



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2045**

**Appeal PA-010220-2**

**Ministry of Health and Long-Term Care**



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## **NATURE OF THE APPEAL:**

The appellant submitted a request to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the transfer agreement between the government (for the Kingston Psychiatric Hospital) and the Province Continuing Care Centre (St. Mary's of the Lake Hospital). The request was clarified to include:

...any correspondence, cabinet briefs, briefing notes, reports, documentation and studies relating to and including the transfer agreement, assessments done, and all documentation between the government (for the Kingston Psychiatric Hospital) and the Province Continuing Care Centre (St. Mary's of the Lake Hospital) in Kingston. This includes quarterly reports on the status of implementation of all directions and progress reports on the implementation of the Human Resources Adjustment plan as directed by the Health Service Restructuring Committee and amended by the Minister of Health, Elizabeth Witmer, on June 2, 2000 for Frontenac, Lennox and Addington counties.

The time frame for the request was also clarified to be from the date that the Restructuring Committee submitted its recommendations regarding Kingston Psychiatric Hospital to the Minister (sometime in 1998). The Ministry acknowledged that the request also included reports for December 2000 and March 2001 and indicated that the search for records would only be up to the date of the request, which was received on November 22, 2000. The Ministry then issued a fee estimate and indicated that sections 17(1) (third party information), 21(1) (invasion of privacy) and section 65(6) (jurisdiction) may apply to some of the records. The appellant paid the fee.

The Ministry did not issue a decision at that time and the appellant appealed the Ministry's "deemed refusal" to this office (Appeal PA-010220-1). This appeal was forwarded to my attention but was subsequently resolved during the inquiry stage by agreement of the two parties. Pursuant to this agreement, the Ministry provided the appellant with a decision regarding certain records (the Phase one decision) and undertook to provide a decision or decisions with respect to the remaining records shortly thereafter (the Phase two and possibly Phase three decisions).

With respect to the "Phase one" decision, the Ministry indicated that section 12 of the *Act* (Cabinet Records) applied to Records HRIT 65 and 66 and that access to certain other records was denied as they were either created outside the time frame of the request or were not responsive to the request. The remaining records identified in Phase one were disclosed to the appellant. The Ministry attached an Index of Records to its decision letter, which described the records for Phase one and the Ministry's decision with respect to each one.

The appellant appealed the Ministry's decision to deny access and Appeal PA-010220-2 was opened.

During mediation of the current appeal, the appellant confirmed that he was only appealing the denial of access to Records 11, 65 and 66. As noted above, the Ministry withheld Records 65

and 66 in their entirety based on the mandatory exemption under section 12 of the *Act*. The Ministry indicated on the Index of Records that Record 11 was being denied in its entirety as it fell outside the request date.

After reviewing the information in the records in conjunction with the Ministry's decision letter and the exemption claimed to withhold access, the Mediator assigned to this appeal noted that Record 11, which was dated March 2, 2000, was created before the date of the request and was therefore, within the scope of the request. The Ministry agreed. Therefore, the scope of the request is no longer an issue. However, the Ministry stated that it was also claiming the application of section 12 to Record 11 as the information in this record (a transitional budget worksheet) was also contained in the appendices to Record 65 (which comprise Record 66). The Ministry subsequently issued a supplementary decision to the appellant in which it claimed section 12(1) for this record.

Further mediation could not be effected and this appeal was moved into adjudication. The sole issue in this appeal is the application of section 12 to Records 11, 65 and 66. I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues remaining to be adjudicated. The Ministry submitted representations in response. I sought representations from the appellant and attached the non-confidential portions of the Ministry's representations to the copy of the Notice that I sent to him. The appellant submitted representations in response.

## **RECORDS:**

The records at issue in this appeal consist of the transitional budget (Record 11), MB20 submission PPH (Provincial Psychiatric Hospitals) Divestment (Record 65) and Appendices (Record 66) withheld under section 12 of the *Act*.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry submits that the records at issue fall within the mandatory exemption provided by sections 12(1)(a), (b) and (e) of the *Act*, or the introductory wording in section 12(1). These sections read:

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;

- (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.

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 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-22, P-331, P-894, P-1570).

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 result will occur where an institution establishes that the 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 the deliberations of Cabinet or its committees (Order PO-1678).

The Ministry describes the three documents at issue as follows:

### **Records 65 and 66**

These documents are clearly on their face identified as a MB-20. The format and headings of those records form various parts of the MB-20, a standard format for submissions of recommendations to MBC [Management Board of Cabinet].

### **Record 11**

Record #11 was prepared for the purpose of briefing the Minister on the matter of the MB-20. It was developed by Health Reform Implementation Team (HRIT) staff to provide the Minister with further financial details for the particular hospital as reflected on page 41 of the MB-20... The Minister is provided with routine briefings including background and financial details on matters that he takes to Management Board of Cabinet as he may be required to speak to questions or issues raised by his Cabinet colleagues.

With respect to MBC deliberations on the issue, the Ministry states:

[D]isclosure of the records at issue would reveal the substance of deliberations and would permit drawing of accurate inferences about the substance of the deliberations of one of the Executive Council committees, Management Board of Cabinet (MBC) in this case. Section 3(1) of the *Management Board of Cabinet Act* specifies that Management Board is a “committee of the Executive Council”. The [Ministry] has included in this submission a confidential minute of MBC

providing evidence that the information contained in the records at issue was deliberated on the date of the minute and the substance of those deliberations. The [Ministry] requests that [I] apply the previous orders (Orders P-22, P-331, P-894, P-1570) along with the consideration of the evidence provided an uphold the decision to deny the records on the basis of the introductory wording of section 12(1) in the *Act*.

The MBC minute that the Ministry attached to its representations confirms that MBC received Records 65 and 66 at a specified meeting. It also details the substance of the deliberations at that meeting, confirming that the focus of this meeting pertained directly to the issues addressed in these records.

The appellant is a representative of the Ontario Public Service Employee's Union (OPSEU). He believes that the records at issue are relevant to the OPSEU local's negotiations of a first collective agreement with its new employer. He indicates further that the union had previously been given assurances that "any and all information regarding the transfer agreement would be provided", but that the Kingston Psychiatric Hospital Administrator "later reneged on that promise, stating that [the new employer] did not wish it provided to us, therefore it would not be forthcoming".

With respect to the application of section 12(1), the appellant states:

That rationale appears to me to be in stark contrast to the principles of democratic and responsible government. I was of the opinion that the deliberations of elected officials should be open to public scrutiny, and that they are accountable for their actions to their constituents. I believe cabinet submissions should be public documents for public knowledge. I fail to comprehend how release of these documents would compromise national security or official secrets.

It is clear from my review of the records, the Ministry's submissions and the MBC minute that the Ministry attached to its representations, that MBC, which is a committee of the Executive Council (see: Order P-1312), considered matters relating to Records 65 and 66. Having considered the context in which Record 11 was created, I find that this record directly relates to a portion of Record 65 and its disclosure would reveal the substance of deliberations of the MBC or permit the drawing of accurate inferences with respect to those deliberations. Therefore, I find that all three records qualify for exemption under the introductory wording of section 12(1).

### **Section 12(2)(b)**

Section 12(2)(b) provides:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

In Order 24, former Commissioner Sidney B. Linden stated that while section 12(2)(b) does not impose a mandatory requirement for the head to seek the consent of Cabinet, the head must address the issue of whether or not consent should be sought.

The Ministry states:

In this case, the [Ministry] considered and subsequently made a discretionary decision not to refer this matter to the Executive Council for consent to grant access to the records which the Ministry claims are exempt under section 12(1). None of the information in these records is available elsewhere in the public domain. The ministry has supplied definitive evidence that the matter has been deliberated by MBC. Furthermore there is no indication that this information is of significant interest to a large portion of the public. The ministry is of the view that seeking consent for subsequent disclosure of these documents could undermine the remaining negotiations of the [Provincial Psychiatric Hospitals] which have not yet been divested, and furthermore would reveal the nature of the discussion on the issue.

Based on the submissions of the Ministry, I am satisfied that the head considered all of the relevant factors present in the circumstances of this case in deciding not to seek the consent of Cabinet. Accordingly, I find that the records are exempt pursuant to the introductory wording of section 12(1) of the *Act*.

In response to the appellant's position with respect to public scrutiny and the accountability of elected officials to the public, I refer to discussions relating to collective ministerial responsibility and an exemption for Cabinet documents in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

At pages 84 and 85, the Williams Commission Report commented on the convention of "collective ministerial responsibility:

The requirements of the convention of collective ministerial responsibility have been described as follows:

...all members of a Government are expected publicly to support its actions and policies, or if they are not prepared to do so, to resign their offices: all ministers must accept responsibility for all of the activities carried out in the name of the Government...

The convention serves to ensure that the legislature and the people can hold the entire government accountable for its actions...

The traditional corollary of the doctrine of collective responsibility is that if an individual minister disagrees with government policy and finds himself unable to

support it, he is expected to resign from the Cabinet. Since all Cabinet ministers are required to support and defend publicly the policies of the government once they are made, their discussions and deliberations prior to a final decision have traditionally been surrounded by secrecy. In the words of one observer, ministers must be able

...to meet together, to have a full and frank discussion of all aspects of a problem, to make concessions to one another, to seek the best and appropriate solution and then to enunciate it with one voice...so that the public is not...confused.

The confidentiality of Cabinet discussions creates an environment in which alternatives can be more vigorously debated at the Cabinet level. Public unanimity prevents individual ministers from denying responsibility for government policy.

...If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.

With respect to the rationale for exempting certain documents, such as those at issue in this appeal, from disclosure under section 12(1) of the *Act*, the Williams Commission Report noted at pages 284-285:

[T]he deliberations and decision-making processes of the Ontario Cabinet have traditionally been shielded from public view, as they have been in all other parliamentary jurisdictions. There are a number of reasons for accommodating this tradition in a freedom of information law...First, the routine disclosure of Cabinet deliberative materials would bring an abrupt and, in our view, undesirable end to the tradition of collective ministerial responsibility...The tradition of confidentiality of Cabinet discussions can also be supported on the basis that it permits public officials to provide the Cabinet with candid advice. Further, there is an evident public interest in ensuring that the decision-making processes of the Cabinet can be conducted as expeditiously as is possible.

...

The disclosure of many of these documents would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members. For the reasons suggested above, all such material should be considered exempt under a freedom of information scheme...

It is apparent that the rationale for including the Cabinet records exemption in the *Act* takes into consideration the accountability of elected officials within the context of the executive decision-making process, and the public interest in maintaining the “tradition of collective ministerial responsibility”.

**ORDER:**

I uphold the Ministry’s decision.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ September 16, 2002