



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

# **ORDER P-508**

**Appeal P-9200654**

**Ministry of Economic Development and Trade**



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 Ministry of Industry, Trade and Technology (now the Ministry of Economic Development and Trade) (the Ministry) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) for:

All Government documents and discussion papers on [the] proposal to use Pension Funds to invest in businesses that the Government deems worthy.

The request, which was initially sent to the Premier's Office and to the Ministry of Treasury and Economics, was subsequently transferred to the Ministry, which has responsibility for the Ontario Investment Fund initiative.

The Ministry located a large number of records which were responsive to the request and agreed to disclose the majority of these documents subject to withholding the personal information of certain individuals pursuant to section 21(1) of the Act. The requester did not appeal the Ministry's decision concerning these records.

The Ministry determined, however, that it would deny access to the remaining records in their entirety on the basis of the exemptions contained in sections 12(1), 13(1) and 18(1)(d) and (e) of the Act. The requester appealed the denial of access.

During the course of mediation, the Ministry informed the appellant that it had located an additional record which had not been identified in the original search. The Ministry subsequently denied access to this document pursuant to sections 13(1) and 18(1)(d) and (e) of the Act.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and to the appellant. Representations were received from both parties.

The records that remain at issue in this appeal are:

- |          |   |
|----------|---|
| Record 1 | A two page memorandum dated January 7, 1992 which outlines the views of Cabinet about establishing an investment fund.            |
| Record 2 | A 12 page briefing document dated December 2, 1991 entitled "Creating An Investment Fund - Policy and Priorities Board Briefing". |
| Record 3 | A two page memorandum dated February 12, 1992 which summarizes a subsequent Cabinet decision respecting the investment fund.      |

**[IPC Order P-508/July 30, 1993]**

- Record 4                    A two page document entitled "Ontario Investment Fund - Treasurer's Notes for Cabinet Discussion, December 18, 1991".
- Record 5                    An undated contentious issue sheet entitled "Ontario Investment Fund".
- Record 6                    An eight page document stamped "Cabinet Submission", dated October 25, 1991 which relates to the Ontario Investment Fund (OIF).
- Record 7                    A five page memorandum dated February 27, 1992 written by an employee of the Ministry of Treasury and Economics which provides advice on certain issues relating to the OIF.

## **ISSUES:**

The issues arising in this appeal are:

- A.     Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 1 through 6.
- B.     Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 5 and 7.
- C.     Whether the discretionary exemptions provided by sections 18(1)(d) and (e) of the Act apply to Record 7.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A:     Whether the mandatory exemption provided by section 12(1) of the Act applies to Records 1 through 6.**

In its representations, the Ministry 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), (b), (c), (d) or (e) apply to the records at issue.

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;
  - (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;
  - (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
  - (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;
- ...

I will address the application of this exemption to each record individually.

### **Records 1 and 3**

Records 1 and 3 are separate two page memoranda dated January 7, and February 12, 1992, respectively, authored by an employee of the Ministry of Treasury and Economics. Each document describes specific decisions taken and directions set by Cabinet with respect to the establishment of an investment fund for the province.

In its representations, the Ministry submits that Records 1 and 3 are records whose release would reveal the substance of deliberations of the Executive Council and, as such, are exempt from disclosure under section 12(1)(a) of the Act.

It should be pointed out that Records 1 and 3 were never submitted to the Executive Council nor to one of its committees. On this basis, in order to qualify for exemption under section 12(1), these records must "reveal the substance of deliberations of an Executive Council or its committees" or permit the drawing of accurate inferences with respect to the actual deliberations (Orders P-226, P-293, P-331, P-361 and P-376).

I have reviewed the two memoranda and I am satisfied that these records fall within the exemption described in the preamble to section 12(1) of the Act as their disclosure would reveal the substance of deliberations of the Executive Council or its committees.

## **Record 2**

Record 2 is a copy of a briefing document submitted to the Policy and Priorities Board of Cabinet (which is a Cabinet committee) about the creation of an investment fund. The record contains a number of proposals which indicate how such a fund might be established. Attached to this record is a Minute of the Cabinet Committee on Economic and Labour Policy (CCELP) in which the Committee agrees to adopt a number of initiatives.

In my view, this briefing document can be properly characterized as a record containing policy options or recommendations prepared for submission to the Executive Council or its committees. Accordingly, I find that the contents of the briefing note are properly exempt under section 12(1)(b) of the Act.

I have also reviewed the CCELP Minute which is attached to the briefing note. In my view, this minute qualifies for exemption under section 12(1)(a) of the Act as it constitutes a record of the deliberations or decisions of the Executive Council or its committees.

## **Record 4**

Record 4 is a two page document described as "Treasurer's notes for Cabinet discussion". These notes outline the Government's position with respect to the creation of the OIF. I have reviewed the briefing notes and I am satisfied that they qualify as a record prepared to brief a Minister of the Crown in relation to a matter that is before or is proposed to be brought before the Executive Council or its committees. Accordingly, I find that Record 4 is properly exempt under section 12(1)(e) of the Act.

## **Record 5**

Record 5 is an undated one page document entitled "The Ontario Investment Fund" which was written by several government employees. The record, described as a "Contentious Issue", contains three subject headings, entitled "Issue", "Suggested Response" and "Background", respectively. The document does not identify the individual or individuals for whom it was prepared.

In its representations, the Ministry states:

The record was also prepared to brief the Treasurer in relation to the Ontario Investment Fund matter that was before the Executive Council and has been before various Committees of the Executive Council. It is respectfully submitted that this document is exempt from disclosure in its entirety pursuant to Section 12(1)(a) and/or (c) and especially (e) of the Act, in that it is a record prepared to brief a Minister of the Crown in relation to a matter that was before the Executive Council.

I have carefully reviewed this document and, in my view, it cannot reasonably be characterized as "a record of the deliberations of decisions of the Executive Council or its committees" under section 12(1)(a) of the Act. Rather, this is a document designed specifically to provide a script for a response should a particular issue be raised by the media or in another public forum. For this reason, I find that section 12(1)(a) of the Act does not apply to the record.

In Order 60, former Commissioner Sidney B. Linden established the following test for the application of section 12(1)(c) of the Act, which is also being claimed to exempt this document:

... 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.

In its representations, the Ministry has not indicated that the document in question was submitted to Executive Council or its Committees and I would consider that result to be extremely unlikely given the nature of the record. On this basis, I find that the document does not qualify for exemption under section 12(1)(c) of the Act.

I will now address the application of section 12(1)(e) to this record. Based on my review of the representations, I find that the Ministry has failed to provide me with adequate evidence that the record was prepared for the specific purpose of briefing the Treasurer of Ontario "in relation to matters which are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultation among ministers relating to government decisions or the formulation of government policy". Nor am I able to draw this inference from the wording of the record which, as I have observed previously, does not designate the Treasurer as the intended recipient of the document and which more accurately focuses on responding to a media issue. On this basis, I find that section 12(1)(e) does not apply to this record.

To summarize, I find that neither sections 12(1)(a), (c) nor (e) apply to exempt Record 5 from disclosure. Since section 12(1) is a mandatory exemption, I have also considered whether the preamble to the section would apply to the record. I find that it does not.

## **Record 6**

Record 6 is a copy of a Cabinet Submission dated October 25, 1991. The Ministry submits that this document was placed before the Executive Council or its committees. I have reviewed the record and find that the document contains policy options submitted or prepared for submission to the Executive Council or its committees. Accordingly, Record 6 is properly exempt from disclosure under section 12(1)(d) of the Act.

To summarize, therefore, I have found that Records 1, 2, 3, 4 and 6 are all exempt from disclosure in their entirety under section 12(1) of the Act.

In its representations, the Ministry indicated that the head of the institution considered whether Cabinet consent should be sought under section 12(2)(b) of the Act to release the records for which the section 12(1) exemption had been claimed. The decision reached was that such consent should not be obtained. I have reviewed the Ministry's reasons to support this decision and I find nothing improper in the manner in which the head exercised her discretion in the present case.

### **ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 5 and 7.**

I will address the application of this exemption to each of the records individually.

## **Record 5**

As indicated previously, Record 5 is a one page contentious issue note entitled "The Ontario Investment Fund" which contains three separate sections labelled "Issue", "Suggested Response" and "Background". In its representations, the Ministry also relies on section 13(1) of the Act to withhold the entire record from disclosure. The Ministry states, in particular, that:

[R]ecord number 5 also contains advice and recommendations of the Public Servants who prepared it, in that it contains "suggested responses" to the contentious issues referred to in the record...

Section 13(1) of the Act reads as follows:

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.

**[IPC Order P-508/July 30, 1993]**

Section 13(1) was considered by former Commissioner Sidney B. Linden in Order 118, in which he made the following observations:

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.

I adopt this approach for the purposes of this order.

In Order P-278, former Assistant Commissioner Tom Mitchinson considered the application of section 13(1) to the "Response" section of an issue note prepared for a Minister. In that order, he accepted the institution's position that the "Response" section of the note contained "advice and recommendations of a public servant" and, therefore, fell within the scope of section 13(1). I similarly find that the "Suggested Response" section of the Record 5 contains "advice and recommendations of a public servant" and is properly exempt from disclosure under section 13(1) of the Act.

As far as the "Issue" and "Background" sections of these records are concerned, I find that they contain factual information, not advice or recommendations, and do not satisfy the requirements for the section 13(1) exemption.

To summarize, therefore, the Ministry can rely upon section 13(1) of the Act to withhold only the "Suggested Response" portion of Record 5.

## **Record 7**

The Ministry has also claimed that section 13(1) applies to Record 7, which is a five page memorandum dated February 27, 1992 written by a Ministry employee. This document, which was prepared for the Acting Deputy Treasurer, is composed predominantly of the advice of the employee on several topics relating to the OIF. The record also contains some factual information which provides a context in which the advice is offered.

I have carefully reviewed this document and find that the factual information is so interwoven with the advice provided that it would not be reasonably practicable, pursuant to section 10(2) of the Act, to extract the factual material only and disclose it to the appellant. On this basis, I find that section 13(1) of the Act applies to exempt Record 7 in its entirety.

I have also reviewed the list of mandatory exceptions to section 13(1) contained in section 13(2) of the Act to determine whether any of these exceptions might apply to Records 5 and 7.



In his representations, the appellant submits that the mandatory exceptions found in sections 13(2)(a) and (g) of the Act apply in the circumstances of this appeal. These provisions specify that:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual information
- (g) a feasibility study or other technical study, including a cost estimate, relating to governmental policy or project

In Order 24, former Commissioner Sidney B. Linden stated that:

... 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts **separate and distinct from the advice and recommendations contained in the record.** (emphasis added)

I adopt the reasoning contained in this order for the purposes of this appeal.

I have carefully reviewed Records 5 and 7 and I find that they do not contain factual information of this nature. I also conclude that neither section 13(2)(g) nor any of the other exceptions in section 13(2) apply in the circumstances of this appeal.

Because section 13(1) is a discretionary exemption, I have also reviewed the Ministry's representations 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 C: Whether the discretionary exemption provided by sections 18(1)(d) and (e) of the Act apply to Record 7.**

Since I have found under Issue B that Record 7 is exempt from disclosure in its entirety, it is not necessary for me to consider Issue C.

## **ORDER:**

1. I uphold the decision of the Ministry to withhold access to Records 1, 2, 3, 4, 6 and 7 and to those portions of Record 5 which are **not** highlighted on the copy of Record 5 which will accompany the copy of this order sent to the Ministry.

2. I order the Ministry to disclose to the appellant the highlighted portions of Record 5, within 15 days of 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 requester pursuant to provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_  
July 30, 1993