



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2466

Appeal PA-050038-1

Ministry of Citizenship and Immigration



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NATURE OF THE APPEAL:

In 2004, a bill to amend the *Ontarians with Disabilities Act, 2001*, was introduced in the Ontario legislature. Now enacted as the *Accessibility for Ontarians with Disabilities Act, 2005*, the legislation was originally referred to by the title “Bill 118”.

Following Bill 118’s introduction, the Ministry of Citizenship and Immigration (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. A copy of Ministry cost projections with respect to Bill 118 including but not limited to MB20 proposals from the Ministry, staffing projection costs et cetera including but not limited to Ministry costs, the costs of setting up the tribunal, the expected annual costs of inspectors and so forth;
2. Projected and/or forecasting models that indicate the cost of implementing the provisions of Bill 118 including but not limited to Ontario Government and the private sector and the broader public sector and any other sector which may not have been mentioned above inclusive of any Ministry examples of what those costs incurred might in fact be; and
3. A copy of any public opinion or sector related polls commissioned by the Ministry of Citizenship and Immigration relating to Bill 118 as well as information that outlines the following regarding the poll:
 - Name of poll commissioned
 - Name of polling firm
 - The stated purpose of the poll commissioned
 - Who in the Minister’s Office was made of aware of [the] poll
 - If applicable, the respective Ministry Branch and/or ADM responsible from the bureaucratic side for initiating and/or managing the commissioning of a poll
 - The estimated cost of the poll commissioned
 - The actual cost of the poll commissioned

The Ministry issued a decision letter granting access to a two page record (what became known as Record 8) related to items one and two of the request, with non-responsive information severed. Access to the remaining responsive records under items one and two was denied pursuant to section 12(1) of the *Act*. The Ministry stated that no records responsive to item three of the request were found since no polls had been commissioned by the Ministry in relation to the bill. The requester (now the appellant) appealed the Ministry’s decision.

During mediation, the Ministry provided the appellant with an Index of Records describing 15 documents responsive to items one and two of the request. The Ministry also issued a supplementary decision letter during the mediation process claiming section 13(1) of the *Act* as an additional exemption for Records 1 and 14 and did so within the period allowed for claiming

further discretionary exemptions, as specified in section 11 of the Commission's *Code of Procedure*.

At the conclusion of mediation, the appellant advised that Records 2, 3 5, 7 and the non-responsive portion of 8 were no longer being sought, but that adjudication of the issues relating to records 1, 4, 6, and 9 – 15 should proceed. The appeal was therefore transferred to me for adjudication.

Initially, I sent a Notice of Inquiry to the Ministry, inviting representations, which I subsequently received from the Ministry. I then sent a Notice of Inquiry to the appellant, and enclosed the Ministry's complete representations. The appellant declined to submit representations.

RECORDS:

The following chart sets out the records still at issue in this appeal and includes a brief description of the record and the exemption relied upon by the Ministry to deny access.

Record Number	General Description	Exemption(s) Claimed <i>(in decision letter)</i>
1	Report prepared to support Cabinet decision on proposed Bill	12(1)(b) and (c) 13(1)
4	Speaking notes for the Minister in seeking Cabinet approval for proposed Bill	12(1)(a) and (b)
6	Communications Plan for introducing the proposed Bill	12(1)(a) and (b)
9	Briefing for Deputy Minister regarding Cabinet submission on proposed Bill	12(1)(c) and (d)
10	Results-based plan submitted to Cabinet regarding Bill implementation	12(1)(a) and (b)
11	Background financial analysis for Record 10	12(1)(c)
12	Briefing material for Minister on information contained in Record 2 [<i>#2 itself is not at issue</i>]	12(1)(e)
13	Background financial analysis for Record 2 [<i>#2 itself is not at issue</i>]	12(1)(c)

14	Summary and analysis of Record 1	12(1)(e) 13(1)
15	Presentation to Minister on Record 1	12(1)(e)

DISCUSSION:

CABINET RECORDS

The Ministry has claimed the application of the section 12 Cabinet exemption to the records at issue in this appeal. Based on the Ministry's decision letter and representations, the following are the pertinent parts of section 12 of the *Act*:

- (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;
 - (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
 - (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
 - (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;
 - (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.

(2) 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.

Representations

Although the Ministry cited various provisions under section 12(1) for each of the ten records at issue, the common thread throughout is that all of the records, or portions of the records that remain at issue, qualify for exemption under the introductory wording of the section. Accordingly, I will consider the introductory wording first.

The Ministry takes the position that any record which would reveal the substance of deliberations of the Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to those deliberations, qualifies for exemption under section 12(1) (for example, Orders P-11, P-22, P-331, P-361, and P-506).

The Ministry described each of the records and the application of the introductory wording of the section 12(1) exemption as follows:

Record 1 – Consultant's report

- This 392 page record is a consultant's report commissioned for the express purpose of advising Cabinet and providing it with a cost benefit analysis for making Ontario accessible to persons with disabilities by the year 2025. The cost estimate information was drawn from Record 1 and directly incorporated into the Cabinet submission, known as Record 2, which is not at issue in this appeal.
- Record 1 also directly informed the deliberations of Cabinet and a number of its committees, including the Committee on Communications, the Health and Social Services Policy Committee and an *ad hoc* committee, with respect to the policy behind the proposed legislation. The findings of the report were used in various presentations by the Minister (of Citizenship and Immigration), including information found in Record 4, which is characterized as speaking notes used by the Minister in presenting to a Cabinet Committee. Citing Order PO-2227, the Ministry takes the position that the entire report is exempt even though it was not placed before Cabinet in its entirety since the most essential elements of the record were the subject of Cabinet's deliberations by way of inclusion in a Cabinet submission.

- The cost estimate information cannot be separated out from the rest of the report (supporting reasons, assumptions, and data and associated explanations) to rationalize disclosing any or all of the remainder of the report, since disclosure would permit the reader to make accurate inferences about the information which was incorporated into the Cabinet submission or the substance of committee deliberations concerning this legislative initiative. The Ministry relies on Orders PO-2227 and PO-1831.

Record 4 – Minister’s speaking notes

- This record contains the speaking notes used by the Minister at the Health and Social Services Policy Committee meeting held in September 2004. The Ministry connects this record with Record 3 (no longer at issue in this appeal), which reflects the substance of the deliberations of that committee of Cabinet. The speaking notes at Record 4 would, by extension, qualify for exemption under the introductory wording of section 12(1). The disclosure of Record 4 would “similarly ... permit accurate inferences to be drawn about the substance of such deliberations”.

Record 6 – Communications plan

- This “plan” was prepared in anticipation of the introduction of Bill 118 into the legislature on October 12, 2004 and for the purpose of laying out a communications strategy. The Ministry adds that although the document is marked “draft”, this was the final version, approved by the Minister’s office, and Communications staff in the Cabinet and Premier’s offices, and it formed the basis of two other records (2(c) and 5), both of which are no longer at issue in this appeal) and which were presented to Cabinet and the Cabinet Committee on Communications.

Records 14 & 15 – Summary and analysis for, and presentation to, Minister regarding record 1

- Record 14 contains a detailed explanation and summary of Record 1 and was used to brief the Minister in anticipation of her appearances before Cabinet and its committees with respect to the approval of Bill 118. Record 15 was used to brief the Minister on September 2, 2004, and reflects the content of Record 1, as set out in the Cabinet submission (Record 2) and briefings of Cabinet committees (Records 2, 3, 5, 7).

Records 13, 12 & 9 – Background financial analysis and material for briefing Deputy Minister on Cabinet submission

- This group of records relates to the Cabinet submission, with Record 13 containing the final version of the financial information presented in the submission. Page one of Record 13 reflects the final total estimates, and the subsequent nine pages contain a detailed breakdown of those final figures. This information was also included in the presentation to the Health and Social Services Policy Committee.
- Records 9 and 12 are based on the content of Record 13 and reflect in summary form the information set out in the Cabinet submission and the Health and Social Service Policy Committee presentation material, and were used to brief the Deputy Minister and Minister, respectively.

Records 10 & 11 – Results Based Plan and its background financial analysis

- The Ministry relies on Order PO-2091 in submitting that a Results-based Plan (“RBP”) and other materials prepared in support of it are exempt under the introductory wording of section 12(1).
- Record 10 is an “activity note” containing 23 pages taken from RBP 2005-06, and forms part of the submission to Cabinet requesting funding for implementing the proposed legislation. The record contains budget and staffing requests for the fiscal years 2005-06, 2006-07, and 2007-08 and the figures in this record reflect refined estimates of the funding amounts contained in the Cabinet submission. Record 10 is not to be confused with the related Ministry Plan that would be made available to the public; it is expressly labeled “Confidential Advice to Cabinet” on each page. Record 10 was approved by the Minister and the Deputy Minister, was submitted to Management Board on December 10, 2004 and was considered by it.
- Record 11 outlines the background analysis for the RBP and contains the specific financial calculations and estimates for the funding request and staffing levels. Although this record was not submitted to Cabinet, it contains background analysis and explanation of Record 10, and therefore qualifies for exemption under the introductory wording of 12(1).

Analysis

The Ministry has claimed that the introductory wording of section 12(1) applies to all of the records at issue in this appeal. As previously noted, if disclosing a record that has never been placed before Cabinet 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].

Based on my careful review of the records and the Ministry's representations, and in the absence of representations from the appellant, I accept the position put forward by the Ministry regarding the application of the introductory wording of section 12(1) to the records in question. Specifically, I am satisfied that the Ministry has established a linkage between the content of each of the records and the actual substance of the deliberations of a Committee, or Committees, of the Executive Council and, ultimately, Cabinet.

In my view, the records can be placed into two categories: (1) records actually presented to Cabinet, and (2) records not presented to Cabinet, but which would, if disclosed, effectively reveal the substance of deliberations of a Committee of the Executive Council, or Cabinet itself.

Record 10 is properly situated in the first category. It is a direct excerpt from a Results-based Plan, which was submitted to, and considered by, Management Board of Cabinet in December 2004. Consistent with the reasoning in Order PO-2091 cited above, I am satisfied that this record is exempt under the introductory wording of section 12(1).

The second group of records relate to the content of Record 1 (the consultant's report), Record 2, (the Cabinet submission), or Record 3 (a submission to a Cabinet committee). These latter two documents are no longer at issue in this appeal, but I would have found that they qualified for exemption under section 12, as having been prepared for, and deliberated upon, by Cabinet.

The Ministry's submissions on Record 1 cite Order PO-2227 in which Adjudicator Frank DeVries held that even though a record may not have been put before Cabinet in its entirety, it could still qualify for exemption under the introductory wording of section 12(1) if the most essential elements of the record were the subject of Cabinet's deliberations by way of inclusion in a Cabinet submission. I agree with that reasoning and adopt it for the purposes of this appeal.

It is important to note that the consultant's report found at Record 1 provides background information and a cost-benefit analysis of an "accessible Ontario", and contains detailed budget estimates for implementing various aspects of the bill. Having reviewed the entire record, I am satisfied that although small segments of the report may not have been incorporated into the Cabinet submission, the essential elements *or substance* of the report did form the basis of the written Cabinet submission considered and approved by Cabinet in September 2004.

I am similarly satisfied by my review of the remaining records (4, 6, 9, and 11 – 15) that disclosure of these speaking and briefing materials and background analyses would reveal the substance of the actual deliberations of Cabinet or its committees on Bill 118, or would permit the drawing of accurate inferences with respect to these deliberations.

Accordingly, I find that these records are subject to the mandatory exemption from disclosure established by the introductory language of section 12(1).

I did consider the issue of severance of the records in this appeal and reviewed Record 1, in particular, with this possibility in mind. However, I am satisfied that applying the established principles of severance to this report would serve no meaningful purpose as the resulting excerpts would, in all likelihood, be insignificant snippets, or simply non-responsive to the appellant's stated intention of obtaining additional information about the costs of implementing the new accessibility legislation. (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.)).

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 sections 12(1)(a) through (e), or section 13, as variously claimed for individual records.

Section 12(2) exceptions to the exemption

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 provided representations on the application of section 12(2)(b), relying on Order P-771 in which former Assistant Commissioner Irwin Glasberg found that while this provision does not impose a requirement on an institution to seek the consent of Cabinet, the head of the institution must at a minimum turn his or her mind to this issue.

The Ministry outlined the factors that were considered by the Minister in reaching the decision not to seek consent of the Cabinet, including:

- the purpose of the legislative exemption, which is to ensure full and frank deliberations of Cabinet;

- the sensitive nature of [the] records;
- the current nature of the records [at the time of the access request];
- the fact that the legislation had not yet been enacted; and
- that ... there existed no reasonable expectation that Cabinet would consent to the request.

Based on the representations of the Ministry regarding the Minister's exercise of discretion, I am satisfied that the Minister exercised her discretion under section 12(2)(b), and considered relevant factors in doing so.

ORDER:

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

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 19, 2006