



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2114-F

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

Management Board Secretariat



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This is my final order dealing with the one remaining issue in Appeals PA-010450-1, PA-010451-1 and PA-010452-1 that was not disposed of in Interim Orders PO-2091-I and PO-2107-I.

NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Management Board Secretariat (MBS) for information relating to the government's Ontario Smart Card Project. For administrative convenience, MBS divided the appellant's request into six separate files. MBS made an access decision on three of these files, and the appellant subsequently appealed each of these decisions.

After conducting an inquiry on the three appeals and receiving representations from both parties, I issued Interim Order PO-2091-I. In it, I found that certain records qualified for exemption under section 12(1) of the *Act* (Cabinet records), as claimed by MBS, and that other records did not qualify for exemption. I ordered MBS to disclose this latter category of records, which it did.

As far as the records that qualified for exemption were concerned, I found, for reasons outlined in Interim Order PO-2091-I, that MBS had not complied with the requirements of section 12(2)(b) of the *Act*, which reads:

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

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

I included a provision (Provision 9) in Interim Order PO-2091-I, requiring the Chair of Management Board of Cabinet to properly exercise discretion under section 12(2)(b), in accordance with the directions outlined in that order, and to provide the appellant and me with an outline of the factors taken into account in that regard.

The Secretary of Management Board of Cabinet (the Secretary), as the Chair's delegate under the *Act*, provided the appellant and me with a letter in compliance with Provision 9. The Secretary outlined the factors she considered in deciding to exercise discretion in favour of not seeking Cabinet consent. The appellant provided representations in response. The Secretary was offered an opportunity to provide reply representations, but declined to do so.

After considering the positions of both parties, I decided that the Secretary had not properly exercised her discretion, and I issued Interim Order PO-2107-I, returning the appeals to MBS. I explained the reasons for reaching this decision as follows:

As noted in Interim Order PO-2091-I, in properly exercising discretion, an institution must take into account all relevant circumstances of a particular case, including points raised by the appellant. In its representations, MBS addresses some considerations specific to the appellant's request, including the type of exempt records at issue; the fact that they have not been made public and, in MBS's view, relate to a "complex and controversial issue"; and an explanation for

why the records are not only historical in nature and that the information contained in them could be placed before the Cabinet again at some future point.

However, in my view, MBS has not adequately addressed all relevant considerations, in particular some of the points raised by the appellant in his most recent representations. As the appellant identifies, transparency in the decision making processes of government is one of the foundations of our democratic system, as reflected by the purpose clause contained in section 1 of the *Act*. The appellant also points out that public discussion of “complex and controversial” issues is an important component of open and accountable government, and that access to records that would inform the public would facilitate civic debate. Neither of these points was identified by the Secretary in her initial representations, and she chose not to address them by way of reply representations. In the circumstances, I am not persuaded that these relevant considerations have been considered by MBS, and the failure to do so, in my view, represents an improper exercise of discretion in the circumstances.

DISCUSSION:

In compliance with Interim Order PO-2107-I, the Secretary provided the appellant and me with a letter addressing the section 12(2)(b) requirements. She states, in part:

In your Order you have asked me to consider two additional factors raised by the appellant: transparency in the decision making process of government and access to records that would inform the public and facilitate civic debate. With respect, I can confirm that both issues outlined by the appellant were considered implicitly and fundamentally in my decision making. In exercising my discretion, I carefully weighed the issue of transparency in the decision making process of government, and the public interest in access to records that would facilitate civic debate against the important parliamentary principle recognized by the section 12 mandatory exemption. As you may be aware, *The Williams Commission* noted that the confidentiality of Cabinet discussions is a “necessary feature of a freedom of information scheme compatible with the parliamentary traditions of the Government of Ontario”. Indeed, the purpose of the section 12 exemption is to protect the confidentiality of Cabinet deliberations in order to allow Cabinet to consider controversial and sensitive issues in an environment where members are free to discuss and debate decisions and policy options. As I outlined in my letter dated January 15, 2003, the issue of smart card technology is sensitive and controversial and could be raised for Cabinet consideration in future. Therefore, after giving careful consideration to the very issues articulate by the appellant, I have exercised my discretion in favour of the principles underlying the section 12 exemption.

The Secretary then reiterated the other factors outlined in her previous representations on section 12(2)(b) and quoted in Interim Order PO-2071-I.

The appellant was offered an opportunity to respond to the Secretary's letter, but declined to do so.

Based on the Secretary's most recent letter, I accept that she has taken into account all of the relevant circumstances of the appellant's particular situation, including the specific considerations identified by him during the course of my inquiry. I find nothing improper in her decision to exercise discretion in favour of not seeking the consent of Cabinet in this case, and would not alter it on appeal.

In her most recent letter, the Secretary states:

... it is important to recognize that any discretion I may have under section 12(2)(b) of the *Act* extends only to whether to ask Cabinet for its consent to disclose Cabinet records. In other words, as Head of the institution I have no authority under the *Act* to consent to the disclosure of such records.

I understand the context under which discretion must be exercised under section 12(2)(b). A decision to exercise discretion in favour of seeking Cabinet consent in response to a specific request or appeal cannot, in itself, result in the disclosure of records that qualify for exemption under section 12(1). Any decision on disclosure must be made by the Executive Council.

The provisions of section 12 create a scheme that recognizes the important principles of Cabinet confidentiality that are reflected in the mandatory exemption, while at the same time acknowledging that there are situations where the Executive Council may decide that disclosure should be made, despite the fact that records qualify for exemption. As the Secretary points out, in her role as delegated head, her discretion is limited to deciding whether to seek consent of the Executive Council. She can decide to do so, in the appropriate circumstances, without interfering with the principles of Cabinet confidentiality described in her most recent letter, and without concern that records or information will be disclosed. In my view, the relevant considerations for the proper exercise of discretion in this context are quite different from the factors that heads must take into account when considering whether to exercise discretion in favour of disclosing exempt records.

FINAL ORDER:

I uphold the exercise of discretion by the Secretary not to seek consent of the Executive Council under section 12(2)(b) of the *Act*.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 24, 2003