



Information and Privacy
Commissioner/Ontario

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

ORDER P-888

Appeal P-9400649

Ministry of Natural Resources



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for access to records relating to a named wildlife centre (the Centre). The requesters indicated that they were seeking information that would help them to understand the process and the considerations underlying the Ministry's decision to fund the Centre. In particular, the requesters sought information about the Centre's funding, its status and authority to operate, its original development proposal and the Ministry's decision to fund the Centre. All of the records relate to the Ministry's decision to support the Centre which is a volunteer-run rehabilitation centre for injured animals.

The Ministry identified numerous records responsive to the request and granted partial access to them. The requesters appealed the Ministry's decision to deny access to parts of certain records and also claimed that additional records must exist.

The Ministry has withheld the options and recommendations contained in a legal status note and the proposed action set out in a briefing note (the records). The Ministry relies on the following exemption to deny access to the records:

- advice or recommendations - section 13(1)

The appellants claim that additional records exist. Therefore, I will also consider whether the search conducted by the Ministry for responsive records was reasonable in the circumstances of this appeal.

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

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act 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 a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere 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.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) of the Act and stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

In Order P-529, Assistant Commissioner Irwin Glasberg considered the possible application of section 13(1) to a record which set out a number of options with the possible outcomes relating to each and the option recommended by the Ministry staff. In that order, the Assistant Commissioner found that the information under each option, i.e. the possible advantages and disadvantages of each option (excluding the headings) and the option favoured by the Ministry staff constituted the advice and recommendations, respectively, which were intended to be protected under the legislation.

I agree with the reasoning in the two orders and adopt it for the purposes of this appeal. I have carefully reviewed the information in the records together with the representations of the parties and I find as follows:

- (1) the portion not disclosed on pages 2 and 3 of the legal status note under each of the three options, represents the "free-flow of advice" which, in my view, was intended to be protected under the exemption provided by section 13(1) of the Act. Similarly, I find that the recommendations on page 3 of the legal status note and the portion withheld on page 3 of the Briefing Note constitute advice or recommendations and are properly exempt under the Act. I have highlighted these portions of the record which should **not** be disclosed.
- (2) the options identified on pages 2 and 3 of the legal status note (i.e. the headings) do not contain advice or recommendations as required by section 13(1). No mandatory exemptions apply to this part of the record and it should be disclosed to the appellants.

REASONABLENESS OF SEARCH

The appellants claim that additional responsive records must exist. During mediation, an additional search for records was undertaken by the Ministry. Records were located and full access was granted. The appellants state in particular that more "Ministry-generated" records with respect to the subject should exist.

In its representations, the Ministry describes the steps taken by its staff to search for responsive records. The Ministry's representations include the sworn affidavits of a legislation transfer specialist (the transfer specialist) for the Resources Stewardship and Development Branch of the Ministry and a wildlife biologist (the biologist) responsible for all the records pertaining to the Centre.

The transfer specialist summarizes the search process including the files and locations searched. Field offices were also contacted as part of the search process. In one particular case, where a record to explain the decision to provide funding to the Centre did not exist, a written explanation of the decision-making process was provided to the appellants. The transfer specialist states that during mediation, additional searches were conducted. Areas searched included the legal services branch of the Ministry and the Provincial Archives. The records identified were released to the appellants.

The biologist confirms that all the documents pertaining to the Centre, with the exception of files for legal documents, are contained in a specific file.

Where the requester provides sufficient details about the records which he/she is seeking and the Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

I have reviewed the representations of the parties and the affidavits provided by the Ministry. Based on the foregoing, I am satisfied that the search undertaken by the Ministry for responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the portions of the legal status note and the briefing note which I have highlighted on the copy of the records provided to the Ministry's Freedom of information and Privacy co-ordinator, with a copy of this order. The highlighted portions of the records should **not** be disclosed.
2. I order the Ministry to disclose to the appellants those parts of the records which are **not** highlighted on the copy of the records referred to in Provision 1.
3. I order the Ministry to disclose the records to the appellants within fifteen (15) days of the date of this order.
4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellants pursuant to Provision 2.
5. I uphold the Ministry's decision with respect to the reasonableness of its search.

Original signed by: _____
Mumtaz Jiwan

_____ March 10, 1995

Inquiry Officer