



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2107-I

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

Management Board Secretariat



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This is my second interim order dealing with the one remaining issue raised in Appeals PA-010450-1, PA-010451-2 and PA-010452-1 that was not addressed in Interim Order PO-2091-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(1)(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.

In that regard, I stated:

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 MBS, 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.

I included a provision (Provision 9) to that effect in Interim Order PO-2091-I.

DISCUSSION:

In compliance with Provision 9, the Secretary of MBS, as delegated head under the *Act*, provide me and the appellant with a letter addressing the section 12(2)(b) requirements. She states, in part:

I have considered the nature and content of the records at issue in the appeals, the circumstances surrounding their creation and the current status of the Smart Card Project. Based on my consideration of these matters, I have decided to exercise my discretion not to seek the consent of the Executive Council to release any of the records that qualify for exemption under section 12(1). Despite the fact that Cabinet has decided not to proceed with the Smart Card Project at this time, the complex and controversial nature of the issues Cabinet considered in its deliberations lead me to this conclusion. The disclosure of these records would necessarily reveal the substance of Cabinet's deliberations on the many complex issues it considered in respect of the Smart Card Project.

More particularly, I based my discretion on the following factors:

1. the information has never been made available to the public and, therefore, is not in the public domain;
2. the records are not merely appendices or attachments to Cabinet records, but rather actual Cabinet submissions, Cabinet minutes, records that reflect materials submitted to Cabinet, and substantive materials prepared by MBS and submitted to Cabinet for meetings at which the Smart Card Project was under discussion;
3. the information at issue is sensitive and even though the project is not going forward at this time, I would not recommend disclosure in light of the subject matter of the deliberations; and
4. the information is not necessarily only of historical significance since the issue of smart card technology could be raised again.

The appellant provided detailed submissions in response, arguing that the Chair of Management Board of Cabinet (as represented by the Secretary of MBS) did not properly exercise discretion because:

1. Her representations consist largely of reiteration of the grounds for the exemption.
2. Any reasons cited are "antithetical to the purposes of the *Act*".
3. She failed to consider what the appellant sees as positive benefits that would result from the disclosure of records that qualify for exemption.

In support of his position, the appellant submits:

In my understanding of FOI legislation, three broad purposes are relevant to the discussion here. A right of public access to government documents is important, because:

1. Having paid for their production, citizens are entitled to see the results.
2. Enables democratic accountability and citizen participation in decision making.
3. Maintains trust in government institutions through transparency.

As a public official, the Chair is required to uphold both the spirit and the letter of the law. Any exercise of discretion should show that the official was cognizant of at least some of these vital factors. Taking each of these in turn, I will argue that such is not the case here:

1. Having paid for their production, citizens are entitled to see the results

The Ontario Smart Card project cost taxpayers in excess of \$10M. With its cancellation there is very little public to show for this investment. The main potential public results are the documents produced by the project, but a large proportion of the key documents remain shrouded by the Section 12 exemption. Why did the Chair apparently not consider that the public would derive recompense for its investment by having access to this work or consider that the Cabinet of a government that has placed such a premium on giving taxpayers value for money not appreciate the opportunity to demonstrate this?

2. Enables democratic accountability and citizen participation in decision making

The Chair cites the “complex and controversial nature of the issues” and the “sensitive ... subject matter” as a reason not to give Cabinet the option to release documents. This strikes me as a serious misreading of the intent of FOI legislation, and hence not acceptable as a “relevant factor”. While recognizing the need for Cabinet to conduct its deliberations away from the glare of publicity, there is no suggestion that the legislation should be used to hide controversy. Indeed just the opposite. Public discussion of controversial matters has been a vital foundation of democratic participation for over 200 years. FOI legislation was born of the need for the public to be well informed in matters that are “complex and controversial” precisely to mitigate the tendencies of governments to obscure their mistakes and thereby inhibit civic debate. Some of the most notable successes of FOI have been in bringing to light matters that public officials have sought to obscure. There would be much less need for FOI legislation if governments were routinely open about “controversial” matters. If there is a possible ‘mistake’ or something else to hide in the case of the Smart Card Project, surely the Chair is under an obligation to at least consider letting the public decide for itself. On the other hand, if there is nothing to hide, why invite the suspicion that inevitably accompanies non-disclosure?

3. Maintains trust in government institutions through transparency

Furthermore, public airing of controversial and complex matters does not necessarily reflect badly on governments if they have little to hide. In this case senior government officials including cabinet members have repeatedly responded to criticism in the media about the privacy issues raised by the Smart Card Project by saying that they are fully taking citizens' privacy concerns into account, but were then not forthcoming with any details. The documents released so far through my various FOI requests do not yet show a clear picture of the role that privacy concerns played in the project development in part since so many of the key documents are still exempted under Section 12. Now that the smart card is no longer under active consideration so the need for confidential deliberation has eased considerably, why would the Cabinet not welcome the opportunity to show that its earlier reassuring but unsubstantiated statements were indeed accurate? Even the findings from the public opinion studies conducted as part of the SCP point to these kinds of potential benefits of greater openness in terms of public support for the project, while leaving open the question of whether the government was actually listening to what Ontarians were telling them of their concerns More generally, such transparency is widely recognized as a foundation for legitimacy of governmental institutions and strengthens popular support for political leaders in particular. Why did the Chair apparently not turn her head to this possibility, one that would benefit both the public and government politicians?

While this one sided view of the Chair in favour of obscurity may well reflect an understandable and widespread defensiveness within government, it can hardly be seen as taking due account of the important public interest purposes of the Act and so does not show the required proper exercise of discretion.

MBS was provided with a copy of the appellant's representations and given an opportunity to reply. However, MBS advised that it would not be submitting reply representations.

I described the proper approach to the application of section 12(2)(b) of the *Act* in Interim Order PO-2091-I as follows:

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)

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 were 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.

Accordingly, I have decided to again return these three appeals to MBS so that the Secretary, as the Chair's delegate, can properly exercise discretion in deciding whether to seek consent of the Executive Council to release any of the various records that qualify for exemption under section 12(1).

INTERIM ORDER:

1. I order the Secretary of MBS, as the Chair's delegate, to properly exercise discretion in deciding whether to seek the consent of the Executive Council to release any of the various records that qualify for exemption under section 12(1) of the *Act*, as outlined in Interim Order PO-2091-I, and to provide me and the appellant with an outline of the factors she considered in exercising discretion in this context, including the considerations identified in this interim order, by **February 14, 2002**.

2. I remain seized of these appeals in order to deal with any outstanding issues relating to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 4, 2003