



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2596**

## **Appeal PA06-252**

### **Ministry of Government Services**



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## **NATURE OF THE APPEAL:**

The Ministry of Government Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for:

...a copy of the submission by the Travel Industry Council of Ontario (TICO) to the Minister [of Government Services], including the request document from TICO and the annexed actuarial report.

The Ministry located both the “request document from TICO” (which is a letter to the Minister of Government Services) and the annexed actuarial report. The Ministry issued a decision denying access to the actuarial report, citing the mandatory third party information exemption in section 17(1) of the Act. The “request document from TICO” was initially described by the Ministry as the cover letter to the report. At the request stage, the requester did not pursue access to the cover letter of the report. The requester (now the appellant) appealed the Ministry’s decision to deny access to the actuarial report.

Mediation was not possible, and the appeal was moved to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the Ministry, TICO and the actuarial firm (the actuary) that prepared the report, initially seeking their representations concerning the sole record at issue at that time (the actuarial report). I received representations from all of these parties.

I then sent a copy of these parties’ representations in their entirety to the appellant, along with a Notice of Inquiry, seeking his representations. I received representations from the appellant in response. I then sought reply representations from the Ministry and TICO in response to the appellant’s submissions. I also sought specific representations from these parties concerning the application of section 12(1) (cabinet records) to the record at issue, as the Ministry had raised this exemption in its initial representations. I received reply representations from the Ministry and TICO. TICO was not involved in the submission of the information in the records to the Executive Council (Cabinet) and therefore declined to make representations on section 12(1). As a result of the appellant’s representations on the scope of the request, the Ministry conducted a further search, and determined that additional records pertaining to TICO’s fee schedule were also responsive to the request. These additional records consist of the following documents:

- Proposed Registration and Renewal Fee Schedule
- Table outlining Net Fee Savings for Retailers
- Table outlining Net Fee Savings for Wholesalers

After consulting with TICO, who had provided these additional records to the Ministry, the Ministry granted the appellant with access to these additional records.

The Ministry also included the request letter to the Minister of Government Services from TICO as a responsive record in this appeal.

I sent a copy of Ministry’s and TICO’s reply submissions to the appellant. However, the Regulation Approval Form and Briefing Note attached to the Ministry’s representations were withheld due to confidentiality concerns. I then sought and received the appellant’s

representations on the application of section 12(1) to both the request letter and the actuarial report. After receiving these representations, I sought and received representations from the Ministry in reply to those of the appellant on the application of section 12(1) to both records.

## **RECORDS:**

The responsive records that remain undisclosed and are at issue in this appeal consist of the actuarial report and the “request letter” to the Minister which accompanied the report. The Ministry has claimed the application of section 12(1) to both records. In addition, the Ministry has claimed the application of section 17(1) to the report.

## **DISCUSSION:**

### **Background Information**

TICO has provided the following information concerning the manner in which the records originated. In its representations, it states that:

TICO is a not-for-profit corporation, which has been delegated responsibility for administering the *Travel Industry Act, 2002* (“TIA”) and Ontario Regulation 26/05 (“Regulation”) by the Ministry.

TICO regulates travel agents and travel wholesalers in the province of Ontario and operates a Travel Industry Compensation Fund.

The Compensation Fund reimburses customers who booked travel services through an Ontario registered travel agency but did not receive the services they paid for as a result of the bankruptcy or insolvency of a registered Ontario travel retailer, travel wholesaler or an airline or cruise line. The Board of Directors of TICO determines the eligibility of claims received in accordance with the Regulation.

TICO is funded by registration and renewal fees paid by travel agents and travel wholesalers.

The Compensation Fund is financed by payments made by registrants based on their gross sales.

...At the time that the actuarial report in question was provided to the Ministry, the Compensation Fund contribution rates were set out in section 53 of the Regulation. In order to change Compensation Fund contribution rates, TICO needed to approach the Ministry to request a Regulation change...

In September of 2005, TICO hired [the actuary] to conduct an extensive review of TICO's claims history from 1993 to 2005 and to look at the risks to the Compensation Fund to determine the appropriate level of the Fund to ensure consumer protection. The Compensation Fund had increased from approximately \$4.5 million when TICO received delegation in June of 1997 to a balance of approximately \$30 million in 2005. TICO felt that a reduction in Compensation Fund contributions might be warranted and wanted a third party analysis to confirm whether a reduction could be made without posing any foreseeable risk to consumers....

The actuarial report concluded that the balance in the Compensation Fund exceeded what was required to protect consumers. It recommended a significant reduction in assessment rates to reduce the balance of the Compensation Fund to the appropriate level. The actuarial report also indicated that the required rate for wholesale registrants should be approximately the same as the assessment rate for retail registrants instead of the 2 to 1 relationship that was previously in effect.

Based on the actuarial report, TICO supplied the request letter and the actuarial report to the Minister of Government Services requesting that the Ministry amend the Regulation to reduce the Compensation Fund contribution rates for both travel agents and travel wholesalers.

## **CABINET RECORDS**

The Ministry relies on the introductory wording of section 12(1) to exempt the records from disclosure, which reads:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees,

## **Representations**

The Ministry claims that the records contain information that was the subject of the deliberations of the Executive Council and the Legislative and Regulations Committee (LRC), a committee of the Executive Council, in support of the Minister of Government Service's recommendation of amendments to Ontario Regulation 26/05 under the *Travel Industry Act, 2002*.

In response, the appellant submits that as the records themselves were not submitted to the Executive Council or to a Committee of same, and that the disclosure of the records would in no way reveal either the substance of, or accurate inferences of, such deliberations of the Executive Council or its committees. The appellant states that:

TICO's hiring of [the actuary] in September 2005 was done after TICO already knew that changes were being proposed which would affect [Ontario Regulation 26/05 under the *Travel Industry Act, 2002*] which TICO administers, and that

TICO would be authorized to itself make changes to its fee structure and Compensation Fund levels.

...TICO hired [the actuary] in order to determine the appropriate size of the Compensation Fund and other fees in anticipation that TICO would be given authority to itself determine the size and contribution levels of the fund in accordance with Bill 190's [an omnibus, housekeeping Bill of hundreds of amendments known as *The Good Government Act*] amendment in this area for several Ministry Administrative Authorities.

...TICO, in its submission to the IPC dated 06 February 2007, attaches at Appendix 4, a copy of a "Rate Reform Package Consultation Paper". On page 2 of this document, TICO states:

As you may be aware, in the past, the government was required to make a Regulation change in order to change Compensation Fund contribution rates. However, the *Good Government Act, 2006* received Royal Assent on June 22, 2006. That statute amended the *Safety and Consumer Statutes Administration Act, 1996* to enable TICO to set the payments that travel agents and travel wholesalers are required to make to the Compensation Fund. The Board of Directors of TICO will now be responsible for establishing the contribution rates and for making any changes to those rates. The change will enable TICO to be responsive and make changes if there is a need to adjust Compensation Fund contribution rates in the future.

It is very difficult to believe that any Committee of Cabinet (Executive Council) or the Executive Council itself would have or could have engaged in any deliberations of such a narrow focus on any matter specifically relating to TICO when, in fact, the legislation at hand affected more than 550 items of amendment, from 16 ministries, including 16 separate pieces of legislation within the Ministry alone.

...Even if [the appellant] were to accept that additional consultations with the Ministry took place and that the added rate reforms approved by the Ministry in June 2006 (within weeks of Bill 190 receiving Royal Assent) were based on such consultations, the fact that the records in question were never submitted by the Ministry to the Executive Council, nor any Committees, creates a high burden of proof to substantiate that an assessment of the status of the Compensation Fund and the claims history of the fund, along with various models to determine future levels of the fund, would reveal the substance of or accurate inferences about any actual deliberations.

...Since TICO states that it was not involved in any process involving Cabinet (Executive Council) or a Committee ..., and therefore did not provide either Cabinet or a Committee with the professional support and guidance necessary to understand the [the actuary] report, how could it be possible for deliberations and/or accurate inferences thereof to have arisen relative to the substance of the [the actuary] report when the Ministry, Cabinet, and Committee would not have been able to understand the substance or key points of the [the actuary] report by itself. In other words, if the [the actuary] report is so difficult to understand and interpret, how could it have reasonably been the essence of a true deliberation or allude to accurate inferences thereof?

In reply, the Ministry states that:

...the request letter and the actuarial report clearly qualify for the mandatory exemption in section 12(1) as they were used by the Ministry in developing its submission to the Executive Council in respect of proposed amendments to Ontario Regulation 26/05 ("Regulation") under the *Travel Industry Act, 2002*. The actuarial report contains a detailed analysis of TICO's claims history and the Compensation Fund, and employs an actuarial model that is used to estimate an appropriate fund level relative to risk and the necessary contribution rates to maintain that level of the fund. The request letter contains a detailed roll-up of the information and analysis in the actuarial report, supporting TICO's request for amendment to the Regulation.

...Furthermore, the data in the actuarial report and the overview of the data and findings contained in the request letter were used to brief the Minister in relation to the proposed amendment to the Regulation that was to be deliberated by the Executive Council.

...[T]he recommendations and actuarial data found in the records have been directly incorporated in a Regulation Approval Form submitted to the LRC committee of the Executive Council and have also been used to brief the Minister in preparation of discussions with his colleagues at Executive Council pertaining to the proposed amendment to the Regulation.

...While it is possible that TICO may have hired [the actuary] to prepare the actuarial report after it was aware that that changes were being proposed that would give it (TICO) the authority to make changes to the contribution rates, as the appellant suggests, this is not relevant to the application of section 12(1). The evidence indicates that TICO used the report to support its request to the Minister to change contribution rates to the Compensation Fund and that the Ministry subsequently used the actuarial data contained in the report, along with TICO's request letter, to inform submissions to a committee of the Executive Council and

to assist the Executive Council in their deliberations of a proposed amendment to Ontario Regulation 26/05.

### **Analysis/Findings**

Based upon my review of the records and the submissions of the Ministry, along with the confidential attachments thereto, I am satisfied that the Ministry has established the necessary evidentiary linkage between the content of the records and the actual substance of the deliberations of a Committee of the Executive Council (the LRC) and, ultimately, the Executive Council (i.e., Cabinet). I am satisfied that disclosure of the records would reveal the substance of deliberations of Cabinet or would permit the drawing of “accurate inferences regarding the substance of those deliberations”. Disclosure would reveal confidential information about the contents of these records.

In the confidential portion of its representations, the Ministry has provided me with a copy of both the Regulation Approval Form for Ontario Regulation 26/05 and the Minister’s Briefing Note for the proposed amendment to this Regulation. Based on my review of these two documents, along with the contents of the records, I am satisfied that the information in the records was used by the Ministry in developing its submission to the Executive Council in respect of proposed amendments to the Regulation.

Previous orders have held that a record that has never actually been placed before Cabinet or its committees can qualify for exemption under the introductory wording of section 12(1). This can occur where an institution establishes 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-226, P-293, P-331, P-361, P-506 and PO-2091-I).

The records were submitted to the Minister on May 10, 2006. The records are expressly referred to in both the Regulation Approval Form for Ontario Regulation 26/05 and the Minister’s Briefing Note in support of the Minister of Government Service’s recommendation of amendments to the Regulation. The information in the records was used in relation to the deliberations of the Executive Council and the LRC concerning the proposed amendment to Ontario Regulation 26/05. Following these deliberations, Ontario Regulation 313/06 came into force on June 16, 2006, amending Ontario Regulation 26/05. This amendment relates to the payments by registrants into the Compensation Fund.

The appellant’s submissions are based on his view that the records were used in the deliberations of the Executive Council concerning statutory amendments enacted pursuant to the *Good Government Act, 2006*. The *Good Government Act, 2006* received Royal Assent and came into force on June 22, 2006, after the date of the amendment to Ontario Regulation 26/05. In fact, however, the records were used in relation to the amendment of Ontario Regulation 26/05 under the *Travel Industry Act, 2002*. The records were not used in relation to the *Good Government*

*Act, 2006*, which amended the *Safety and Consumer Statutes Administration Act, 1996*, and gave TICO the authority to change the Compensation Fund rates on its own.

The appellant also claims that the records should be disclosed as the actuarial report is available to any TICO registrant travel agency member who is willing to sign a Third Party Release Agreement.

The appellant submits that despite the requirements for recipients of the report to sign a Third Party Release Agreement, no adequate controls could ever be invoked to prevent widespread disclosure of the report. The appellant also submits that the report contains aggregated and summarized data which is already in TICO's Annual Reports or available elsewhere.

In response, TICO claims that it has never publicly disclosed the report itself, although it has provided information regarding the report and communicated the findings of the report, as follows:

- On June 22, 2006, TICO issued an Industry Advisory and a Press Release advising that the government had approved a change to Ontario Regulation 26/05 to reduce Compensation Fund contribution rates for travel agents and travel wholesalers. Both the Advisory and Press Release make reference to the actuarial report obtained in support of the request for the rate reduction.
- At its Annual General Meeting on June 27, 2006, TICO did a presentation to stakeholders, including members of the travel industry and the public about Rate Reform, which included information about the reduction to Compensation Fund contributions and the actuary report.
- At a Meeting of Members held on July 25, 2006, TICO did another presentation on Rate Reform.
- TICO also released a Consultation Paper on its Rate Reform Package.

TICO appended copies of the above-mentioned Industry Advisory, Press Release, presentation on Rate Reform and Consultation Paper to its representations. These documents contain general information and do not reveal the specific detailed information contained in the records.

Furthermore, although TICO has in the past disclosed the entire actuarial report subject to the confidentiality provisions in the Third Party Release Agreement, I find that the entire contents of the records, which consist of both the report and the accompanying request letter to the Minister, have not been disclosed publicly without conditions attached. For this reason, the release of the actuarial report in conjunction with the signing of the confidentiality provisions in the Third Party Release Agreement does not remove this record from the application of the exemption in section 12(1).



Accordingly, I find that both records are exempt from disclosure on the basis of 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 section 17(1) also applies.

**ORDER:**

I uphold the Ministry's decision to not disclose the records.

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

July 20, 2007 \_\_\_\_\_