



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-894

Appeal P-9400615

Ministry of the Attorney General



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NATURE OF THE APPEAL:

Commencing in the spring of 1993, a series of meetings were convened between representatives of the provincial government and members of the Grandview Survivors Support Group (the Support Group). The objective of these sessions was to negotiate a settlement package for a number of individuals who had attended the Grandview Training School for Girls. The parties eventually concluded such an agreement which was then submitted to Cabinet for approval.

The requester in this appeal, which is brought under the Freedom of Information and Protection of Privacy Act (the Act), is a reporter with an interest in this subject. He has asked the Ministry of the Attorney General (the Ministry) to provide him with copies of all documents which describe the financial details of the settlement package. In particular, he has sought information on (1) the total cost of the settlement, (2) how these costs are broken down, (3) the legal fees to be paid to a named lawyer and (4) the monies paid out as of the date of his access request (July 12, 1994).

The Ministry identified a Cabinet Submission along with three appendices (labelled A, B and C) as the sole group of records that was responsive to the request. The Ministry decided not to release this package to the requester based on the following exemptions contained in the Act:

- Cabinet records - section 12(1)(b)
- advice or recommendations - section 13(1)
- positions to be applied to negotiations - section 18(1)(e)
- solicitor-client privilege - section 19

The Ministry also informed the requester that, as of the date of his request, it had not paid out any monies under the settlement agreement.

The requester appealed the Ministry's decision not to disclose the Cabinet Submission to the Commissioner's office.

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

In his representations, the appellant for the first time took the position that additional records should exist which were responsive to his request.

Following receipt of the Notice of Inquiry, the Ministry provided the appellant with a second decision letter in which it identified three further records. These were (1) the actual settlement agreement entered into between the parties, (2) Appendix D to the Cabinet Submission (which is a draft of the settlement agreement) and (3) a two-page Cabinet Minute. The Ministry disclosed the first of these documents to the appellant in its entirety. The Ministry decided, however, to withhold Appendix D under sections 12(1)(b), 13(1), 14(1)(a), (b) and (f) and 19 of the Act. The Ministry also declined to release the Cabinet Minute

under section 12(1)(a) of the Act.

The Ministry then indicated for the first time that it wished to apply the exemptions contained in sections 14(1)(a), (b) and (f) of the Act (law enforcement and the right to a fair trial) to the Cabinet Submission which it identified in its original decision letter. These exemptions were claimed well beyond the 35-day time limit specified in the Confirmation of Appeal notice provided to the Ministry. Finally, the Ministry took the position that certain parts of the Cabinet Submission were not responsive to the request.

A second Notice of Inquiry was sent to the parties to obtain submissions respecting the two additional records which the Ministry had located. Representations were received from the Ministry only.

REASONABLENESS OF SEARCH

In his representations, the appellant for the first time expressed his view that additional records that were responsive to his request should exist. Following the receipt of the appellant's submissions, however, the Ministry advised him, through its second decision letter, that it had identified three additional records. As indicated previously, the Ministry then released one of these documents to the appellant.

Following the issuance of the second decision letter, the Commissioner's office contacted the appellant to determine if he wished to make any further representations on the outstanding issues in this appeal. The appellant indicated that he would not be making any further submissions. On this basis, I must assume that the appellant no longer wishes to contest the adequacy of the Ministry's search for responsive records and I will not pursue this issue any further in this appeal.

DISCUSSION:

CABINET RECORDS

The Ministry claims that the Cabinet records exemptions found in sections 12(1)(a) and (b) of the Act apply to the Cabinet Minute and the Cabinet Submission (including the four appendices), respectively.

The relevant parts of section 12(1), which is a mandatory exemption, state 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,

- (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;

...

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of the Executive Council or its committees (not just the types of documents listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

I will turn first to the Cabinet Submission and its four appendices. This document contains background information on the situation of the former Crown wards and provides an outline of the proposed settlement agreement. The four appendices, in turn, contain supplementary information. Appendix A provides a list of the costs associated with the proposed agreement. Appendix B is a chart which describes the interim and future cost implications of the settlement process. Appendix C is a communications plan. Finally, Appendix D contains an actual draft of the agreement.

In its representations, the Ministry indicates that the Cabinet Submission and the four appendices were considered by the Executive Council during a meeting held on April 27, 1994. This point is verified by the contents of the Cabinet Minute.

The Ministry also notes that some of the former Grandview residents have not yet accepted the settlement package and that the deadline for taking up this offer is June 30, 1995. On this basis, the Ministry points out that the implementation of the agreement is still ongoing.

Following a review of evidence before me, I am satisfied that the disclosure of the Cabinet Submission along with its four appendices would reveal the substance of deliberations of the Executive Council. The result is that this package is exempt from disclosure under the introductory wording to section 12(1) of the Act.

I will now consider the Cabinet Minute. In its representations, the Ministry indicates that this document constitutes a minute or other record of the deliberations of an Executive Council and, therefore, falls squarely within the wording of section 12(1)(a) of the Act. I agree and find that Cabinet Minute is properly exempt from disclosure under this provision.

CONSENT TO WAIVE THE CABINET RECORDS EXEMPTION

Section 12(2)(b) of the Act stipulates that, despite section 12(1), the head of an institution shall not refuse to disclose a record where the Executive Council for which the record has been prepared consents to the release of the record.

Previous orders issued by the Commissioner's office have held that, while this provision does not impose a requirement on the head of an institution to seek the consent of the Executive Council to release the relevant

records in every case, the head must at a minimum turn his or her mind to this issue.

In its representations, the Ministry indicates that the Acting Deputy Attorney General, as the delegated head for the purposes of the section 12(2)(b) consent provision, considered whether she should seek the consent of the Executive Council to release the two records. The Ministry has provided the Commissioner's office with the considerations which this official took into account in determining that she should not seek such consent in the present situation. The Ministry also notes that, in this particular case, the official consulted with the Attorney General before making her decision.

I have carefully reviewed the Ministry's submissions on this subject. I am satisfied that the delegated head sufficiently considered the question of whether to seek Cabinet consent to release the records in question. On this basis, the Ministry is entitled to rely on the Cabinet records exemption to withhold the Cabinet Submission and the Cabinet Minute from disclosure.

Based on this determination, it is not necessary for me to consider the Ministry's position that (1) certain portions of the records are not responsive to the request, (2) the records are also exempt from disclosure under sections 13(1), 18(1)(e) and 19 of the Act and (3) it is entitled to raise the section 14(1)(a), (b) and (f) exemptions for the Cabinet Submission after the deadline set for the receipt of discretionary exemptions.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

March 24, 1995

POSTSCRIPT:

In this order, I have determined that the Ministry may rely on the Cabinet records exemption to withhold the two records from disclosure. It is important to point out, however, that the settlement agreement described in the Cabinet Submission involves the expenditure of large amounts of public funds, the details of which have yet to be disclosed.

I have observed in several previous orders that the current fiscal climate has placed an unparalleled

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obligation on officials at all levels of government to ensure that tax dollars are spent wisely. To ensure that such an approach is being applied, it is important that institutions make every effort to disclose the manner in which public funds are being applied to different government programs.

Consistent with this objective, I would encourage the Ministry, once the ongoing settlement negotiations involving the former Grandview residents have been completed, to approach the Executive Council with a view towards obtaining its consent to release to the appellant and the public the financial details of the settlement package. This objective could be accomplished by disclosing Appendix B of the Cabinet Submission, which sets out the general costs associated with the settlement agreement, or by making public a summary of this information.