



Information and Privacy  
Commissioner/Ontario

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

## **ORDER P-920**

Appeal P-9400713

Ministry of the Attorney General



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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 Ministry of the Attorney General (the Ministry) received a request for access to information related to the factors which resulted in the 1992 increase in court fees.

The Ministry identified 165 pages of documents as being the records responsive to the request and denied access to all but three of the pages. The requester appealed this decision.

The appellant subsequently clarified the request and narrowed the scope of the appeal to apply to documents containing the following information:

- 1) details of the proposal to increase probate fees, which was subsequently adopted by the provincial government;
- 2) projections as to the amount of increased revenue anticipated to be obtained as a result of the proposal to increase probate fees; and
- 3) any information pertaining to the proposal to increase probate fees, including internal memoranda and reports.

As a result of this clarification, there are only five records, consisting of 32 pages, remaining at issue. The Ministry also indicated that it was no longer relying on the discretionary exemptions provided by sections 18(1)(a) and (e) of the Act. The records at issue and the corresponding exemptions are set out in Appendix A to this order.

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

While reviewing the records at issue and the submissions of the parties, I formed the view that additional responsive records might exist. Accordingly, I suggested to the Ministry that they undertake another search for more records. As a result of this search, the following two documents, as described by the Ministry, were located:

- (1) Treasury Board Submission - Reallocation Review - Probate Fee: dated April 1, 1992;  
and
- (2) Cabinet Submission - Reallocation Review - Ontario Court System: dated December 5, 1991

So as not to further delay the processing of this appeal, I will dispose of the issues related to the five records described in Appendix A in this order. I will order the Ministry to make an access decision on the two records it has recently located. If the appellant is not satisfied with the decision, he may appeal to the Commissioner's office.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry claims that section 12(1)(d) applies to exempt Records 1, 2, 3 and 5 from disclosure. In addition, it submits that Records 1 and 2 are exempt pursuant to section 12 (1)(b) and that section 12(1)(c) applies to Records 3 and 5. These provisions collectively 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,

...

- (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;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

...

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 records listed under the various parts of section 12(1)), qualifies for exemption under section 12(1).

In its representations the Ministry claims that Records 1 and 2 must be withheld under section 12(1)(b) of the Act. For this exemption to apply to a document, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees.

The Ministry states that it prepared Record 1 and its attachment, Record 2, for a submission to Treasury Board to obtain approval for the proposed increase in court tariffs of fees. Treasury Board is a committee of Cabinet comprised of several senior ministers. The submission, with the spreadsheet analysis attachment, was in fact presented to Treasury Board on April 7, 1992 and considered on that date.

The submission itself contains various "proposals" which I find to be recommendations to Treasury Board as to the amounts of the fee increases. In addition to containing other information, the spreadsheet analysis contains recommendations with respect to the specific proposed dollar figures for each fee tariff.

Thus I find that the Ministry can rely on section 12(1)(b) to withhold Records 1 and 2 from disclosure in their entirety.

The Ministry next claims that Records 3 and 5 are exempt from disclosure under section 12(1)(c) of the Act. Record 3 is a package of materials forwarded to the Assistant Deputy Attorney General from an individual at the Courts Administration Division of the Ministry. Record 5 consists of a memorandum from the Acting Deputy Attorney General to the Deputy Treasurer.

For section 12(1)(c) to apply, the record at issue must contain background explanations or analyses of problems and it must have been 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 addition, it is necessary for the document itself to have been submitted or prepared for submission in this fashion (Order 188).

After providing some background information on the contents of Record 3, the Ministry states that "Ultimately, the problems which are explained in record 114-119 [Record 3] were submitted to the Executive Council for its consideration". However, I have not been provided with any evidence to indicate that this record, or Record 5, was actually submitted or prepared for submission to Executive Council or one of its committees. On this basis, I find that the Ministry cannot rely on section 12(1)(c) of the Act to withhold these records from disclosure.

The Ministry also submits that section 12(1)(d) applies to exempt Records 3 and 5 from disclosure. For the Ministry to successfully rely on this provision, it must demonstrate that the documents were used for or reflect consultations among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

Before it proceeded to seek Management Board approval for an increase in Surrogate Court Tariffs, the Ministry consulted with the Ministry of Treasury and Economics. At the time, the Ministry of Treasury and Economics had begun developing proposals for an initiative which the Ministry felt could impact on its own plans with respect to the Surrogate Court fees. With respect to Record 3, the Ministry states that "These briefing materials include explanations and analyses of problems and options and the recommendations of the civil service". With respect to Record 5, the Ministry states that " ... Such consultation between ministries on related matters is necessary for coordinated policy formulation and government decision making".

I have carefully reviewed the contents of Records 3 and 5 in conjunction with the representations provided by the Ministry. I find that neither of these records reflects consultations among **ministers** of the Crown. In addition, there is no evidence that these documents were actually used for consultation among the ministers in question. On this basis, I find that the Ministry cannot rely on section 12(1)(d) to withhold the two records in question.

In making my findings on the application of sections 12(1)(c) and (d), I have considered the purposes of the Act as set out in sections 1(a)(i) and (ii), namely that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

As section 12(1) is a mandatory exemption, I have also considered whether any of the remaining parts of the section, including the introductory wording, apply to Records 3 and 5. I find that they do not.

## **ADVICE AND RECOMMENDATIONS**

The Ministry claims that Records 3, 4 and 5 are exempt pursuant to section 13(1) of the Act.

This section 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 under section 13(1) of the Act. He 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".

Record 3 consists of four documents : (1) a covering memorandum (page 114), (2) a briefing note (pages 115-116), recommendations (pages 117-118), and (4) a "Questions and Answers" sheet (page 119).

The Ministry submits that this record contains the advice not only of the author of the documents, but also that of public servants employed by the Ministry of Treasury and Economics. The Ministry further claims that the advice and recommendations pertain to suggested courses of action relating to the tariffs, which ultimately had to be considered by the Executive Council. With respect to the "Questions and Answers" sheet, the Ministry indicates that the "responses" provide advice in the form of proposed answers to hypothetical questions.

I have carefully reviewed the four documents which constitute Record 3. I find that they mainly contain factual information for review by the Assistant Deputy Ministry.

As the Ministry suggests, several previous orders issued by the Commissioner's office have held that the response portions of issues sheets, documents analogous to page 119, may qualify for protection under section 13(1) under the category of advice or recommendations. However, in Order P-771, Assistant Commissioner Irwin Glasberg declined to follow that approach. He concluded that the contents of the response sections of issue sheets were purely factual in nature and did not contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process.

I concur with the approach taken by Assistant Commissioner Glasberg and adopt it for the purposes of this appeal. I find that the response section of the "Questions and Answers" sheet does not contain any information which relates

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to a course of action which the Assistant Deputy Minister (or anyone for that matter) might accept or reject as part of the policy development process in this case. Moreover, I find that the content of the responses, like the rest of the document, is purely factual in nature.

I find, however, that the "Recommendations" section of the briefing note (page 116) and the "recommendations" document (pages 117-118) in its entirety satisfy the section 13(1) exemption.

The Ministry submits that Record 4 contains advice on the surrogate court proposal and recommends a course of action. While the document contains the author's opinion of the proposal, in my view, it neither provides any advice nor suggests any recommendations to operationalize this opinion within the deliberative process of government decision making and policy making. Accordingly, it does not qualify for exemption pursuant to section 13(1) of the Act.

The Ministry submits that Record 5 contains recommendations as to a joint course of action to be pursued by the Ministry and the Ministry of Treasury and Economics with respect to some issues of mutual interest. I do not agree. In my view, the memorandum prepared by the Acting Deputy Attorney General analyzes these issues and then asks the recipient of the document, the Deputy Treasurer, for **his** recommendation as to the action the Ministry should pursue. Thus, I find that the advice and recommendations exemption does not apply to Record 5.

In summary, I have found that only portions of Record 3 qualify for exemption under section 13(1) of the Act. I have highlighted these portions on the copy of Record 3 provided to the Freedom of Information and Privacy Coordinator of the ministry with a copy of this order.

The appellant submits that section 13(1) does not apply for two reasons. First, he claims that the exceptions in sections 13(2)(a), (b), (g), (i) and (j) apply. These provisions state:

- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
  - (a) factual material,
  - (b) a statistical survey;
  - (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
  - (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;
  - (j) a report of an interdepartmental committee task force or similar body, or

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of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

I have considered the application of these exceptions to those portions of Record 3 which I have found qualify for exemption pursuant to section 13(1). The factual material in these portions of the document are so intertwined with the advice and recommendations that it is not possible to disclose the factual material without also disclosing the material which is properly exempt. Therefore, the section 13(2)(a) exception does not apply.

The appellant has provided no submissions as to how any of the records at issue could be said to contain information which is a statistical survey. Nor, in my view, can Record 3 be characterized as such. Accordingly, the exception in 13(2)(b) has no application.

Section 13(2)(g) is a mandatory exception to the application of the exemption for a type of document, a study. Even if the record at issue contains advice or recommendations pursuant to section 13(1), the head must disclose the entire record if it is a feasibility study or other technical study, including a cost estimate, relating to a government policy or project. I find that portions of Record 3 which satisfy the exemption do not fall within the parameters of the section 13(2)(g) exception.

I have been provided with no information as to how section 13(2)(i) can be said to apply to the records at issue.

In order for the exception in section 13(2)(j) of the Act to apply, it must be established that:

1. The document is a "report" within the meaning of the Act.
2. The report has been prepared by a committee or similar body within an institution.
3. The committee or similar body has been established for the purpose of preparing a report on a particular topic.

The exempt portions of Record 3 are recommendations. In my view, they do not constitute a "report" within the meaning of the Act. Thus, section 13(2)(j) does not apply.

Therefore, I find that none of the section 13(2) exceptions claimed by the appellant apply to the advice and recommendations which I have previously found to qualify for exemption under section 13(1).

In the alternative, the appellant suggests that because the decision to increase the tariffs has already been implemented, any advice or recommendations related to the decision cannot be characterized as a "suggested" course of action to be accepted or rejected. The exemption in section 13(1) is not time-limited. That is, once a record or part of a record falls within the exemption provided for under section 13(1) of the Act, it does not lose the benefit of the exemption merely because the institution has completed a determination of the matter. However, as the exemption is discretionary, the fact that a decision on the subject matter of the advice or recommendations has been made is one of the factors that should be considered by the head of an institution in the exercise of his or her

discretion.

In the present appeal, the delegated decision maker has exercised her discretion in favour of non-disclosure. Based on the submissions of the Ministry, I find that there is nothing improper in the manner in which the discretion was exercised.

The appellant has also enclosed, as part of his submissions, a reference to an article in which another individual, in response to a request under the Act, was granted access to an internal government memorandum showing projected revenues from a fee increase for annual corporate filing fees. The appellant suggests that this situation should be considered as a precedent to be applied in the present appeal.

In my view, I cannot apply the facts of the case reported in the article to the circumstances of the appeal before me. A different institution, the Ministry of Consumer and Commercial Relations, disclosed the record at issue. Without having seen the document, I cannot conclude that it is "strikingly analogous" to the records at issue in this appeal. Moreover, I would emphasize that most of the exemptions in the Act are discretionary and their application dependent upon the unique circumstances of every case.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant has included as part of his submissions, a section entitled "Evidence in Support of Submissions". In this section, he has provided some background information and sets out what may be characterized as a "public interest argument" pursuant to section 23 of the Act. This section provides as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

This section does not apply to the Cabinet records exemption in section 12(1) of the Act. Therefore, I will only consider its application to those portions of Record 3 which I have found qualify for exemption pursuant to section 13(1) of the Act.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

The appellant submits that:

The Ontario government recently increased probate fees within the province. Experts have reason to believe that the increase has caused people to rearrange their affairs so that their wills can be probated in other jurisdictions or not at all. It is also likely that the brunt of the fee increase is falling on those persons or estates which cannot afford legal advice as to how probate fees can be avoided.

...



It is our impression, based on discussions with estates practitioners that many schemes to reduce or avoid probate fees are being implemented without proper legal advice. A host of problems are undoubtedly being generated as a result. It is hardly in the interest of the public that such poorly conceived schemes are laying the foundations for legal difficulties and/or court battles in the future.

The appellant has provided no evidence to support these claims. In particular, he makes no submissions on how disclosure of the records relates to the problems he appears to attribute to the increase in probate fees. Thus, I find that he has not demonstrated the existence of a compelling public interest in disclosure of the information in Record 3 and section 23 does not apply in the circumstances of this appeal.

## **ORDER:**

1. I uphold the Ministry's decision not to disclose Records 1 and 2 in their entirety and those portions of Record 3 which I have highlighted on the copy of this record 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 Records 4 and 5 in their entirety and the non-highlighted portions of Record 3 to the appellant within fifteen (15) days of the date of this order.
3. 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 2.
4. I order the Ministry to issue a final decision on access to the following records:
  - (1) Treasury Board Submission - Reallocation Review - Probate Fee: dated April 1, 1992;  
and
  - (2) Cabinet Submission - Reallocation Review - Ontario Court System: dated December 5, 1991

in accordance with the provisions of sections 26 and 29 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 27 of the Act.

5. I order the Ministry to provide me with a copy of the decision letter referred to in Provision 4 within thirty-five (35) days after the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_

Anita Fineberg  
Inquiry Officer

\_\_\_\_\_  
May 2, 1995

## APPENDIX A

### INDEX OF RECORDS AT ISSUE

Appeal Number P-9400713

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1 (pages 90-100)	Treasury Board Submission: "Proposed Increase in Court Tariffs of Fees", dated April 7, 1992	12(1)(b) and (d) 13(1)	Decision upheld
2 (pages 101-113)	Spreadsheet Analysis on Tariff of Fees (attachment to Record 1)	12(1)(b) and (d) 13(1)	Decision upheld
3 (pages 114-119)	Memorandum re: Surrogate Court Fees dated December 4, 1990 from Courts Administration Division to Assistant Deputy Attorney General, Courts Administration with attached briefing material	12(1)(c) and (d) 13(1)	Disclose in part
4 (page 120)	Memorandum re: Court Reform - Court Fees dated December 11, 1990 from Director of the Court Reform Task Force to the Assistant Deputy Attorney General, Courts Administration	13(1)	Disclose in full
5 (pages 121-122)	Memorandum re: Increase to Surrogate Court Fees dated January 4, 1991 from Acting Deputy Attorney General to Deputy Treasurer	12(1)(c) and (d) 13(1)	Disclose in full