



Information and Privacy  
Commissioner/Ontario

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

# **ORDER P-812**

Appeal P-9400371

Ministry of Consumer and Commercial Relations



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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 requester asked the Ministry of Consumer and Commercial Relations (the Ministry) for access to:

- (1) The minutes of the Ministry's Advisory Committee on the Personal Property Securities Act where the curative provisions of the statute were discussed.
- (2) A specific memorandum sent by a Ministry official to the committee dated April 15, 1978 respecting amendments to the draft legislation.
- (3) Any records reflecting the Ministry's position on how the curative provisions of the Personal Property Securities Act (the PPSA) should be revised.
- (4) Any studies, surveys and questionnaires (including the results obtained from these instruments) pertaining to the curative provisions of the PPSA.

The Ministry transferred a fifth part of the request involving another piece of legislation to the Ministry of the Attorney General.

The requester is a law professor with a scholarly interest in the historical development of the PPSA and related legislation.

The Ministry initially identified four sets of minutes that were responsive to part 1 of the request but made the decision not to disclose the contents of these records based on the Cabinet records exemption found in section 12(1)(e) of the Act. The Ministry also informed the requester that it could not locate any records that were responsive to parts 2, 3 or 4 of the request.

The requester appealed the access decision to the Commissioner's office and also claimed that additional records should exist which were responsive to his request.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from both parties. The Ministry subsequently identified four additional records that were responsive to the request and disclosed these documents to the appellant in their entirety.

## **DISCUSSION:**

### **RAISING OF NEW DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS**

On June 17, 1994, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the

date of the confirmation (that is, until July 25, 1994) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

It was not until August 29, 1994, following the issuance of the Notice of Inquiry, that the Ministry indicated for the first time that it wished to rely on section 13(1) of the Act (the advice or recommendations exemption) to deny access to the four sets of minutes.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

Inquiry Officer Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, Inquiry Officer Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In the present case, the Ministry was advised of the policy in question yet decided to rely on a new discretionary exemption more than two months after the Confirmation of Appeal was issued. Since the Ministry has failed to advance any arguments to indicate why the 35-day time limit should not apply in the present appeal, I will not consider the application of the section 13(1) exemption in this appeal.

## **CABINET RECORDS**

As indicated previously, the records which are responsive to this request consist of four sets of minutes issued by the PPSA Advisory Committee (the Committee) which discuss the curative provisions of the PPSA. The minutes are dated July 10, 1985, July 30, 1986 and April 22 and May 6, 1987, respectively.

[IPC Order P-812/December 7, 1994]

In its representations, the Ministry indicates that the Committee was established by the Minister of Consumer and Commercial Relations to propose amendments to the PPSA. The Committee was made up of prominent Ontario lawyers with expertise in the field of commercial law.

The Ministry submits that the responsive portions of the four sets of minutes are exempt from disclosure under both section 12(1)(e) of the Act as well as the introductory wording of section 12(1). These provisions state that:

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 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 deal first with the application of section 12(1)(e) of the Act.

In order for the minutes to qualify for exemption under this provision, the Ministry must establish that these records were prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees;  
or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

I have carefully reviewed the Ministry's representations on the application of this exemption but I am unable to discern any specific arguments to suggest why section 12(1)(e) applies to the four sets of minutes. Because this exemption is mandatory in nature, I have independently reviewed these records and considered the context in which they were created.

I find that there is no evidence before me to indicate that the minutes were prepared to brief the Minister on matters before or proposed to be brought before the Executive Council or its committees or on issues which would form the subject of consultations among ministers regarding government decisions or the formulation of government policy. The result is that section 12(1)(e) does not apply to the records at issue.

I must now determine whether the minutes are exempt from disclosure under the introductory wording of section 12(1). This preamble states that a Ministry must refuse to release a record where such disclosure would reveal the substance of deliberations of an Executive Council or one of its committees.

Based on previous orders, it is possible that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of section 12(1). This result will occur where a Ministry establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

In its representations, the Ministry states that, although the minutes may have never gone before Executive Council or the Minister, the advice and recommendations which were derived from these documents eventually found their way to these parties and were ultimately incorporated into legislation which was enacted in 1989.

The Ministry then submits that when the minutes are compared with the text of the legislation, a third party could identify with reasonable certainty those issues that were deliberated upon by Cabinet. In addition, according to the Ministry, the disclosure of the minutes would enable the appellant to determine the considerations which Cabinet applied in assessing the advice and recommendations of the Committee. Therefore, the release of the minutes would reveal the substance of deliberations of the Executive Council.

I have carefully reflected on the Ministry's argument which is essentially that the release of the minutes would permit the drawing of accurate inferences with respect to the substance of deliberations of the Executive Council. At the outset, I would point out that the minutes were prepared three to five years before Cabinet deliberated on the enactment of the new legislation. Second, based on my review of the minutes, I am not persuaded that their release would permit a third party to accurately infer the theme or subject of the discussions which Cabinet undertook with a view towards deciding how to structure the new legislation. To state the matter a bit differently, the connection between the minutes and the subsequent deliberative process is too remote to allow this type of inference to be drawn.

Because section 12 is a mandatory exemption, I have also considered whether sections 12(1)(a), (b), (c), (d) or (f) might apply to the records at issue. I have concluded that none of these provisions are applicable in the circumstances of this appeal.

The result is that the disclosure of the responsive portions of the minutes would not reveal the substance of deliberations of the Executive Council or any of its committees.

I have highlighted those parts of the minutes which should be released to the appellant in yellow on the copy of the records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator.

## **REASONABLENESS OF SEARCH**

The appellant contends that further records should exist which are responsive to parts 2, 3 and 4 of the request.

The Ministry, for its part, indicates that it has been unable to locate the documents in question. To substantiate its position, the Ministry has provided the Commissioner's office with an affidavit signed by its Freedom of Information and Privacy Co-ordinator. In this affidavit, the Co-ordinator outlines the steps taken by Ministry officials to locate responsive records. More particularly, the affidavit indicates that Ministry staff (including legal counsel to the PPSA Registration Branch) searched through 12 boxes of records in an effort to find any relevant documentation.

Following my review of the four sets of minutes which the Ministry was able to locate and the accompanying affidavit, I noted that the July 10, 1985 minutes made reference to an earlier set of minutes (dated November 16 to 18, 1984) where the curative provisions of the PPSA were also discussed. Given the potential relevance of this document, I asked the Ministry to undertake a more directed search for the record in question.

In response to this request, the Ministry provided the Commissioner's office with a supplementary affidavit. In this document, the Ministry indicates that it undertook a second search of its records holdings for the minutes in question. The result of these inquiries was that the particular set of minutes could not be located. In its affidavit, the Ministry suggests that the minutes, which are over ten years old, may no longer exist.

Where a requester provides sufficient details about the records to which he is seeking access and the Ministry indicates that no responsive records can be found, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records that are responsive to the request.

Following a careful review of the evidence, I am satisfied that the search conducted by the Ministry was reasonable in the circumstances of this appeal.

## **ORDER:**

1. I order the Ministry to disclose to the appellant within fifteen (15) days of the date of this order the highlighted portions of the following pages of the records - Pages 1 and 2 of the July 10, 1985 minutes; Page 1 of the July, 30 1986 minutes; Pages 1 and 4 of the April 22, 1987 minutes and Pages 1, 4 and 5 of the May 6, 1987 minutes. These portions are highlighted on the copy of these pages which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of the pages of the records which are disclosed to the appellant pursuant to Provision 1 of this order.

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

\_\_\_\_\_ December 7, 1994