



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

# **ORDER P-1034**

## **Appeal P-9500194**

### **Ministry of Consumer and Commercial Relations**



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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 revenue 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 notes that in 1992, many fees which had been charged for goods and services rendered by the provincial government were substantially increased. In the case of Ontario corporations, a special filing fee under section 6 of the Ontario Corporations Act was introduced and continued for the years 1993 and 1994. This was provided for in Ont. Reg. 256/92 made on April 30, 1992, under the general regulation section 22(b) of the Corporations Information Act.

It is the position of the appellant that if in fact these fees were a means of raising **general revenue** for the province, they should not have been established through the general regulation, which he maintains, is for the purpose of improving the corporations information system. Rather, the appellant maintains that, according to the Constitution Act, 1867, they should have been raised through an authorizing act of the legislature duly announced in a speech from the throne by the Lieutenant Governor of the province.

The appellant has submitted various requests under the Freedom of Information and Protection of Privacy Act (the Act) to several government ministries in order to ascertain the bases of the 1992 fee increases.

## **NATURE OF THE APPEAL:**

The appellant submitted a request under the Act to the Ministry of Consumer and Commercial Relations (the Ministry) for access to eight categories of information related to the application of the strategy to the Ministry, and, in particular, the mandatory special corporate filing fees.

The Ministry identified six responsive records and provided two of them to the requester. The Ministry denied access to the remaining four records under the following exemptions under the Act:

- Cabinet Records - section 12(1) [ Records 1-3]
- advice and recommendations - section 13(1) [Record 4]

The appellant appealed this denial of access.

He also clarified his request and identified two additional documents which he believes are responsive to the request but which were not included in the six records previously identified by the Ministry:

- (1) A document prepared by Treasury Board sent to the Deputy Minister on or about July 21, 1992 relative to the new strategy designed with the goal of raising non-tax revenues; and
- (2) A letter and attachments from the Ministry of Revenue dated July 28, 1992, to the Deputy Minister concerning the strategy.

The appellant also indicated that the July 28 letter included a reference to “a list of new initiatives which have already been accepted for implementation”. He indicated that the annual information returns for corporations was included on that list. Thus he maintained that his original request would include Ministry records on “The 1991 Non-Tax Revenue Policy Review”.

The Ministry responded that it would conduct an additional search for records responsive to the appellant’s clarification. As a result of this search, the Ministry located another responsive record, the Treasury Board announcement of the strategy with the attached implementation plan. These documents were provided to the appellant. The Ministry stated that it could not locate any other responsive records.

The appellant then sent another letter to the Ministry. In this letter, he asked the Ministry to advise him if there existed a contract between the Ministry and Treasury Board for various programs, including the special and annual corporate filing fees, and, if so, to provide him with a decision on access to the document. The appellant stated that this document was referred to in the implementation plan which the Ministry had recently provided to him. The appellant was then advised that, as this was a new request, it would not be addressed in this appeal.

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

After the Ministry had issued its initial decision letter, it had claimed that section 18(1) also applied to exempt all four records from disclosure. However, in its submissions, it has indicated that it is no longer relying on this exemption. As it is a discretionary exemption, I will not consider it in this order.

Accordingly, the records at issue and the exemptions claimed for each may be described as follows:

- (1) Application to Treasury Board MB20 - sections 12(1)(b) and 13(1);
- (2) Briefing note on Treasury Board Submission - sections 12(1)(c) and 13(1);
- (3) Memorandum from Deputy Minister’s Office regarding Cabinet Minute - sections 12(1)(a) and 13(1); and
- (4) Briefing Presentation on Non-Tax Revenue Policy - section 13(1).

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry claims that the introductory wording of section 12(1) and/or sections 12(1)(a), (b) and (c) of the Act apply to exempt Records 1, 2 and 3 from disclosure.

The relevant parts of the Cabinet records exemption 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,

- (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 submissions, 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;

...

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 an Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), qualifies for exemption under section 12(1).

Other orders have held that a record which has never been placed before an Executive Council or its committees may nonetheless qualify for exemption under the introductory wording of section 12(1). This result will occur where a government organization establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

In addressing the submissions of the parties, I will first consider the Ministry’s representations on the application of section 12(1) to Records 1, 2 and 3 and determine if the records meet the criteria for exemption set out in this section. I will then consider the arguments of the appellant and make my findings on the disclosure of the records.

I will begin by considering the application of section 12(1)(b) to Record 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.

Record 1 is an application to Treasury Board known as an “MB20”. The Ministry states that Ontario government policy requires that an MB20 be prepared any time a Ministry is making a request for funding or expenditure increases. The Ministry indicates that this particular document was created by the Ministry with the assistance of Management Board Secretariat.

I have reviewed this record and agree with the Ministry's submissions that it contains policy options and recommendations with respect to the government's position on annual filings under the Corporations Information Act and fees with respect to those annual filings.

The Ministry further states that this record was submitted to Policy and Priorities Board, a committee of Cabinet, on March 2, 1992, and was discussed by Cabinet on March 11, 1992, as evidenced by Cabinet Minute No. 15(b)-10/92, referred to in Record 3 in this appeal.

Based on the Ministry's submissions, I conclude that Record 1 contains policy options and recommendations and was, in fact, submitted to both a committee of Cabinet as well as Cabinet itself.

I will now determine if Records 2 and 3 meet the criteria for exemption from disclosure under the introductory wording of section 12(1). The preamble states that an institution must refuse to release a record where such disclosure would reveal the substance of deliberations of an Executive Council or one of its committees.

Record 2 is the briefing note which accompanied the Treasury Board MB20 (Record 1). The briefing note was presented to Policy and Priorities Board on March 9, 1992 and to Cabinet on March 11, 1992, as evidenced by the Cabinet Minute previously referred to. This document sets out the issue, originating program, background, financial summary and comments. The Ministry indicates that this record is the "quick explanation" of the issues set out in more detail in Record 1.

On the basis of the Ministry's submissions, and my review of the briefing note, I find that disclosure of Record 2 would reveal the substance of the deliberations of Policy and Priorities Board and the Executive Council in that it would reveal the theme or substance of the deliberations of these bodies.

Record 3 is a memorandum from the Office of the Deputy Minister to the Assistant Deputy Minister. It is an extract from the Cabinet Minute and is a formal recording of the decisions made by Cabinet on March 11, 1992 and by Policy and Priorities Board on March 9, 1992. I accept the submissions of the Ministry that to disclose this record would reveal the substance of the deliberations of these bodies at their respective meetings.

The appellant's position on the application of section 12(1) to Records 1, 2 and 3 is essentially the same as that he advocated in Appeal Number P-9500221, which was resolved by my Order P-987. It is his submission that:

... the records at issue are products or results of the "substance of deliberations", as opposed to the deliberations themselves which led to the implementation of the Revenue Strategy. These records were part of the implementation process ... Regarding the test for section 12(1)(b)... [I]t is submitted that the policy options or recommendations regarding the Non-Tax Revenue Strategy had already been dealt with by the Executive Council or its committees, and that the application to Treasury Board MB-20 form as well as the briefing

note on the Treasury Board's submission were part of the nuts and bolts of the revenue strategy in operation ...

I suggest that the section 12 mandatory exemption deals with matters leading to government policies or decisions, whereas the records at issue relate to the carrying out of those policies or decisions. In the words of section 12(1)(b), these records were not meant to be or contain "policy options or recommendations submitted" to the Executive Council or its committees. The deliberations had taken place and the Non-Tax Revenue Strategy received Cabinet approval on April 1, 1992.

First of all, I would note that, in this case, Records 1, 2 and 3 **pre-date** the April 1, 1992 Cabinet approval of the strategy (unlike the situation in Order P-987 in which the records at issue were submitted to Treasury Board on May 12, 1992, **after** the strategy had been approved).

Secondly, I have found that only Record 1 would qualify for exemption under section 12(1)(b) (I found that Records 2 and 3 met the criteria for exemption under the introductory wording of section 12(1)). In this regard, I would address the appellant's arguments in the same way as I did in Order P-987 in which I stated:

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, in the present appeal, I find that even if Record 1 is considered to be part of the Ministry's implementation strategy, it can still contain "policy options" and/or "recommendations" for the purpose of section 12(1)(b).

In his supplementary representations, the appellant claims that he has concluded that Records 1 and 2 constitute the "business case that will constitute the basis of the multi-year contract with Treasury Board". This is referred to in the implementation plan as follows:

Ministries that wish to participate in this new strategy by either developing a new revenue generating program or revising an existing one will be required to complete a TB20 form. The TB20 will include a business case that will constitute the basis of the multi-year contract with Treasury Board, along with the corresponding Treasury Board minute.

In this regard, the appellant 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.

Once again, these are essentially the same arguments the appellant proposed in Appeal P-9500221. In Order P-987 I addressed them as follows:

... 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 contains the "results" of a Cabinet submission.

In this appeal, Record 1 contains more detail than the records at issue in Appeal P-9500221, such that it is possible that it might be characterized as the Ministry's "business case". However, not only does this record pre-date the April 1, 1992 Cabinet approval of the strategy, it also pre-dates the July 7, 1992 implementation plan. Moreover, Record 1 is an "MB20" while the implementation plan refers to a "TB20". Therefore, it is difficult to see how Record 1 could form the TB20 referred to in the implementation plan. In addition, I remain of the view that the document could be a "business case" and still be considered to be a Cabinet submission.

As far as Records 2 and 3 are concerned, I have found that they qualify for exemption under the introductory wording of section 12(1), which contains none of the limitations suggested by the appellant in his submissions.

In summary, I do not accept the appellant's submissions that Records 1, 2 and 3 cannot qualify for exemption under section 12(1) of the Act. I find that Record 1 is exempt pursuant to section 12(1)(b) and that Records 2 and 3 are exempt under the introductory wording of section 12(1) of the Act.

## **ADVICE OR RECOMMENDATIONS**

The Ministry claims that Record 4 is exempt from disclosure under section 13(1) of the Act which states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any 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 4 is a document titled “Non-Tax Revenue Policy, A New Approach to Revenue Generation in the OPS, 1992-93 and Beyond”. It was presented by an Assistant Deputy Minister (the ADM) of the Ministry to senior managers in the Ontario public service at a financial management forum held on June 11, 1992.

At the outset, I note that the information contained in this record is strikingly similar to that included in a document dated January 14, 1992, prepared by a group called the Non-Tax Revenue Review Committee (the Committee), and entitled “A New Non-Tax Revenue Strategy for the Ontario Government and Best Non-Tax Revenue Generation Opportunities for 1992-93” (the Committee report). The appellant has attached a copy of this document to his supplementary representations and advised that he received it from the Ministry of Finance in response to a request to that institution under the Act. The ADM who presented Record 4 was the chairperson of the Committee.

I will now consider the Ministry’s submissions on the application of section 13(1) to Record 4.

The Ministry submits that the record contains the advice and recommendations of a public servant as to how to adopt and implement the non-tax revenue policy of the Ontario government. The Ministry also states that:

...The record in question is a communication from a public servant to other public servants identifying policy options and models to provide advice to senior level decision makers.

In my view, the contents of this document do not reflect the deliberative process of government decision-making or policy making. I will examine the various sections of this document in explaining how I reached this conclusion.

The first seven pages of the record contain background factual information on the non-tax revenue policy and the work of the Committee established to develop the policy.

The next four pages contain four “options” as to the manner in which the strategy may be implemented in various situations. There are no “pro’s and con’s” set out for each option. Nor is the ADM recommending or advising the senior managers that one option should be adopted in preference to the others. Rather, it is clear from the record itself that these options are not mutually exclusive. The options represent four different approaches which may be applied to the various types of programs and services listed under each category. Moreover, the four options are set out in even greater detail on pages 4, 5 and 6 of the Committee report. In these circumstance, I find that the options do not constitute advice or recommendations for the purposes of section 13(1).

The next page is entitled “Recommended Requirements re: Implementation”. In my view, this information does not form part of the deliberative process of government. Despite the inclusion of the word “recommended” in the title, this page establishes the criteria for the types of proposals which would be



considered to meet the goals of the non-tax revenue strategy. That is, any non-tax revenue opportunities which are identified must meet the listed conditions before being considered for implementation as part of the new strategy. In addition, these requirements appear on page 15 of the Committee report where they are set out as "... a set of principles and guidelines around revenue generation...".

The next two pages are entitled "How to Utilize this Policy". Essentially, this is a list of ten items which a manager should consider in establishing the process for identifying strategic opportunities and implementing them. I do not find that disclosure of these guidelines would interrupt the free flow of advice within the deliberative process of government decision-making or policy making.

The next six pages of Record 4 consist of examples and initiatives raised by the Committee and non-tax revenue opportunities. They do not represent advice or recommendations.

The balance of this record outlines the potential benefits and risks for these new programs. I find that their disclosure would not reveal the advice or recommendations of the ADM. They are very general and do not relate to government decision-making or policy making.

In summary, based on my review of the record itself, and the similarity between the information contained in it and that included in the previously disclosed Committee report, I find that Record 4 does not qualify for exemption under section 13(1) of the Act and should be disclosed to the appellant in its entirety.

**ORDER:**

1. I uphold the decision of the Ministry to deny access to Records 1, 2 and 3.
2. I order the Ministry to disclose Record 4 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 record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_  
October 25, 1995