



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1726

Appeal PA-990049-1

Ministry of Education and Training



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NATURE OF THE APPEAL:

The Ministry of Education and Training (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the results of "... any polls, focus groups or other opinion research conducted by the government in the last year on education-related issues, plus the cost".

The Ministry identified 23 responsive records. It granted access in full to seven records, and denied access to the other 16 in their entirety pursuant to section 13(1) of the Act. The Ministry's decision letter to the requester included an index describing the records, which identified the polling firm that prepared each of the 23 records, together with the corresponding cost for each project.

The requester (now the appellant) appealed the Ministry's decision, and also claimed that there is a compelling public interest in disclosure of the records pursuant to section 23 of the Act.

During mediation, the Ministry disclosed four additional records. The Ministry also clarified that no records were prepared with respect to two of the projects listed in the index; one other was cancelled without any record being created; and in one other instance a single record was prepared for two of the listed projects. As a result, by the end of mediation the scope of the appeal was reduced to eight records.

I sent a Notice of Inquiry to the Ministry and the appellant, and received representations from both parties.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry claims that the records qualify for exemption pursuant to section 13(1) of the Act which states:

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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) (see, for example, Orders P-1054, P-1593 and PO-1709).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

According to the Ministry, the three polling firms which submitted the eight records were retained as consultants to conduct particular focus groups on various education-related issues, and to report their findings to the Ministry. The Ministry explains:

It is standard practice in the consulting profession to conduct focus groups as a means of gathering research on a project. A focus group is used as a tool of "market analysis". Focus groups are not intended to be ends in themselves but rather, are indicators of the public's opinion on a certain issue. When a company or the government hires a consultant to conduct a focus group, the purpose is to obtain advice or recommendations that can be used to streamline, modify, create or revamp policy.

The Ministry goes on to submit:

It is the Ministry's position that the consultant's records on the focus groups reveal, on their face, advice or recommendations to the government pursuant to section 13(1) of the *Act*. They represent more than mere reportage. But in the alternative, the Ministry also relies on the IPC's ruling that a record may be exempt if it would reveal advice or recommendations by inference, even though it is not itself advisory in nature (Orders P-233, M-280). Either on their face or by inference, the records at issue indeed, reveal advice or recommendations by consultants retained by the government for their expertise and skill. Certainly, in the public sector, expressed feelings of the public on a specific issue (on which a great deal of policy work has already taken place) has a direct and meaningful impact on the formulation and direction of the government's policy.

The appellant submits:

... My experience is that polling companies offer, not advice, but analysis and interpretation of their work that simply makes it easier to understand. Still, I acknowledge that it's *possible* the reports prepared by the polling companies contain advice or recommendations that *stem out of* the results of that research. This part of the report *may* fall under the exemption.

However, the actual data from the polling, and the actual responses of the focus group members cited in the reports are, I submit, a completely different matter.

That information is simply the neutral outcome of methodically, perhaps, scientifically, conducted research. It is a measure, whether accurate or not, of public opinion. As
[IPC Order PO-1726/November 5, 1999]

countless pundits have commented over the decades, polls, focus groups and other opinion research can be interpreted in any number of ways, depending on the biases of those doing the interpretation. The raw data remains just that - an attempt at representing the facts, without the subjective analysis. Therefore, it can't be exempted.

The eight remaining records are all memoranda which report the results and/or findings of individual focus groups. Six records relate to various communications and/or advertising strategies being considered or implemented by the Ministry, and the other two deal with policies under consideration at the time of the focus group session. Each record describes the composition of the focus group, the issues or questions that were canvassed, the various responses and input obtained from focus group participants, and the analysis and conclusions drawn from these responses by the polling firm.

Having reviewed the eight records, as well as the other 16 records disclosed to the appellant, I find that, with certain exceptions which I will discuss below, these eight records do not contain advice and recommendations as those terms are used in section 13(1), and most of the contents of these records do not qualify for exemption.

It is obvious that members of the public are not public servants, employees or consultants retained by the Ministry. Input to the government by members of the public on issues canvassed by the focus group session, although arguably helpful in the formulation of government policy, does not constitute advice or recommendations for the purpose of section 13(1).

The eight focus group reports are essentially factual in nature, and most of their content does not contain or reveal "a suggested course of action which will ultimately be accepted or rejected during the deliberative process". The Ministry has disclosed other focus group reports in their entirety, and I do not accept that this type of record, simply by its very nature, qualifies for exemption under section 13(1). I also find that the value-added work of a polling firm in summarizing, analysing and interpreting the results of focus group sessions would not constitute advice or recommendations. In order to fall within the scope of section 13(1), in my view, the consultant would have to take the further step of applying that analysis in the form of actual advice, recommendations or suggested courses of action to be taken by the client Ministry.

Certain parts of each record contain information which qualifies as advice or recommendations. These parts are generally contained in headings such as "strategic conclusions", "recommendations" or "suggested course of action", but in some instances the advice and recommendations is part of a "summary" or "conclusions" section of the report. These parts of the records outline the consultant's suggested specific course of action and proposed changes to the Ministry's communications and advertising strategy. Accordingly, I am satisfied that they constitute advice and recommendations as contemplated by the Act, and qualify for exemption under section 13(1) (see also Order P-1477).

I further find that none of the exceptions found in section 13(2) apply to the parts of the records that qualify for exemption under section 13(1) of the Act.

COMPELLING PUBLIC INTEREST

Section 23 states:

An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the mandatory section 13(1) exemption.

The appellant makes a number of submissions on this issue. He argues that the fact that the records are focus groups reports is of public interest. He also points out that education is a field of significant current public interest, and that "... it follows naturally that research revealing the opinions of Ontarians on some of these education issues is of great public importance." Finally, he submits that:

... it is difficult to comprehend how release of these documents could possibly impede the flow of advice within the decision-making process, especially since they date back as late as 1997. Public opinion research, which may or may not contain some element of advice, is just one small ingredient contributing to the final decisions of government. It cannot, I believe, be compared to the type of document this exemption was surely designed to protect: documents whose express purpose is to present to cabinet the opinions of civil servants or others whose views are considered particularly important.

The Ministry points to past orders of this office that have determined that a public interest in disclosure does not necessarily flow from the fact that the request is made by a member of the media. The Ministry also states that:

The burden regarding applicability of this section falls on the individual seeking the application. The records on their face do not lend themselves to a "compelling public interest" argument.

I accept the appellant's position that there is a public interest in knowing the results of polling and focus group testing, and also that he has the ability, as a member of the media, to give voice to this interest through his work. However, as a consequence of my findings in this appeal, the actual results, conclusions and analysis of the various focus group sessions that are the subject of the eight records will be disclosed to the appellant. In my view, this level of disclosure is sufficient to address public interest considerations. I am not persuaded that any public interest in disclosure extends to the remaining parts of the records, which do not reflect public opinion, but rather advise the Ministry on how it might want to adapt communication and advertising strategies in future or proceed with further work on certain policy issues. In any event, even if

[IPC Order PO-1726/November 5, 1999]

there is a public interest in disclosure of this information, I am not convinced that it is "compelling", which is a requirement of section 23.

Therefore, I find that section 23 does not apply to those parts of the eight records I have found to qualify for exemption under section 13 of the Act.

ORDER:

1. I uphold the Ministry's decision to deny access to the parts of the records which contain advice and recommendations. I have attached a highlighted version of the records with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator which identifies the parts that should **not** be disclosed.
2. I order the Ministry to disclose all parts of the records not covered by Provision 1 to the appellant by **November 29, 1999**.
2. 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 2.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

November 5, 1999