



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

ORDER PO-1914

Appeal PA-000040-3

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Finance (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records created from May 1, 1998 to the date of this request (January 31, 2000):

- a) All records showing a decision or direction by the Minister of Finance, the Deputy Minister of Finance, or an Assistant Deputy Minister of Finance regarding Pay Equity legislation and specifically regarding Proxy Pay Equity. Without limiting the generality of this request, this request includes any records showing a decision or direction by the Minister of Finance, the Deputy Minister of Finance, or an Assistant Deputy Minister of Finance related to either or both of the following:
 - i) ongoing Pay Equity or Proxy Pay Equity adjustments
 - ii) any communications between the Ministry of Finance and the Ministry of Health regarding Pay Equity or Proxy Pay Equity.
- b) A copy of the report created by KPMG (1998/99) for the Ministry of Finance regarding how to respond to the court decision to reinstate Proxy Pay Equity.
- c) This request is intended to gain information regarding this government's plan to comply with the following court decision which reinstated Proxy Pay Equity legislation:

[1997] O.J. No. 3563
Court File No. RE 7248/96
Ontario Court of Justice (General Division)
Justice I. O'Leary
Heard: April 7 - 11, 1997
Judgement: September 5, 1997.

Therefore, any information pertinent to the government's response to this judgement is also requested.

In a decision letter dated April 3, 2000, the Ministry denied access to the responsive records, pursuant to section 65(6)3 of the *Act*. The appellant appealed the Ministry's decision.

In Order PO-1828 dated October 31, 2000, I did not uphold the application of section 65(6)3 to the records at issue and ordered the Ministry to provide the appellant with a decision regarding access to the requested information. In a decision letter dated November 29, 2000, the Ministry advised the appellant that it was denying access to each of the six responsive records pursuant to the exemptions contained in sections 12(1) (Cabinet records) and 13(1) (advice or recommendations) of the *Act*. The appellant appealed the Ministry's decision to the Commissioner's office and Appeal Number PA-000040-3 was opened.

During the mediation of the appeal, the Ministry granted access to one record, a consultant's report dated May 1998. The Ministry also clarified that it applied the mandatory exemption in section 12(1) to Records 3, 4 and 5 and the discretionary exemption in section 13(1) to Records 1 and 2. As it was not possible to resolve the remaining issues in this appeal, it was moved to the adjudication stage of the appeal process.

I provided the Ministry with a Notice of Inquiry setting out the issues remaining in the appeal and soliciting its representations. The Ministry provided me with its submissions regarding the application of the exemptions to the records, and indicated that it intended to apply the Cabinet records exemption in section 12(1) to all of the records. As this is a mandatory exemption, I am required to consider its application regardless of the fact that it had not been applied to Records 1 and 2 in the Ministry's original decision letter.

In Order PO-1907, dated May 14, 2001 and involving an appeal from a decision of Management Board Secretariat (MBS), I addressed the application of the section 12(1) exemption to records which are identical to Records 3, 4 and 5 in the present appeal. In that decision, I upheld MBS' decision to deny access to these records after finding that they were properly exempt under section 12(1). This decision was provided to the appellant who indicated to me that, while he recognized that these records are likely to be found to be exempt in this appeal, he wished to continue with the adjudication process. He also informed me that he did not intend to submit any representations and would not require a Notice of Inquiry setting out the issues in the appeal.

DISCUSSION:

CABINET RECORDS

As noted above, in Order PO-1907 I held that records identical to those identified as Records 3, 4 and 5 in the present appeal were exempt from disclosure under section 12(1). In the absence of any evidence which might persuade me to make a contrary finding, I find that my decision with respect to these records in that order is applicable in the present appeal. Accordingly, I find that Records 3, 4 and 5 are exempt from disclosure under the mandatory exemption in section 12(1).

Records 1 and 2 consist of two memoranda dated November 10, 1998 and December 17, 1998. Record 1 is addressed to the Minister of Finance from the Deputy Minister of Finance and is entitled "Pay Equity Redistribution - Progress Report". Record 2 is addressed to the Secretary of the Cabinet and Clerk of the Executive Council from the Deputy Minister of Finance and is entitled "Call to Deputy Ministers". The Ministry argues that both documents are exempt from disclosure under the introductory wording or section 12(1) and the specific categories of records described in sections 12(1)(c) and (e). 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,

- (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;

- (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;

The Ministry submits that, with respect to Record 1, Order PO-1907 established that the subject matter of the memorandum (Pay Equity Redistribution) was discussed by Cabinet or one of its committees. It argues that:

[T]his is a record prepared to brief the Minister of Finance in relation to that subject matter, a matter which was also the subject of consultations among ministers whether in or out of Cabinet relating to the government's decisions and the formulation of government policy on that subject.

With respect to Record 2, the Ministry submits that since the recipient of the memorandum is an officer of Cabinet and the chief officer of Management Board of Cabinet, one of the Cabinet's committees, "any recommendation of a course of action to her is advice to her in her capacity as a member of Cabinet or its committees." The Ministry's representations are unclear as to whether the subject matter of this memorandum was actually brought to Cabinet or one of its committees by the recipient.

However, the Ministry argues that the information contained in Record 2 is identical to that which is found at page 4 of Record 3, which I have found to be exempt from disclosure under section 12(1). The Ministry submits that Record 3 in the present appeal was found to be part of a series of Cabinet documents which stated the roles and responsibilities of various participants in the discussion of the issue under consideration and that the information contained in Record 2 is reflected in Record 3, which was created shortly afterwards.

In comparing the contents of Records 1 and 2 to the information in Records 3, 4 and 5 and those which I found to be exempt under section 12(1) in Order PO-1907, I find that the disclosure of the subject matter under discussion would reveal the substance of the deliberations of the Cabinet or Management Board of Cabinet. The information contained in Records 1 and 2 reflects the Ministry's efforts to implement and give effect to the decisions made by Cabinet and Management Board of Cabinet. As a result, these records qualify for exemption under the introductory wording to section 12(1).

Because of the manner in which I have addressed the application of section 12(1) to the records, it is not necessary for me to consider whether they are also exempt under section 13(1).

ORDER:

I uphold the Ministry's decision.

Original Signed By: _____

June 21, 2001

Donald Hale
Adjudicator