



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

# **ORDER PO-1652**

Appeal PA-980182-1

Ministry of Finance



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## **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 all records created since June 1, 1997 showing a decision or direction by the Minister, the Deputy Minister or an Assistant Deputy Minister regarding Pay Proxy Equity. The request included, but was not limited to, any records related to either or both of the following:

- (i) the announcement made by the Minister of Finance on December 15, 1997 regarding \$140 million dollars for retroactive Proxy Pay Equity adjustments and \$500 million for ongoing Pay Equity adjustments;
- (ii) any communications between the Ministry of Finance and the Ministry of Health regarding Pay Equity.

The Ministry identified 40 responsive records. It granted access to three records, and denied access to the remaining 37 records in their entirety, claiming exemptions under sections 12(1)(b), (c), (d) and (e), 13(1) and 18(1)(g) of the Act.

The requester (now the appellant) appealed this decision.

During mediation, the appellant was provided with a copy of the Ministry's index which describes the records and sets out the exemptions claimed for each.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only.

I will use the Ministry's numbering scheme in referring to the records with one minor change. Record 40 is referred to in the Ministry's index as a single record, but the Ministry's representations consider it as eight separate records (Records 40A through 40H). I will also deal with it as eight records.

The Ministry states in its representations that it has decided to disclose Records 4, 8-18, 22-23, 36-37 and 39 in their entirety, as well as portions of Records 1, 2, 19, 20, 21 and 34. Accordingly, these records or partial records are no longer at issue in this appeal. It is unclear whether these records have actually been disclosed to the appellant, so I will include a provision in this order requiring disclosure.

The Ministry's representations make no reference to the application of sections 12(1)(c), (d) and (e), and section 18(1)(g). I assume the Ministry is no longer relying on these exemptions. Because section 12(1) is a mandatory exemption, I will take paragraphs (c), (d) and (e) of this exemption into account in my discussion of section 12(1) which follows.

## **PRELIMINARY ISSUE:**

### **LATE RAISING OF A DISCRETIONARY EXEMPTION**

On July 14, 1998, the Commissioner's office provided the Ministry with a Confirmation of Appeal, indicating that an appeal from the Ministry's decision had been received. The Confirmation also stated that, based on a policy adopted by the Commissioner's office, the Ministry had 35 days from the date of the Confirmation (i.e. until August 19, 1998) to raise any new discretionary exemptions not originally claimed in its decision letter.

The policy referred to in the Confirmation was originally brought to the attention of the Ministry in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions During an Appeal", distributed by the Commissioner's office to all provincial and municipal institutions in January 1993. The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the disclosure of information is prejudiced.

The Ministry did not raise any additional exemptions during this 35-day period.

In the Ministry's representations dated December 18, 1998, it raised the section 19 exemption claim for Records 40F and 40H. The index of records provided by the Ministry to the appellant and this office did not include section 19 among the exemption claims for Record 40, or any other records for that matter. The Ministry's representations provided no explanation as to why it did not claim this exemption during the permitted 35-day period, or why I should allow this new exemption claim at this late stage of the appeal.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Ontario Court (General Division) Divisional Court in the judicial review of Order P-883 (Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg (21 December 1995), Toronto Doc. 220/89, (leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

In the absence of any representations from the Ministry on this issue, and in light of the obvious inherent prejudice which would accrue to the appellant in delaying the adjudication of this appeal if the Ministry is  
[IPC Order PO-1652/January 20, 1999]

permitted to raise a new discretionary exemption claim at this late stage, I find that this is not an appropriate case to allow the Ministry to raise its new section 19 exemption. In my view, the Ministry had ample time to review the records and consult with counsel to confirm the discretionary exemptions it wanted to rely on as the appeal proceeded through the mediation stage of the process.

The Ministry's representations, do not address the application of any of the exemptions originally claimed for Record 40H. Two of the exemptions were discretionary (sections 13(1) and 18(1)(g)). This record on its face does not meet the requirements of either of these exemptions, and, in the absence of any evidence from the Ministry on why these exemptions should apply, I find that they do not. Because section 12(1) is a mandatory exemption, I will consider its possible application to Record 40H in the following discussion.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry claims that all of the remaining records are exempt from disclosure, either in whole or in part, by virtue of the introductory wording of section 12(1) and/or section 12(1)(b) of the Act. These sections state:

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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

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 (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [e.g. Orders P-11, P-22 and P-331].

It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This could occur where a ministry establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [eg. Orders P-226, P-293, P-331, P-361 and P-506].

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

1. the records must contain policy options or recommendations, and

2. the records must have been submitted or prepared for submission to the Executive Council or one of its committees.

[Order 73]

**Records 1, 2, 7, 34, 35 and 40A-40E**

Records 40A and 40C are actual Cabinet Submissions. The Ministry explains that they were submitted and discussed by the Policy and Priorities Board of Cabinet (P&P), a committee of Cabinet, on October 27, 1997 and December 8, 1997 respectively. The Ministry states that Record 40A addresses the issue of how the Government of Ontario should fund pay equity costs, with a number of options set out and analysed; and Record 40C sets out the options available for a redistribution mechanism of pay funding. The Ministry adds that these records were subsequently discussed by Cabinet on October 29, 1997 (Record 40A) and December 10, 1997 (Record 40C). The Ministry submits that disclosure of these records would reveal the substance of deliberations of both P&P and Cabinet.

Record 40E is also a Cabinet Submission on pay equity funding signed by the Deputy Minister of Finance, and Record 40D is an unsigned draft of the same document. According to the Ministry, while these records were prepared for submission to Cabinet, they were actually used in preparing and finalizing Record 40A. Record 40B is a different unsigned draft Cabinet Submission on funding options for proxy pay equity, dated November 14, 1997, which was prepared for the signature of the Minister of Finance and Minister of Labour. The Ministry states that this record was used in the preparation of Record 40C.

Record 7 consists of two proxy pay equity charts that also form part of Record 40C.

The only information the Ministry is not prepared to disclose from Record 34 consists of two lines which reflect the contents of a Cabinet Minute.

Record 35 is a "Briefing Note" titled "Cabinet Submission - Proxy Funding", dated November 17, 1997. According to the Ministry, this record contains the substance of an October 17, 1997 Cabinet decision relating to redistribution options for pay equity, and sets out the details of these options. These same options are also found in Record 40B. The Ministry also submits that Record 35 was used in the preparation of Record 40C, the actual Cabinet Submission, and that disclosure would reveal the substance of deliberations of P&P and Cabinet.

Having reviewed these various records, I find that all of them are documents which were either considered and discussed by P&P and Cabinet (Records 40A and 40C), or contain information directly related to the issues considered and discussed by either or both of these bodies (Records 7, 35, 40B, 40D, 40E, and the severed portions of Record 34). In my view, disclosure of these records or partial records would reveal the substance of deliberations of Cabinet and one of its committees, and I find that they are exempt under the introductory wording of section 12(1).

The information severed from the bottom of the first page and the top of the second page of Records 1 and 2 comes after the heading "Recently Cabinet Agreed that:". The Ministry states that this information contains the substance of decisions made by Cabinet relating to pay equity redistribution for proxy agencies.

The Ministry submits that disclosure of this information would reveal the substance of deliberations of Cabinet. Given the nature of this information and its similarity to information contained in Records 40A and 40C, I agree with the Ministry, and find that it is also properly exempt under the introductory wording of section 12(1) of the Act.

### **Records 19, 20, 21, 31, 32, 33 and 38**

The Ministry explains that Records 31, 32, 33 and 38 and the information severed from Records 19, 20 and 21 all relate to Record 40C. The Ministry states that these records contain information directly related to Cabinet's deliberations on the redistribution mechanism for pay equity, which remain confidential and have not been announced publicly. The Ministry states that further Cabinet decisions need to be made in relation to the implementation of the redistribution mechanism, its commencement, and the consultative process to be undertaken with the agencies that receive funding. In the Ministry's view, disclosure of these records would reveal the substance of deliberations of P&P and Cabinet.

Records 19, 20 and 21 are draft and final memoranda, dated February 19, 20 and 24, 1998, from an Assistant Deputy Minister to the Deputy Minister of Finance; Record 31 is a draft letter from the Deputy Minister of Health to the Deputy Minister of Finance; Records 32 and 33 are inter-ministerial e-mails, dated January 29, 1998 and February 11, 1998, respectively; and Record 38 is a March 3, 1998 letter from the Deputy Minister of Community and Social Services to the Deputy Minister of Finance. All of these records deal with pay equity funding and/or pay equity redistribution. I have compared the content of these records with Record 40C and, in my view, the information withheld from these records reflects the deliberations undertaken by P&P and Cabinet in considering and discussing Record 40C. Therefore, disclosure of these records or partial records would reveal the substance of deliberations of P&P and Cabinet, and I find that they all qualify for exemption under the introductory wording of section 12(1).

### **Records 24-30, 40F and 40G**

Records 24, 25, 26, 27, 28, 29 and 30 are all documents containing various costing figures with respect to pay proxy equity, either in tabular or narrative form. Records 24, 25, 27, 28 and 29 also each contain a one-page FAX transmittal sheet. The Ministry states that the figures in Records 24, 27, 28 and 29 were used to calculate the findings reported in specific portions of Record 40A, and the figures in Records 25, 26 and 30 were likewise used in the development of Record 40C.

Record 40F is a memorandum from a Ministry employee addressed to counsel in the Constitutional Law Branch of the Ministry of the Attorney General. The Ministry states that the purpose of the document was to seek advice on whether any legal and/or constitutional restraints existed in relation to the pay equity funding options being prepared by the Ministry for submission to Cabinet. The various options are referred to in the memorandum, and are outlined in detail in an attachment which accompanied the memorandum.

According to the Ministry, the subsequent opinion received from counsel, and the actual options discussed in Record 40F, were used in the preparation of Record 40A, the actual Cabinet Submission.

Record 40G is an eight page table titled "Summary of Deputy Responses to Draft Submission". The Ministry states that Record 40D, the draft Cabinet Submission, was distributed to various Deputy Ministers for comment, and Record 40G summarizes their responses. These responses were then used by the Ministry in preparing Record 40A, the actual Cabinet Submission.

The Ministry argues that disclosure of Records 24, 25, 26, 27, 28, 29, 30, 40F and 40G would reveal the substance of deliberations of Cabinet, since they make reference to matters which were ultimately considered by Cabinet.

Having carefully reviewed the Ministry's representations, and compared the text of these various records to the content of the records actually discussed and considered by P&P and Cabinet, with the exception of the FAX transmittal sheets, I am persuaded that disclosure of these records would reveal the substance of deliberations of P&P and Cabinet, and/or permit the drawing of accurate inferences regarding the substance of these deliberations. Therefore, I find that Records 24, 25, 26, 27, 28, 29, 40F and 40G are properly exempt under the introductory wording to section 12(1).

As far as the FAX transmittal sheets for Records 24, 25, 27, 28 and 29 are concerned, they simply contain the identity of the Ministry employee sending and receiving the attached records. They make no reference to the substance of the actual records, and I find that they do not qualify for exemption under any part of section 12(1). They also do not contain nor would they reveal advice or recommendations, and are therefore also not exempt under section 13(1).

### **Record 40H**

Record 40H is a memorandum addressed to "File" from counsel for the Ministry. It contains information regarding a matter involving the issue of pay equity and a private hospital. The Ministry in its original decision claimed exemption under section 12(1) for Record 40H (as part of Record 40), but has not provided any representations on the application of section 12(1) to this record. Because section 12(1) is a mandatory exemption, I have considered the application of this exemption to Record 40H, and I find that it does not apply. The contents of the record are opinion and factual material about the particular identified matter and do not reflect, nor would they reveal, the substance of any deliberations of Cabinet or any of its committees. In the absence of any representations, I also find that it does not contain policy options or recommendations, nor was it submitted or prepared for submission to Cabinet or one of its committees, as required in order to qualify for exemption under section 12(1)(b). Also, in the absence of representations from the Ministry, I find that the requirements of sections 12(1)(c), (d) and (e) or any other part of section 12(1) have not been established for Record 40H.

Therefore, I find that Record 40H and the FAX transmittal sheets for Records 24, 25, 27, 28 and 29 do not qualify for exemption and should be disclosed to the appellant.

**ORDER:**

1. I order the Ministry to disclose Records 4, 8-18, 22-23, 36-37, 39, 40H and the FAX transmittal sheets for Records 24, 25, 27, 28 and 29 in their entirety, as well as the portions of Records 1, 2, 19, 20, 21 and 34 for which the Ministry has withdrawn its exemption claims, to the appellant by **February 4, 1999**.
- 2.. I uphold the Ministry's decision to deny access to the remainder of the records or partial records.
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 records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Tom Mitchinson  
Assistant Commissioner

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January 20, 1999