



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-483

Appeal P-9200540

Ministry of Finance



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ORDER

BACKGROUND:

The Ministry of Treasury and Economics (now the Ministry of Finance) (the Ministry) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) for: any and all records, wherever situate, respecting the extension of the environmental levy to non-refillable beverage alcohol containers announced in the April 30, 1992 provincial budget to be implemented, inter alia, by amendments to Ontario Regulation 548/90 and, without limiting the generality of the foregoing, particulars of any consultations which have taken place with other provincial and federal government departments respecting the extension of the levy.

The Ministry located a number of records responsive to the request. The Ministry also transferred portions of the request to other provincial institutions which had a greater interest in the records pursuant to section 25(2) of the Act. The Ministry also notified three affected persons pursuant to section 28(1) of the Act with respect to the records which were in its custody.

In its initial decision letter, the Ministry granted access to a number of records in their entirety. The Ministry, however, denied access to certain other records, either in full or in part, on the basis of the exemptions contained in sections 12(1), 17(1) and 19 of the Act. The requester appealed the denial of access and also maintained that additional records responsive to the request must exist.

During the course of mediation, all of the records for which the ministry had claimed the section 17(1) exemption, were disclosed to the appellant. Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and to the appellant. Representations were received from the Ministry only.

ISSUES:

The issues arising in this appeal are:

- A. Whether the Ministry's search for responsive records was reasonable in the circumstances.
- B. Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 44, 45, 46 and to the information contained in Records 1b and 5 which the Ministry has withheld.
- C. Whether the discretionary exemption provided by section 19 of the Act applies to Record 47.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry's search for responsive records was reasonable in the circumstances.

Along with its representations, the Ministry provided an affidavit sworn by a staff member who conducted the search for records responsive to the appellant's request. This individual was employed as an Economist in the Commodity Taxes Section of the Taxation Policy Branch. In this affidavit, the employee sets out the steps which the Ministry took to locate records which would be responsive to the request.

The Ministry first determined that the records in question would be housed within its Taxation Policy Branch. Ministry staff then searched the Branch's central filing system for the years 1989 through 1992. The ambit of the search was then extended to the personal and computer files of Branch staff who had been involved with the environmental levy. The Ministry official then confirmed that all of the documents located through this search had been identified in the Ministry's initial decision letter.

I have carefully reviewed the Ministry's representations and the affidavit evidence provided to me. I am satisfied that the Ministry has taken all reasonable steps to locate records responsive to the appellant's request. I, therefore, find that the Ministry's search was reasonable in the circumstances of this appeal.

ISSUE B: Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 44, 45, 46 and to the information contained in Records 1b and 5 which the Ministry has withheld.

The Ministry has relied on the introductory wording of section 12(1) of the Act to withhold all or parts of the five records referred to above. In addition, the Ministry has claimed that section 12(1)(b) applies to Record 44 and that section 12(1)(a) exempts Record 46 from disclosure. These provisions read 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;

In this appeal, Records 1b, 5 and 45 were not submitted to Cabinet or its committees. In these circumstances, in order for a record to qualify for exemption under section 12(1), the document must "reveal the substance of deliberations of an Executive Council or its committees". It has been held in a number of previous orders that disclosure of a record would reveal the substance of deliberations if the disclosure of information contained in the record would permit the drawing of accurate inferences with respect to the actual deliberations of an Executive Council (Orders 203, P-226, P-293, P-331 and P-361).

I propose to deal with the application of section 12(1) to each of the records at issue.

Record 1b

Record 1b is a briefing note dated April 21, 1992 drafted by an Economist with the Commodity Taxes Section of the Ministry's Taxation Policy Branch. Access has been granted to all of the record except for bullet points 4 and 5 on page 2. These bullet points refer to a proposal discussed at a Cabinet meeting and to matters contained in a Cabinet Submission. In its representations, the Ministry claims that the disclosure of these bullet points would permit the drawing of accurate inferences about the substance of deliberations of the Executive Council.

Having examined the information that was withheld in conjunction with the other records at issue in this appeal, I accept the Ministry's position. I find, therefore, that the information in question is properly exempt under section 12(1) of the Act.

Record 5

Record 5 is a briefing note dated May 13, 1992 concerning changes to the taxation scheme for certain alcoholic beverages and beverage containers. The Ministry has withheld one sentence in the final part of bullet point 4 on page 3 of this record. In its representations, the Ministry states that disclosure of this information would permit the drawing of accurate inferences about the substance of deliberations of the Executive Council. Having examined the portion of the record withheld by the Ministry, I am satisfied that it is properly exempt under section 12(1) of the Act.

Record 44

Record 44 is a copy of a Cabinet Submission which was provided to the Executive Council on March 25, 1992. The Ministry has claimed that section 12(1)(b) applies to this record in addition to the preamble of section 12(1).

I am satisfied that the requirements of section 12(1)(b) have been met as this record contains policy options and recommendations which were submitted to the Executive Council.

Record 45

Record 45 consists of a covering memorandum and a four page Ministry document containing staff comments on the Cabinet Submission described in Record 44. The Ministry has exempted this record in its entirety, based upon the preamble of section 12(1). I am satisfied that disclosure of the four pages of the Ministry's staff comments would permit the drawing of accurate inferences about the substance of deliberations of the Executive Council and, therefore, that section 12(1) is available to withhold this information.

In my view, however, the covering memorandum attached to this document would not be exempt under section 12(1) of the Act. While the "subject" heading of the memorandum lists a number of topics to be considered, the document does not reveal, nor does it permit the drawing of accurate inferences about, the **substance** of deliberations of the Executive Council. Accordingly, the covering memorandum attached to Record 45 should be released to the appellant.

Record 46

Record 46 consists of the Minutes of the March 25, 1992 Cabinet meeting at which the Cabinet Submission described as Record 44 was discussed. The Ministry has claimed that section 12(1)(a) applies to this record in addition to the preamble of section 12(1). I find that this record qualifies for exemption under section 12(1)(a).

ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to Record 47.

Record 47 is a paper copy of a memorandum sent electronically by the Ministry's Director of Legal Services to the Senior Policy Advisor of the Ministry's Taxation Policy Branch.

Section 19 of the Act consists of two branches, which provide the head of an institution 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).

In its representations, the Ministry takes the position that Record 47 is exempt from disclosure under the second branch of the test. Previous orders have held that a record can be exempt under

Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must, however, be satisfied in order for a record to qualify for exemption under Branch 2. These are:

1. the record must have been prepared by or for Crown Counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

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I have carefully reviewed the record and the representations provided by the Ministry. I am satisfied that Record 47 was prepared by Crown Counsel and that the document contains legal advice provided to a Ministry employee. On this basis, I find that Branch 2 of the section 19 test applies to this record.

Section 19 is a discretionary exemption which allows the Ministry to deny access to a record which may otherwise be subject to release. I have reviewed the Ministry's representations regarding its exercise of discretion in favour of claiming this exemption and I find nothing improper in the manner in which this discretion was exercised.

ORDER:

1. I uphold the Ministry's decision to deny access to bullet points 4 and 5 on page 2 of Record 1b, the sentence at the end of bullet point 4 on page 3 of Record 5, the four pages of staff comments in Record 45 and to Records 44, 46 and 47 in their entirety.
2. I order the Ministry to disclose the one page covering memorandum in Record 45 within 15 days following the date of this Order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon my request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ June 24, 1993