



Information and Privacy
Commissioner/Ontario

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

ORDER PO-2362

Appeal PA-040137-1

Management Board of Cabinet



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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Management Board of Cabinet (Management Board) received a request for access to copies of all documents and correspondence (including electronic) produced, received or in the possession of Management Board since the election of the Liberal Government in 2003, that pertain in any way to the matter of including universities under the *Act*. The request indicated that this would include any and all communications within the government, and between Management Board and outside parties, including the universities and the Council of Ontario Universities.

Management Board identified records responsive to the request and granted partial access to a great number of records, denying access to others.

The requester (now the appellant) appealed the decision to deny access.

During mediation, it was confirmed that the appellant seeks access to the severed portions of only two records, a portion of a document headed “confidential draft” and a portion of an email to an individual. Management Board relies on the exemption contained in section 12 of the *Act* (cabinet records) to deny access to those records.

Mediation did not settle any further issues and the matter moved to the adjudication stage.

A Notice of Inquiry was sent to Management Board seeking representations on the issues set out in the notice. This office then sent the Notice of Inquiry to the appellant, together with Management Board’s representations in their entirety. The appellant provided representations in response.

RECORDS AT ISSUE

As confirmed at mediation, the appellant seeks access to the severed portions of two records numbered by Management Board as Records number 41 and 44. In its representations Management Board describes the nature of the records at issue, and the severances, as follows:

Record # 44 is an email between staff members of the Ministry of Training, Colleges and Universities (TCU) and MBS [Management Board Secretariat]. The email contains a briefing note prepared for the Chair of the Management Board of Cabinet by the Manager of the Access and Privacy Office of MBS. The final bullet contained under the heading “Background” has been redacted in accordance with section 12 of the *Act*.

The redacted information identifies the subject matter of a policy initiative or initiatives that will be the subject of a policy submission prepared by MBS for the Management Board of Cabinet, (a committee of the Executive Council), and the Executive Council.

Record # 41 is an email between staff members of TCU and MBS. The e-mail specifically refers to the briefing note contained in record # 44. A portion of a sentence has been redacted from the e-mail in accordance with section 12 of the

Act. The redacted information identifies and refers to the policy initiative or initiatives that have been redacted from Record # 44.

DISCUSSION:

CABINET RECORDS

Management Board claims that the records at issue qualifies for exemption under the introductory wording of section 12(1), as well as the specific provisions in sections 12(1)(a), (b) and (e).

These provisions of section 12(1) read:

- (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
 - (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
 - (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
 - (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Counsel or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

Any record that would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-331 and PO-2320].

If disclosing a record that had never been placed before the Executive council or its committees would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld [Orders P-226, P-293, P-331, P-361 and PO-2320].

The term “Executive Council” means Cabinet. Section 3(1) of the *Management Board of Cabinet Act* specifies that Management Board is a “committee of the Executive Council”.

Section 12(1)(e): Record Prepared to Brief a Minister of the Crown

Management Board submits that disclosure of the information would reveal information contained in a record prepared to brief a minister of the Crown in relation to matters that are before, or that are proposed to be brought before the Executive Council, or its committees, or that are the subject of consultations among ministers relating to government decisions or the formulation of government policy. As a result, Management Board submits that section 12(1)(e) of the Act applies.

In order to qualify for exemption under this section, Management Board must establish that the record itself has been prepared to brief a Minister in relation to matters that are either:

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

[Order 131]

The Representations of the Management Board

Management Board submits:

Record # 44 includes a copy of a briefing note prepared for the Chair of the Management Board of Cabinet by the manager of the Access and Privacy Office at MBS. The information redacted from the briefing note informs the Chair about the nature and status of a policy initiative or initiatives that will be the subject of a Cabinet submission. In this regard, the information redacted from Record # 44 qualifies for exemption under the plain meaning of subsection 12(1)(e) because it is contained in a record, that was prepared to brief a minister, in relation to a matter that is proposed to be brought before the Executive Council or its committees.

Record # 41 is an e-mail between staff members in two ministries that refers to the same policy initiative or initiatives reflected in Record # 44. MBS respectfully submits that disclosure of this information will reveal the subject matter of records that are currently being prepared for submission to the Executive Council and one of its committees. In addition, the Chair of the Management Board of Cabinet, as the minister responsible for MBS, will be provided with, and briefed on the submissions before they are submitted to the Executive Council.

Previous Orders of the Commissioner have restricted the application of subsection 12(1)(e) to only those records actually prepared to brief a minister [Orders 131, P-946]. While Record # 44 would qualify for exemption based on the Commissioner's interpretation of section 12(1)(e), MBS respectfully submits that a purposive interpretation of subsection 12(1)(e) is required to ensure that information that would *reveal* information, or give an *accurate inference* of information, contained in records prepared to brief a minister in the circumstances contemplated by subsection 12(1)(e) is not disclosed. ...

Accordingly, MBS respectfully submits that the information redacted from Record # 41 qualifies for exemption under subsection 12(1)(e), as it would reveal information that will be included in a record prepared to brief the Chair of the Management Board of Cabinet in relation to matters that are proposed to be brought before the Executive Council and the Management Board of Cabinet committee.

[Emphasis in Original]

Management Board also advises that:

Counsel in the MBS Services Branch has communicated with the Director of the MBS Corporate Policy Branch to confirm if the policy initiative or initiatives referred to in both records remain subject to the mandatory section 12 exemption. The Director has confirmed in writing, [referring to a letter attached to the Ministry's representations] that the MBS Corporate Policy Branch is currently preparing a Cabinet submission on the policy initiative or initiatives referred to in the records at issue in this appeal. The Director expects that the submission will be provided to the Chair of the Management Board of Cabinet in early 2005, and will then be submitted to the Management Board of Cabinet, and subsequently the entire Executive Council, pending approval, shortly thereafter.

The letter that was referred to by the Management Board in their submissions, sets out the following:

I confirm that the policy initiative or initiatives referred to in the documents identify the subject matter of a policy submission the MBS Policy Branch is currently preparing for submission to the Management Board of Cabinet

It is expected that the submission will be provided to the Chair of the Management Board of Cabinet in early 2005, and subject to his approval, will be submitted to the Management Board of Cabinet shortly thereafter. If the Management Board of Cabinet approves the submission, it will then be submitted to the Executive Council.

The Representations of the Appellant

In his notice of appeal, after requesting disclosure of Records number 41 and 44 in their entirety, amongst other things, the appellant states:

These documents, I believe, are doubly important. Despite significant public demand, and despite its own advertised commitment to transparency, the current government is apparently refusing even to consider including universities under FIPPA. Just as the public should have access to information about how universities use the two billion dollars of public funds they receive from the government, so the public should be informed as to why their government is now refusing to afford them that access. These documents might well shed some light on the latter, offering a glimpse of the reasons behind the government's intransigence, and, thus, some clear indication of how best to proceed to render the universities accountable.

The accountability of the universities, in short, presupposes the accountability of the government.

In his representations, amongst other things, the appellant states with respect to Management Board's submissions that:

The reasoning of the MBS counsel is remarkable, and alarming, in that it argues that access to a record can be denied on the basis of unknown and unknowable possible future events, which can neither be demonstrated nor disproved. Such a claim should be rejected because it renders impossible any refutation of a government claim to exemption and provides in effect a blanket exemption for any and all government records, utterly undermining FIPPA.

According to the MBS counsel's argument, all that need be asserted by the government is that a subject matter identified in a record may at some future time become a matter considered in a policy initiative which may at some other future time become a matter for Cabinet deliberation. Again, this could apply to almost any record and there would be no way an applicant, or adjudicator, could assess or deny it, human beings not being blessed with knowledge of the future.

With respect to the correspondence from Management Board describing the current status of the information, the appellant states:

... First, it indicates only that the subject matter identified in the redacted records at hand is *now* the subject matter of a policy submission which the MBS Corporate Policy Board is "currently preparing for submission to the MBC." There is no indication that such an initiative was in preparation, or was even anticipated, *at the time of the request when the exemption was claimed*. Second, whereas the counsel repeatedly uses the word "will" in referring to prospective

events, the ... submission uses only language appropriately speculative and conditional, eg. "It is expected that;" "subject to his approval;" "If the Management Board of Cabinet approves." Despite the prophetic pretensions of the MBS counsel future events remain in the realm of the unknown, and that is the problem here.

[Emphasis in Original]

Analysis and Finding

I am satisfied that, based on my review of Records 44 and 41 and the factual and legal submissions filed, that Record number 44 is a copy of a briefing note prepared for the Chair of the Management Board of Cabinet by the manager of the Access and Privacy Office at Management Board with respect to a matter before or proposed to be brought before the Executive Council or one of its committees and that information severed from the e-mail (Record 41) would permit the drawing of accurate inferences with respect to this matter, the information severed from the records is exempt under section 12(1)(e) of the *Act*. The content of the Management Board's representations that the appellant finds objectionable, simply confirms that the policy will be the subject of a submission prepared for the Management Board.

As I have found that these records qualify for exemption under section 12(1)(e), it is not necessary to consider other grounds raised by Management Board to deny access to the information.

Section 12(2)(b):

In its representations, Management Board also addressed the application of section 12(2)(b) of the *Act*, in explaining what steps were taken before it was decided to rely on the section 12 exemption. Section 12(2)(b) provides that despite the application of mandatory exemptions set out in section 12(1), a record may be disclosed if the Executive Counsel for which the record has been prepared consents to access being given.

Management Board explains:

The head of MBS, when determining that the mandatory section 12 exemption applied to records at issue in this appeal, considered the issue of whether to seek the approval of the Executive Council to release the records. After giving the matter careful consideration, the head has exercised her discretion not to seek the Executive Council's approval.

The head has based her decision on the fact that the information redacted from the records is not known to the public, and that the matter(s) referred to in the records have not yet been submitted to the Executive Council, but will be in the near future. Consequently, the head determined that it would not be appropriate to seek the consent of the Executive Council to release information Cabinet has not yet had a chance to deliberate and consider.

I am satisfied that the steps taken by the head satisfy any requirements that may be contained in section 12(2)(b).

The Application of Section 23 of the *Act*

In the notice of appeal the appellant refers to the public interest in the disclosure of the information, which, in some circumstances would raise the possible application of the "public interest override" set out at section 23 of the *Act*. However, section 23 does not apply in this appeal because section 12 is not included on the list of exemptions that may be overridden.

ORDER:

I uphold the decision of the Management Board.

Original Signed by: _____

Steven Faughnan
Adjudicator

_____ January 21, 2005