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

ORDER P-809

Appeal P-9400231

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 requester asked the Ministry of Natural Resources (the Ministry) for (1) any environmental scanning materials pertaining to Aboriginal communities and (2) information relating to the provincial government's jurisdiction to transfer the control of land and resources to these communities. The requester is an individual with an interest in issues involving First Nations.

The Ministry identified a total of four records that were responsive to the request and disclosed two of these documents to the requester in their entirety. The Ministry refused, however, to provide access to the two remaining records (a Cabinet submission and a draft discussion paper) based on the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- positions to be applied to negotiations - section 18(1)(e)
- proposed plans or policies of an institution - section 18(1)(g)

The requester appealed this decision to the Commissioner's office. The requester also took the position that additional records should exist which are responsive to his request.

A Notice of Inquiry was provided to the requester/appellant and the Ministry. Representations were received from both parties. In its submissions, the Ministry identified an earlier version of the draft discussion paper as a further record that was responsive to the request. The Ministry also denied access to this document under sections 13(1) and 18(1)(e) and (g) of the Act.

DISCUSSION:

CABINET RECORDS

The Ministry claims that the Cabinet records exemptions found in sections 12(1)(b) and (c) of the Act apply to a Cabinet submission, dated December 1, 1993, which includes a discussion paper. I shall refer to this document as Record 1 for the purposes of this appeal.

In order for a record to be exempt from disclosure under section 12(1)(b) of the Act, the Ministry must establish that:

1. the record contains policy options or recommendations; and

2. the record has been submitted or prepared for submission to the Executive council or its committees.

In its representations, the Ministry indicates that this document was prepared for submission to Cabinet, although it has not yet been placed before this body. The Ministry also points out that the Cabinet submission contains recommended policies and guidelines respecting negotiations with First Nations.

I have carefully reviewed this document and find that it contains policy options and recommendations and that it was prepared for submission to Cabinet. Accordingly, the record is exempt from disclosure under section 12(1)(b) of the Act and must not be disclosed to the appellant.

POSITIONS TO BE APPLIED TO NEGOTIATIONS

The Ministry claims that the two versions of the draft discussion paper, dated March 5 and April 21, 1993, respectively, are exempt from disclosure under section 18(1)(e) of the Act. I shall refer to these documents as Records 2 and 3 for the purposes of this appeal.

In order for this exemption to apply to a record, the Ministry must establish that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations; **and**

3. the negotiations are currently being carried on or will be carried on in the future; **and**

4. the negotiations are being conducted by or on behalf the Government of Ontario or an institution.

In its representations, the Ministry states that the two discussion papers were created to support specific negotiations being undertaken between the Government of Ontario and a particular First Nation. The Ministry then goes on to identify those portions of the discussion papers which it believes constitute criteria, plans or positions regarding the land and resource issues under negotiation.

The Ministry indicates that, although these negotiations have produced an Agreement in Principle between the parties, the First Nation has yet to formally ratify the document. On this basis, the Ministry submits that the First Nation may still request that further revisions be made to the text. The Ministry then states that, should the Agreement be re-opened, further negotiations would be necessary. On this basis, it is the Ministry's position that the negotiations between the parties have not yet been completed.

Following a review of the evidence before me, I have concluded that portions of each discussion paper either contain or would reveal criteria or positions to be applied to negotiations carried on by the

Government of Ontario and that these negotiations have yet to be concluded. The parts of the paper which qualify for exemption under section 18(1)(e) are:

(1) For Record 2 - pages 9-15 and 17-28 in their entirety and those portions of pages 7, 8 and 29 which have been highlighted in blue in the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator.

(2) For Record 3 - pages 7-16, 18-31 and 33 in their entirety and those portions of pages 6 and 32 which have also been highlighted in blue.

I find, however, that with several exceptions, the discussions in Records 2 and 3 relating to the "NAN six new reserves" (pages 4-8 of Record 2 and pages 2-6 or Record 3) do not contain information which the Ministry intended to apply to future negotiations. The two papers make this point quite clearly by stating that the principles in question are not expected to set a precedent for policy direction in dealing with other Aboriginal communities. I also find that the remaining portions of the records, which mostly contain background information, do not constitute "positions, plans, procedures, criteria or instructions" for the purposes of section 18(1)(e) of the Act.

I will now consider whether the other exemptions which the Ministry has claimed apply to the parts of Records 2 and 3 which are not subject to the section 18(1)(e) exemption.

PROPOSED PLANS OR POLICIES OF AN INSTITUTION

The Ministry submits that section 18(1)(g) of the Act applies to exempt the contents of the two discussion papers from disclosure. In order for the Ministry to rely on this exemption, it must establish that the record:

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.

In its representations, the Ministry states that if the positions outlined in the discussion papers are released prior to the ratification of the agreement with the First Nation, its ability to negotiate effectively will be compromised.

I will first consider the second part of the section 18(1)(g) test. In my view, the Ministry has not provided the evidence necessary to show that the release of the remaining portions of Records 2 and 3 could reasonably be expected to result in (1) the premature disclosure of the pending policy decision or (2) undue

financial benefit or loss to a person. The result is that the section 18(1)(g) exemption does not apply to the parts of the records that remain at issue.

ADVICE OR RECOMMENDATIONS

The Ministry also claims that the advice or recommendations exemption found in section 13(1) of the Act applies to the two discussion papers. 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 have carefully reviewed the representations which the parties have provided to me. I find that, with four exceptions, the portions of the discussion papers which remain at issue constitute historical information and not advice or recommendations for the purposes of the Act. The parts of the papers which qualify as advice or recommendations are the following:

(1) For Record 2 - those parts of pages 7 and 29 which I have highlighted in yellow on the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Coordinator.

(2) For Record 3 - those parts of pages 5 and 32 which have also been highlighted in yellow.

I will now consider the appellant's contention that the Ministry's search for responsive records was inadequate.

REASONABLENESS OF SEARCH

The appellant has argued that further records should exist which are responsive to his request. At the outset, the appellant notes that he is seeking access to the background materials which the Ministry used to formulate its discussion papers. He believes that the Ministry must have collected a significant amount of information before these documents and the related Cabinet submission were completed.

The appellant also suggests that consultations must have taken place with other Ministries which have policies concerning the provision of services to native communities. He also refers to other sources of background materials which he believes the Ministry considered before drafting the records at issue.

In its representations, the Ministry points out that the appellant's request for records relating to the issue of jurisdiction over land and resources was limited to documentation in the custody of its Aboriginal Policyand Operations Branch (APOB). On that basis, the Ministry's search for responsive records on this subject was restricted to the document holdings of this Branch.

To support its position that the search for responsive records was reasonable, the Ministry has enclosed affidavits from five past and present APOB employees. These affidavits deal with the manner in which the Ministry undertook its document search, which records holdings were searched and the results of these inquiries (which was that only three responsive records were located).

The Ministry also points out that it carefully reviewed the documents that were referred to in Records 1, 2 and 3 and determined that their contents did not relate specifically to the transfer of jurisdiction over lands and resources to Aboriginal communities.

Finally, the Ministry notes that the appellant's request for environmental scanning materials was not limited to the APOB. For this reason, the ambit of the Ministry's search extended beyond this Branch and included the Ministry's general records holdings. As a result of this search, two newsletters were identified and subsequently disclosed to the appellant.

Where a requester provides sufficient details about the records to which he is seeking access and a Ministry indicates that responsive records cannot be located, 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 with absolute certainty that the requested records do not exist, it must provide sufficient evidence which shows that it has made a reasonable effort to identify and locate records that are responsive to the request.

I have carefully considered the representations made by the parties including the five affidavits provided by the Ministry. While I have considerable sympathy for the appellant's position, I must conclude that the Ministry has made a reasonable search for the records which would be responsive to the appellant's request.

In my view, the divergent positions taken by the parties on the adequacy of search issue arise largely because of the wording of the original request. There, the appellant was quite clear that, with respect to the jurisdictional aspect of his request, he was seeking records in the custody of a specific Ministry Branch. On this basis, the Ministry's search for responsive records was restricted to this organizational unit. In his representations, however, the appellant seems to take the position that the Ministry's search should have extended to other areas of the Ministry and the provincial government.

In this order, I have upheld the reasonableness of the Ministry's search efforts in the context of the wording of the specific request that is before me. I believe, however, that in order to fully address the information needs of the appellant, the Ministry should contact him to indicate where within the provincial government the information that he seeks might be located. The appellant would then be in a more informed position to determine whether he should file additional access requests.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 1, pages 9-15 and 17-29 of Record 2 and pages 7-16 and 18-33 of Record 3 in their entirety, as well as to those portions of pages 7 and 8 of Record 2 and pages 5 and 6 of Record 3 which have been highlighted on the copy of the records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose pages 1-6, 16 and 30-33 of Record 2 and the cover page, index, pages 1-4 and 17 of Record 3 in their entirety and the non-highlighted portions of pages 7 and 8 of Record 2 and of pages 5 and 6 of Record 3 to the appellant within 15 days of the date of this order.

3. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of those portions of Records 2 and 3 which are disclosed to the appellant pursuant to Provision 2.

Original signed by: December 2, 1994
Irwin Glasberg
Assistant Commissioner