



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2053-F

Appeal PA-020003-1

Ministry of Education



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NATURE OF THE APPEAL:

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

All correspondence, reports, memos, public opinion poll results and summaries pertaining to the province's intention to require criminal background checks on teachers.

The requester subsequently clarified her request to include:

All correspondence, reports, memos, public opinion poll result summaries pertaining to the province's intention to require criminal background checks on teachers over the past 12 months (March 13, 2000 – March 13, 2001). By correspondence, the requester means internal, between ministry staff, including e-mails but not any form of correspondence from the public. Legal records are also exempted from the request. Only final drafts of records are requested. Research material is also included in the request. The requester is trying to determine how the Ministry reached the conclusion regarding background checks.

The Ministry identified a number of responsive records, and denied access to all of them on the basis of the following exemptions contained in the *Act*:

- section 12(1) - Cabinet records
- section 18(1)(g) - economic and other interests

The Ministry also advised the requester that "public opinion poll result summaries" do not exist.

The requester (now the appellant) appealed the Ministry's decision.

A number of events occurred during the mediation stage of this appeal:

- The appellant accepted that no "public opinion poll result summaries" exist.
- The appellant agreed to remove any "housekeeping records" (e.g., records relating to the arrangement of meetings) from the scope of her request. The Ministry identified certain records that fell within this category and provided the appellant with an index describing the remaining records and exemption claims.
- The Ministry disclosed a number of records in their entirety and portions of Record 1. As a consequence, section 18(1)(g) is no longer an issue in the appeal, nor are two other exemption claims raised by the Ministry for the first time during mediation.

- The appellant withdrew the undisclosed portions of Record 1 from the scope of her request.

At the end of mediation, the only outstanding issue was the application of section 12(1) to the remaining undisclosed records.

Once the appeal had been transferred to the adjudication stage, I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues in the appeal and asking for written representations. The Ministry provided representations. After issuing Interim Order PO-2036-I (that dealt with the sharing of the Ministry's representations with the appellant), I sent the Notice of Inquiry to the appellant, together with the non-confidential portions of the Ministry's representations. The appellant did not submit representations in response.

RECORDS:

The following eight records remain at issue:

- Record 4 - June 2000 Interministerial Consultations - section 12(1)(d)
- Record 6 - June 28, 2000 Research Charts and Tables - section 12(1)
- Record 10 - July 20, 2000 email message - section 12(1)(a)
- Record 16 - September 28, 2000 email message - section 12(1)(a)
- Record 17 - October 2, 2000 email message - section 12(1)(a)
- Record 18 - October 11, 2000 email message - section 12(1)(a)
- Record 19 - October 11, 2000 email message - section 12(1)(a)
- Record 28 - January 25, 2001 Briefing Materials section 12(1)

DISCUSSION:

Cabinet Records

The Ministry relies on the following provisions of section 12(1) of the *Act* to deny access to the various records that remain at issue in this appeal, as described above:

12. (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;

...

- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

Introductory wording

The Ministry claims that Records 6 and 28 qualify for exemption under the introductory wording of section 12(1).

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 that 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 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 (Orders P-226, P-293, P-331, P-361 and P-506).

Record 28 is dated January 25, 2001 and is described in the Ministry’s index as “Briefing Materials”. The Ministry originally claimed section 12(1)(e) for this record, but withdrew this claim in its representations, stating “the Ministry recognizes that section 12(1)(e) no longer applies to the record”.

Record 28 actually consists of a number of separate documents relating to the Ministry’s criminal records check initiative. They are described by the Ministry as:

- #1 an implementation plan, prepared for a Cabinet subcommittee meeting
- #2 a “Report Back” slide package for presentation to a Cabinet subcommittee meeting, together with a memorandum from the Deputy Minister of Education to the Deputy Solicitor General regarding recommended options in the materials for the subcommittee meeting
- #3 a draft “background information” package prepared for a Cabinet meeting
- #4 an implementation plan slide package prepared for a briefing of the Minister of Education
- #5 various status reports on the criminal reference check initiative

Document #4 is dated January 25, 2001, and all other Record 28 documents pre-date document #4. A number of the Record 28 documents are referred to in document #4, and I presume (although the Ministry does not state this directly) that the various other Record 28 documents were attached to document #4 as part of the January 2001 ministerial briefing package.

It is clear from the content of these various Record 28 documents that Cabinet and/or one of its committees considered various approaches to implementing a program of criminal reference checks for teachers and school employees during the March 2000 – March 2001 timeframe covered by the appellant's request. Some of the documents (e.g. documents #1, #2 and #3) appear to have been presented to Cabinet or one of its committees, and the substance of the deliberations taking place in that context are evident from the content of these documents. In other cases (e.g. document #4 and certain components of document #5) the documents do not appear to have been presented to Cabinet or one of its committees, but they contain detailed descriptions of other documents that would appear to have been considered as part of the Cabinet decision-making process. It is clear from the content of these Record 28 documents that a series of decisions and directions from Cabinet would require actions by the Ministry and others extending beyond the March 2001 timeframe of the appellant's request. Document #4 and a number of components of document #5 refer, in part, to these future activities.

Having carefully reviewed all documents comprising Record 28, I find that they all contain information relating to the deliberations of Cabinet and/or one of its committees on the issue of establishing and implementing a criminal reference check system within the education sector. I also find that disclosing these documents would reveal the substance of Cabinet deliberations, thereby satisfying the requirements of the introductory wording of the section 21(1) exemption. I further find that, although there may be small portions of some Record 28 documents that contain factual or other information not directly relating to the actual substance of Cabinet deliberations, it is not possible in the circumstances to sever these portions and order the disclosure of any information that would be meaningful. Therefore, I find that Record 28 in its entirety qualifies for exemption under the introductory wording of section 12(1) of the *Act*.

Record 6 consists of nine discrete documents. The Ministry explains that these documents formed part of the material in the appendices of document #2 in Record 28. Having reviewed the various Record 6 documents and compared them to document #2 in Record 28, I accept the Ministry's position, in part. Four of the Record 6 documents are similar in form and substance to portions of document #2 in Record 28, and I find that these four documents qualify for exemption under the introductory wording of section 12(1) for the same reason as document #2 in Record 28.

However, the five other Record 6 documents do not fit this description. Three of them appear to be internal Ministry policy documents that frame the issue of criminal reference checks and identify a number of policy development approaches and considerations that would need to be addressed in researching the issue. Two others consist of a fax cover sheet/questionnaire and a mailing list of organizations that were sent the questionnaire asking for their input on criminal reference checks. There is nothing on the face of these documents to indicate that they were ever presented to Cabinet or its committees during the deliberative process of considering the criminal reference check issue, nor am I persuaded, based on the Ministry's brief representations, that

these documents would reveal the substance of deliberations of Cabinet or would permit the drawing of accurate inferences with respect to any such deliberations. In addition, the mailing list and what appears to be an earlier draft version of the questionnaire have already been disclosed to the appellant as part of Record 35. Therefore, I find that these five Record 6 documents do not qualify for exemption under section 12(1) of the *Act*, and should be disclosed. For clarity, I will provide the Ministry with a copy of the five Record 6 documents that are covered by this finding.

Section 12(1)(a)

The Ministry claims section 12(1)(a) as the basis for denying access to Records 10 and 16-19, all of which consist of email messages exchanged by various staff of the Ministry and other ministries involved in the criminal reference check issue. The Ministry does not take the position that any of these records consist of actual agendas or minutes of meetings of Cabinet or one of its committees. Rather, in the Ministry's view, disclosing these records would reveal the agenda items or decisions made at various Cabinet meetings, thereby bringing the records within the scope of section 12(1)(a).

In Order PO-1725, I discussed the meaning of the word "agenda", one of the specific words that appears in section 12(1)(a):

I also want to comment on the important distinction between the term "agenda" as it appears in the exemption at section 12(1)(a) of the *Act*, and entries such as those appearing in the records at issue in these appeals. The word "agenda" in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an "agenda" as this term is used at section 12(1)(a).

...

In my view, the same reasoning applies to the word "minute" as it appears in section 12(1)(a). It too refers to a specific record, created as an official document of Cabinet Office, which identifies the actual decision made or action taken by Cabinet or one of its committees on a specific topic at a particular meeting.

Records 16-19 all consist of a string of emails exchanged by various Ministry staff and other government employees involved in the criminal reference check issue. The contents of Record 17 have already been disclosed to the appellant through the release of Record 20, so this record clearly does not qualify for exemption under 12(1) and should be disclosed. Some of the contents of Record 16 have similarly been disclosed in Record 20, and these portions also do not qualify for exemption under section 12(1).

None of Records 18, 19 or the remaining portions of Record 16 contain or make direct reference to an agenda item or minute of any Cabinet or Cabinet committee meeting. They were all created during a short period of time following the meeting of the Education Policy Committee

of Cabinet held on September 21, 2000. The existence of this meeting has already been revealed to the appellant through the disclosure of other records in this appeal (e.g. Record 20). Accordingly, I find that any portions of Records 16, 18 and 19 that refer to the date of this Cabinet committee meeting and the fact that the topic of criminal reference checks was discussed at the meeting do not qualify for exemption under section 12(1), and specifically that this information does not qualify as an “agenda” for the purpose of section 12(1)(a).

None of Record 16 contains an “agenda” or “minute” as those words are used in section 12(1). One portion of Record 16 makes reference to an optional approach to implementing the criminal reference check process that has already been identified in other disclosed records (e.g. Record 23), and the rest of this record deals with generalized statements regarding implementation issues, none of which, in my view, would reveal the substance of deliberations of Cabinet or its committees. Accordingly, I find that none of Record 16 qualifies for exemption under section 12(1) of the *Act*, and it should be disclosed.

Record 18 is largely administrative in nature, and clearly does not contain an “agenda” or “minute” as the words are used in section 12(1)(a). However, one statement in this record could, in my view, reveal the substance of deliberations that took place at the September 21, 2001 meeting, and I find that this statement qualifies for exemption under the introductory wording of section 12(1). The rest of Record 18 does not qualify for exemption and should be disclosed.

Record 19 also clearly does not contain an “agenda” or “minute” as the words are used in section 12(1)(a). However, the substance of this email chain concerns specific implementation details of the criminal reference check issue that flow directly from the Cabinet committee process, and these details do not appear to have been revealed to the appellant through the disclosure of other records in this appeal. For this reason I find that disclosure of Record 19 would reveal the substance of deliberations of a Cabinet Committee, and therefore this record qualifies for exemption under the introductory wording of section 12(1).

Record 10 is a brief email message to and from various Ministry staff dealing with the possible items to be included on future agendas of two Cabinet committee meetings. Most of this record contains information that is not responsive to the appellant’s request. Specifically, one of the meetings does not deal with the topic of criminal reference checks, and the other one that does also includes two other unrelated topics. I find that all of this non-responsive information should not be disclosed to the appellant. The only responsive portion of Record 10 is a one-line reference to the upcoming meeting where document #2 of Record 28 was presented to the Education Policy Committee of Cabinet. The information in this line has already been revealed to the appellant through the disclosure of other records in this appeal, and for that reason I find that it does not qualify for exemption under section 12(1), and specifically section 12(1)(a) as claimed by the Ministry.

Section 12(1)(d)

The Ministry claims that Record 4 qualifies for exemption under section 12(1)(d). This record consists of a number of documents, all of which relate to the establishment of an interministerial

consultation committee looking into various implementation issues stemming from the introduction of the *Safe Schools Act* in May of 2000.

For a record to qualify for exemption under section 12(1)(d), the institution must establish that the record:

- (a) was used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or
- (b) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

(Order P-1621)

The Ministry submits that disclosing the various Record 4 documents that contain information relating to the interministerial consultation process would reveal “the substance of a Cabinet minute and discussion of matters relating to ongoing policy decisions, and notes (draft) from this consultation”. The Ministry also points out that the various Record 4 documents identify stakeholders who comprise a working group, and that the agenda for a meeting of this working group also contains information that would reveal the substance of Cabinet’s direction on the criminal reference checks issue. Finally, the Ministry submits:

Given the nature of the information contained in record 4, as summarized above, the Ministry submits that disclosure of the record would undeniably reveal the substance of deliberations of a Cabinet committee and reveal information both used for and reflecting consultations relating to the making of government decisions on the formulation of government policy. Therefore, the Ministry maintains its position that this record is exempt from disclosure under section 12(1)(d) of the *Act*.

Two of the documents comprising Record 4 consist of agendas of a meeting of the interministerial consultation group and a meeting of the stakeholder working group. Both of these documents quote from the direction provided by the Education Policy Committee of Cabinet on the issue of criminal reference checks, and also make reference to the parameters for the direction set by the Cabinet committee. I find that disclosing these portions of the two documents would reveal the substance of deliberations of the Cabinet committee and qualify for exemption under the introductory wording of section 12(1).

As far as the other portions of these two documents, as well as all other documents comprising Record 4 are concerned, I find that none of them reflect the substance of Cabinet deliberations on the criminal reference check issue, nor do any of them meet the specific requirements of section 12(1)(d). A number of these documents were provided to individuals outside of government, which, in my view, is inconsistent with their treatment as confidential Cabinet records. I have also been provided with no representations that would establish that any of these documents were

used for or reflect consultations **among Ministers of the Crown**, as required by section 12(1)(d). Rather, they relate to a process of interministerial staff and external stakeholder consultation established by the Ministry in order to canvass implementation issues relating to the policy decisions made by Cabinet on criminal reference checks and reflected in legislation. No Cabinet minister is referred to in any of these documents, nor do the various issues identified for consultation refer to a process that would ultimately lead to consultations among Ministers. Therefore, I find that none of the Record 4 documents qualify for exemption under section 12(1)(d) and, with the exception of the portions that I found qualify for exemption under the introductory wording of section 12(1), the rest of the Record 4 documents should be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 19 and 28 in their entirety, the non-responsive portions of Record 10, and the portions of Records 4, 6 and 18 not covered by Provision 2 of this order.
2. I order the Ministry to disclose the responsive portions of Record 10, Records 16 and 17 in their entirety, and the portions of Records 4, 6 and 18 that do not qualify for exemption under section 12(1). I have provided the Ministry with:
 - an attached highlighted copy of Record 18 indicating the portions that qualify for exemption and **should not be** disclosed.
 - an attached highlighted copy of Record 10 identifying the portion that is responsive to the appellant's request and **should be** disclosed.
 - an attached copy of the two Record 4 documents, highlighting the portions that **should not be** disclosed.
 - an attached copy of the five Record 6 documents that do not qualify for exemption and **should be** disclosed.

Disclosure under this provision should be made by the Ministry by **November 8, 2002**.

3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the disclosed records, upon request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

October 18, 2002