under section 12(1)(b) of the Act.

Introductory text of section 12(1)

In its representations, the Ministry distinguishes between two distinct parts of Record 1: Parts I and II, which concern eligibility and residency policy, and Part III, which concerns out of country payment policy. I will first consider Part III.

Part III

The Ministry states:

... Part III of record 1 became the basis for a Cabinet submission. The submission, which incorporated and expanded upon the information contained in Part III, was brought before Cabinet and approved in April, 1991.

The Ministry attached a copy of the April, 1991, Cabinet submission to its representations. I have compared the contents of Part III of Record I with the contents of the Cabinet submission and, based on this review, I am satisfied that disclosure of Part III of Record 1 would "reveal the substance of deliberations" of Cabinet.

Accordingly, I find that Part III of Record 1 qualifies for exemption under section 12(1) of the Act.

Parts I and II

The Ministry states that Parts I and II:

... were incorporated into a voluminous discussion paper on eligibility. The information contained in this paper is currently being reworked into a policy options paper within the Health Insurance Division.

...

It is submitted that the revised paper is tentatively scheduled for Deputy Minister's Committee, a Committee responsible for steering all policy directions for the Ministry,

in late February. Pending the decisions taken at this Committee, the paper is expected to be taken before Cabinet.

The Ministry attached a copy of the "voluminous discussion paper" to its representations.

It has been previously stated that a record need not actually be placed before Cabinet or one of its Committees in order to qualify for exemption under section 12; however, in such cases the record must still "reveal the substance of deliberations" of Cabinet or one of its Committees, as required by the introductory text of section 12(1). [Order 72]

In my view, the Ministry's representations on this point are too speculative. The relationship that it describes between the contents of Parts I and II of Record 1 and a possible future Cabinet submission is remote. On the facts presented, I am not persuaded that disclosing Parts I and II of Record 1 would reveal the substance of Cabinet deliberations or the deliberations of one of its Committees.

Accordingly, I find that Parts I and II of Record 1 do not qualify for exemption under section 12(1) of the Act.

Parts I and II are discussed in the "Executive Summary" (pages 5-13); and parts of the Appendices (pages 27-44) relate to Parts I and II. For the reasons outlined above, I find that the portions of the "Executive Summary" and the Appendices which relate to Parts I and II of the Record do not qualify for exemption under section 12(1) or 12(1)(b).

In conclusion, Parts I and II of Record 1 and all related portions of the "Executive Summary" and Appendices should be disclosed. I have attached a highlighted copy of Record 1 to the copy of this Order which will be sent to the Ministry. The highlighted portions are the portions which should **not** be disclosed.

ISSUE B: Whether section 19 of the Act applies to Record 2.

Section 19 of the Act states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry claims that Record 2 qualifies for exemption under Branch 1.

In order to qualify for exemption under Branch 1 (the common law solicitor-client privilege), the Ministry must provide evidence that the Record satisfies either of the following tests:

1. a) there is a written or oral communication, **and**
 - b) the communication must be of a confidential nature, **and**
 - c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Record 2 is a memorandum from a Ministry lawyer to an employee of the Ministry's Corporate Correspondence Unit. The Ministry submits that it is "a legal opinion and analysis".

Having reviewed Record 2, I am satisfied that it meets all four parts of the first test for exemption under Branch 1: it is a written communication; its contents raise an expectation that it will be treated in confidence; it is a communication from a lawyer to an agent (the recipient of the memorandum was acting on behalf of the client - the Director of the Ministry's Communications and Information Branch); and, it is directly related to giving legal advice.

Accordingly, I find that Record 2 qualifies for exemption under section 19 of the Act.

Section 19 is a discretionary exemption. I am satisfied that the Ministry has exercised its discretion to deny access to Record 2 in accordance with proper legal principles and I find nothing improper in the circumstances.

Because of the manner in which I have disposed of Issue B, I need not address Issues C and D.

ORDER:

1. I order the Ministry to disclose Parts I and II of Record 1 and the related portions of the "Executive Summary" and Appendices to the appellant within 15 days of the date of this Order. I have attached a highlighted copy of Record 1 to the copy of this Order which will be sent to the Ministry. The highlighted portions are the portions which should **not** be disclosed to the appellant.
2. I uphold the decision of the Ministry to deny access to Part III of Record 1 (and the related portions of the "Executive Summary and Appendices), and to Record 2 in its entirety.
3. In order to verify compliance with the Order, I order the head to provide me with a copy of the Record which is disclosed to the requester pursuant to Provision 1 of this Order, only upon request.

Original signed by: _____
Tom Wright
Commissioner

_____ February 26, 1993