



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2495

Appeal PA-040358-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specific report of the Assistive Devices Branch (ADB). The report was related to an Assistive Devices Program (ADP) pricing review. The report was prepared by a [named business] consulting firm.

The Ministry located the responsive record and denied access to the full report, stating:

Access to the entire report is denied under the authority of section 12(1) [deliberations of cabinet] and section 17(1)(a), 17(1)(b), and 17(1)(c) [third party information]. In addition to these exemptions, access is being denied to page 15 of the report under the authority of section 13(1) [advice or recommendations].

The requester, now the appellant, appealed that decision. In her appeal letter to this office, the appellant stated that she was "... only interested in the release of the section of the report as it applies to [the appellant] ... [and] ... that all names and identifiers may be blacked out..."

Mediation did not resolve the appeal, and it was moved to the inquiry stage of the appeal process.

Initially, I sent a Notice of Inquiry to the Ministry, inviting representations. I received representations from the Ministry, and shared the non-confidential portions with the appellant, along with a Notice of Inquiry. In responding to the Notice, the appellant raised issues to which I felt the Ministry should be given an opportunity to reply; accordingly, a reply Notice of Inquiry was sent along with a complete copy of the appellant's representations. The Ministry provided reply representations.

After thoroughly reviewing the parties' representations, I decided that it was unnecessary to seek representations from any potential affected parties.

PRELIMINARY DISCUSSION:

As noted, the appellant narrowed her request in her appeal letter. During my inquiry, I asked the Ministry to advise which portion of the record was responsive to the appellant's narrowed request. The Ministry identified the responsive pages as 209 – 221.

Additionally, in representations, the Ministry requested that I allow the late raising of a discretionary exemption, section 13, to portions of the record other than page 15. For the reasons that follow in this order, it is not necessary for me to make any finding regarding this request.

RECORD:

The record at issue is a portion of a 273 page report dated June 13, 2003, titled *MOHLTC Assistive Devices Program Pricing Review: Results and Analysis – Final*. The specific pages are 209 – 221.

CABINET RECORDS

The Ministry has claimed the application of the section 12(1) Cabinet exemption to the record at issue in this appeal. The introductory wording of that section reads as follows:

(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...

Introductory wording of section 12(1)

Previous decisions of this Office have established that the use of the word “including” in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing 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 [See Orders P-361, P-604, P-901, P-1678, PO-1725].

In its initial representations, the Ministry submits that the “report is exempt in its entirety” because the record would reveal the substance of deliberations of Cabinet or would permit the drawing of “accurate inferences regarding the substance of those deliberations”, even though the report itself was not placed before Cabinet. The Ministry elaborates that “the report contains recommendations and specific data” that was “directly” (their emphasis) incorporated into a report placed before Cabinet.

In response, the appellant submits that the Ministry did not focus on the narrowed portion of the report as requested. The appellant states further that the Ministry did not discharge its burden of proof: the Ministry did not provide evidence supportive of its submissions that disclosure of the record “would permit the drawing of accurate inferences regarding the substance of [Cabinet’s] deliberations”. Additionally, the appellant states that the Ministry’s submissions are “insufficient to exempt the pages in their entirety under the *Act*”. The appellant reiterates that the Ministry did not provide evidence “capable of meeting the burden of proof”.

As previously noted, I provided the Ministry with a copy of the appellant’s representations and invited the Ministry to submit reply representations. The Ministry provided reply representations, portions of which were confidential. Based on my careful review of the records and, in particular, the Ministry’s confidential representations, I accept the position put forward by the Ministry regarding the application of the introductory wording of section 12(1) to the record, specifically, the pages in question. The Ministry provided sufficiently compelling evidence, based on which, I am satisfied that disclosure of the record would reveal the substance of deliberations of Cabinet or would permit the drawing of “accurate inferences regarding the substance of those deliberations”, even though the report itself was not placed before Cabinet.

Additionally, I am also satisfied that the relevant portions of the report contain “recommendations and specific data” that were *directly* incorporated into a report placed before Cabinet. Accordingly, I find that the record at issue is exempt from disclosure on the basis of the introductory wording at section 12(1).

In reviewing the evidence and the record, I did consider the possibility of severance of the record. In this appeal, in particular, the specified pages. However, I am satisfied that applying the established principles of severance to this report would serve no meaningful purpose as the resulting excerpts would be insignificant snippets, or non-responsive to the appellant’s request for information on the ADP pricing review. (See *Ontario (Minister of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* (1997), 102 O.A.C. 71; 46 Admin. L.R. (2d) 115, also reported at [1997] O.J. No. 1465 (Div. Ct.)). [See Order PO-2466]

Section 12(2) exceptions to the exemption

During my inquiry, I asked the Ministry for representations regarding the possible application of section 12(2) (exceptions to the exemption), which reads:

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

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The exception at section 12(2)(a) of the *Act* is not applicable to the records at issue since the records are not more than twenty years old. However, section 12(2)(b) provides that Cabinet may consent to access being given to the records.

Section 12(2)(b) is discretionary and permits an institution to disclose information despite the fact that it could withhold it. An institution must therefore exercise its discretion in determining whether to ask Cabinet to consent to the disclosure of the records in question. On appeal, the Commissioner may determine whether the institution failed to do so. This office may send the matter back to the institution for an exercise of discretion based on proper considerations, but may not substitute its own discretion for that of the institution.

The Ministry submitted that while it considered whether to seek the consent of cabinet regarding disclosure, it decided not to do so. The Ministry explained that in exercising its discretion, it considered several factors and decided it was inappropriate, in this case, to seek consent. The Ministry stated it considered specifically that the:

... report contains very recent and sensitive information ... [T]he report was prepared with an expectation that it would be treated as a confidential document that would not be made public ... [and] the recommendations found in the actual cabinet submission on the ADP pricing model closely mirror information that is contained in the report.

Based on the representations of the Ministry, I am satisfied that, in exercising its discretion, the Ministry took into account relevant factors and did not take into account irrelevant factors under section 12(2)(b).

Given my finding that the introductory wording of section 12(1) exempts the records at issue in this appeal, I do not need to specifically consider the application of section 17 or section 13, as variously claimed for the record.

As a final note, I thank both the appellant and the Ministry for providing me with detailed and helpful submissions.

ORDER:

I uphold the decision of the Ministry and dismiss the appeal.

Original Signed by: _____
Beverly Caddigan

_____ August 15, 2006