



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

ORDER P-1351

Appeal P_9600365

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to “the implementation of market value assessment or actual value assessment on neighbourhoods and/or individual properties in the City of Toronto”. Specifically, the requester sought access to any studies on the “distribution of tax increases or decreases along with any other impact studies which have been prepared”. The requester is a representative of the City of Toronto’s Urban Development Services Department.

The Ministry denied access to the impact studies which it prepared as part of the “Golden Report”, claiming the application of section 22(a) of the Act, as these records are publicly available in a CD-ROM version from Publications Ontario. It also denied access to three additional impact studies which it prepared, under the Cabinet records exemptions contained in sections 12(1)(c) and (d).

The requester, now the appellant, appealed the Ministry’s decision to deny access to the three impact studies and submitted that additional records responsive to his request should exist.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from both parties. In its submissions, the Ministry appears to have withdrawn its reliance on section 12(1)(c) and, instead, is now relying on sections 12(1)(b), (d) and (e). Because sections 12(1)(b), (d) and (e) are mandatory exemptions, I am obliged to review their possible application to the responsive records.

DISCUSSION:

CABINET RECORDS

Sections 12(1)(b), (d) and (e) of the Act provide that:

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;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be

brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

I will begin by applying the introductory wording of section 12(1) to the records.

Introductory Wording of Section 12(1)

It has been determined in many previous orders that the use of the word "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 subparagraphs of section 12(1)), qualifies for exemption under section 12(1).

In addition, it is possible that a record which has never been placed before an Executive Council or its committees may qualify for exemption under the introductory wording of section 12(1). This result will occur where an institution establishes that 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.

The Ministry submits that the disclosure of the Cabinet Submission, which includes the studies which are the subject of this appeal, would reveal the substance of the deliberations of the Executive Council which took place on March 27, 1996. It further argues that the studies themselves "are an integral part of the Cabinet Submission and were made available for Cabinet to consider."

In Order 40, former Commissioner Linden, when faced with determining whether certain "Cabinet Submissions" fell within the ambit of the introductory wording in section 12(1), made the following observations:

In my view, if records #2, #3 and #4 went before the Executive Council or any of its committees (which they did), and decisions were subsequently made by the Executive Council about the subject matter contained in them (which they were), then disclosure of these records would necessarily reveal the substance of deliberations of an Executive Council or its committees and therefore meet the requirements for exemption under subsection 12(1). I therefore find that records #2, #3 and #4 fall within the scope of the subsection 12(1) mandatory exemption.

I accept the Ministry's contention that the records at issue were included in a Cabinet Submission which went before the Executive Council on March 27, 1996. I also accept that certain deliberations concerning the contents of the submission took place. I find, therefore, that the disclosure of the records at issue would necessarily reveal the substance of those deliberations by the Executive Council. Because the requirements for exemption under the introductory wording of section 12(1) have been met, the records are exempt from disclosure.

Section 12(2)(b)

Section 12(2)(b) reads as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

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 [Orders P-771 and P-1146].

The Ministry has provided an affidavit from its delegated head, the Freedom of Information and Privacy Co-ordinator. There, the Co-ordinator indicates that he considered whether to seek the consent of Cabinet to disclose the requested records. Elsewhere in its submissions, the Ministry submits that because of the sensitivity of the information contained in the records, there was "no likelihood of the consent being given". For this reason, the Ministry indicates that it did not seek the consent of Cabinet.

In my view, the head of an institution must determine whether or not to bring the matter before Cabinet for the purposes of section 12(2)(b) based on the circumstances of the individual case and the nature of the records at issue. In this case, the factors which would lead the Minister of Finance, as head of the institution, to bring the issue of consent before Cabinet would be the following:

- (1) The legislation which enacts the new property assessment scheme was tabled after the Ministry made the decision not to disclose this information and not to seek Cabinet consent to its disclosure.
- (2) Similar types of statistical information appear in the appendices to the Golden Report, albeit based on other, earlier data.
- (3) The Cabinet for whom the records was created is still in place.
- (4) The records at issue are not the entire Cabinet Submission. Rather, they are discrete documents which were appended to the submission. They are easily separated from the submission and are limited to the statistical information prepared by the Ministry.
- (5) The information would be of significant interest to hundreds of thousands of property owners across the Greater Toronto Area.

In the present case, the government has not changed since the date of the submission of the records to Cabinet. In addition, it would appear that the delegated head exercised his discretion not to seek Cabinet consent to the disclosure of the records at the time the decision letter was issued in September 1996. Since that time, the assessment of real property in the province has been the subject of recently-introduced legislation and has been the focus of intense public and

media scrutiny. Finally, the proposed legislation relating to the manner in which properties are assessed will affect the people of Ontario in a significant way. In my view, the disclosure of the records by the Ministry would clearly assist the public in assessing the impact of the legislation.

In light of the changed circumstances since the time that the delegated head made the decision not to seek Cabinet consent and taking into account the impact on the public of the proposed legislation, I believe that it would be appropriate for the Minister of Finance to now seek the views of Cabinet on whether these records may now be disclosed.

ADEQUACY OF SEARCH

The appellant submits that it is his understanding that the Ministry retains copies of all reassessment impact studies which it prepares and then forwards to individual municipalities throughout Ontario. For this reason, he believes that additional studies should exist.

The Ministry provided an affidavit sworn by an Economic Specialist in the Property Taxes Section of the Tax Policy Branch of the Ministry in which she states that the only impact studies which exist are those which were made public in the Golden Report and the three studies which were attached to the March 27, 1996 Cabinet Submission and identified as the records at issue in this appeal.

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that such a record does 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 the requested record does 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.

I have considered the submissions of the parties and I find that the Ministry's search for records which are responsive to the appellant's request was reasonable in the circumstances of this appeal.

ORDER:

1. I order the Ministry to outline the relevant fact situation to the Premier (as head of the Executive Council) or his designate, in writing, to determine whether the Executive Council would be prepared to consent under section 12(2)(b) of the Act to the release of the records. I further order that the response given by the Executive Council is to be provided to the appellant no later than **March 27, 1997**.
2. I order the Ministry to provide me with a copy of the response of the Executive Council mentioned in Provision 1 of this order no later than **April 1, 1997**. This document should be sent to my attention c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. I find that the Ministry's search for records was reasonable and dismiss that portion of the appeal.

Original signed by: _____

_____ February 25, 1997

Donald Hale
Inquiry Officer