



Information and Privacy
Commissioner/Ontario

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

ORDER P-1425

Appeal P_9600462

Ministry of Environment and Energy



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 Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to the continuation of the Ministry's Intervenor Funding Project. The Ministry located a number of responsive records and granted access to some of them, in whole or in part. Access to the remaining records and parts of records was denied, pursuant to the following exemptions contained in the Act:

- Cabinet records - sections 12(1)(a), (b) and (e)
- advice or recommendations - section 13(1)
- relations with other governments - section 15
- solicitor-client privilege - section 19

The requester, now the appellant, appealed that part of the Ministry's decision which dealt only with 14 severances made to a 63-page record entitled "Content of Final Decision Note to Minister Elliott". The Ministry claimed the application of sections 12(1)(a), (b) and (e), as well as section 13(1) to the severed portions of this document, a 12-page summary and five appendices totalling 41 pages.

A Notice of Inquiry was provided to the Ministry and the appellant, legal counsel to an environmental organization which often appears as an intervenor at hearings before the Environmental Assessment Board (the EAB), the Ontario Energy Board (the OEB) and Joint Boards under the Consolidated Hearings Act. Representations were received from the appellant and the Ministry. The Ministry also indicated that it intended to rely on the application of section 12(1)(f) to exempt certain portions of the record. This was communicated to the appellant, who advised that he did not wish to make any further submissions on the possible application of this section to the information contained in the record.

DISCUSSION:

CABINET RECORDS

As noted above, the Ministry is relying on sections 12(1)(a), (b), (e) and (f) of the Act. These sections 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 submission, to the Executive Council or its committees;

- (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; and
- (f) draft legislation or regulations.

I will determine whether the exemptions under section 12(1) apply to each of the 14 severances as they appear in the record.

Severances 1 and 2

The Ministry submits that the information which has been withheld from disclosure on page 1 and under bullet point 1 on page 2 is identical to that contained in a February 19, 1996 briefing note provided to the Minister. For this reason, it argues that the record was prepared to brief a minister of the Crown within the meaning of section 12(1)(e) and it is, accordingly, exempt under this section. I do not agree with the position taken by the Ministry with respect to this information. The subject matter of these portions of the record was not proposed to be taken, nor was it ultimately brought, before Cabinet or one of its committees. For this reason, I find that section 12(1)(e) has no application to these portions of the record.

Severances 3 and 6

The Ministry submits that Severance 3 on page 2 and Severance 6 on page 8 of the record contain references to information contained in a Cabinet submission which was provided to the Policy and Priorities Committee of Cabinet on February 14 and May 14, 1996. I find that the disclosure of this information would reveal the substance of deliberations of two meetings of Cabinet. The information is, therefore, exempt under the introductory wording to section 12(1).

Severances 4, 5 and 8

Severances 4, 5 and 8 on pages 2 and 3, pages 3 to 8 and pages 22 to 25 respectively, contain an outline of the options available to the government with respect to the continuance of the Intervenor Funding Project. The Ministry submits that these portions of the record fall within the ambit of section 12(1)(b) as they contain policy options. I have not, however, been provided with any evidence that this information was, in fact, submitted or prepared for a submission made to Cabinet or one of its committees. I find that this information is not, accordingly, exempt under section 12(1)(b).

Severance 7

The Ministry submits that Severance 7, contained in pages 18 and 19, is exempt under the introductory wording to section 12(1). It submits that the disclosure of this portion of the record would reveal the deliberations of the respective Ministers attending a Policy and Priorities

Committee meeting. It also indicates, however, that the information in these records reflects certain discussions which took place at two meetings in the fall of 1995 between the Ministry and representatives of other "stakeholder ministries". I have not been provided with any evidence to demonstrate that these meetings took place in the context of a meeting of Cabinet or its committees, as is required by the introductory wording to section 12(1).

In my view, in the absence of such evidence, I am unable to find that the substance of the deliberations of Cabinet or one of its committees would be revealed by the disclosure of this portion of the record.

Severance 9

The Ministry submits that Severance 9, found on page 26 of the record, is exempt under section 12(1)(f) as it contains draft wording to be incorporated into certain proposed legislation. I agree that, because Severance 9 contains draft legislation, it is properly exempt under section 12(1)(f).

Severance 10

The information contained in Severance 10 on pages 31 and 32 relates to the steps to be taken by the Ministry, along with the Ministry of the Attorney General, in relation to the implementation of the strategies agreed upon by the Policy and Priorities Committee of Cabinet. As such, I agree with the Ministry's submission that this portion of the record is properly exempt under section 12(1)(e).

Severance 11

As was the case with Severances 4, 5 and 8, Severance 11 contains policy options with respect to the future of intervenor funding in Ontario. I have found above that Severances 4, 5 and 8 were not exempt under section 12(1)(b) as I had not been provided with sufficient evidence to demonstrate that these portions of the record, which contain a number of policy options, had been submitted or prepared for submission to Cabinet or its committees. Again, and for identical reasons to those described in my discussion of Severances 4, 5 and 8 above, I find that Severance 11, on pages 31 to 36, does not qualify for exemption under section 12(1)(b).

Severances 12, 13 and 14

The Ministry submits that the information contained in these portions of the record, which represent an analysis of the options detailed in Severance 11, amount to a draft version of the information presented to the Minister in the briefing note dated February 19, 1996. It indicates that this information is also an earlier version of the options and recommendations made to the Minister in 1995. The Ministry goes on to submit that:

Disclosure of the information in exemptions 11, 12, 13 and 14 would reveal the disclosure of the options **that would have been discussed by P & P** (Policy and Priorities Committee of Cabinet) **had the government decided to continue funding**. Alternatively, the information will form the basis of the Cabinet Submission relating to the OEB review. [emphasis added]

It is clear from these submissions that this information was not submitted to Cabinet or one of its committees and I have been provided with no evidence to indicate that it will be referred to in any future submission. For this reason, I find that the information contained in Severances 12 (on page 46), 13 (on pages 46 and 47) and 14 (on page 48) is not exempt under section 12(1)(b).

In conclusion, I have found that Severances 3, 6, 9 and 10 are properly exempt under section 12(1). I will now proceed to determine the application of section 13(1) to Severances 1, 2, 4, 5, 7, 8, 11, 12, 13 and 14.

ADVICE OR RECOMMENDATIONS

The Ministry submits that the information contained in each of the remaining severances are exempt under section 13(1) of the Act. This section reads:

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.

The Ministry indicates that the record was prepared by a Policy Analyst in its Policy Development Branch. The record also incorporates the information contained in the February 19, 1996 briefing note prepared by the Policy Analyst for the Minister's consideration.

Severances 4, 5, 8, 11, 12, 13 and 14 contain various policy options describing alternative courses of action available to the Minister and the government relating to the issue of continued funding for the intervenor project. The Ministry submits that in Orders 128, P-529, P-658, P-922 and P-978, the Commissioner's office has held that information containing a suggested course of action, as well as the advantages and disadvantages of each option, is properly exempt under section 13(1). It further argues that the disclosure of the information contained in these severances would allow the drawing of accurate inferences about the recommended course of action which is also contained in the records.

I have reviewed the information contained in Severances 4, 5, 8, 11, 12, 13 and 14 and find that each contain either a suggested course of action or their disclosure would allow the drawing of accurate inferences about the recommended course of action. Accordingly, in my view, their disclosure could reasonably be expected to reveal advice or recommendations of a public servant within the meaning of section 13(1).

I have also reviewed the records in order to determine whether they contain information which falls within the ambit of the mandatory exceptions to section 13(1), set out in section 13(2). I find that none of the exceptions in section 13(2) apply to this information.

The Ministry has only made generic submissions with respect to Severances 1 and 2. Based on my review of this information, I find that they do not qualify for exemption under section 13(1).

With respect to Severance 7, the Ministry argues that the information represents advice received from civil servants employed by other Ministries at a meeting held to discuss intervenor funding

on October 5, 1995. I have reviewed the information contained in Severance 7 and find that it qualifies for exemption under section 13(1). The disclosure of this portion of the record could reasonably be expected to reveal the advice of a public servant. None of the exceptions set out in section 13(2) apply to this information.

By way of summary, I find that Severances 3 to 14 are exempt from disclosure under either sections 12(1) or 13(1). Severances 1 and 2 do not qualify for exemption under either section, however.

ORDER:

1. I uphold the Ministry's decision to deny access to the information contained in Severances 3 to 14 of the record.
2. I order the Ministry to disclose to the appellant the information contained in Severances 1 and 2, on pages 1 and 2 of the record, by **August 6, 1997**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

July 16, 1997