



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2147

Appeal PA-020318-1

Ministry of Community, Family and Children's Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Community, Family and Children's Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Reports to or from [the] Deputy Minister relating to computer and technical support issues at [the] Family Responsibility Office including all drafts and related memos, e-mails etc. from June 2001 to present.

The Ministry located 22 responsive records and denied access to them, in their entirety, claiming the application of the following exemptions contained in the *Act*:

- Cabinet records – section 12(1) – all of the records; and
- advice or recommendations – section 13(1) – Records 9, 10 and 11.

The requester, now the appellant, appealed the Ministry's decision.

Mediation of the appeal was not successful and it was moved to the adjudication stage of the process. I decided to seek the representations of the Ministry initially, as it bears the onus of establishing the application of the exemptions claimed to the responsive records. The Ministry made representations, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. In its submissions, the Ministry indicated that it is no longer relying on the mandatory exemption in section 12(1) for Records 4 and 9. However, the Ministry continues to rely on the exemption in section 13(1) with respect to Record 9. As the Ministry no longer objects to the disclosure of Record 4, I will order that it be disclosed to the appellant.

The appellant made submissions in response to the Notice, raising for the first time the possible application of the "public interest override" provision in section 23 of the *Act*. I then shared the representations of the appellant with the Ministry and invited it to make additional reply submissions on the application of section 23 to the records. The Ministry provided additional reply submissions on this issue.

RECORDS:

There are 21 records remaining at issue in this appeal. They consist of correspondence, memoranda, status reports, presentations to the Deputy Minister, briefing and issue notes and a business plan.

DISCUSSION:

CABINET RECORDS

The Ministry has claimed the application of the introductory wording to section 12(1) and sections 12(1)(b), (c) and (e) to the records at issue, with the exception of Record 9. These sections state:

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,

- (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;
- (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

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].

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].

Record 1

Record 1 is a letter dated May 24, 2002. The Ministry submits that, although Record 1 was not placed before Cabinet or one of its committees, it “contains information which forms the basis of the submission made to Management Board of Cabinet.” I have reviewed the contents of Record 1 and find that they are substantially similar to certain documents presented to Management Board, a committee of Cabinet, for its deliberation in November 2002. As such, I agree with the position taken by the Ministry and find that the disclosure of the contents of Record 1 would reveal the substance of deliberations of a Cabinet committee, or that its release would permit the drawing of accurate inferences with respect to these deliberations. Accordingly, I find that Record 1 is exempt from disclosure under the introductory wording to section 12(1).

Records 2 and 3

Records 2 and 3 are undated Issue Notes prepared to brief the incoming Minister of Community, Family and Children's Services and the Premier on the status of the development and implementation of upgrades to the technology available to the Family Responsibility Office. This undertaking is referred to as the Integrated Service Delivery Model Project (the ISDMP). The Ministry takes the position that Records 2 and 3 fall within the exemption in section 12(1)(e) as they were prepared to brief a Minister of the Crown and contain information currently before Management Board of Cabinet.

In the alternative, the Ministry submits that the subject matter of these records is currently before Management Board of Cabinet awaiting its decision. The Ministry argues that the disclosure of the contents of Records 2 and 3 would, therefore, reveal the deliberations of a Cabinet committee or at least permit the drawing of accurate inferences with respect to those deliberations.

To qualify for an exemption under 12(1)(e), the Ministry must establish that the record itself has been prepared to brief a Minister in relation to a matter that is either:

- (a) before or proposed to be brought before Cabinet or its committees;
or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

(Order 131)

I find that both Records 2 and 3 qualify for exemption under section 12(1)(e) as they represent records prepared to brief the Premier and Minister of Community, Family and Children's Services with respect to matters that continue to be before a committee of Cabinet.

Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22

These records are status reports prepared by the Family Responsibility Office regarding the status of the ISDMP at various stages of its development. The Ministry indicates that they were prepared for the Assistant Deputy Minister, the Deputy Minister and ultimately, the Minister in order to brief him on matters which are currently before Management Board of Cabinet. As a result, the Ministry argues that the responsive portions of these records fall within the ambit of section 12(1)(e) and the introductory wording to section 12(1).

The Ministry also submits that much of the contents of these records is not responsive to the appellant's request as it "does not pertain to computer and technical support issues at the Family Responsibility Office", as outlined in the appellant's request. In my view, all of the information contained in the status reports comprising Records 5, 6, 12, 13, 14, 15, 16, 17 and 22 is responsive to the appellant's request. I find that the records clearly describe the methodologies employed by the Ministry in bringing the project along to its conclusion. The manner in which this project is to be implemented necessarily involves issues surrounding information technology

and the deployment and training of Ministry staff. I find that this information falls within the ambit of the wording used by the appellant in his request as he is seeking access to information relating to “computer and *technical support* issues”. In my view, the Ministry has interpreted the request in an overly narrow fashion by attempting to limit its scope to include only some portions of these records. Rather, I will address the application of the exemptions claimed to all of Records 5, 6, 12, 13, 14, 15, 16, 17 and 22.

In Order PO-2002, Assistant Commissioner Tom Mitchinson commented on the application of the exemption in section 12(1)(e) to a briefing note, “prepared and delivered to Cabinet Office on behalf of the Executive Council and its committees.” He found that:

Having reviewed Record 1, I would describe it as a communications-related briefing note, prepared for the apparent purpose of providing suggested comments that could be made by a Minister or government official if called upon to respond to questions concerning the status of the topic identified in the briefing note. Its content is factual in nature and does not include any of the specific information included on the Record 6 presentation slides.

In my view, Record 1 is a time-sensitive document prepared in April 2001 for the purpose of dealing with public statements on the work of the task force to that point in time. It deals with an issue that arguably could have been, but in fact was not, considered by Cabinet or one of its committees at that time. When the work of the task force is ready for consideration by CCOPS and Cabinet, Record 1 would have limited if any value and, in my view, it is reasonable to conclude that an updated and different briefing note would be prepared, if required, to reflect the status of the matter at that time. Accordingly, I find that Record 1 was not prepared for the purpose of briefing a Minister on a matter that **is or is proposed to be** before Cabinet or its committees, and therefore does not qualify for exemption under section 12(1)(e) of the *Act* [my emphasis].

In my view, a similar conclusion can be reached with respect to the application of section 12(1)(e) to the contents of Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22. While these documents may have been provided to the Minister, I find that their subject matter was not then before Cabinet or one of its committees and that the information contained in them would have “limited if any value” by the time these matters are ultimately considered by Management Board of Cabinet. The information contained in Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22 was topical at the time of its creation and dissemination but would have been supplanted by other, more timely, information as the ISDMP proceeded. For this reason, I cannot agree that section 12(1)(e) has any application to these records.

Similarly, I find that the introductory wording in section 12(1) also has no application to Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22. I find that the disclosure of the contents of these records would not reveal the substance of deliberations of Management Board of Cabinet as these records simply report on the status of the project in the most general terms. Specific information regarding the actual work being performed is not included in the records.

I conclude by finding that Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22 are not exempt from disclosure under either section 12(1)(e) or the introductory wording to section 12(1). As no other exemptions have been claimed for these records and no mandatory exemptions apply to them, I will order that they be disclosed, in their entirety, to the appellant.

Record 7

Record 7 is a memorandum dated July 9, 2001 from the Deputy Minister to an official with the Office of the Provincial Auditor. The Ministry submits that, although Record 7 was never placed before Cabinet, its disclosure would reveal the substance of the deliberations of Management Board of Cabinet, one of its committees. Based on my review of the contents of Record 7, I find that it is exempt from disclosure under the introductory wording to section 12(1) as it contains information which was the subject of deliberations by Management Board of Cabinet.

Record 10

The Ministry submits that Record 10, an Issue Note to the Minister dated March 30, 2002, is exempt under the introductory wording to section 12(1) and sections 12(1)(b) and (c).

The two criteria which the Ministry must satisfy in order to exempt a record under section 12(1)(b) are:

1. the record must contain policy options or recommendations; and
2. the record must have been submitted or prepared for submission to Cabinet or its committees.

[Order 73]

For a record to qualify under section 12(1)(c), the Ministry must establish that:

1. the record contains background explanations or analyses of problems to be considered: and
2. the record itself was submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions; and
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; and

4. the decision at issue either:
 - (i) has not been made; or
 - (ii) has been made but not implemented.

[Order P-1623]

I find that the Ministry has not provided sufficient evidence to indicate that the disclosure of Record 10 would reveal the substance of deliberations of Cabinet or one of its committees. Similarly, it has not provided me with evidence to establish that Record 10 was “submitted or prepared for submission” to Cabinet or one of its committees, as is required by sections 12(1)(b) and (c). Rather, the Ministry relies on the fact that Record 10 was submitted to the Minister to assist in his deliberations. Accordingly, I find that Record 10 does not qualify for exemption under the introductory wording to section 12(1) or sections 12(1)(b) or (c). I will address the application of the discretionary exemption in section 13(1) to Record 10 below.

Record 11

Record 11 is a draft proposal which was submitted to both the Minister and to Management Board of Cabinet for their deliberation “as a basis for developing a Cabinet submission”. Based on my review of the contents of Record 11, I find that it qualifies for exemption under the introductory wording to section 12(1) as its disclosure would reveal the substance of the deliberations of Management Board of Cabinet.

Records 18, 19, 20 and 21

Records 18 to 21 consist of a slide presentation created in support of a submission made to Management Board of Cabinet. The Ministry argues that these records qualify for exemption under the introductory wording to section 12(1) as their disclosure would reveal the substance of deliberations of a committee of Cabinet. I have reviewed Records 18 to 21 and find that they qualify for exemption under the introductory wording to section 12(1) as the information contained therein was presented to Management Board of Cabinet and its disclosure would reveal the substance of the Cabinet committee’s deliberations. This finding is in accordance with that of Assistant Commissioner Mitchinson in Order PO-2091-I which also addressed the application of the introductory wording in section 12(1) to a slide presentation created to accompany a presentation to a Cabinet committee.

Application of the Exception in 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 Order 24, former Commissioner Sidney B. 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.

The Ministry submits that:

In the circumstances of this Appeal, the head did not feel the record should be released, nor was there a reasonable expectation that Cabinet would provide consent for the disclosure of the documents. Furthermore, the subject matter of the records was to be compiled in a submission, which was later provided to a committee of Cabinet.

The Ministry goes on to provide additional confidential submissions respecting the nature of the subject matter of the records and the fact that Management Board of Cabinet has not yet determined whether to proceed with the course of action set forth therein.

Based on the submissions of the Ministry, I am satisfied that the Ministry considered appropriate criteria in reaching its decision not to seek the consent of Cabinet under section 12(2)(b). Accordingly, I will not return the appeal to the Ministry for a proper exercise of its discretion.

ADVICE OR RECOMMENDATIONS

The Ministry has applied the discretionary exemption in section 13(1) to Records 9 and 10. This section states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto

Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order P-434 Assistant Commissioner Mitchinson made the following comments on the "deliberative process":

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. [Orders 94, P-233, M-847, P-1709]

Record 9

Record 9 is a letter from the Director of the Family Responsibility Office to the Office of the Provincial Auditor dated August 22, 2001. The Ministry submits that:

Disclosure of this document would reveal advice and recommendations of a public servant to an employee of another government institution. The recipient of this document, being the Provincial Auditor's Office, was in a position to either accept or reject the suggested course of action and in fact did so (Order 118). As stated in Order 24, section 13(1) is included as an exemption so that 'persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure.'

The Ministry also provided confidential submissions respecting the actual contents of Record 9 which I am unable to refer to in the body of this order.

Based on the contents of Record 9 and the representations of the Ministry, I am satisfied that the disclosure of this letter would reveal advice or recommendations of the Director of the Family Responsibility Office to an official with the Office of the Provincial Auditor respecting a

suggested course of action. I find, accordingly, that Record 9 qualifies for exemption under section 13(1) and that none of the exceptions listed in section 13(2) apply to this information.

Record 10

The Ministry submits that Record 10 is also exempt under the discretionary exemption in section 13(1) as it contains advice or recommendations made by the Head of the Ministry's Children's Programs I & IT Branch to the Minister regarding a suggested course of action. It goes on to submit that:

The recipient of this document, namely the Minister would have the ability to accept or refuse the recommendation.

The record consists of several parts, including a section entitled "Response", another entitled "Background" and a final section entitled "Confidential Advice". In my view, only the final section contains information which qualifies as advice or recommendations within the meaning of section 13(1). The remaining portions of the record simply lay out the issue and certain background information intended to assist the Minister in reaching his decision. As a result, I find that only that portion of Record 10 entitled "Confidential Advice" qualifies for exemption under section 13(1). The remainder of Record 10 is not exempt and I will order that it be disclosed to the appellant.

By way of summary, I find that Records 1, 2, 3, 7, 11, 18, 19, 20 and 21 qualify for exemption under section 12(1) while Record 9 and that portion of Record 10 entitled "Confidential Advice" qualify for exemption under section 13(1). Records 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22 and Record 10 (with the exception of the section entitled "Confidential Advice") are not exempt under any of the exemptions claimed. I will, therefore, order that these records be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists "an overwhelming and important public interest" in the disclosure of the type of information contained in the records at issue in this appeal. While not specifically referring to section 23 of the *Act*, the appellant's submissions indicate his belief that there exists a need for the "open and frank disclosure of information related to" the information systems operated by the Family Responsibility Office.

The public interest override provided by section 23 does not apply to records which qualify for exemption under sections 12, 14, 16 or 19 of the *Act*. Accordingly, I need only consider the application of section 23 to those records found to be exempt under section 13(1) – Records 9 and a portion of Record 10.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

In my view, the appellant has provided a substantive basis for a finding that there exists a public interest in the disclosure of information relating to the information systems operated by the Family Responsibility Office. The Ministry acknowledges as much as it refers to the involvement of the Office of the Provincial Auditor in examining this contentious issue.

The Ministry submits that the Family Responsibility Office has undergone program audits and follow-up audits by the Provincial Auditor’s Office bi-annually since 1994. The annual reports of the Provincial Auditor and the follow-up audits are publicly available documents. The Ministry relies on the decision of Assistant Commissioner Mitchinson in Order PO-1887 in which he made the following statement concerning the application of section 23 to situations “where investigations are conducted to deal with the process in question” which is the subject matter of records subject to a request under the *Act*. After determining that there existed a public interest in the disclosure of the records, he found that this public interest did not outweigh the purpose of the exemptions that he had found to apply to the records. Specifically, he stated that:

. . . it is my view that the independent investigations and other reviews conducted concerning the sale of this property address the public interest concerns raised by the parties to the extent that, in my view, the public interest in the disclosure of these records does not outweigh the purpose of the sections 13(1), 17(1) and 18(1) exemptions in these circumstances.

The Ministry submits and I agree that any “public interest concerns have been satisfied by the continued involvement and reports of the Ontario Provincial Auditor’s Office.” In my view, the fact that the Auditor has chosen to exercise his oversight powers in relation to the information technology issues at the Family Responsibility Office render the public interest in the disclosure of the contents of Records 9 and 10 (in part) less compelling. As a result, I find that there does not exist the requisite compelling public interest in the disclosure of Records 9 and 10 to bring the public interest override provision in section 23 into play with respect to these two records.

ORDER:

1. I order the Ministry to disclose to the appellant Records 4, 5, 6, 8, 12, 13, 14, 15, 16, 17 and 22 and Record 10 (with the exception of the section entitled “Confidential Advice”) by providing him with copies no later than **June 27, 2003 (35 days)** but not before **June 21, 2003 (30 days)**.

2. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 7, 9, 11, 18, 19, 20, 21 and that portion of Record 10 entitled "Confidential Advice".
3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant.

Signed by _____
Donald Hale
Adjudicator

_____ May 22, 2003