

ORDER PO-2042

Appeal PA-010287-1

Ministry of Education

NATURE OF THE APPEAL:

The Ministry of Education (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “copies of the Ministry of Education’s analysis, research, studies or other documents that describe or examine the possible effects of the proposed Education Equity Tax Credit, on Ontario’s public school system, and on independent schools in Ontario, and the potential cost of the tax credit.” The Ministry located two records, entitled “Equity in Education Tax Credit: Issues for the Ministry of Education” (Record 1) and “Tax Credit for Independent Schools” (Record 2) which were responsive to the request and denied access to them on the basis that they were exempt under the Cabinet records exemption in section 12(1) of the *Act*.

The requester, now the appellant, appealed the decision to deny access.

During the mediation stage of the appeal, the Ministry provided the Mediator with written confirmation that the “Tax Credit for Independent Schools” (Record 2) document was prepared for government members of the Standing Committee on Finance and Economic Affairs on or about June 6, 2001 in preparation for public hearings. The Ministry confirmed also that Record 1, “Equity In Education Tax Credit: Issues for the Ministry of Education”, was prepared for a meeting of Cabinet’s Priorities, Policy and Communications Board on May 31, 2001. A copy of the agenda for the Priorities, Policy and Communications Board’s meeting on that date, showing this issue as an agenda item, was provided to the Mediator. The Ministry explained that these were the only two records held by the Ministry, as the Equity in Education Tax Credit was a Ministry of Finance, rather than a Ministry of Education initiative.

The appellant indicated to the Mediator that he accepted that the Priorities, Policy and Communications Board is a committee of the Executive Council. As a result of further mediation, the Ministry withdrew its reliance on section 12(1) with respect to Record 2 and disclosed it to the appellant on February 12, 2002.

I decided to seek the representations of the Ministry, initially and sent it a Notice of Inquiry setting out the facts and issues in the appeal. The Ministry submitted representations, which were shared, except for two attachments, with the appellant along with a copy of the Notice. The Ministry indicates that it is no longer relying on section 12(1)(e) but continues to rely on the introductory wording in section 12(1) to deny access to the remaining record at issue. The appellant also made representations in response to the Notice of Inquiry provided to him and these submissions were shared, in their entirety, with the Ministry. I then received additional reply representations from the Ministry addressing the specific issues raised by the appellant in his submission.

DISCUSSION:

CABINET RECORDS

Introduction

The Ministry relies on the introductory wording to section 12(1) as the basis for denying access to the record at issue. This section reads:

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,

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 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) [Orders P-11, P-22 and P-331]. As section 12(1) is a mandatory exemption, I am required to consider the application of the introductory wording of the exemption, regardless of the Ministry’s decision to no longer rely on section 12(1)(e).

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 an institution 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 [Orders P-226, P-293, P-331, P-361 and P-506].

The Appellant’s Submissions

The appellant has raised a number of questions with respect to the timing of the creation of the record in relation to the Cabinet committee meeting at which it was apparently discussed. In addition, the appellant points out that the Ministry must “ensure that a decision was made at the Cabinet or subcommittee meeting in question in order for the section 12 exemption to apply”, relying on the decision of former Commissioner Sidney Linden in Order 40. The appellant suggests that since the tax credit measure was announced in the May 9, 2001 Budget, he questions how a decision on its implementation would have been made at the Committee meeting on May 31, 2001.

The appellant queries how and why the document at issue came to be marked as a “Confidential Advice to Cabinet”, whether the subject matter of the record was in fact discussed at the May 31, 2001 Committee meeting and whether some decision about it was arrived at then.

The Ministry’s Representations

The Ministry submits that the record at issue was prepared to assist a Cabinet committee, the Priorities, Policy and Communications Board:

. . . in deliberations respecting the final version of the Equity in Education Tax Credit regulation, which was filed in November 2001 and went into effect in January 2002. The item shown on the agenda provided in our earlier representations was part of the May 31 [2001] deliberations of a Cabinet committee. Consequently, the Ministry argues that the content of the record

would, at the very least, permit the drawing of accurate inferences with respect to deliberations on the subject.

In response to each of the items raised by the appellant, in its reply representations, the Ministry indicates that the budget announcement made on May 9, 2001 presented the tax credit initiative only in "broad strokes." It points out that the meeting of the Priorities, Policy and Communications Board held on May 31, 2001 was "to deliberate on the details of the regulation that would not itself be finalized until January 2002." The Ministry also advises that the document in question was drafted between the date of the May 9 announcement and the May 31 meeting by a senior policy analyst, who inserted the confidentiality language referred to in the appellant's submission. The Ministry also indicates that the senior policy analyst was contacted and confirmed that she attended the May 31 meeting at which time the agenda item regarding the tax credit initiative was in fact discussed by the Priorities, Policy and Communications Board.

Findings

I find that the Ministry has provided me with sufficient evidence to conclude that the subject matter of the record at issue was deliberated at a meeting of a Cabinet Committee, the Priorities, Policy and Communications Board, on May 31, 2001. I also find that the purpose of that meeting was to discuss the subject matter contained in the record, the proposed regulation that would give effect to the Budget announcement made on May 9, 2001. I am satisfied based on the submissions of the Ministry that deliberations about the subject matter of the record took place at the Committee meeting on May 31, 2001.

Based on the submissions of the Ministry and my review of the record itself, I am satisfied that its disclosure would reveal the substance of the deliberations of the Priorities, Policy and Communications Board, a Committee of Cabinet, which took place on May 31, 2001 and that the record is, therefore, exempt from disclosure under the introductory wording in section 12(1).

ORDER:

I uphold the Ministry's decision to deny access to the record.

Original signed by: _____
Donald Hale
Adjudicator

September 11, 2002 _____