



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2857

Appeal PA-050129-3

Ministry of Finance



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a solicitor representing the owners of thirteen properties (the requester). Following a teleconference call, the requester narrowed the request to include the following:

... any and all records or documents of any kind relating to the decision making which took place and resulted in the inclusion of the [13 properties] in the *Greenbelt Area*. ... including any and all emails which remain on the system and/or have been printed out in hard copy.

The requester noted that he was not requesting any e-mails and electronic documents maintained on backup tapes.

The Ministry issued an interim access decision and a fee estimate. In its interim access decision, the Ministry advised that some records would not be disclosed on the basis of the exemptions in sections 12(1) (cabinet records), 13(1) (advice or recommendations), 17(1) (third party information) and 18 (economic and other interests).

Following payment of the fee, the Ministry issued a final access decision in which it indicated that 52 records had been located. In that decision, the Ministry granted access to certain records and denied access to the remaining records or parts of records on the basis of sections 12(1), 13(1), 17(1) and 21(1) (invasion of privacy) of the *Act*. The Ministry also indicated that an affected party whose interests may be affected by the disclosure of information relating to it had been notified of the Ministry's decision to disclose certain information to the requester, and that that party had 30 days to file an appeal of the Ministry's decision to disclose.

The requester, now the appellant, appealed the Ministry's decision to deny access to the records. The appellant also indicated that he was appealing on the basis that more responsive records ought to exist, and he identified the three individuals who, in his view, ought to have responsive records. The issue regarding the reasonableness of the Ministry's search for records is therefore an issue in this appeal.

The Ministry subsequently sent the requester a decision letter, indicating that the affected party had not appealed the Ministry's decision to disclose certain records relating to it, and the Ministry accordingly provided the requester with those records.

During mediation, the mediator confirmed that section 17(1) was no longer an issue in this appeal. Mediation did not resolve the other issues, and this appeal was transferred to the inquiry stage of the process. This office sent a Notice of Inquiry, setting out the facts and issues on appeal, to the Ministry, initially.

The Ministry subsequently issued a revised decision in which it granted access in full to Records 16, 28, 29, 34 and 35 and access to additional information contained in Record 49. The Ministry

indicated that portions of the remaining information in Record 49 were not responsive to the request and portions were withheld pursuant to the exemptions in sections 12(1) and 21(1).

The Ministry then submitted representations in response to the Notice of Inquiry, which also reflected its revised decision.

The file was transferred to me to complete the adjudication process. I decided to seek submissions from the appellant on the outstanding issues and records. It should be noted that the responsiveness of information was not addressed in previous decisions of the Ministry or in mediation. The appellant was contacted to determine whether he wished to pursue access to the portion of Record 49 that the Ministry claimed was non-responsive to the request and he responded in the affirmative. Accordingly, the responsiveness of the portions of Record 49 is included as an issue in this appeal.

I then sent the Notice of Inquiry, along with a copy of the representations of the Ministry, to the appellant. The appellant provided representations in response, and those representations were shared with the Ministry, who provided reply representations.

RECORDS:

The Ministry identified 52 responsive records, and granted full access to nine of them (Records 4, 5, 6, 8, 16, 28, 29, 34 and 35). The Ministry denied access to the remaining 43 records in whole or in part on the basis of the identified exemptions. These records consist of internal e-mails, briefing notes, presentations, draft presentations, slide decks, and agendas.

DISCUSSION:

REASONABLE SEARCH

As I noted above, the appellant believes that more responsive records ought to exist, and he identified the three individuals who, in his view, ought to have responsive records. These individuals were identified as the former Minister of Finance, the Chief of Staff to the Former Minister and the Executive Assistant to the Former Minister.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

The Ministry provided an affidavit, sworn by an economist employed by the Ministry (the Economist). The Economist indicated that he created and/or presented most of the records at

issue in this appeal and that he was involved in responding to the appellant's request. In his affidavit, the Economist states:

As policy lead on this file, I was charged with coordinating a response at both the branch level (for the Industrial and Financial Policy Branch) as well as at the division level (within the Office of Economic Policy). As part of this coordination, I interviewed all members of my unit as well as all other staff in the branch and division that might have had some involvement on the Greenbelt file. I asked staff to conduct a search through their own individual records. I also performed a search for responsive records by examining my own email, electronic files, paper files as well as the branch central files and files from the Assistant Deputy Minister's Office. It is also my understanding that [a named individual] had performed a search of the Minister's Office and failed to locate any responsive records other than those that I found. As the lead policy analyst on this file, I was the author or keeper of most of the records deemed to be responsive.

The appellant was provided with a copy of this affidavit. In the appellant's representations, however, there was no mention made of this issue. In the introductory discussion in the appellant's representations, the issues identified for the discussion that followed excluded the reasonableness of the Ministry's search for responsive records.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. In this appeal, the requester has identified by name three individuals that he believes ought to have additional responsive records; however, given the opportunity to respond to the efforts made by the Ministry to locate responsive records, he did not question the search method or elaborate on why he believed additional records should exist.

Based on the affidavit provided by the Economist, I am satisfied that the search conducted by the Ministry was reasonable in the circumstances of this appeal.

RESPONSIVENESS OF RECORDS

The Ministry has withheld portions of Record 49 as non-responsive to the request. These portions comprise various e-mails contained in an e-mail chain. The Ministry does not explain in its representations why it has withheld this information as non-responsive.

Although the appellant indicated that he wished to have this issue addressed, in his representations, the only discussion he provides consists of a statement that the Ministry did not disclose these portions as they were non-responsive.

The Ministry has also claimed that portions of Record 27 are not responsive to the request. The appellant was not asked to address the responsiveness of these portions in the Notice of Inquiry that was sent to him, and, although the Ministry's representations were shared with him, he did not address the Ministry's position regarding these portions of the record. Nevertheless, I have

decided to review the portions of Record 27 that the Ministry has identified as being non-responsive.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Previous orders of this office have held that institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Further, to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

In view of the lack of submissions on this issue by the parties, I have reviewed the portions of Records 27 and 49 that the Ministry claims are not responsive, and make the following findings:

The information contained in the portions of the e-mail chain at issue in Record 49 is very innocuous, however, it must be read in context and in doing so, I find that it is clearly connected to the previous e-mails in the chain. Accordingly, I find that it is reasonably related to the appellant's request.

The Ministry originally claimed section 12(1) for these portions of Record 49. It did not make any representations on the application of section 12(1) to them. However, I note that the information at issue in this discussion is of a similar nature to the information at issue in Record 26, for which representations were made. Rather than sending Record 49 back to the Ministry to issue a decision on these portions, I will consider the representations it has made generally and with regard to Record 26 and apply them to the portions of Record 49 that it withheld as non-responsive.

The portions of Record 27 identified as non-responsive pertain to a Cabinet committee meeting, but do not pertain to the subject matter of this request. I

agree with the Ministry that these portions of the record are not reasonably related to the request and have been properly removed as being non-responsive. In addition to the portions that the Ministry has identified, I find that the first clause in the first sentence identified by the Ministry as falling within the exemption at section 12(1)(a) is also not responsive to the request. This clause refers to an agenda item for the scheduled Cabinet meeting, but it does not pertain to the subject matter of the request. Rather, it pertains to the subject matter of the portion of the e-mail that I have found to be non-responsive. Accordingly, I will only consider whether section 12(1) applies to the remaining portion of the first sentence, the second sentence in the identified e-mail and the subject of the e-mail.

CABINET RECORDS

The Ministry relies on the introductory wording in section 12(1) as well as sections 12(1)(a), (d), (e) and (f) to deny access to the records for which the section 12(1) exemption claim is made. These sections read:

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;
- (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
- (f) draft legislation or regulations.

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].

Representations

The Ministry provides extensive representations on the application of section 12(1) to the records, and provides an affidavit from the Economist, who was an employee with the Ministry at the relevant time, and who wrote and presented most of the records at issue. The Ministry categorizes the records according to their contents, and identifies that the section 12 exemptions “gravitate around three Cabinet submissions; one in the year 2003, one in 2004 and the other in 2005.” The Ministry then reviews the records under these categories. In conducting my analysis, I will review the records under these various categories.

The appellant also makes extensive representations on the application of the section 12(1) exemption. The appellant begins by noting that, under section 53 of the *Act*, the burden of proof in relation to section 12 lies squarely with the Ministry. The appellant also notes that the criterion for the application of section 12(1), as found in that section’s introductory wording, is that disclosure of the record must “reveal the substance of deliberations of the Executive Council or its committees.”

The appellant then reviews the manner in which this section has been interpreted by this office, including references to some of the orders set out above, and in particular states that the wording in the introduction to section 12 that a document’s disclosure would “reveal the substance of deliberations” has also been subject to the following clarifications:

Where disclosure of a record would permit the drawing of accurate inferences with respect to the substance of deliberations of Cabinet, the mandatory exemption in section 12(1) can also apply, whether or not the record has itself been placed before Cabinet. [Orders P-361, P-604, P-901, P-1678, P-1831, PO-17251.

Records which reveal merely the process by which consultation occurred and legislation was prepared is insufficient to meet the exemption criteria established by subsection 12(1). It cannot be said that the disclosure of such information alone will reveal the substance of Cabinet[’s] deliberations. [Order P-1570]

There may also be a distinction between the substance of contents (e.g. policy recommendations, etc.) contained in a record or report, and the substance of the deliberations actually made by the Executive Council or its committees. In some cases, the contents may be distinct from the deliberations for the purposes of exemption under s. 12(1). [Order P-2241]

Finally, if a record is actually placed before Cabinet or a committee that, in itself, is strong - but not necessarily determinative - evidence that disclosing its content could reveal the substance of deliberations. Especially where a record was not actually placed before Cabinet, the Ministry must provide evidence and argument

sufficient to establish a link between the content of the record, and the actual substance of Cabinet deliberations. [Order P-2320]

The appellant then proceeds to refer to each of the records for which section 12(1) is claimed, and provides representations disputing the Ministry's position that the exemption applies to each record. I will review the specific arguments put forward by the appellant for each of the records below; however, for many of the records the appellant makes the following arguments:

The Appellants contend that [the] record does not meet the requirements of section 12(1). The Appellants submit that the records reveal merely the process by which consultation occurred and legislation was prepared and, therefore, disclosure of such information alone will not reveal the substance of Cabinet[']s deliberations. Further, the Appellants submit that in this case the contents of the records are distinct from the deliberations for the purposes of exemption under s. 12(1).

I will refer to this recurring argument in the discussions that follow as "the process and deliberations argument."

The appellant also refers to the wording in section 12(1)(a) and the interpretation of "the Executive Council or its committees," and states:

A "committee", for these purposes, is a group composed of Ministers where there is "collective ministerial responsibility and Cabinet prerogative" that justifies invoking the application of the exemption. "Staff" committees are distinct from this group and do not fall within the parameters of section 12(1)(a). [P-604]

For some of the records set out below, the appellant argues that the meeting to which these records relate is not a meeting of "the Executive Council or its committees."

With respect to the application of section 12(1)(d), the appellant states:

[This] exemption is only applicable to 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, which would reveal the substance of deliberations of the Executive Council or its committees.

In order to qualify for an exemption under section 12(1)(d), the record must:

- 1) reflect consultation among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy, or
- 2) have been used to make government decisions or the formulation of government policy.

[Order P-883, which was upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]:

There must also be evidence that the record was used for consultation among *Ministers*; it is not sufficient that the record was used for consultation among civil servants *employed by Ministries*. [Order P-920].

Regarding the application of section 12(1)(e), the appellant states:

It was established in Order 131 that to qualify for an exemption under section 12(1)(e), the Ministry must establish that the record itself has been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

Given that it uses the present tense, section 12(1)(e) has been held to be prospective in its application, and therefore is inapplicable to matters that have already been considered by the Executive Council or its committees [Order P-604].

In order to rely on the exemption under section 12(1)(e), the Minister must establish that the subject-matter of the record was the subject of ongoing discussion and direction by Cabinet. [PO-2250]

In its reply representations, the Ministry responds to a number of the general comments made by the appellant. I will address some of these responses in the discussion of individual records below.

Records Relating To The December 1, 2003 Cabinet Submission

Records 18, 19, 20, and 21

The Ministry states:

Records 19, 20 and 21 are submissions to Cabinet committees. Pursuant to the affidavit by [the Economist], these records were submitted to and deliberated by the Federal, Interprovincial and Municipal Relations Committee, a committee of Cabinet, on December 1, 2003. Records 19 and 20 contain submissions to the Cabinet committee regarding the Greenbelt protection options and recommendations for the Greenbelt legislation. Record 21 is the associated

Communications Plan with Cabinet approval lines on page 9 and 10. Although this document does indicate on the top right corner as a “draft”, the affidavit by [the Economist] clearly indicates that this was submitted to and deliberated by the Cabinet committee. Record 18 is the covering memorandum that was submitted along with Records 19, 20 and 21 to the Federal Interprovincial and Municipal Relations Committee on December 1, 2003. Pages 31-34 of Record 20 consist of the “draft” Cabinet Minute which became the proposed Cabinet Minute when signed by the Minister and Deputy Minister on page 34. That portion is subject to section 12(1)(d) of [the Act]; that is, the exemption for a Cabinet Minute. The Ministry submits that disclosure of these records would reveal the substance of deliberations of Cabinet or of its committees.

The appellant states:

The Ministry submits that disclosure of Records 18, 19, 20 and 21 would reveal the substance of deliberations of Cabinet or of its committees.

The Appellants submit that since the Federal, Interprovincial and Municipal Relations Committee is not a committee of Ministers, but rather a “staff” committee, this record does not fall within section 12(1)(a). At the material time, the Federal, Interprovincial and Municipal Relations Committee was composed of 13 MPPs, only six of whom were also Ministers.

In any event, the Appellants further submit that the disclosure of these records would not provide for an accurate inference of the deliberations of Cabinet or its committee.

The appellant also states:

The Ministry submits that pages 31-34 of Record 20 is subject to section 12(1)(d) of the Act, specifically the exception for a Cabinet Minute.

The Appellants contend that the Ministry has failed to meet its onus in establishing this factual assertion. Accordingly, it is not entitled to rely on the section 12(1)(d) exemption.

In response to the appellant’s assertion that the Federal, Interprovincial and Municipal Relations Committee is not a committee of Cabinet, the Freedom of Information and Privacy Co-ordinator for the Ministry states:

[T]he Appellant argues that a certain **committee of the Executive Council** is not a Cabinet committee because it is composed of ministers and other MPPs. In response, the Ministry submits the evidence of [the Economist] who is most knowledgeable about it and has sworn that it is a Cabinet committee. I have contacted [the Economist] for further information on this point, and he informs me that this structure is a typical feature of the two McGuinity governments for

Cabinet committees. There is no written protocol on this, but it is the premier's prerogative to establish these committees and determine the proportion of Cabinet members, Parliamentary Assistants and MPPs. Only Treasury Board and Management Board of Cabinet are defined by statute through the Treasury Board Act and the Management Board of Cabinet Act. If you go to the "Premier's Website" from www.gov.on.ca, and click on "Team" at the top, you will be taken to a list of the members of all current cabinet committees on the McGuinty team. Click on these cabinet committees, as they are called on the website, and you will see that they are composed of ministers and other MPPS; some are Parliamentary Assistants to ministers and others are just MPPs. I attach two committee member lists from the web to make this point as Schedule A.

The MPPs are not staff but elected members of the provincial parliament. "Staff" means employees and civil servants of the Ministry like myself, not elected officials or cabinet ministers. The Ministry submits that the Federal, Interprovincial and Municipal Relations Committee, created on December 1, 2003, was every bit as much a committee of Cabinet as any other in the McGuinty government. P-604 predates the McGuinty government and can be distinguished on that ground. The s. 12 legislation has not been amended to exclude such Cabinet committees.

Analysis and Findings

Based on the Ministry's representations, including the affidavit sworn by the Economist, and my review of the records, I find that Records 19 and 20 are submissions presented to the Federal, Interprovincial and Municipal Relations Committee. I find further that Record 21 is the associated Communications Plan which includes a section for Cabinet to indicate its approval. In addition, I accept the Ministry's explanation regarding the structure and composition of committees at the time this committee was created, which is supported by the sworn affidavit of the Economist, who provided first-hand knowledge of the workings of this committee. Accordingly, I find that the Federal, Interprovincial and Municipal Relations Committee is a Cabinet committee. Moreover, I find that disclosure of these three records would reveal the substance of deliberations of a committee of Cabinet and Records 19, 20 and 21 are, therefore, exempt pursuant to the introductory wording of section 12(1).

Record 18, however, is simply a covering memorandum that was attached to Records 19, 20 and 21. It does not contain any more information than was provided in the Ministry's description of the records in its representations. I am not persuaded that disclosure of this record would reveal in any way the substance of the deliberations of Cabinet or one of its committees. The Ministry makes the following additional comments regarding cover pages generally in response to the appellant's argument that many of the records simply relate to the process of getting a record to Cabinet:

[The appellant's argument] which distinguishes between records describing the process of getting to Cabinet and the subject matter of records which go to Cabinet is a useful distinction...

The Ministry responds that the process argument could be used for cover pages showing the path or the intended path of a Cabinet document, as long as the substance of the Cabinet document being sent is not revealed or summarized. Generally the cover pages are kept with the documents for the [Commissioner's Office], not because they are exempt, but because they are needed to show the path of the record at issue. The process is the process of how a document gets to a Cabinet Committee, through ADM's, deputy ministers and the Minister. The cover page while not strictly exempt reveals none of the requested information, and as such is a *de minimus* piece of paper, simply not worth separate argument or separate disclosure. There are a number of cases on severance which make the point that some pieces of information are too small to be worth the trouble of being severed or treated separately whether they are exempt or not. In one case the rule is to "sever only when the result is a reasonable fulfillment of the purpose of the statute ... Disconnected snippets of releasable information taken from otherwise exempt passages are not in my view severable. Without the context such information would be worthless." [Order PO-1721 and PO- 1851] Thus the Ministry's counter argument is that the cover pages which are process documents belong with the exempt material, and should not be treated separately as it would not fulfill any access purpose of the statute but would make the exempt material devoid of context. The Ministry has chosen to follow the severance cases to assist the [Commissioner's Office] rather than the case cited by the Appellant.

The Ministry notes that it holds this position regarding similar types of records at issue in this appeal.

I agree with the Ministry that an institution should not be required to sever a record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless," "meaningless," or "misleading" information.

However, in this case, the Ministry is attempting to apply this line of reasoning to an entire document, that is, the covering memorandum that shows the path of the Cabinet submission. Not only does this record contain a complete body of information, it may have value, in itself, as evidence of such a process. I am not persuaded that the information contained in this record is "without context" or "worthless." As no other exemptions have been claimed for Record 18, I will order it disclosed.

Record 23

The Ministry states:

Record 23 is a draft of Record 20 dated November 21, 2003. The content of the draft is essentially identical to the final version albeit [with] a minor addition to the final version; that is, Record 20 addresses an additional issue that was not part of the draft version. Since Record 23 was used to prepare Record 20 and disclosure of these records would reveal the substance of deliberations of a Cabinet committee, the Minister submits that this record should be exempt.

The appellant states:

Given that Record 23 is merely a Draft of Record 20, the Appellants rely on the same reasoning to argue for disclosure of this record, specifically:

- 1) Since the Federal, Interprovincial and Municipal Relations Committee is not a committee of Ministers, but rather a “staff” committee, this record does not fall within section 12(l)(a). At the material time, the Federal, Interprovincial and Municipal Relations Committee was composed of 13 MPPs, only six of whom were also Ministers.
- 2) The disclosure of these records would not provide for an accurate inference of the deliberations of Cabinet or its committee.

Referring to the Ministry’s description of this record, the appellant also submits that “these records or parts of records do not adhere to the requirements of section 12(l)(d),” and reiterates his process and deliberations argument.

Analysis and Findings

I found above that the Federal, Interprovincial and Municipal Relations Committee is a Cabinet committee, and that disclosure of Record 20 would reveal the substance of deliberations of a committee of Cabinet pursuant to the introductory wording of section 12(1). Having reviewed Record 23, which is a draft version of Record 20, I find that disclosure of Record 23 would similarly reveal the substance of deliberations of a committee of Cabinet and is, therefore, exempt under the introductory wording of section 12(1).

These findings do not apply, however, to the first page of Record 23, which is a covering attachment to the draft Cabinet submission. My findings above regarding covering memoranda apply to the cover page. As no other exemptions have been claimed for the cover page, I will order the Ministry to disclose it to the appellant.

Record 3

The Ministry states:

Record 3 is an email discussion relating to the Greenbelt Cabinet submission that was deliberated on December 1, 2003. The severed portion reveals the topic of the Cabinet submissions. The Ministry submits that revealing the comments would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees.

Similar to his submissions regarding other records at issue in this discussion, the appellant repeats the process and deliberations argument.

Analysis and Findings

The only portion of this four-page record at issue comprises two sentences in one response within the e-mail chain. While the information in these two sentences refers generally to the Greenbelt issues, it is very vague, and it is not clear to me how disclosure would reveal the substance of the deliberations of Cabinet or one of its committees. Accordingly, I find that the withheld portion of Record 3 is not exempt under section 12(1) of the *Act*. As no other exemptions have been claimed for this record, I will order that it be disclosed.

Records 9 and 50

The Ministry states:

Record 9 is an e-mail discussion on the Greenbelt Cabinet submission that was deliberated on December 1, 2003. The severed portions represent comments that are directly related to the Cabinet submissions. The Ministry submits that revealing the comments will provide for an accurate inference of the subject matter of deliberations of Cabinet or its committees. Record 50 is part of an e-mail chain that Record 9 is affiliated with. For the same reasons, this Record should not be disclosed.

The appellant reiterates his process and deliberations argument.

Analysis and Findings

Record 9 is a duplicate of one of the e-mails in the e-mail chain contained in Record 50. When read in context, it is apparent that the discussion in the e-mails relates directly to the deliberations of Cabinet at its December 1, 2003 meeting. Accordingly, I accept that it is exempt under section 12(1) of the *Act*.

Records 17 and 25

The Ministry states:

According to [the Economist's] affidavit, Record 17 is a briefing note that was prepared to brief the Deputy Minister and the Minister on a matter which was deliberated by the Federal, Interprovincial and Municipal Relations Policy Committee, a Cabinet committee, on December 1, 2003. The Record reflects the Ministry's comments on the Cabinet submission at Record 20.

Record 25 is identical to Record 17 except for its title and date. Pursuant to the affidavit by [the Economist], this briefing note was presented to the Deputy Minister and Minister. The Ministry submits that disclosure of these records would reveal the substance of deliberations of the Cabinet or its committee.

The appellant states that the Ministry has failed to establish on the facts that these records meet the requirements of section 12(1)(e). In addition, the appellant relies on his process and deliberations argument.

Analysis and Findings

Records 17 and 25 are clearly, on their face, briefing notes relating to items to go before Cabinet or one of its committees. I accept the Ministry's submissions that these briefing notes were prepared to brief the Deputy Minister and the Minister on a matter before Cabinet and/or one of its committees. I find that disclosure of Records 17 and 25 would reveal the substance of deliberations of Cabinet and/or its committee, and they are, therefore, exempt pursuant to the introductory wording of section 12(1).

Record 22

The Ministry states:

This Record is a memorandum that contains a Variance Report regarding the Cabinet Minute dated December 3, 2003, a Compendium to the Greenbelt Protection Act, 2003, and associated Bill. The Variance Report contains and discusses the December 1, 2003, Cabinet Minute and should be excluded pursuant to paragraph 12(1)(a) of [the *Act*]. With respect to the Compendium, the Ministry submits that [the Commissioner's office] should follow a previous Order where it was found that information explaining a draft regulation is exempt under the introductory words of section 12(1) (Order P-1205). Finally, the Ministry submits that the draft regulation should be exempt pursuant to paragraph 12(1)(f) of [the *Act*].

The appellant states:

[T]his record should not be exempted from disclosure under section 12(1)(a). Although the Ministry has indicated that the Variance Report "contains and discusses" a Cabinet Minute, the Minister has failed to establish that it provides for an accurate inference of the deliberations of Cabinet or its committee.

Likewise, in the Appellants' view it has not been shown by the Ministry that the content of the Compendium meets the requirements of the section 12(1)(a) exemption.

With respect to the exemption in section 12(1)(f), the appellant simply rephrases the Ministry's description, but does not appear to take a stance on the application of this section.

Analysis and Findings

The Variance Report (first two pages of this record) contains references to the content of the Cabinet Minute, which I find either reflects the deliberations of Cabinet or would provide an

accurate inference of those deliberations. Moreover, I am satisfied that disclosure of the draft Bill would reveal the substance of the deliberations of Cabinet and/or one of its committees. I find, therefore, that this record, in its entirety, is exempt under the introductory wording of section 12(1).

Records Relating To The September 23, 2004 Cabinet Submission

Records 46, 47, 48, 51 and 52

Regarding Records 46, 47 and 48, the Ministry states:

Records 46, 47 and 48 are submissions to Cabinet committees. Pursuant to the affidavit by [the Economist], these records were submitted to and deliberated by the Community Affairs Policy Committee, a committee of Cabinet, on September 23, 2004. Records 46 and 47 contain the deliberations of Cabinet regarding the Greenbelt legislation and recommendations concerning the administration and implementation of the Greenbelt. Record 47 also contains a Cabinet Minute proposed on pages 29-32 and signed. That portion is subject to section 12(1)(d) of [the Act]; that is, the exemption for a Cabinet Minute. Record 48 is the associated Communications Plan. Although this document does indicate on the front page as a “draft”, the affidavit by [the Economist] clearly indicates that this was submitted to and deliberated by the Cabinet committee. The Ministry submits that disclosure of these records would reveal the substance of deliberations of a Cabinet committee.

The Ministry states that Records 51 and 52:

[A]re draft copies of Records 47 and 46 respectively. The content of the drafts are essentially identical to the final versions albeit [with] a few minor additions to the final versions. Thus, all of the information found in the draft copies can be found in the final versions. Since these documents were used to prepare Records 46 and 47 and the disclosure of these records would reveal the substance of deliberations of Cabinet or its committees, the Minister submits that these records should be exempt.

The appellant repeats his process and deliberations argument in support of the position that Records 46, 47 and 48 are not exempt, and adds that “the Ministry has failed to establish on the facts that [Record 47 meets] the requirements of section 12(1)(d).” The appellant adds that since the exemption of Records 51 and 52 is contingent on finding that Records 46 and 47 are exempt, they are, by extension, not exempt.

Analysis and Findings

Records 46 and 47, on their face, indicate that they are submissions prepared for Cabinet or one of its committees. Record 48 is a draft prepared for the Minister. All three records are dated September 14, 2004. In his affidavit, the Economist explains the process through which the

Cabinet submissions ultimately made their way to the Community Affairs Policy Committee, which he states is a committee of Cabinet, on September 23, 2004, and confirms that all three records were submitted to and deliberated on by this committee. Based on the Economist's affidavit and my review of these three records, I am satisfied that Records 46, 47 and 48 are exempt pursuant to the introductory wording of section 12(1).

I have compared Records 51 and 52 to Records 46 and 47 and agree with the Ministry that they are substantially similar to Records 46 and 47, which I have found to be exempt. The only difference between these records is that Records 46 and 47 contain additional information. Accordingly, I find that Records 51 and 52 are also exempt from disclosure under section 12(1) because their disclosure would reveal the substance of the deliberations of Cabinet or one of its committees.

Record 38

The Ministry states:

Record 38 is a slide presentation from the Ministry of Municipal Affairs and Housing to a group of Nine Ontario Government Ministers, known as the G9, dated August 16, 2004. The Ministry submits that section 12(1)(e) of [the *Act*] should apply as this is the subject of consultation among ministers. Furthermore, all of the information presented on the slides was derived from Record 46, which was submitted to and deliberated by a Cabinet committee on September 23, 2004. Since the documents are fairly similar, the Ministry submits that disclosure of the record would reveal the substance of deliberations of a Cabinet committee.

The appellant states:

The Appellants contend that the Ministry's reliance on the fact that the documents are "fairly similar" is misguided. In every case, the Ministry is imbued with the responsibility and onus for establishing that the documents that it seeks to exempt from disclosure fall within the requirements of the *Act's* provisions.

In any event ... the Ministry has failed to establish on the facts that these records meet the requirements of section 12(1)(e).

Analysis and Findings

The Ministry indicates that the information in Record 38 "was derived from" Record 46, which would imply that it should post-date the creation of Record 46. Record 38 pre-dates Record 46 by approximately one month. However, after reviewing both records, I am satisfied that Record 38 encapsulates the same information that is set out in the Cabinet submission (Record 46), and its disclosure would reveal the substance of the deliberations of Cabinet or one of its committees. Accordingly, I find that Record 38 is exempt from disclosure pursuant to the introductory wording of section 12(1).

Record 7

The Ministry states:

Record 7 is a slide presentation prepared by [the Economist] in relation to the Greenbelt plan. With respect to the section 12(1) analysis, only one part has not been released; the third bullet on page 2. The bullet should not be disclosed for it would reveal the precise issues deliberated at the Cabinet committee meeting that took place on September 23, 2004. The Ministry submits that this information will provide a strong inference of the substance of the Cabinet committee deliberations and, as a result, should not be released.

Similar to other submissions made by the appellant, he stresses that the process and deliberations argument should be considered.

Analysis and Findings

The third bullet point on page 2 describes matters to be brought before a Cabinet committee meeting. I accept the Ministry's position that disclosure of this information would provide an accurate inference of the substance of the Cabinet committee deliberations. In the circumstances, I accept that the withheld portion of Record 7 is exempt under section 12(1).

Records 11, 24 and 43

The Ministry states:

Record 11 is a briefing note prepared by [the Economist] for inclusion in a larger briefing note to go to the various Ministers who attended the Cabinet committee meeting on September 23, 2004. The briefing note examines and comments on some of the issues deliberated at the Cabinet committee meeting. The Ministry submits that releasing the briefing note will provide for an accurate inference of deliberations of Cabinet or of its committee and, as a result, should not be released. Records 24 and 43 are draft versions of Record 11 and, for similar reasons, they should not be disclosed to the requester.

The appellant asserts that records do not meet the requirements of section 12(1)(a). In addition, the appellant relies on the process and deliberations argument.

Analysis and Findings

Records 11, 24 and 43 are not identical, however, the information contained in each one is clearly similar. An examination of Record 11 indicates that it pre-dates the Cabinet committee meeting, and that it pertains to the specific submissions to be deliberated at that meeting. I accept the Ministry's submissions that disclosure of Record 11, and by extension, Records 24 and 43, would reveal the substance of the deliberations of Cabinet and are, therefore, exempt under section 12(1).

Records 15 and 37

The Ministry states:

Record 15 is an e-mail discussion that led to the creation of the briefing note found in Record 11. The severed portions directly reflect the comments presented in Record 11 which, in turn, relate to some of the issues deliberated at the Cabinet committee meeting on September 23, 2004. The Ministry submits that revealing the comments will provide for an accurate inference of deliberations of Cabinet or of its committees. Record 37 is part of an e-mail chain that Record 15 is affiliated with. For the same reasons, this Record should not be disclosed.

The appellant states:

The Appellants submit that the Ministry has wholly failed to establish that any of the listed comments, notes, briefing notes:

- 1) were submitted or prepared for submission to the Executive Council or its committees; or
- 2) would reveal the substance of deliberations of Cabinet or its committees.

The Ministry simply has not met its burden of proof in this regard.

In a similar vein, the Ministry submits that Record 37 is “part of an e-mail chain that Record 15 is affiliated with”, and should not be disclosed since it would provide for an accurate inference of the deliberations of Cabinet or its committee.

The Appellants contend that an e-mail that is simply “affiliated with” another Record does not amount to sufficient grounds for exemption under the *Act*. Instead, the Ministry is obliged to bring itself within the specific exemption criteria set out by the legislation.

Analysis and Findings

Although the Ministry has used the term “affiliated with” to describe the relationship between Records 15 and 37, I note that they are for the most part duplicates, with Record 37 containing one additional e-mail as part of the chain. Comparing the information in Record 11 with those contained in the e-mail chains in Records 15 and 37, I am satisfied that disclosure of the e-mails would reveal the information contained in Record 11. Having found Record 11 exempt under section 12(1), I also find that disclosure of Records 15 and 37 would reveal the substance of the deliberations of Cabinet and are, therefore, exempt under section 12(1).

Records 14 and 42

The Ministry states:

According to [the Economist's] affidavit, Record[s] 42 and 14 are briefing notes presented to the Minister of Finance in advance of the G9 meeting on August 16, 2004, and September 20, 2004, respectively. Both records are similar to one another as they reflect some of the issues deliberated at the Cabinet committee meeting that took place on September 23, 2004. The Ministry submits that the severed portions will provide an accurate inference of the substance of the Cabinet committee deliberations and, as a result, should not be released. Additionally, since these records reflect consultations among ministers of the Crown on matters relating to the making of government decisions, the records should also be withheld pursuant to section 12(1)(d) of [the *Act*].

The appellant takes issue with the Ministry's position, and states:

... the Ministry has wholly failed to establish that any of the listed comments, notes, briefing notes were submitted or prepared for submission to the Executive Council or its committees; these briefing notes were submitted to the Minister of Finance; and therefore do not fall within the wording of section 12(1)(a).

The appellant also states that the Ministry has failed to establish on the facts that these records meet the requirements of section 12(1)(d) and reiterates the process and deliberations argument.

In response, the Ministry clarifies that Records 14 and 42 "are speaking notes prepared for the Minister to present to the G9 ministers, another group of Cabinet ministers." The Ministry also points out that it did not argue that these records were exempt under s. 12(1)(a); it argued that they were exempt under s. 12(1)(d). The Ministry reiterates that these records were used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. The Ministry adds that Government policy and decisions were made as a result of the G9 meeting.

Analysis and Findings

Having reviewed Records 14 and 42, I accept the Ministry's description of them and find that disclosure of the withheld information in the two records would reveal the substance of the deliberations of the G9 minister's meeting. Accordingly, I find that Records 14 and 42 are exempt under the introductory wording of section 12(1).

Record 27

The Ministry states:

Record 27 is an e-mail discussion that relates to the Cabinet committee meeting on September 23, 2004. The first two lines of the e-mail, under the word

“Helen”, reveals an agenda item at the Cabinet committee meeting contrary to section 12(1)(a) of [the *Act*]. The Ministry also submits that disclosing this information would permit the drawing of accurate inferences with respect to the deliberation of a Cabinet committee under section 12(1) of [the *Act*].

The appellant takes the position that this record does not meet the requirements of section 12(1)(a) and repeats his process and deliberations argument.

Analysis and Findings

In Order PO-1725, former Assistant Commissioner Tom Mitchinson was required to determine whether an appointment schedule of a senior staff member within the Premier’s office, which contained numerous references to meetings dealing with various subjects having a policy-making dimension, and to particular cabinet committees, ministers of the Crown, Premier’s Office, Cabinet Office or other government officials, or non-governmental individuals, groups or organizations, fell within section 12(1)(a). His comments are relevant to some of the records at issue in this appeal, including Record 27. He stated:

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). Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting.** Therefore, none of the entries in the records at issue in these appeals is an “agenda”, nor could any of these records be said to reveal any part of a Cabinet agenda. It is only by virtue of the capacity of these entries to reflect the Premier’s deliberations in establishing Cabinet’s priorities that they fall within the introductory wording of section 12(1) by revealing the substance of that exercise. Accordingly, even though some of the entries may refer to the subject matter of items actually considered by Cabinet and/or appearing on a specific Cabinet agenda, this does not transform any particular entry or series of entries into a Cabinet “agenda” under section 12(1)(a). [my emphasis]

The portion of Record 27 at issue in this discussion is merely a reference to an agenda item for a scheduled Cabinet meeting. In my view, the comments made by former Assistant Commissioner Mitchinson are directly on point. As this information is contained in an e-mail message as part of a general communication, rather than as an “agenda,” as that term is described above, it does not qualify for exemption under section 12(1)(a). Moreover, there is nothing on the face of the record or in the Ministry’s representations that provides a context or other additional information

that would permit the reader to draw accurate inferences as to the substance of actual deliberations occurring at a specific Cabinet meeting. Accordingly, I am not persuaded that disclosure of this information, standing alone, would reveal the substance of Cabinet deliberations on the topic. As no other exemptions have been claimed for this portion of the record, it should be disclosed to the appellant.

Records 30 and 33

The Ministry states:

Record 30 is an e-mail discussion on the Greenbelt Cabinet submission that was deliberated on September 23, 2004. The severed portions represent comments that are directly related to the Cabinet submission. The Ministry submits that revealing the comments will provide for an accurate inference of deliberations of Cabinet or of its committees.

The appellant takes the position that these two records do not meet the requirements of section 12(l)(a) and repeats its process and deliberations argument.

Analysis and Findings

The substantive portion of Record 33 is a duplicate of Record 30. Record 30 has one additional e-mail in the e-mail chain. Having reviewed these records, I find that they contain staff comments on the Greenbelt Cabinet submission that pre-date the Cabinet meeting. I accept the Ministry's position that disclosure of these records would permit accurate inferences of the deliberations of Cabinet or its committees, and they are, therefore, exempt under section 12(1) of the *Act*.

Records 31, 32, 44 and 45

The Ministry states:

According to [the Economist's] affidavit, Records 31, 32, 44 and 45 are briefing notes that were used to brief the Deputy Minister and the Minister on matters that were ultimately deliberated by Cabinet or one of its committees. Record 31 was discussed in anticipation of the meeting by the Federal, Interprovincial and Municipal Relations committee, a Cabinet committee, which was scheduled to convene on September 14, 2004. As [the Economist] indicated in his affidavit, that committee meeting did not take place. The matter was rescheduled for deliberation at another Cabinet committee meeting, the Community Affairs Policy Committee, on September 23, 2004. Consequently, Record 32, which is identical to Record 45, was created and discussed in advance of that meeting. Finally, Record 44 was discussed prior to the Cabinet meeting that took place on September 29, 2004. The Ministry submits that all of these records reflect matters that were deliberated by Cabinet or one of its committees and, as a result, should be withheld pursuant to section 12(1) of [the *Act*].

The appellant takes the position that these two records do not meet the requirements of section 12(l)(a) and repeats his process and deliberations argument.

Analysis and Findings

Similar to Records 17 and 25, Records 31, 32, 44 and 45 are clearly, on their face, briefing notes relating to items to go before Cabinet or one of its committees. I accept the Ministry's submissions that these briefing notes were prepared to brief the Deputy Minister and the Minister on a matter before Cabinet and/or one of its committees. I find that disclosure of Records 31, 32, 44 and 45 would reveal the substance of deliberations of Cabinet and/or its committee, and they are, therefore, exempt pursuant to the introductory wording of section 12(1).

Record 36

The Ministry states:

Record 36 is an e-mail discussion on the Greenbelt Cabinet submission that was deliberated on September 23, 2004. The severed portions represent topics discussed in the Cabinet submission. The Ministry submits that revealing the e-mail will provide for an accurate inference of deliberations of Cabinet or of its committees.

The appellant reiterates the process and deliberations argument.

Analysis and Findings

This record reflects discussions between a staff member involved in the Greenbelt issues and a staff member who does not appear to be working in this area. The Ministry's representations do not explain how disclosure of the comments made in the e-mail would reveal or permit the drawing of accurate inferences of the substance of the Greenbelt submission and/or the deliberations of Cabinet or one of its committees. Based on my review of the record I am not satisfied that section 12(1) applies to this information, and it is, therefore, not exempt. As no other exemptions have been claimed for Record 36, I will order that it be disclosed.

Record 49

The Ministry notes that portions of this record have been disclosed, a portion is non-responsive to the request and portions are exempt under section 21(1) and 12(1) of the *Act*. I found above that the portion that the Ministry claims to be non-responsive is, in fact, responsive. I have addressed the portion that the Ministry claims to be exempt under section 21(1) below. I will address the portion of this record that the Ministry claims to be exempt pursuant to section 12(1), as well as the portion that the Ministry claimed to be non-responsive. The Ministry makes the following submissions on the portion of the record that is highlighted in yellow on the copy provided to this office:

Record 49 is an e-mail discussion on the Greenbelt Cabinet submission that was deliberated on September 23, 2004... the yellow portion of the third page (page 30) is related to the Cabinet submission on September 23, 2004. The severed portion is a direct quotation from the Cabinet submission and it accurately reveals the deliberations of Cabinet or its committees. As a result, the Minister submits that this portion of the record should be exempt pursuant to section 12(1) of [the *Act*].

The appellant takes the position that the severed portion of Record 49 at issue does not meet the requirements of section 12(1)(a) and repeats the process and deliberations argument.

Analysis and Findings

This record contains staff comments relating to the Cabinet submission. Having reviewed the portion of this record that the Ministry claims falls within the introductory wording of section 12(1) (the portion highlighted in yellow), I agree with the Ministry's position and find that it is properly exempt under section 12(1).

As I indicated above, I have reviewed the Ministry's representations generally in determining whether the portion of this record that it claims was not responsive is exempt under section 12(1), which was the exemption originally claimed for it. I have also paid particular attention to the representations the Ministry made regarding Record 26, which is similar in nature to the non-responsive portions claimed for Record 49. In my findings below regarding Record 26, I noted that the e-mail exchange relates to administrative matters with only a vague reference to the Greenbelt submission. It is noteworthy that the Ministry did not make representations specific to this type of information, but simply stated that revealing the comments in the various e-mails within the chain will provide for an accurate inference of deliberations of Cabinet or of its committee.

Similar to my conclusions below regarding Record 26, I find that the portions of Record 49 highlighted in pink on the copy provided to this office are administrative in nature, and I am not persuaded that disclosure of these portions of the record would reveal the substance of the deliberations of Cabinet or one of its committees and find, therefore, that it is not exempt under section 12(1). As no other exemptions have been claimed for these portions of Record 49, they should be disclosed to the appellant.

Records Relating To The February 24, 2005 Cabinet Submission

Records 12 and 13

The Ministry states:

Records 12 and 13 are identical with the exception of the handwritten portions of Record 12. The Minister submits that the severed portion under the heading "Issue" should be subject to the introductory words of section 12(1). The severed portion reflects some of the issues deliberated at the Cabinet meeting that took

place on February 24, 2005. The Ministry submits that this information will provide an accurate inference of the substance of the Cabinet deliberations and, as a result, should not be released.

The appellant reiterates the process and deliberations argument.

Analysis and Findings

Based on my review of these two records, I accept the Ministry's position that their disclosure would reveal the substance of the deliberations of Cabinet or one of its committees. Accordingly, Records 12 and 13 are exempt under section 12(1) of the *Act*.

Record 26

The Ministry states:

Record 26 is an e-mail discussion on the Greenbelt Cabinet submission that was deliberated on February 24, 2005. The severed portions are directly related to the Cabinet submission. The Ministry submits that revealing the comments will provide for an accurate inference of deliberations of Cabinet or of its committee.

The appellant reiterates the process and deliberations argument.

Analysis and Findings

The e-mail exchange relates to administrative matters with only a vague reference to the Greenbelt submission. In the circumstances, I find the appellant's characterization of the record as revealing "merely the process by which consultations occurred and legislation was prepared" to be a more accurate reflection of the nature of the information contained in it. I am not persuaded that disclosure of this record would reveal the substance of the deliberations of Cabinet or one of its committees and find, therefore, that it is not exempt under section 12(1). As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

Other Records

Records 39, 40 and 41

The Ministry states:

Record 41 is the agenda for the G9 Forum, a Cabinet committee meeting that took place on September 20, 2004 as indicated by [the Economist's] affidavit. Pursuant to section 12(1)(a) of [the *Act*], this agenda should not be disclosed. Record 40 is an earlier draft of the agenda and Record 39 is the associated covering letter. These documents should be excluded considering that the information contained in the documents reflect the actual agenda items that were deliberated on September 20, 2004.

The appellant repeats the process and deliberations argument.

Analysis and Findings

Similar to the above discussion under Record 27, the comments made by former Assistant Commissioner Mitchinson in Order PO-1725 are relevant to Records 39, 40 and 41. To provide context, I have again set out his comments on this issue:

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). Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting. Therefore, none of the entries in the records at issue in these appeals is an “agenda”, nor could any of these records be said to reveal any part of a Cabinet agenda. It is only by virtue of the capacity of these entries to reflect the Premier’s deliberations in establishing Cabinet’s priorities that they fall within the introductory wording of section 12(1) by revealing the substance of that exercise. Accordingly, even though some of the entries may refer to the subject matter of items actually considered by Cabinet and/or appearing on a specific Cabinet agenda, this does not transform any particular entry or series of entries into a Cabinet “agenda” under section 12(1)(a).

Record 41 is an agenda for the G9 Forum. I accept the Ministry’s position that this record falls squarely within the exemption in section 12(1)(a) as it is 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. The Ministry’s description of Record 40 appears to be incorrect. Record 40 does not appear to be an earlier draft of Record 41 but is, rather, an agenda for the G9 Forum relating to an earlier meeting. Similar to my finding for Record 41, I find that Record 40 is also exempt under section 12(1)(a) as it is an agenda for a meeting of a committee of Cabinet.

Record 39 is not an agenda *per se*, but appears to be a covering memorandum which refers to an agenda and various attachments. Having compared this record to Records 40 and 41, I am satisfied that it provides sufficiently detailed information to permit an accurate inference regarding the substance of the deliberations of the meetings to which the agendas relate. Accordingly, I find that Record 39 is exempt under the introductory wording of section 12(1).

ADVICE OR RECOMMENDATIONS

Introduction

The Ministry takes the position that Records 1, 7, 10, 12 and 13 qualify for exemption under section 13(1) of the *Act*, which reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations,” the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, Order PO-2115, Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)]

Sections 13(2) and (3): exceptions to the exemption

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

Representations

The Ministry refers to the previous orders set out above which interpret section 13(1), and also takes the position that the records for which section 13(1) is claimed do not fall within section 13(2) and 13(3) of the *Act*. The Ministry states:

... the Ministry does not believe that the records contain a coherent body of facts separate and distinct from the advice and recommendations (13(2)(a) of [the *Act*]). The records reflect the advice to various government officials and [the Ministry] respectfully submits that it is not possible to separate the factual content from the advice and recommendations. None of the records contain a feasibility or technical study (13(2)(g) of [the *Act*]), or a plan or proposal to change a program of an institution. Similarly, the records do not contain reports of interdepartmental committee task forces or similar bodies (13(2)(j) of [the *Act*]) nor the report or recommendation of a committee, council or other body (13(2)(k) of [the *Act*]). The documents contain, *inter alia*, advice of various government officials with respect to the economic implications of the Greenbelt Plan.

The Ministry then reviews each of the records for which the section 13(1) claim is made. I will review each of those records.

The appellant's representations on the application of section 13(1) also refer to the previous orders of this office noted above. The appellant concedes that the exceptions in sections 13(2) and (3) have no application to the records, but also provides specific representations on each of the records, which I review below.

In reply, the Ministry states:

Since all of the Records 1, 7, 10, 12, and 13 were briefing notes and slides written by an economist of [the Ministry], the documents, not unexpectedly, contain an economist's advice. An economist's advice often consists of counselling how to make the economically correct decision. Thus all these severed pieces of the records can be claimed as the advice and recommendations of a civil servant. For example, the severed piece of Record 1 uses the words, "should consider issuing..." The last page of Record 7 recommends that the reader needs to ... certain things before committing to action." The three lines of recommendation in Record 10, page 1 are couched in the form of a question but what follows is the

same advised course of action as is recommended in the later records. Records 12 and 13 confirm this and they are clearly advising certain kinds of further ... Please refer to the Ministry's original argument on page 9 of its submission. The Ministry has limited its claims specifically to the three lines or so of recommendation made on each record.

I will now review the application of section 13(1) to each of the records.

Record 1

The Ministry states:

This record is a briefing note prepared by [the Economist] and presented to the Deputy Minister on December 13, 2004. The severed portion under the heading "Recommended Approach" relates to a suggested course of action, noted on page 1, which will ultimately be accepted or rejected by the Deputy Minister during the deliberative process. Disclosing this information would provide for an accurate inference as to the nature of the actual advice and recommendation given. As a result, the Minister submits that this severed portion of the record be exempt pursuant to section 13(1) of [the Act].

The appellant states:

The appellants submit that the requirements of section 13(1) have not been met in this instance. Even if the briefing note contains a discussion of the various issues or potential problems relating to the Greenbelt Plan, it will not fall within the wording of the section if they fail to provide specific "advice" or "recommendations". [Order P-529]

Indeed, in the appellants' submission, rather than constitute "advice" or "recommendations" pursuant to the wording of section 13(1), the comments more closely resemble "factual or background information", which have been found not to fall within the exemption. Alternatively; the handwritten notes may be characterized as "evaluation information", which is likewise not caught by the Act's purview. [Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [cited above]; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto, Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, [cited above].

Analysis and Finding

The only portion of Record 1 at issue under section 13(1) is the few lines under the heading "Recommended Approach." Having reviewed this portion of the record, I am satisfied that it contains a recommended course of action from staff to the Deputy Minister, which the Deputy

Minister could accept or reject during the deliberative process. Accordingly, I find that the withheld portion of Record 1 qualifies for exemption under section 13(1) of the *Act*.

Record 7

The Ministry states:

Record 7 is a slide presentation prepared by [the Economist] regarding the economic implications of the Greenbelt Plan. With respect to the section 13(1) analysis, only one part is applicable; the first bullet on the last slide. The bullet represents a question posed between civil servants and relates to a suggested course of action, which will ultimately be accepted or rejected by the recipient during the deliberative process. Disclosing this information would provide for an accurate inference as to the nature of the actual advice and recommendation given. As a result, the Minister submits that this portion of the record should be exempt pursuant to section 13(1) of [*the Act*].

With respect to the applicability of section 13(1) to the severed portion (the first bullet on the last slide) of Record 7, the appellant states:

... the Ministry has failed to advise as to whom the slide presentation was directed, and accordingly has failed to meet its onus in connection with establishing that the section 13(1) exemption applies.

... the requirements of section 13(1) have not been met in this instance. A slide presentation outlining “economic implications” will not constitute the requisite “advice” or “recommendations” that are necessary in order to trigger the exemption in that section.

... even if [it] pertains to the needed “advice” or “recommendations”, the record does not allow for an inference of the nature of the actual advice and recommendation given, and should therefore not be exempt from disclosure under section 13(1) of the *Act*.

Analysis and Finding

The withheld portion of this record is found under the heading “Conclusion.” In substance, I am satisfied that the comment is more in the nature of a recommendation, as it sets out the Economist’s recommended process to follow. Accordingly, the withheld portion on the last page of Record 7 qualifies for exemption under section 13(1) of the *Act*.

Record 10

The Ministry states:

This record is a briefing note prepared by [the Economist] and presented to the Deputy Minister and Minister in advance of a meeting with [the Ministry of Municipal Affairs and Housing (the MMAH)] on September 22, 2004. The briefing note examines certain economic implications of the Golden Horseshoe Greenbelt. The severed portion represents a question posed between civil servants and relates to a suggested course of action, which will ultimately be accepted or rejected by MMAH during the deliberative process. Disclosing this information would provide for an accurate inference as to the nature of the actual advice and recommendation given. As a result, the Minister submits that this portion of the record should be exempt pursuant to section 13(1) of [the *Act*].

The appellant states:

The appellants submit that the requirements of section 13(1) have not been met in this instance. Even if the briefing note contains a discussion of the various issues or potential problems relating to the Greenbelt Plan, it will not fall within the wording of the section if they fail to provide specific “advice” or “recommendations”. [Order P-529]

Also, the appellants contend that even if [it] pertains to the needed “advice” or recommendations, the record does not allow for an inference of the nature of the actual advice and recommendation given, and should therefore not be exempt from disclosure under section 13(1) of the *Act*.

Analysis and Finding

The withheld portion of Record 10 does not use language referring to a specific “recommendation,” nor is it written using advisory language. Nevertheless, the author of the briefing note is clearly asking the recipients (the Deputy Minister and Minister) to consider following a certain course of action. In the circumstances, I accept the Ministry’s characterization of the information and find that it qualifies for exemption under section 13(1) of the *Act*.

Records 12 and 13

The Ministry states:

Records 12 and 13 are identical with the exception of the handwritten portions of Record 12. These records are briefing notes prepared by [the Economist] and presented to the Deputy Minister and Minister in advance of a meeting with MMAH on February 23, 2005. The severed portions under the heading “Proposed Questions” represents questions posed between civil servants and

relates to suggested courses of action, which will ultimately be accepted or rejected by MMAH during the deliberative process. Disclosing this information would provide for an accurate inference as to the nature of the actual advice and recommendation given. As a result, the Minister submits that the severed portions of the records should be exempt pursuant to section 13(1) of [the *Act*].

The appellant states:

The appellants contend that the portion of the record does not allow for an inference of the nature of the actual advice and recommendation given, and should therefore not be exempt from disclosure under section 13(1) of the *Act*.

Analysis and Finding

I found above that the majority of the withheld portions of these two records are exempt under section 12(1). The remaining portion comprises the last sentence in the first paragraph under “Proposed Questions.” Based on my review of this portion of the records and the Ministry’s submissions, I am satisfied that it is similar to the information contained in Record 10 and find that it qualifies for exemption under section 13(1).

Exercise of discretion under section 13(1)

I found above, that portions of Records 1, 7, 10, 12, and 13 qualify for exemption under section 13(1) of the *Act*. In exercising its discretion to withhold these portions from disclosure, the Ministry states that it considered a number of factors, including the reasonableness of its decision, the effect of the disclosure of the records and fairness and concluded that releasing the information at issue under section 13(1) would inhibit the open and frank communication between government advisers and decision makers. The Ministry also noted that it limited the withheld portions of the records to only the few lines in each case that contained the actual advice or recommendations.

Based on the Ministry’s submissions on this, and my review of the file and representations generally, I am satisfied that the Ministry has properly exercised its discretion to withhold information under section 13(1). Accordingly, I find that the withheld portions of Records 1, 7, 10, 12, and 13 are exempt from disclosure pursuant to section 13(1).

PERSONAL INFORMATION

General principles

Under section 2(1) of the *Act*, “personal information” is defined, in part, to mean recorded information about an identifiable individual. To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Nevertheless, even if information relates to an individual in a professional, official or

business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R- 980015, PO-2225].

Representations

The Ministry states that there is a portion at the top of the first page of Record 49 that contains personal information of an Ontario government employee. It notes that “personal information” is defined under section 2(1) of the *Act* to include an individual’s telephone number (subparagraph (f)). The Ministry then states that, since the telephone numbers on this page are associated with the individual in a personal capacity, they qualify as personal information.

The appellant states:

[Record 49] contains information relating to an Ontario government employee, more specifically the person’s telephone number.

The appellants submit that on a reasonable interpretation, a person’s telephone number does not amount to information “about” a person in a “personal capacity”; it reflects nothing “about” the individual *per se*. Rather, it is simply a mechanism by which the person can be contacted. More to the point, it is simply information associated with the person in a professional, official or business capacity, which in previous decisions has been held not to constitute information “about” the person.

In reply, the Ministry states that, in relation to the cell and pager numbers at the top of the first page of Record 49:

It is not known whether these devices are corporate or personal, but corporate cell phones were somewhat rarer in 2004 as compared to today. Pagers were often marketed to parents so that even their small children can contact them simply by pushing a button prompting the parent to phone back, but they could be used corporately. Phone numbers generally may fall into the category of business or personal information depending on who is paying for them.

The Ministry then refers to its original submissions, set out above.

Analysis and Findings

As I noted above, previous orders of this office have found that where information is associated with an individual in his or her business or professional capacity, it will generally not be considered personal information (See: Orders M-118, M-454 and P-729, in addition to those orders referred to above). Of particular relevance are the comments made by Senior Adjudicator John Higgins in Order M-454, where he found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but “information [that] relates to the ordinary operation of the business.”

Having reviewed this portion of Record 49, I note that the two numbers are included in the e-mail along with a government e-mail address. In this context, I find that this information is clearly intended to be used as a "business" contact. Although it is not clear whether the employee was using a corporate (government issued) or personally obtained device, the intention of the employee to use it in the ordinary course of government business is clear.

Moreover, based on the evidence before me, I conclude that there is nothing about the cell and pager numbers that, if disclosed, would reveal something of a personal nature about the individual (See: Order PO-2225 for a discussion of this issue). In the circumstances, I find that the cell and pager numbers do not qualify as personal information. Accordingly, section 21(1) is not available to withhold this information. As no other exemptions have been claimed for this information, I will order it to be disclosed.

ORDER:

1. I order the Ministry to disclose Records 3, 18, 26, 36, the first page of Record 23, the responsive portions of Record 27 and the portions of Record 49 withheld under section 21(1) and non-responsive to the appellant by **January 28, 2010 but not before January 18, 2010**.
2. I uphold the Ministry's decision to withhold the remaining records at issue.
3. The Ministry's search for responsive records was reasonable and this portion of the appeal is dismissed.
4. In order to verify compliance with this order, I reserve the right to require the Ministry to send me a copy of the records disclosed pursuant to provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

December 21, 2009 _____