



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

ORDER P-1146

Appeal P-500721

Ministry of Transportation



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NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Transportation (the Ministry). The request was for copies of any documents pertaining to the selection, approval and budget allocation for the Bradford Bypass Proposal/Study and the engagement of a consultant. The request specifically indicates that it includes:

... copies of any call for tender documents and responses thereto for this engagement and any document analyzing and recommending acceptance of the [winning] bid, if there was one, or any other reason for granting the contract to this consultant.

The Ministry disclosed five responsive records and denied access to several others. The Ministry relies on the following exemption in the Act to deny access to the undisclosed records:

- Cabinet records - section 12.

The appellant filed an appeal of the denial of access. The letter of appeal also suggests that, in the appellant's view, additional responsive records exist. This raises the issue of whether the Ministry's search for records was reasonable in the circumstances.

The records initially located by the Ministry which are at issue in this appeal consist of:

- two Management Board submissions (Records 6 and 7);
- one clarification of a Management Board Submission (Record 8);
- two extracts of Management Board minutes (Records 9 and 10); and
- an Application and Report to Management Board, also known as an "MB20" (Record 11).

This office sent a Notice of Inquiry to the appellant and the Ministry. Representations were submitted by both parties.

During the inquiry stage of this appeal, the Ministry discovered an additional responsive record, consisting of an Application and Report to Management Board (Record 12). The Ministry decided to deny access to this record under section 12, and advised the appellant of this decision by letter. The Ministry has provided representations in support of its decision to deny access to Record 12. The appellant was offered an opportunity to make representations with respect to this record and indicated that he relies on his previous representations in this regard.

DISCUSSION:

CABINET RECORDS

This exemption is found in section 12 of the Act, which states, in part:

- (1) 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 submission, to the Executive Council or its committees; ...
- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where, ...
 - (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The term "Executive Council" means Cabinet. Section 3(1) of the Management Board of Cabinet Act specifies that Management Board is a "committee of the Executive Council".

Records 6 and 7 consist of Management Board submissions, and Record 8 is a clarification of the submission in Record 7. The Ministry's representations confirm that these documents were submitted to Management Board. This is reinforced by the contents of Records 9 and 10, which are Management Board minutes confirming the approval of these submissions. I find that Records 6, 7 and 8 meet the criteria outlined in section 12(1)(b), and they are exempt.

Records 9 and 10 are extracts of Management Board minutes. I find that they are exempt under section 12(1)(a).

Records 11 and 12 are both entitled "Application and Report to Management Board". These forms are also referred to as "MB20's". The entire purpose for preparing these forms is to submit them to Management Board in order to obtain funding approvals. Again, the submission of these records to Management Board is confirmed not only in the Ministry's representations, but by the approvals recorded in Records 9 and 10. I find that Records 11 and 12 are exempt under section 12(1)(b).

The appellant submits that the consent of Cabinet to disclosure of these records should be sought, in order to bring them within the exception in section 12(2)(b). 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 Cabinet to release the relevant records in every case, the head must at a minimum turn his or her mind to this issue.

The Ministry's representations indicate that this possibility was considered. Because the records relate to a previous government, and because of conventions and protocols accompanying a change of government, the Ministry decided not to seek consent. I agree with the Ministry's decision in this regard, although for a slightly different reason. Section 12(2)(b) indicates that consent to disclosure must come from "the Executive Council for which, or in respect of which,

the record has been prepared". As that body (i.e. the Cabinet of the previous government) no longer exists, it would not be practical to seek its consent to disclosure.

I uphold the Ministry's decision to deny access to the records under section 12.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that further 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 further 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In his letter of appeal, the appellant argues that there should be more documentation to support the decisions taken by Management Board.

The Ministry's representations indicate that, in this case, a formal tender was not undertaken. Rather, an alternative process known as "roster/rotation" was followed. Therefore, no tender documents were produced. The Ministry also indicates that the analysis to support Management Board's decisions is contained in the Management Board submissions (Records 6 and 7), which are exempt under section 12.

The Ministry's representations go on to outline the process employed to locate responsive records. Two searches were conducted in the Ministry's Central Region Planning Office (which would be responsible for a project in the Bradford area). The first search was at the request stage, and the second was undertaken after the appeal was filed. The second search did not produce any further records. This is verified by three affidavits of Ministry employees who conducted the searches. I am satisfied that these individuals are knowledgeable about the relevant record-keeping systems.

With regard to the discovery of Record 12 during the inquiry, the Ministry explains that, as a result of a review of the records initially located, it became apparent that Record 12 should have been included as responsive. A copy was obtained and a decision on this record was issued to the appellant.

In the circumstances of this appeal, I find that the appellant has not provided a reasonable basis for concluding that additional records may exist. Moreover, I am satisfied that the Ministry's record searches were reasonable under the circumstances. Accordingly, I will dismiss this aspect of the appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 6 through 12, inclusive.
2. The Ministry's search for responsive records was reasonable and the appeal relating to the search for records and the existence of additional records is dismissed.

Original signed by: _____

John Higgins
Inquiry Officer

_____ March 13, 1996