



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2091-I

Appeals PA-010450-1, PA-010451-1 and PA-010452-1

Management Board Secretariat



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NATURE OF THE APPEALS:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Management Board Secretariat (MBS) for access to “information, including all relevant details, pertaining to the history (since 1998), current status, and future planning of the Ontario Smart Card Project.” The request went on to identify six specific items relating to the Smart Card Project.

For administrative convenience, MBS divided the appellant’s request into six separate files. Three of these files have reached the adjudication stage of this office’s appeals process, and are dealt with together in this order.

Appeal Number PA-010450-1 (Appeal #1)

Appeal #1 deals with the following item in the appellant’s request:

Smart Card External Advisory Council: terms of reference, basis of selection for membership, current membership, schedule of meetings held and planned, attendance at meetings, agendas, background materials provided to attendees, meeting minutes, advice provided and other details.

MBS identified 47 records responsive to this item. It provided the appellant with access to some records, and denied access to others, either in part or in whole, relying on one or more of the following exemptions in the *Act*:

- section 12 Cabinet records
- section 13 advice to government
- section 18 economic and other interests of Ontario
- section 21 invasion of privacy

MBS attached an index of records to its decision letter.

The appellant appealed MBS’s decision.

During mediation, a number of things occurred:

- The appellant confirmed that he was not interested in pursuing access to the information severed pursuant to section 21 in Records 17 and 22, so these two records are no longer at issue. He also indicated that he was not interested in any personal telephone numbers and addresses in Record 2, but wished to pursue access to the other information that had been severed from this record pursuant to either section 21 or section 13.
- MBS issued a supplemental decision letter claiming section 12 for Record 34 and section 19 (solicitor client privilege) for Record 36, in addition to other exemptions already claimed for these two records.

- MBS reconsidered its decisions and released certain records to the appellant, some in full and others in part. Because one of these was Record 36, I do not have to deal with the section 19 exemption claim raised by MBS during mediation.
- The appellant confirmed that he is not interested in pursuing access to portions of records identified by MBS as being non-responsive to the request, or to the binders for members of the External Advisory Council.
- The appellant believes that External Advisory Council members must have communicated via e-mail with each other and with project staff, and that e-mail records must therefore exist. Accordingly, the issue of whether MBS has made reasonable efforts to identify all responsive records is an issue in Appeal #1.

Appeal Number PA-010451-1 (Appeal #2)

Appeal #2 deals with the following item in the appellant's request:

Internal planning: details regarding the budgets (spent and forecast), staff, timelines, and expected rollout of the Ontario Smart Card.

MBS identified 41 records responsive to this item. It disclosed one record and denied access to the remaining records on the basis of one or more of the exemptions found in sections 12, 13, 18 and 21 of the *Act*. MBS attached an index of records to its decision letter.

The appellant appealed MBS's decision.

During mediation, a number of things occurred:

- MBS issued a supplemental decision letter claiming section 12 for Records 2, 5, 18, 19, 24, 25, 26, 28, 30, 31, 38, 39 and 41.
- MBS reconsidered its position and released additional records to the appellant, some in full and others in part.
- The appellant confirmed that he is not interested in personal telephone numbers or addresses severed pursuant to section 21, or to the portion of Record 37 severed by MBS under section 21. The only portion of Record 37 remaining at issue is the cover memorandum withheld by MBS under section 12.
- MBS withdrew its section 13 and section 18 claims, and expanded its section 12 exemption claim to cover all responsive records. MBS also claimed section 21 as an additional basis for denying access to Records 9 and 33.
- The appellant confirmed that he is not interested in pursuing access to portions of records identified by MBS as being non-responsive to the request.

- Because only one e-mail message was included among the responsive records, the appellant believes that additional e-mail messages must exist. Accordingly, the issue of whether MBS has made reasonable efforts to identify all responsive records is an issue in Appeal #2.

Appeal Number PA-010452-1 (Appeal #3)

Appeal #3 deals with the following item in the appellant's request:

Privacy Impact Assessment: person responsible, timetable, plans for public consultation, and expected publication date.

MBS identified 61 records in response to this item. It disclosed seven records, either in whole or in part, and denied access to the remaining records on the basis of one or more of the exemptions in sections 12, 13 and 18 of the *Act*. MBS attached an index of the records to its decision letter.

The appellant appealed MBS's decision.

During mediation, a number of events occurred:

- MBS issued a supplemental decision claiming section 12 for Records 1 and 26.
- MBS reconsidered its position and released additional records to the appellant, some in full and others in part.
- MBS withdrew its section 13 and section 18 exemption claims.
- The appellant confirmed that he is not interested in pursuing access to portions of records identified by MBS as being non-responsive to the request.
- Because of the limited number of e-mail messages included among the responsive records, the appellant believes that additional e-mail messages must exist. Accordingly, the issue of whether MBS has made reasonable efforts to identify all responsive records is an issue in Appeal #3.

For all three appeals, the appellant indicated that he wanted to receive the records in electronic format. MBS had not done so at the conclusion of mediation.

Mediation was not successful in fully resolving these appeals, so they were transferred to the adjudication stage. I sent a Notice of Inquiry to MBS, initially, outlining the facts and issues and seeking written representations. MBS submitted detailed representations, which were then provided to the appellant with a copy of the Notice. The appellant also submitted representations.

In its representations, MBS stated that "all records disclosed in response to these requests have now been provided to the Appellant in electronic form". The appellant disputes this, maintaining that some records in each of the three appeals have not yet been provided electronically. MBS

does not appear to object to providing electronic versions of the various records, and I will include a provision in this order requiring it to provide an electronic version of any disclosed records not already provided to the appellant.

In his representations, the appellant accepts MBS's position with respect to the section 13 and section 21 exemption claims. Accordingly, these two exemptions and the records or portions of records for which MBS had claimed these exemptions are no longer at issue in this appeal.

As far as the search issues are concerned, the appellant states:

I am willing to forego pressing this issue from this appeal, if the following issue is resolved. My concern relates to MBS's representation which states that OSCP [Ontario Smart Card Project] staff conducted "searches through their files including all individual documents, e-mails and handwritten notes that staff may have worked on or been involved in from January 1, 1999 to July 27, 2000" My request for this information was submitted July 21, 2001. I would like to be sure that the search was conducted up until the date of my request, nearly one year after the end date of the search as stated in MBS's representation. If the search was indeed conducted up until the date of my FOI request, then I will accept MBS's search as "reasonable" under the law.

I advised MBS of the appellant's position, and received the following explanation:

Our submissions state that "... the Director of SCP Delivery Framework, (a senior SCP staff member), requested all SCP staff to conduct searches through their files including all individual documents, e-mails and handwritten notes that staff may have worked on or been involved in from January 1, 1999 to *July 27, 2000.*" ...

Please be advised that date for the time frame for record searches has been incorrectly stated in our submission. The Director's e-mail lists the search dates as being January 1, 1999 to *July 27, 2001.* This was the time frame for searches for each of the requests. I apologize for any confusion that has resulted from this error.

Based on MBS's explanation, I am satisfied that the appellant's concern regarding search activities has been addressed, and the adequacy of MBS's searches for responsive records is no longer an issue in these appeals.

Therefore, the only remaining issue is whether the various withheld records qualify for exemption under section 12 of the *Act*.

RECORDS:

The following records remain at issue in these appeals. They are all described in the indices provided by MBS to the appellant in response to his requests.

Appeal #1

Records 26, 34, 44, 46 and 47

Appeal #2

Records 1, 2, 5, 6, 8, 9, 10, 13, 15-28, 30, 31, 32, 33, 34, 36, 37 (cover memorandum only), 40 and 41

Appeal #3

Record 1 - pages 22, 23 and 68 (page 68 is a duplicate of page 23)
Record 2 - page 16
Record 6 - pages 1, 6, 11, 21, unnumbered, 4, 9 and 12
Record 9 - cover page, and pages 17, 18 and 19
Record 26 - pages 2, 3, 3, 1, unnumbered and 2

DISCUSSION:

Section 12(1) of the *Act* reads as follows:

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;
- (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;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (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; and

- (f) draft legislation or regulations.

Submissions

MBS

MBS points out that the purpose of the Cabinet records exemption claim is to preserve the integrity of the Cabinet decision-making process and to ensure the confidentiality of Cabinet's deliberations. It submits that "records that would reveal the substance of those deliberations and the decision-making process are exempt under section 12 and cannot be disclosed".

MBS describes the records as falling into one of 4 broad categories:

- Cabinet or Cabinet committee records (e.g. Cabinet minutes)
- Cabinet or Cabinet committee Submissions
- materials prepared for submission to Cabinet or Cabinet committees
- materials which, if disclosed, would reveal the deliberations of Cabinet, or give an accurate inference as to the deliberations of Cabinet

MBS relies on the following principles established in past orders of this office in support of its section 12 exemption claim:

1. It is possible for records that have never been placed before Cabinet or its committees to qualify for exemption under the introductory words of section 12. They may occur where a ministry establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees or where release would permit the drawing of accurate inferences regarding the substance of the deliberations (Orders 72, 73, 147, P-226, P-293, P-1137, PO-1742-I, PO-1831).
2. Disclosure of actual Cabinet Submissions, as well as unsigned draft submissions material used in the preparation of the submission would reveal the substance of the deliberations of Cabinet and are therefore exempt under the introductory wording of section 12 (Orders PO-1652, PO-1914).
3. If a record was created as a direct result of a Cabinet committee's request for information, such information contained in a record would fall within section 12 (Orders 72, 206).
4. To qualify for exemption under section 12(1)(b) a record must contain specific policy options or recommendations. There must be evidence that the record went before Cabinet or its committees, or that it was incorporated into a Cabinet Submission or was used as a basis for developing a Cabinet Submission (Order P-323).

The appellant

The appellant identifies five broad concerns regarding MBS's reliance on the section 12 exemption:

1. MBS's overly broad application and interpretation of the section;
2. MBS's denial of access to entire records rather than using the severance provision of the *Act* to permit partial access;
3. the significant number of records withheld under section 12;
4. MBS's claiming section 12 for additional records during the mediation stage of the appeal; and
5. the absence of reasons from MBS for not approaching Cabinet regarding the release of records, as provided by section 12(2)(b).

Regarding the appellant's fourth concern, the scope of MBS's section 12 claim was expanded for all three appeals during the course of mediation. This was reflected in the Mediator's Report that was provided in draft to both parties at the end of mediation. Although given an opportunity to do so, the appellant did not object at that time, and I will not deal with this issue further here. It is also relevant and important to state that section 12 is a mandatory exemption claim. Records that qualify for exemption under this section cannot be disclosed. Accordingly, greater leeway is provided to institutions in claiming section 12 after issuing a decision letter than would be the case for a discretionary exemption. It is also noteworthy that MBS identified the section 12 exemption in its original decision letters to the appellant, and merely expanded its scope after the matters had reached the appeal stage.

I will take the appellant's first three concerns into account in making my findings on the various records, and will address the fifth concern separately at the end of this order.

Introductory wording of section 12(1)

MBS submits that all records or portions of records that remain at issue in these appeals qualify for exemption under the introductory wording of section 12(1).

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 that would reveal the substance of deliberations of Cabinet or one of its committees qualifies for exemption under section 12(1), not just the types of records enumerated in the various subparagraphs of section 12(1) (see Orders P-11, P-22 and P-331).

It is also possible that a record that has never actually been placed before Cabinet or its committees could qualify for exemption under the introductory wording of section 12(1). This could occur where an institution establishes that disclosing 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 (see Orders P-226, P-293, P-331, P-361 and P-506).

Findings

Appeal #2

Record 40 is a minute reflecting the decisions taken by Management Board of Cabinet (MBC) at its June 8, 2000 meeting on various aspects of the Smart Card Project, including report-back requirements. I find that this record clearly qualifies for exemption under section 12(1)(a), as well as the introductory wording of section 12(1).

Records 8, 15 and 27 are formal submissions prepared by SCP staff. MBS submits that Records 8 and 15 were submitted to MBC on June 1, 2000 and January 28, 1999 respectively, and that Record 27 was submitted to the Economic and Resource Policy Committee of Cabinet on June 19, 2000. I find that disclosing any portions of these three records would reveal the substance of Cabinet committee deliberations, and that they fall squarely within the scope of the introductory wording of section 12(1).

Records 1 and 10 are slides used by SCP staff in conjunction with the Record 8 submission. Having reviewed the content of Records 1 and 10, I find that they include similar information to Record 8, and that disclosing any portions of Record 1 and 10 would reveal the substance of the deliberations of MBC in the context of its consideration of the Record 8 submission. Therefore, I find that Records 1 and 10 fall within the scope of the introductory wording of section 12(1).

Records 16 and 17 are slide packages, both dated November 1, 1999. They address a number of topics that are not responsive to the appellant's request, but also include information concerning the Smart Card Project. MBS submits that these records were submitted to MBC at a meeting in November, 1999. I accept that disclosing these records would reveal the substance of deliberations of this Cabinet committee, and that they qualify for exemption under the introductory wording of section 12(1).

Record 20 is a 7-page section of MBS's 2000-01 Business Plan, and Record 36 is a 5-page section of the 2001-02 Business Plan. Both records deal with the Smart Card Project. Records 32, 33 and 34 are briefing notes and other materials prepared by MBS in support of Record 36. MBS submits that its Business Plan was presented in both years to MBC, and that disclosing these records would reveal the deliberations of this Cabinet committee on the Smart Card Project. I concur, and find that Records 20, 32, 33, 34 and 36 qualify for exemption under the introductory wording of section 12(1). It is important to note in this regard that the Business Plans presented to MBC by MBS are not the same records as the public Business Plan made available by all government ministries on an annual basis.

MBS states that Records 9 and 41, although not formally submitted to Cabinet, were created in order to assist in the preparation of MBS's 2001-02 Business Plan. MBS submits:

In this respect, these records were created for use in, and as a basis for, preparing MBS's BPA [Business Plan Allocation] Management Board of Cabinet

submission. The record sets out in particular detail information, that has been “rolled-up” or summarized in MBS’s 2000-2001 BPA Cabinet submission. For this reason, MBS submits that disclosure of Record #41 and #9 would allow a reader to draw a very accurate inference about the information actually submitted to MBC for consideration in MBS’s 2001 BPA. For this reason, MBS submits that the records are exempt under the opening words of section 12(1).

Having compared Records 9 and 41 to the actual Business Plan documents for 2000-01 and 2001-02 (Records 20 and 36), I accept the Ministry’s position. They contain detailed budget estimates for various aspects of the Smart Card Project, which form the underlying basis for the overall budget figures presented to MBC during the business planning allocation process. Accordingly, I find that disclosing Records 9 and 41 would permit the drawing of accurate inferences regarding the substance of MBC’s deliberation of Record 36, and that these records qualify for exemption under the introductory wording of section 12(1) of the *Act*.

Records 28, 30 and 31 consist of a letter and e-mail messages exchanged among SCP staff in the fall of 2000. MBS submits that these records were prepared in the context of the Business Planning process underway at that time, and that disclosing their content would permit someone to draw accurate inferences about the actual Business Plan submitted to MBC later that year. Having compared the content of Records 28, 30 and 31 to Record 36, I accept the Ministry’s position. Therefore, I find that Records 28, 30 and 31 qualify for exemption under the introductory wording of section 12(1).

Record 6 is headed “Cabinet Submission” for the Economic and Resource Policy Committee, and is dated June 11, 2001. Record 13 is a copy of some pages of Record 6. MBS states that neither of these records was actually submitted to the Cabinet committee, but that they contain information that, if disclosed, would reveal the substance of deliberations of Cabinet. MBS points specifically to Record 40, the report-back requirements set by Cabinet committee minute for the Smart Card Project, and submits that disclosing Records 6 and 13 would reveal the content of this exempt record.

MBS also submits:

... the information contained in these records is substantially similar to information contained in MBS’ 2001 Business Plan (BPA) submission referred to herein in records #20, 32, 33 and 36, as well as the SCP June 8, 2000 submission (record #8). MBS submits that disclosure of these records would reveal the substance of the information considered by Cabinet in the MBS 2001 BPA submission to MBC, and in the June 8, 2000 submission.

Having compared Records 6 and 13 with Record 40, I do not accept MBS’s position that disclosing Records 6 and 13 would reveal the contents of Record 40. Record 40 is a Cabinet minute dealing primarily with the establishment of the SCP team, while Records 6 and 13 deal with issues associated with the potential implementation of various initiatives associated with the project. Although Record 40 makes reference to future report-back requirements for the project, in my view, disclosing Records 6 and 13 would not reveal the substance of deliberations of Cabinet or its committees in that regard.

The MBS Business Plan for 2001-02 (Record 36) includes financial information regarding the SCP team, as well as estimates of overall project implementation costs. Records 6 and 13 contain a more extensive discussion of some of these implementation estimates. I am satisfied, based on my review of Records 6 and 13, that their disclosure would reveal the substance of deliberations of MBC in the context of its consideration of the Record 36 MBS Business Plan. Therefore, I find that Records 6 and 13 qualify for exemption under the introductory wording of section 12(1).

MBS makes the following submissions regarding Records 18, 19, 21, 22, 24, 25 and 26:

These seven records were prepared by staff in MBS and other ministries to provide information relating to the SCP for inclusion in the MBS submission June 8, 2000 (Record #8). MBS submits that disclosure of these records would allow a reader to draw an accurate inference about information supplied to Cabinet, and deliberated by Cabinet, in the June 8, 2000 submission.

MBS further submits that the preparation of information for submission to MBC was necessarily an iterative process. Information supplied to MBC in the June 8, 2000 submission (Record #8) may not be identical to information contained in these records. MBS submits, however, that these records were created expressly for the purpose of preparing submissions to Management Board of Cabinet, and that any disclosure of these records would allow a reader to draw a very accurate inference about the nature and scope of the information supplied to MBC in the June 8, 2000 submission. For this reason, MBS submits that these records are exempt under the opening words of section 12(1).

MBS also describes Record 23 as a submission prepared by SCP “partners” in another Ministry that “was ultimately utilized by MBS in the document (Record #8) submitted to MBC on June 8, 2000.” MBS argues that disclosing this record would give an accurate inference of the substance of deliberations of MBC in respect of issues relating to the SCP.

Record 8 includes a section dealing with funding for the Smart Card Project, including specific estimates for various components of the project. I have carefully reviewed Records 18, 19, 21, 22, 23, 24, 25 and 26 and they consist of detailed explanations of the overall funding estimates included in Record 8. Therefore, I accept the Ministry’s position that disclosing Records 18, 19, 21, 22, 23, 24, 25 and 26 would permit the drawing of accurate inferences regarding the substance of the Cabinet committee’s deliberation of Record 8, and I find that these records qualify for exemption under the introductory wording of section 12(1) of the *Act*.

MBS’s representations on Records 2 and 5 are as follows:

Records 2 and 5 are flowcharts prepared by staff of the SCP which describe matters requiring submission to Cabinet, together with forecast time-frames for such submissions. The records outline in particular detail items that were considered by Cabinet during the term of the SCP. For this reason, MBS submits that disclosure of these records would reveal the substance of deliberations of

Cabinet and would allow a reader to draw an accurate inference as to the directions and decisions of Cabinet. MBS submits that both charts are therefore exempt under the opening words of section 12(1).

MBS does not suggest that Records 2 and 5 were themselves submitted for consideration by Cabinet or one of its committees. In Order 72, former Commissioner Sidney B. Linden dealt with a similar claim under the introductory wording of section 12(1). He stated:

Can records that are incorporated into a Cabinet submission or records that are used as a basis for developing a Cabinet submission, if disclosed, reveal the “substance of deliberations” of the Cabinet or its committees?

In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the “substance of deliberations” of Cabinet, as required by the wording of subsection 12(1). Documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary exemption provided by subsection 13(1) of the *Act*.

I have carefully reviewed the contents of Records 2 and 5, and compared them to the various records in these three appeals that qualify for exemption under section 12(1). I am unable to conclude that disclosing Records 2 and 5 would reveal the substance of any deliberations reflected in those exempt records. Records 2 and 5 both describe various projected activities associated with the Smart Card Project over a multi-year period, including various steps and actions that would need to be taken in order to successfully implement the overall program. In my view, these records reflect operational plans and project activities under consideration by the SCP team, and do not fall within the scope of the “rare and exceptional circumstances” identified by former Commissioner Linden. There is nothing to indicate that they were intended to be placed before Cabinet and, based on the information before me in this appeal, including the Ministry’s representations, I am not persuaded that their disclosure would reveal or permit the drawing of accurate inferences regarding the substance deliberations of Cabinet or its committees. Therefore, I find that Records 2 and 5 do not qualify for exemption under the introductory wording or any of the enumerated paragraphs of section 12(1) of the *Act*, and should be disclosed to the appellant.

The cover memorandum of Record 37 is a 1-page transmittal memo attaching a 2000-01 budget forecast for the Smart Card Project from a senior official of the SPC team to a financial officer at MBS. MBS does not address this memorandum in its representations. I have reviewed the content of this document and, in the absence of evidence or argument from MBS, I find that it does not qualify for exemption under the introductory wording or any of the enumerated paragraphs of section 12(1) of the *Act*, and should be disclosed to the appellant.

Appeal #1

Record 47 consists of portions of Record 8 from Appeal #2. For the same reasons outlined earlier for Record 8, I find that the portions of Record 47 at issue in Appeal #1 qualify for exemption under the introductory wording of section 12(1).

The undisclosed page of Record 46 is identical to information contained in Record 47, and I find that it also qualifies for exemption under the introductory wording of section 12(1).

Record 26 is a set of briefing slides prepared by the SCP team to brief the Chair of MBC. MBS submits that:

Pages 9, 10, 11, 12, 13 and 14 in particular outline issues addressed by Cabinet, or submitted to Cabinet for consideration in the June 8, 2000 MBC submission (Record #47). MBS submits that disclosure of the listed pages of the presentation would allow a reader to draw an accurate inference about the deliberations of Cabinet on these issues and as such the pages are exempt under the opening words of section 12(1).

MBS's submissions do not deal specifically with the rest of Record 26.

Record 26 is dated March 22, 2000, at an early stage of the Smart Card Project. It contains a general overview of the proposed approach to the project and the anticipated benefits of moving in this policy direction. MBS's representations are restricted to 6 pages of this 26-page record (pages 9, 10, 11, 12, 13 and 14). These pages discuss the major issues to be addressed by the project and, although their content is largely general in nature, when compared to Record 47 (the actual June 8, 2000 Cabinet submission), I accept that disclosing the content of these 6 pages would permit one to draw accurate inferences about the June 8, 2000 deliberations by MBC. I also find that page 20 of Record 26 is reproduced in Record 47 and its disclosure would reveal the substance of MBC's deliberations. In the absence of specific representations from MBS on the rest of Record 26, I am not persuaded that disclosing the remaining pages would reveal the substance of deliberations of MBC. Therefore, I find that pages 9, 10, 11, 12, 13, 14 and 20 of Record 26 qualify for exemption under the introductory wording of section 12(1), and that the remaining pages do not qualify for exemption under either the introductory wording or any of the enumerated paragraphs of section 12(1) and should be disclosed.

Record 34 is a set of briefing materials prepared by the SCP team for presentation to the SCP External Advisory Committee. MBS submits that:

... pages 6, 7, 8, 9 and 19 of this package reveal, on their face, the decisions of Cabinet. MBS therefore submits that pages 6-9 inclusive and page 19 are exempt from disclosure under the opening words of section 12(1) as they reveal the substance of the deliberations of Cabinet.

MBS's submissions do not deal specifically with the rest of Record 34.

Record 34 is dated September 5, 2000, and consists of a 23-page set of slides used at the orientation session of the External Advisory Committee. Like Record 26, the slides contain largely general information about the Smart Card Project and the expected role of the Committee. Pages 6-9 deal with decisions made to that point in time by the government on the SCP, as well as future items that will require government direction. In comparing these pages to Record 47, I accept that disclosing them would permit the drawing of accurate inferences as to the deliberations of MBC when it considered the submission on the SCP at the June 8, 2000 meeting, as suggested by MBS. Page 19, on the other hand, is more general in nature and I am not persuaded that its disclosure would have the same impact as pages 6-9. In the absence of specific representations from MBS on the rest of Record 34, I am not persuaded that disclosing the remaining pages would reveal the substance of deliberations of MBC. Therefore, I find that pages 6, 7, 8 and 9 of Record 34 qualify for exemption under the introductory wording of section 12(1), and the remaining pages, including page 19, do not qualify for exemption under either the introductory wording or any of the enumerated paragraphs of section 12(1) and should be disclosed.

Record 44 is a copy of the agenda and minutes of a meeting of the External Advisory Committee. MBS submits that:

... the minutes contain the substance of policy analysis in respect of a matter that was required to be submitted to Cabinet for decision making further to the Cabinet Minute (Record #40 in Appeal No. PA-010451-1). The disclosure of the contents of the external advisory council's minutes would reveal the substance of the directions of Cabinet outlined in the Cabinet minute. MBS also submits that disclosure of the contents of this record would also reveal the substance of the deliberations of Cabinet related to the submission made to MBS on June 8, 2000 (Record #47). In particular MBS refers to page 11 of the June 8, 2000 submission and submits that Record #44 relates specifically to this matter. MBS submits, therefore, that this record is exempt from disclosure under the opening wording of section 12(1).

The appellant points out in his representations that other minutes of External Advisory Committee meetings have been disclosed to him, and questions why these particular minutes should be exempt. The minutes reflect discussions on a particular component of the Smart Card Project. As MBS submits, this topic is identified on page 11 of Record 47, the Cabinet submission on the SCP. However, in my view, the content of Record 44 is different in nature and substance from Record 47. Record 44 reflects the results of work undertaken by members of the SCP team on the identified topic, together with a summary of comments made by the External Advisory Committee in response. I am not persuaded that disclosing this record would reveal or permit the drawing of accurate inferences as to the substance of MBC's deliberations on the SCP at its June 8, 2000 meeting. Therefore, I find that Record 44 does not qualify for exemption under either the introductory wording or any of the enumerated paragraphs of section 12(1) and should be disclosed.

Appeal #3

Records 6 and 9 consist, respectively, of portions of Records 8 and 27 from Appeal #2. For the same reasons outlined earlier for Records 8 and 27, I find that the portions of Records 6 and 9 at issue in Appeal #3 qualify for exemption under the introductory wording of section 12(1).

Pages 22, 23 and 68 of Record 1, and page 16 of Record 2 are portions of two different briefing packages that outline timelines for the SCP. The rest of these records have already been disclosed to the appellant. MBS submits that “their disclosure would reveal the substance of matters that Project staff have confirmed were considered by Cabinet”. For this reason, MBS submits that pages 22, 23 and 68 of Record 1 and page 16 of Record 2 are exempt under the opening words of section 12(1).

The undisclosed portions of Record 26 consist of flow charts similar or identical to portions of Record 2 in Appeal #2, and the representations provided by MBS for this record are also essentially the same.

The undisclosed portions of Records 1 and 2 consist of project timelines for the Smart Card Project. Although different in layout, they are similar in nature to Records 2 and 5 in Appeal #2. For the same reasons outlined earlier for Records 2 and 5 in Appeal #2, I find that the undisclosed portions of Records 1, 2 and 26 do not qualify for exemption under section 12(1) and should be disclosed to the appellant.

Section 12(2)(b)

Section 12(2)(b) reads as follows:

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

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

In its representations, MBS states: “The Head, in applying the mandatory section 12 exemption, determined that this is not an appropriate case for seeking Cabinet consent to disclosure of the records at issue.”

In response, the appellant submits:

MBS’s representation did not provide any information regarding why they decided not to approach Cabinet about the release of documents. Why was it “not appropriate” to so inquire? I question whether it was truly considered as an option. Given that the project has been cancelled, one might expect that there would be greater openness regarding the project to enable research that could improve understanding of the difficulties they face and improve the chances for success in the future. This is one of the few ways that the \$10 million invested in the project would bring some public benefit.

In one of the early orders of this office, Order 24, former Commissioner Linden discussed section 12(2)(b) and outlined the way in which it should be approached by institutions relying on the Cabinet record exemption. He stated:

After careful consideration of the submissions of both parties and an analysis of the issue, I have reached the conclusion that the *Act* does not impose an absolute requirement on the head to seek the consent of the Cabinet in all cases where an exemption under subsection 12(1) is contemplated by the institution.

I have reached this decision for three reasons: the *Act* imposes no clearly defined absolute requirement for the Cabinet to consider all subsection 12(1) rulings; it would be impractical to impose an absolute requirement; and it would be inappropriate in some circumstances to require a head to seek Cabinet consent. . .

After explaining the rationale behind each of these reasons, the former Commissioner stated:

For these reasons I have concluded that subsection 12(2)(b) does not impose a mandatory requirement, but rather provides the head with discretion to seek Cabinet consent, depending on the circumstances of a particular case. This discretion allows a head to seek consent of Cabinet in cases where he or she feels a record should be released and where a reasonable expectation may exist that the Cabinet will not withhold its consent.

In my opinion, the circumstances of each case must dictate whether or not the head seeks Cabinet consent. However, in all cases, it is incumbent on the head to be mindful of the option available under subsection 12(2)(b) and direct his or her mind to whether or not consent of the Cabinet should be sought. I am also of the view that the discretion of the head to seek consent must be exercised irrespective of whether the requester has asked the head to do so as part of a request for subsection 12(1) records.

Subsection 12(2)(b) provides no express guidance on appropriate criteria for a head to consider in deciding whether to seek Cabinet consent. These criteria will develop with time and experience, but could perhaps include the following: the subject matter contained in the records; whether or not the government policy contained in the records has been announced or implemented; whether the record would reveal the nature of Cabinet discussion on the position of an institution; or whether the records have, in fact, been considered by the Cabinet. I want to emphasize that this list is by no means exhaustive or definitive and is only included in an effort to identify examples of the types of criteria I feel should be considered.

The former Commissioner accepted that the head in Order 24 had properly considered whether or not to seek consent, but in a subsequent case (Order 72) he found that there was no evidence that the head had considered the possibility of seeking Cabinet consent, and returned the appeal to the institution for a proper exercise of discretion.

In my view, the brief statement by MBS in its representations is not sufficient to establish a proper exercise of discretion under section 12(2)(b) in the circumstances of this appeal. As the appellant points out, Cabinet has decided not to proceed with the Smart Card Project at this time, and all of the records at issue here would appear to now be largely historical in nature.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed. (See also Order P-344)

Based on the brief representations provided by MBS, I am not persuaded that all of the relevant circumstances of this particular case have been taken into account, including the points raised by the appellant. For this reason, I have decided to return these three appeals to MBS so that the Chair of MBC, as head of that institution, can properly exercise his discretion in deciding whether to seek the consent of the Executive Council to release any of the records that qualify for exemption under section 12(1). I will require the Chair to provide me and the appellant with an outline of the factors he considered in exercising discretion in this context.

INTERIM ORDER:

1. I uphold MBS's decision to deny access to the following records in Appeal #1: Records 26 (pages 9-14 and 20), 34 (pages 6-9), 46 and 47.
2. I order MBS to disclose the following records in Appeal #1 to the appellant by **January 15, 2003**: Record 44 and all portions of Records 26 and 34 not covered by Provision 1 of this order.
3. I uphold MBS's decision to deny access to the following records in Appeal #2: Records 1, 6, 8, 9, 10, 13, 15-28, 30-34, 36, 40 and 41.
4. I order MBS to disclose the following records in Appeal #2 to the appellant by **January 15, 2003**: Records 2 and 5, and the cover memorandum of Record 37.
5. I uphold MBS's decision to deny access to the following records in Appeal #3: Records 6 and 9.
6. I order MBS to disclose the following records in Appeal #3 to the appellant by **January 15, 2003**: the remaining responsive portions of Records 1, 2 and 26.

7. I order MBS to provide the appellant with an electronic version of each record disclosed during the course of these appeals or in compliance with this order, unless already provided in electronic format.
8. I reserve the right to require MBS to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 2, 4 and 6, only upon request.
9. I order that the Chair of MBS to properly exercise discretion in deciding whether to seek the consent of the Executive Council to release any of the records that qualify for exemption under section 12(1) of the *Act*, and to provide me and the appellant with an outline of the factors he considered in exercising discretion in this context, by **January 15, 2003**.
10. I remain seized of these appeals in order to deal with any outstanding issues relating to Provision 9.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

December 19, 2002