



Information and Privacy
Commissioner/Ontario

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

ORDER P-987

Appeal P-9500221

Ministry of the Attorney General



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BACKGROUND:

On April 1, 1992, the Ontario Cabinet approved a new Non-Tax Revenue Strategy (the strategy) designed in response to the government's need to improve customer service in the delivery of its programs and to increase revenues from non-tax sources. On July 7, 1992, the Fiscal Planning Branch of the Ministry of Treasury and Economics prepared a report to present an implementation plan for the new strategy. The report was titled "Implementation Plan, Non-Tax Revenue Strategy" (the implementation plan).

The appellant is an individual who believes there is a link between the strategy and increases in the fees charged by various government ministries for performing certain services. For example, in April, 1992, the Ministry of Consumer and Commercial Relations established, by regulation, mandatory annual report filings with associated fees. The appellant maintains that the information contained in documents he has obtained under the Freedom of Information and Protection of Privacy Act (the Act) from the Ministries of Finance and Consumer and Commercial Relations, establishes a connection between the strategy and the passing of the regulation.

The appellant seeks to establish the same link between the increases in estates fees which were established by Ont. Reg. 293/92, made on May 14, 1992. The regulation was made under the Administration of Justice Act, legislation administered by the Ministry of the Attorney General (the Ministry).

NATURE OF THE APPEAL:

The appellant submitted a request under the Act to the Ministry for access to the following six categories of information:

- (1) records describing and/or defining the strategy as it applies to the Ministry;
- (2) records and communications received by the Ministry advising it of the strategy and instructing its implementation;
- (3) records indicating the date that the strategy was approved by Cabinet;
- (4) records setting out the revenue expected to be raised by the Ministry as a result of the strategy;
- (5) records setting out the revenue expected to be raised through the fees for letters probate and letters of administration by the Ministry as a result of the strategy (including gross and net if operating costs were factored in); and
- (6) records relating how the determination was made by the Ministry that the fee increase should be as high as it was.

The Ministry advised the appellant that no records responsive to parts 1-3 of his request existed. The Ministry denied access to records responsive to parts 4-6 of the request on the basis of the following exemptions contained in the Act:

- Cabinet records - sections 12(1)(a), (b), (c), (d), (e) and (f)
- advice and recommendations - section 13(1)

The appellant appealed both aspects of this decision. In his letter of appeal, the appellant identified specific documents which he alleged should exist in response to parts 1-3 of his request. He also objected to the fact that the Ministry failed to identify which records it claimed were responsive to parts 4-6.

During the mediation of this appeal, the appellant forwarded numerous documents to this office in support of his position that more responsive records exist. With the appellant's agreement, these documents were attached to the Notice of Inquiry sent to the Ministry. A Notice of Inquiry was also forwarded to the appellant. Representations were received from both parties.

In its representations, the Ministry indicates that it no longer relies on the application of the exemptions contained in sections 12(1)(a), (c), (e) and (f) of the Act.

The records at issue in this appeal are:

- (1) Treasury Board submission, dated April 7, 1992, entitled: "Proposed Increase in Court Tariffs of Fees"; and
- (2) Spreadsheet analysis on Tariff of Fees (attachment to Record 1).

Accordingly, the issues to be considered in this order are: (1) the existence of additional responsive records to parts 1-3 of the request; and (2) the application of sections 12(1)(b) and (d) and 13(1) of the Act to Records 1 and 2.

THE EXISTENCE OF ADDITIONAL RESPONSIVE RECORDS

In its submissions, the Ministry states that:

... in the process of preparing for this appeal, the Ministry conducted further searches and located several other documents responsive to the request. A decision letter with respect to these records will be sent out shortly.

The affidavit attached to the Ministry's submissions indicates that these additional records were located in the Ministry's Courts Administration Division, Policy Development Division, Crown Law Office - Civil, and Finance Branch (Corporate Services Division).

The Ministry has not provided copies of these documents to this office. Nor has it indicated whether, in its view, these records are responsive to parts 1-3 of the appellant's request. The Ministry has provided no information related to the searches it conducted with respect to this request and appeal. It may very well be that once the Ministry advises the appellant of the nature of the additional records it has located, the appellant will be satisfied that the Ministry has conducted reasonable searches to locate the responsive records.

In these circumstances, I believe that the most expeditious way to deal with this matter is for me to consider the application of the exemptions to the two records the Ministry has identified to date. I will order the Ministry to issue a decision letter with respect to the additional records. Once the Ministry has done so, the appellant may appeal both the access decision and raise the issue of the existence of additional records if he is still not satisfied that the Ministry has located all responsive records.

DISCUSSION:

The records at issue in this appeal are the same as Records 1 and 2 referred to in Order P-920. In that order, I upheld the Ministry's application of section 12(1)(b) of the Act to deny access to these documents. The appellant in this case received a copy of the order and, based on that decision and other documents which have recently come to his attention, has made a number of submissions on the application of the exemptions claimed by the Ministry, that is, sections 12(1) and 13(1) of the Act. I will consider these submissions in the discussion which follows.

CABINET RECORDS

Sections 12(1)(b) and (d) of the Act state:

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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (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 order for the exemption in section 12(1)(b) 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 has essentially reiterated the representations it submitted in Appeal P-9400713. As far as section 12(1)(b) is concerned, the Ministry states that Records 1 and 2 were prepared for and, in fact submitted to, Treasury Board, a committee of Cabinet, on May 12, 1992. The Ministry indicates that the records were used to brief Treasury Board, make recommendations and obtain Treasury Board approval for the proposed increases in court tariffs of fees. The Ministry indicates that the records contain specific policy options with respect to those tariffs which should be increased and why, as well as recommendations with respect to the proposed dollar figures.

The appellant's position on the application of section 12(1) to the records may be summarized as follows. As previously indicated, Cabinet approved the strategy on April 1, 1992. Thus, the strategy was in place at the time at which the records at issue were submitted to Cabinet, that is on April 7, 1992. The appellant submits that the records must therefore be part of the government's implementation of the strategy. Thus he states that:

... it seems unlikely that Records 1 and 2 could contain "Policy options or recommendations" within Section 12(1)(b). The thrust of these records was that the A-G Ministry was applying for approval of its participation in the Revenue Strategy by these documents ...

The appellant goes on to note that, in his view, the records also constitute the "business plan" which is the "contract" between the Ministry and the Treasury Board as set out in the implementation plan attached to the appellant's submissions. The appellant thus submits that:

... it is not the purpose of the Section 12 exemption to prevent the public from having access to documents which are the result of Cabinet deliberations and which are being acted upon on an ongoing basis in fact.

I am not persuaded by the appellant's submissions. In my view, documents submitted to Cabinet which address the implementation of previously-approved policies, may still contain "policy options" and/or "recommendations" within the meaning of section 12(1)(b) of the Act. The implementation plan itself states that "Approval of this implementation plan is required from Treasury Board". Moreover, the implementation plan refers to "proposals" from government ministries which will be measured against a set of "evaluatory criteria" prior to a Treasury Board decision being made. Thus, even if Records 1 and 2 are considered to

be part of the Ministry's implementation strategy, I find that they can still contain "policy options" and/or "recommendations".

As far as the appellant's second argument is concerned, I have been provided with no evidence to support the appellant's assertion that Records 1 and 2 constitute the Ministry's "business plan" as described in the implementation plan. Given the contract requirements and criteria for such business plans as set out in the implementation strategy, I have reservations as to whether the records meet these conditions. However, even if they are so characterized, I am not persuaded that this removes them from the scope of section 12(1) of the Act, nor that, as the appellant suggests, this characterization changes them from a Cabinet submission into a record which constitutes the "results" of a Cabinet submission.

In summary, the appellant's submissions do not satisfy me that the decision I made with respect to these records in Order P-920 is incorrect. I find that Record 1 (the submission) contains various "proposals" which are recommendations to Treasury Board as to the amounts of the fee increases. I find that Record 2 (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) of the Act to withhold Records 1 and 2 from disclosure. Therefore, I need not consider the application of sections 12(1)(d) or 13(1) to the records.

ORDER:

1. I uphold the decision of the Ministry to deny access to Records 1 and 2.
2. I order the Ministry to issue a decision on access to the additional records it has located, in accordance with sections 26 and 29 of the Act, within ten (10) days of the date of this order.
3. I order the Ministry to provide me with a copy of the decision referred to in Provision 2 within fifteen (15) days of 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

August 29, 1995

Inquiry Officer