



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

# ORDER P-1623

Appeal P\_9800122

Management Board of Cabinet



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## **NATURE OF THE APPEAL:**

Management Board of Cabinet (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the decision to pursue the privatization of services presently provided by the Ontario Realty Corporation. In particular, the requester sought access to business plans or financial analyses developed internally by senior management or externally by a consultant or consulting firm, related to the decision to privatize.

In November, 1995, the government announced a major initiative designed to reduce the costs of internal administration within the Ontario Public Service over the next two years. In this regard, Management Board Secretariat (MBS) produced a framework entitled "Alternative Service Delivery" (ASD) which set out a number of options for the delivery of services traditionally carried out directly by civil servants. The records requested relate to ASD options for services presently provided by the Ontario Realty Corporation.

The Board located records responsive to the request and denied access on the basis that section 12(1) (cabinet records) applied. The Board also indicated that section 65(6) (jurisdiction) applied to some of the records. The requester (now the appellant) appealed the decision to deny access.

During mediation, the Board withdrew its reliance upon section 65(6) of the Act and granted access to four records.

The records that remain at issue consist of 15 records listed and described in an Index of Records prepared by the Board and provided to the appellant and this office. The sole issue to be determined in this appeal is the application of section 12(1) to the records.

This office provided a Notice of Inquiry to the appellant and the Board. Representations were received from both parties.

## **DISCUSSION:**

### **CABINET RECORDS**

The Board has claimed the application of sections 12(1)(a), (b) and (c) of the Act, as well as the introductory wording contained in the section, to the records at issue. Section 12(1) provides, in part, as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the 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;
- (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.

### **Section 12(1)(a)**

The Board claims that Records 5 and 9 are exempt from disclosure under section 12(1)(a) because they reveal minutes which contain notification of a Cabinet decision. The Board states that all Alternative Service Delivery initiatives require approval first from the Board before being ratified by Cabinet.

I have carefully reviewed Records 5 and 9 and I agree that they form parts of minutes of meetings of Management Board of Cabinet, and disclosure would reveal a decision of the Executive Council or its committees. I find that Records 5 and 9 are properly exempt from disclosure under section 12(1)(a) of the Act.

### **Sections 12(1)(b) and (c)**

In order for the records to qualify under section 12(1)(b), the Board must satisfy two criteria:

1. the record must contain policy options or recommendations, and
2. the record must have been submitted or prepared for submission to the Executive Council or one of its committees.

[Order 73]

Previous orders have established the following standard for considering records subject to a section 12(1)(c) exemption claim. For a record to qualify for exemption under this section, the Board must establish that:

1. The record contains background explanations or analyses of problems to be considered; **and**
2. The record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions; **and**
3. The matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; **and**

4. The decision at issue has not been made **or** implemented. [my emphasis added here]

[Order 60]

Having considered this test and the wording of the section, it is my view that it would be more appropriate to restate the section 12(1)(c) test as follows:

For a record to qualify under section 12(1)(c), the Board must establish that:

1. the record contains background explanations or analyses of problems to be considered: **and**
2. the record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions; **and**
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; **and**
4. the decision at issue either
  - (i) has not been made or
  - (ii) has been made but not implemented.

The Board submits that Records 1, 2, 4, 6, 7, 9, 10, 11, 12, 15 and 17 are exempt under sections 12(1)(b) and (c). The Board submits that these records contain policy options and recommendations submitted or prepared for submission to the Executive Council or its committees. The Board states that the records were prepared at various stages in the process, beginning with the business cases and ending with the approval of the alternative service delivery on November 4, 1997.

The Board submits that Records 13 and 14 are also exempt under section 12(1)(b) as they contain submissions or recommendations about restructuring, downsizing and layoffs. The Board states that this information is directly related to Record 1, which sets out the issues of staffing and outsourcing.

The Board has also claimed the exemption in section 12(1)(b) for Record 16. It states that the record contains details of discussions between Management Board Secretariat and the Office of Privatization. The Board points out that these details or particulars were reported back to Management Board of Cabinet, a committee of Cabinet.

The Board submits that the records which are exempt under section 12(1)(b) are also exempt under 12(1)(c) as they contain background explanations and analyses. The Board states that at

the time of the request, approval for the ASD had been given but the program has not been implemented. The Board states further that Management Board of Cabinet is required to report back to Cabinet in February, 1999, on the results of the procurement process, prior to the awarding of any contracts under the ASD.

I have carefully examined the records and I note that Records 10 and 16 also contain memos and handwritten notes. I will consider these parts of these two records in my discussion of the introductory wording of section 12(1) of the Act. I find that Record 14 does not contain policy options or recommendations and I will consider it under the introductory wording discussion below.

I find that all of the remaining records contain policy options or recommendations relating to the ASD. I am also satisfied, upon review of the records, that they were either submitted or prepared for submission to the Executive Council or one of its committees and section 12(1)(b) therefore applies to exempt them from disclosure.

I find also the records contain or have attached detailed explanations or analyses of data in support of the options and recommendations put forth. The records are all dated prior to November 4, 1997 when Management Board of Cabinet approved the ASD. The Board has advised that Management Board is required to report back to the Executive Council and/or its committees with the results of the procurement process prior to the awarding of contracts, and that the matter is on the agenda for a meeting in February, 1999. The restated test requires that the decision at issue either has not been made **or** has been made but not implemented. I am satisfied that the decision to proceed with the ASD has been made but has not been implemented. I find, therefore, that each of the requirements for sections 12(1)(b) and (c) have been satisfied and the records are properly exempt.

### **Introductory Wording**

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). The Board submits that Record 16 contains the substance of discussions between Management Board Secretariat and the Office of Privatization which were reported back to Management Board of Cabinet for consideration and that disclosure of Record 14 would permit the drawing of accurate inferences regarding the substance of deliberations on staffing at a Management Board Meeting.

The Board also relies on previous orders of this office which have determined that it is possible for records that have never been placed before an Executive Council or its committees to qualify for exemption under the introductory wording of section 12(1). In my view Records 10, 14 and 16 contain information, which if disclosed, would reveal the substance of deliberations of the Executive Council or its committees. I find, therefore, that Record 14 and the remaining parts of Records 10 and 16 are properly exempt under the introductory wording in section 12(1) of the Act.

### **ORDER:**

I uphold the decision of the Board.

Original signed by: \_\_\_\_\_  
Muntaz Jiwan  
Adjudicator

\_\_\_\_\_ October 8, 1998