



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-726

Appeal P_9300638

Ministry of Natural Resources



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant sought access to two reports from the Ministry of Natural Resources (the Ministry) relating to the operation of the Ontario Provincial Parks system. The appellant is a non-profit organization with an interest in the preservation of provincial parks. The Ministry decided to deny access to both documents based on the following exemptions contained in the Act:

- Cabinet records - sections 12(1)(b) and (c)
- advice or recommendations - section 13(1)
- proposed plans of an institution - section 18(1)(g)

A Notice of Inquiry was sent to the appellant and the Ministry. Representations were received from both parties.

The records at issue in this appeal consist of two reports which together constitute a business review of the provincial parks system. The first record (which is referred to as "Study A") is an internal Ministry report referred to as the Park System Rationalization Study. This report, which is made up of two volumes, identifies those provincial parks which are contributing to the overall objectives of the system and then presents options to rationalize the delivery of parks services. Volume 1 consists of the report, itself, whereas Volume 2 contains a series of supporting documents.

The second record (described as "Study B") was prepared by a consulting firm and considers alternative models for the organization of the provincial parks system.

DISCUSSION:

CABINET RECORDS

In its representations, the Ministry submits that the policy options and recommendations contained in the reports will eventually lead to a Cabinet Submission, in which some or all of the options and recommendations found in the documents will be discussed.

On this basis, the Ministry submits that the studies fall within the Cabinet records exemptions found in sections 12(1)(b) and (c) of the Act. These provisions prescribe that:

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;
- (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.

In order for sections 12(1)(b) and (c) to apply to a record, the Ministry must establish that the document was submitted, or prepared for submission, to an Executive Council or one of its committees. In the present case, there is no specific evidence before me to indicate that the reports were prepared with this objective in mind. In particular, the Ministry has not established that either the present Cabinet or its committees has any plans to consider reforms to the provincial parks system. For these reasons, I find that neither section 12(1)(b) nor (c) applies to the two reports at issue.

I further conclude that none of the remaining parts of section 12(1), including the introductory wording of the section, apply to the records.

ADVICE OR RECOMMENDATIONS

The Ministry also submits that the two reports fall within the advice and recommendations exemption found in section 13(1) of the Act. This provision states that:

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.

It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

I will initially consider the application of this exemption to the internal Ministry report (Study A). Following a careful review of this record, I find that the following parts of Volume 1 contain information which qualifies as advice or recommendations under section 13(1):

- (1) The parts of pages iv, v, 12, 13, 31 and 32 which I have highlighted in yellow.
- (2) The list of recommendations found on pages 35 and 36 which are also highlighted in yellow.

I further find that the remaining parts of this volume, which consist of factual materials, discussions of methodology, analyses and preliminary findings, do not constitute advice or recommendations for the purpose of the Act. The same is true for Volume two of Study A which consists solely of charts and statistics.

I will now consider the report of the consulting firm (Study B). The objective of this document is to explore and select an organizational design which will best reflect the mandate of the provincial parks system. This report sets out the methodology to be used in the study,

summarizes the results of interviews that were conducted, considers alternative organizational models, explores the economics of each model and provides recommendations and an implementation plan. Following a careful review of this record, I find that all or parts of pages 8, 10, 11, 43, 44, 67, 69 70, 72, 78, 80, 82, 84, 85 and 87-96, which I have highlighted in yellow, qualify for exemption under the advice or recommendations exemption.

EXCEPTIONS TO THE ADVICE OR RECOMMENDATIONS EXEMPTION

I must now consider whether any of the mandatory exceptions contained in section 13(2) of the Act apply to the parts of the records which I have previously characterized as advice or recommendations.

In its representations, the appellant submits that the exceptions found in sections 13(2)(f) and (g) of the Act apply to any advice or recommendations in the reports which the Ministry has chosen not to disclose under section 13(1) of the Act. The Ministry, on the other hand, submits that these provisions are not applicable since only parts of the reports deal with the efficiency of the parks system.

Section 13(2)(f) prescribes that an institution **shall not** refuse to disclose a record which contains "a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy". Section 13(2)(g), on the other hand, requires that an institution not refuse to make available "a feasibility study or other technical study, including a cost estimate, relating to a government policy or project".

Sections 13(2)(f) and (g) are unusual in the context of the Act in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the Ministry must still disclose the **entire** document if the record falls into one of the section 13(2) categories.

I will first consider whether either section 13(2)(f) or (g) applies to the Ministry's internal report (Study A). As indicated previously, the report evaluates which provincial parks are contributing to the overall objectives of the system and then discusses how the delivery of park services can be optimized.

Based on my review of this report, I find that both volumes of the document qualify as a study of the performance or efficiency of a particular program (the provincial parks system) of the Ministry. While it is true that some parts of the report may deal with other related topics, the focus of this study is clearly on assessing the adequacy of the parks system as it is presently structured.

On this basis, I find that the report falls squarely within the section 13(2)(f) exception which means that the portions of this record which I have previously characterized as advice or recommendations are not subject to the section 13(1) exemption.

I will now turn to the report of the consulting firm (Study B). The authors of Study A indicate that this document will constitute a "feasibility study for alternative delivery models". Study B examines the various organizational design models which may be applied to the parks system and recommends the model which the authors find to be the most appropriate based on

established assessment criteria. I must now determine whether this document constitutes a "feasibility study relating to a government policy or project" for the purposes of section 13(2)(g) of the Act.

The Concise Oxford Dictionary (8th edition) defines the term "feasibility study" as a study of the practicability of a proposed project. As indicated previously, the report under consideration recommends that a particular model for the organization of the provincial parks system be selected and goes on to assess the characteristics of this proposal.

I have carefully reviewed this report and find that it may reasonably be described as a feasibility study relating to a government policy or project. That project is the selection of an organizational design to maximize the utility of the provincial parks system. While it is true that portions of the report provide stakeholder comments on the delivery of park services and evaluate the merits of competing models, the fundamental object of the study is to consider the feasibility of the design which the consulting firm has recommended. On this basis, I find that the section 13(2)(g) exception applies to those parts of the records which had previously qualified for exemption under section 13(1).

PROPOSED PLANS OF AN INSTITUTION

The Ministry also submits that section 18(1)(g) of the Act applies to exempt the two reports from disclosure. In order to qualify for exemption under this provision, the Ministry must establish that each report:

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.

I will turn first to the second part of the test. In Order M-182, Inquiry Officer Holly Big Canoe considered the municipal equivalent of section 18(1)(g) of the Act. In this decision, she found that the term "pending policy decision" contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution.

The Ministry disagrees with this interpretation and submits that the appropriate definition of a pending policy decision "contemplates a situation that has started but remains unfinished." I have carefully reflected on this argument.

The intent of section 18(1)(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In my view, it follows that for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. In addition, the first part of

the section 18(1)(g) test makes specific reference to proposed policy decisions. In my view, the nature of this wording also contemplates that the type of decision referred to in the second part of the test will be one that has already been made.

For these reasons, I do not accept the interpretation which the Ministry has advanced and prefer to follow the approach articulated in Order M-182.

To complete this analysis, I must determine whether the disclosure of the information contained in the reports could reasonably be expected to result in undue financial benefit or loss to a person. Following a careful review of the Ministry's representations, I find that I have not been provided with sufficient evidence to establish that such results are likely to occur.

Since the Ministry has failed to establish that either the first or second aspects of the second part of the section 18(1)(g) test have been met, it follows that this exemption does not apply to the information found in the two reports.

ORDER:

1. I order the Ministry to disclose the two records to the appellant in their entirety within fifteen (15) days following the date of this order.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

July 15, 1994