



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2422

Appeal PA-040246-1

Ministry of Education



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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*) the Ministry of Education (the Ministry) received a request for access to “Identification and Program Standards for Exceptionalities prepared within the last five years,” in either Word or PDF format.

The Ministry identified records responsive to the request and denied access to them on the basis of the mandatory exemption set out at section 12 of the *Act* (Cabinet Records).

The requester (now the appellant) appealed the decision of the Ministry.

Mediation did not resolve the appeal and the matter moved to the adjudication stage.

I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. The Ministry filed representations in response. In its representations, the Ministry asked that a portion of its representations not be shared with the appellant due to confidentiality concerns. I then sent a copy of the Notice of Inquiry along with the Ministry’s severed representations, to the appellant. As the appellant’s representations raised issues to which I determined that the Ministry should be given an opportunity to reply, I sent the representations accompanied by a covering letter to the Ministry inviting their reply representations. The Ministry filed further representations in reply.

RECORDS:

The records at issue consist of Draft Proposed Program Standards for Special Education Programs and Services, which are identified as “Consultation Documents”.

DISCUSSION:

SPECIAL EDUCATION IN ONTARIO

In its representations the Ministry details the statutory and regulatory scheme governing the provision of special education programs and services in Ontario.

The Ministry explains that section 170(1)7 of the *Education Act* makes it a duty of school boards to provide special education programs and services for their exceptional pupils. “Exceptional pupil” is defined in section 1(1) of the *Education Act* to mean the following

a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee, ... , of the board,

(a) of which the pupil is a resident pupil,

(b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or

(c) to which the cost of education in respect of the pupil is payable by the Minister;

The Ministry submits that the Minister of Education's role with respect to special education is set out in section 8(3) of the *Education Act*, which provides as follows:

The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

Section 57.1 of the *Education Act* requires that every district school board establish a special education advisory committee.

In its representations, the Ministry also explains that in the year 2000 the government of Ontario began a process for the development of program standards that would set Ontario-wide criteria for special education programs. The Ministry further states that the development of the program standards benefited from input from volunteer groups, that advised on the contents of the standards.

The Ministry's initial representations also state that it has issued categories and definitions of exceptionality through a memorandum dated January 15, 1999 which updated some earlier definitions. The Ministry asserts that the updated definitions are, generally speaking, more detailed information about the nature of the conditions that relate to the categories of "exceptional pupil" set out in section 1(1) of the *Education Act*. In its reply representations the Ministry states that those expanded and updated definitions are found in a publication entitled "Special Education, A Guide for Educators" (the Guide).

CABINET RECORDS

The Ministry claims that the records qualify for exemption under the introductory wording of section 12(1), as well as the specific provision in section 12(1)(b).

These parts of section 12(1) read:

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.

The Introductory Wording in Section 12(1)

The use of the word “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the 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-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].

Section 12(1)(b): Record Containing Policy Options or Recommendations

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and the record must have been either submitted to Cabinet, or if not, then at least prepared for that purpose. [Orders 73, PO-2186-f]

The Representations of the Ministry

The Ministry submits that the Draft Proposed Program Standards for Special Education Programs were produced in response to the Cabinet directive to permit Cabinet and/or its committees to deliberate. The Ministry further explains that although those actual records were never submitted to Cabinet committee, a single representative record containing common content and similar in purpose, style and format to the records at issue was submitted to the Education Policy Committee (EPC) of Cabinet. The Ministry submits that disclosure of any or all of the records would effectively disclose the substance of the single representative record presented to the EPC and thereby permit accurate inferences about the substance of the Cabinet committee and Cabinet deliberations on the subject. The Ministry asserts that disclosing any or all of the

records would disclose the content of the single representative record, and the substance of deliberations of the Executive Council or its committees would then be revealed.

The Ministry submits that a review of the content of each of the records, demonstrates that they are draft policy documents. The Ministry also submits that the substance of the records at issue indicates that the records provided supporting material to the submission to the EPC, and that they were prepared, in accordance with Cabinet directive, for the same purposes.

The Representations of the Appellant

The appellant submits that the very public nature of the development of the standards indicates it would not be appropriate to deny access on the grounds of Executive privilege. In this regard the appellant points to the public announcement of the development of program standards and the assistance given by volunteers from public and professional groups in that process. The appellant is of the view that the substance of the records is the work of the volunteer groups. The appellant states that she is “hard-pressed to think why direction to the volunteer groups should remain confidential ... [and] there also seems to be little reason to withhold the documents especially since the Ministry itself indicated that more work was needed to ‘take these standards to the next level of development’”.

The appellant submits that in order for me to decide whether the records qualify for exemption under section 12, I will have to determine whether the requested documents reflect substantial input by Cabinet or its committees, beyond the direction that might have been provided to volunteer consultants at the outset.

The appellant states that she requested material related to “identification” by which she says she meant, “operational definitions of the exceptionalities”. As set out above, in reply the Ministry explained that the definitions of the exceptionalities are contained in the Guide, and are found at pages A18 to A20 (which formed a part of the Ministry’s representations). The appellant submits that, “[w]hile clearly those definitions are important, they do not seem to constitute policy according to the Ministry’s own definition”.

The appellant further submits that, based on the separation of the responsibilities of the Ministry and school boards the Ministry could not be prescriptive about the nature of programming and placements but could only provide guides for minimum services for exceptional pupils. The appellant suggests that due to the lack of accountability through funding, the ultimate responsibility for constructing programming and specific plans lies with the district school boards. Hence, the definitions are neither regulation nor policy formulated at the Ministry level and should not be withheld.

The appellant submits that the issue that gave rise to her request, that of portability of identification and the minimum programming for exceptional students across Ontario, remains unresolved. The appellant states that access to the records should be allowed because they offer

informed and considered direction for improvement that could be useful to district school boards and advocacy groups.

Analysis and Finding

While I appreciate the appellant's position, her arguments do not directly address the question of whether disclosure of the records would reveal the substance of deliberations of Cabinet or one of its committees, as contemplated in the introductory wording of section 12(1), nor whether they fit within the wording of section 12(1)(b). If either of these criteria is met, the records are exempt.

Based upon my review of the records and the factual and legal submissions filed, including the Ministry's confidential representations, and comparing the records to the single representative record that was presented to the EPC, I am satisfied that the Ministry has established a linkage between the content of the records and the actual substance of the deliberations of a Committee of the Executive Council (the EPC) and ultimately Cabinet. The records are similar in form, content and style to the single representative record that was produced in response to a Cabinet directive and upon which the EPC deliberated. I find that disclosure of the records would reveal the substance of the deliberations of a Committee of Cabinet (the EPC) and ultimately of Cabinet, in that they contain the substance of the matter that was then under deliberation by the EPC and Cabinet. I am satisfied, therefore, that the records qualify for exemption under the introductory wording of section 12(1).

As I have found that these records qualify for exemption under the introductory wording of 12(1), it is not necessary for me to consider whether the specific provision in section 12(1)(b) also applies.

Section 12(2)(b):

Section 12(2)(b) of the *Act* provides an exception to the section 12(1) exemption. It reads in part:

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

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

The Ministry submits that there is no mandatory requirement to obtain consent but rather, section 12(2)(b) provides discretion to seek consent in the appropriate circumstances, on a case by case basis. Furthermore, the Ministry says, the only entity that can give consent is the "Executive Council for which, or in respect of which, the record has been prepared". The Ministry submits that the *Act* does not contemplate the disclosure of Cabinet records under section 12(2)(b) through the consent of a "new" Executive Council.

The Ministry submits that, as a result of the change of government in 2003, the Executive Council that existed when the records were prepared no longer exists. As of the date of the Ministry's representations, the matter "has not yet been brought back to Cabinet". The Ministry therefore submits that it has no discretion to exercise with respect to seeking Cabinet's consent to the release of the records, as the Executive Council for which the record was prepared no longer exists.

I agree with the Ministry that only the Executive Council for which, or in respect of which, a record was prepared can consent to its release, and accordingly, no action could appropriately have been taken under section 12(2)(b).

The Application of Section 23 of the Act

In her representations 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 Ministry.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ October 18, 2005