



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2122

Appeal PA-020161-1

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 “ministerial briefing notes regarding the provincial government’s Ontario Family Health Network and its start-up efforts”. Specifically, the requester sought access to:

...information pertaining to discussions by ministry staff about specific goals for the networks, including how many physicians should be signed up each given year. As well, I would like to see financial planning or a budget on how the new template agreements, recently reached with the Ontario Medical Association, might result in additional costs.

I would also like any other information, e-mails or memos on this subject.

The Ministry contacted the requester to clarify the request. As a result, the request was reformulated as follows:

... Documentation regarding the Ontario Family Health Network and the purpose(s) of its formation, including but not limited to ministerial briefing notes, discussion papers, reports, Q’s and A’s, backgrounders and emails. Please include any financial planning or a budget on how the new template agreements, recently reached with the Ontario Medical Association, might result in additional costs. Also include any forecasts, goals or targets for the sign-up of physicians into networks and their associated target dates. The search should be limited to January 1, 2001 to December 10, 2001.

In addition, the requester withdrew any e-mail messages from the scope of her request.

The Ministry identified 17 responsive records, which were described in an index provided to the requester. Four records were disclosed in full, and six other records were disclosed in part. The remaining records or partial records were withheld on the basis that they fall within the scope of the mandatory section 12(1) exemption (Cabinet records). The Ministry also charged the requester an \$85.10 fee, which she paid.

The requester (now the appellant) appealed the Ministry’s decision. In her letter of appeal, the appellant identifies that there is a public interest in the disclosure of these records. However, as was pointed out to the appellant during mediation, the “public interest override” in section 23 of the *Act* does not apply to records that qualify for exemption under section 12(1).

Mediation did not resolve this appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry initially to the Ministry, setting out the facts and issues in the appeal and seeking representations. The Ministry provided representations, the non-confidential portions of which were shared with the appellant, together with the Notice. The appellant also submitted representations.

RECORDS:

The following records remain at issue, all of which are described in the index provided to the appellant:

Records 5 – 8, 10 – 11	Briefing notes (withheld in part)
Record 12	Roll-out Scenarios
Records 13 – 15	Budget Impact of Roll-out Delays
Record 16	Operating Proposal Briefing Note

DISCUSSION:

The Ministry submits that the records qualify for exemption under the introductory wording of section 12(1), as well as section 12(1)(a), (b) and (e). These sections of the *Act* state as follows:

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 Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

Introductory wording to section 12

Previous orders have established 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 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 disclosure of 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).

The Ministry submits:

...that disclosure of the records at issue would reveal the substance of deliberations and would permit drawing of accurate inferences about the substance of the deliberations of one of the Executive Council committees, Management Board of Cabinet (MBC) and Policy, Priorities and Communications Board (PPCB) in this case. Section 3(1) of the *Management Board of Cabinet Act* specifies that Management Board is a “committee of the Executive Council.” PPCB is also one of the committees that provides advice to Cabinet. [The Ministry] has included in this submission confidential minutes of the Executive Committees providing evidence that the information contained in the records at issue was deliberated on the date of the minute and the substance of those deliberations.

Records 5, 6, 7, 8, 10 and 11 are all briefing notes, most of which have already been disclosed to the appellant. The withheld portions all contain similar information under the heading of “Confidential Advice to the Minister.” Based on the Ministry’s representations, including the confidential portions, I find that the undisclosed portions of Records 5, 6, 7, 8, 10 and 11 qualify for exemption under the introductory wording of section 12(1). The Cabinet’s Priorities, Policy and Communications Board and Management Board met on November 30, 2000 and February 26, 2002 respectively to discuss the establishment of the Ontario Family Health Network and, in my view, disclosing the withheld portions of Records 5, 6, 7, 8, 10 and 11 would reveal the substance of the deliberations of those two Cabinet committees.

Section 12(1)(b)

In order to qualify for exemption under section 12(1)(b) of the *Act*, the Ministry must establish that

1. the record contains policy options or recommendations; and
2. the record was submitted or prepared for submission to Cabinet or its committees.

(Order 73)

The Ministry submits that:

...there is prima facie evidence that records 12, 13, 14, 15 and 16 are subject to this exemption. These documents are clearly on their face identified as a Business Planning Proposal Notes (BPA) and supporting documents (BPA requests). The format and headings of these records form various parts of the Business Plan (BPA) submissions, and are in the standard format for submissions of such requests to MBC for funding and financial decisions. Several previous [Commissioner’s] decisions have consistently found that MBC submissions qualify for exemption in section 12(1)(b). [Orders P-1034, P-1312, P-1327].... Record #16 is on the standard form for presentation of proposals for business plan funding requests (BPA) and the fact that it is on the standard form for such

requests provides evidence that it was prepared for submission to MBC...There is also evidence on the face of records #12, 13, 14 and 15 that provides evidence that these provided supporting material as noted on the headings...indicating that these records formed a part of the supporting material for record #16 and were prepared for the same purpose and deliberations. It is a common part of the BPA submissions to MBC to supply supplemental information to support the proposals or to provide more detail in answer to follow up questions on the deliberation of the proposals.

The confidential portion of the Ministry's representations includes a minute of the February 26, 2002 Management Board of Cabinet meeting, confirming that the Ministry's Business Plan was considered at that meeting.

Based on the representations and evidence provided by the Ministry, and consistent with previous orders involving similar records, I find that Records 12, 13, 14, 15 and 16 qualify for exemption under section 12(1)(b) of the *Act*. They contain policy options concerning the business activities of the Ministry and were submitted to Management Board of Cabinet during the course of the business planning process for 2003-04.

In light of my findings under section 12(1)(b) and the introductory wording of section 12(1), it is not necessary for me to deal with sections 12(1)(a) or (e).

Section 12(2)(b)

Section 12(2)(b) provides:

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

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

In its representations, the Ministry states:

In this case, [the Ministry] considered and subsequently made a discretionary decision not to refer this matter to the Executive Council for consent to grant access to the records which the Ministry claims are exempt under section 12(1). None of the information in these records is available elsewhere in the public domain. The ministry has supplied definitive evidence that the matter has been deliberated by MBC and Executive Committees. The ministry is of the view that seeking consent for subsequent disclosure of these documents could undermine the remaining negotiations and implementation of future Family Health Networks which have not yet been created, and furthermore would reveal the nature of the discussion on the issue.

For these reasons the ministry has considered the option, but has decided not to exercise its discretion [to] seek permission of Cabinet to disclose the records at issue.

In response, the appellant submits:

The Ministry made its choice not to go to cabinet, and closed this potential route for access. I do not believe I should be penalized for a unilateral decision made by the ministry without consultation of cabinet. I question the reasoning behind such a decision.

...

As a matter of public policy, [the newspaper represented by the appellant] believes that the public, through the media, should have a right to inform the public about the ideas and decisions made by elected officials.

...

The Ontario Family Health Network represents a dramatic change in the way health care is delivered at the front lines of this province, including how health professionals will be paid. That is why I believe the public has right to know and understand what the principles and ideals are behind such a fundamental policy change.

In one of the early orders of this office, Order 24, former Commissioner Sidney B. Linden discussed section 12(2)(b) and outlined the way in which it should be approached by institutions relying on the Cabinet record exemption. He stated:

After careful consideration of the submissions of both parties and an analysis of the issue, I have reached the conclusion that the *Act* does not impose an absolute requirement on the head to seek the consent of the Cabinet in all cases where an exemption under subsection 12(1) is contemplated by the institution.

I have reached this decision for three reasons: the *Act* imposes no clearly defined absolute requirement for the Cabinet to consider all subsection 12(1) rulings; it would be impractical to impose an absolute requirement; and it would be inappropriate in some circumstances to require a head to seek Cabinet consent. . .

After explaining the rationale behind each of these reasons, the former Commissioner stated:

For these reasons I have concluded that subsection 12(2)(b) does not impose a mandatory requirement, but rather provides the head with discretion to seek Cabinet consent, depending on the circumstances of a particular case. This discretion allows a head to seek consent of Cabinet in cases where he or she feels a record should be released and where a reasonable expectation may exist that the Cabinet will not withhold its consent.

In my opinion, the circumstances of each case must dictate whether or not the head seeks Cabinet consent. However, in all cases, it is incumbent on the head to be mindful of the option available under subsection 12(2)(b) and direct his or her mind to whether or not consent of the Cabinet should be sought. I am also of the view that the discretion of the head to seek consent must be exercised irrespective of whether the requester has asked the head to do so as part of a request for subsection 12(1) records.

Subsection 12(2)(b) provides no express guidance on appropriate criteria for a head to consider in deciding whether to seek Cabinet consent. These criteria will develop with time and experience, but could perhaps include the following: the subject matter contained in the records; whether or not the government policy contained in the records has been announced or implemented; whether the record would reveal the nature of Cabinet discussion on the position of an institution; or whether the records have, in fact, been considered by the Cabinet. I want to emphasize that this list is by no means exhaustive or definitive and is only included in an effort to identify examples of the types of criteria I feel should be considered.

Applying this reasoning, in my view, in properly exercising discretion an institution must take into account all relevant circumstances of a particular case, including those particular to the request, the requester, and the context in which the information is being sought. Based on the Ministry's representations, I accept that it has taken into account all of the relevant circumstances relating to the appellant's request, including the ongoing nature of discussions and negotiations surrounding the implementation of future Family Health Networks. I find nothing improper in the decision to exercise discretion in favour of not seeking the consent of Cabinet in this case, and would not alter it on appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

March 4, 2003