

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3719

Appeal PA15-355

Financial Services Commission of Ontario

April 7, 2017

Summary: The Financial Services Commission of Ontario (FSCO) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for formal submissions/representations or correspondence exchanged between FSCO and the Insurance Bureau of Canada on auto insurance topics. The request included any preparatory meeting notes, meeting notes and agendas. FSCO denied access to a briefing note and a comment paper, along with a cover email, citing the introductory wording of the mandatory Cabinet records exemption in section 12(1). This order finds that this exemption does not apply and orders disclosure of the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 12(1) (introductory wording).

OVERVIEW:

[1] The Financial Services Commission of Ontario (FSCO) received a request for access under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* that was clarified to read as follows:

From January 1, 2012 to present (November 17, 2014) any formal submissions/representations or formal correspondence on auto insurance topics received from the Insurance Bureau of Canada (the IBC) to FSCO and FSCO responses to the IBC. Include preparatory meeting notes,

meeting agenda and meeting notes for meetings with the IBC that arose from such submissions/representations/correspondence.

[2] After conducting a preliminary search for records, FSCO issued an interim access and fee estimate decision as well as a time extension decision. FSCO subsequently advised the requester that, as the disclosure of the responsive records could affect the interests of the IBC, FSCO would notify the IBC pursuant to section 28 of the *Act*.

[3] The IBC submitted representations in response to FSCO's notification, claiming that section 17(1) (third party information) applies to exempt ten of the records in full. Referring to FSCO's index of records, the IBC advised that it authorized the disclosure of a number of records.

[4] After reviewing the IBC's representations, FSCO issued an access decision to the requester and the IBC, granting the requester access to the records, in part. In its decision, FSCO advised the parties that it located 29 responsive records and of those, it granted the requester complete access to 23 records. However, FSCO advised that it denied the requester access to six records under the mandatory exemptions in sections 12(1) (Cabinet records) and 17(1) and the discretionary exemption in section 13(1) (advice or recommendations) of the *Act*.

[5] The IBC appealed FSCO's decision and appeal PA15-140 was opened. The requester (the appellant in this appeal) also appealed FSCO's decision and this appeal, appeal PA15-355, was opened.

[6] During mediation of the two appeal files, the IBC agreed to review the records that remain at issue to determine whether they would provide consent to the disclosure of any additional information. The IBC agreed to disclose a number of additional records. FSCO disclosed these records to the requester. As a result, these records were no longer at issue in this appeal. The IBC confirmed its position that section 17(1) applies to the records that remain at issue.

[7] In addition, the requester raised the possible application of the public interest override in section 23 of the *Act* to the records that remain at issue.

[8] Further mediation was not possible. As such, appeals PA15-140 and PA15-355 were transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The former adjudicator assigned to the appeals began a joint inquiry of PA15-140 and PA15-355 by inviting FSCO and the IBC to make representations in response to a Notice of Inquiry. FSCO submitted representations.

[9] On February 5, 2016, the IBC advised that it no longer wished to pursue its appeal. Accordingly, appeal PA15-140 was closed and FSCO issued a revised decision granting the requester access to the records that were subject to the IBC's appeal in appeal file PA15-140.

[10] FSCO also submitted amended representations to reflect the issues that remain outstanding in appeal PA15-355. In its amended representations, FSCO advised that it no longer claimed section 13(1) to the records and confirmed that it withheld Records 4, 7 and 8 under the introductory wording of section 12(1) of the *Act* only. As such, the only issue that remains in this appeal is whether Records 4, 7 and 8 are exempt from disclosure under the introductory wording of section 12(1).

[11] Representations were then sought and exchanged between FSCO and the requester on the remaining issue in accordance with section 7 of the IPC's¹ *Code of Procedure and Practice Direction 7*.

[12] The file was then transferred to me to complete the inquiry. In this order, I find that the exemption in section 12(1) does not apply and I order disclosure of the records.

RECORDS:

[13] The records that remain at issue are FSCO's Auto Insurance Policy Unit (AIPU) Records 4, 7 and 8.

DISCUSSION:

Does the introductory wording of the mandatory Cabinet records exemption at section 12(1) apply to the records?

[14] Section 12(1) reads in part:

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...

[15] FSCO relies on the introductory wording of section 12(1) and states that, as the regulator of automobile insurance in the province, it plays an instrumental role in providing analysis of stakeholder proposals and provides advice to the Ministry of Finance (the ministry) on potential reforms.

[16] FSCO describes the IBC as a trade association that represents the majority of property and casualty insurance companies operating in Ontario and that it is also a major stakeholder in the automobile insurance industry.

[17] FSCO states that the opinions, advice, and recommendations of the IBC, as well

¹ The Information and Privacy Commissioner, Ontario, Canada.

as those of other significant stakeholders forming part of or having an interest in the automobile insurance industry, are routinely sought in connection with regulatory matters, reform proposals to automobile insurance, and the implementation of reforms.

[18] FSCO states that because automobile insurance in Ontario is a highly regulated product, the government reviews and considers changes to the laws governing automobile insurance on a regular and ongoing basis. It states that consideration of changes to these laws at times requires input from the regulated sector, including the IBC, that will be affected by the reforms.

[19] FSCO states that Records 4, 7 and 8 contain proposals and recommendations submitted by the IBC on specific items for reform consideration and contain policy recommendations that were subsequently the subject of Cabinet committee discussions on automobile insurance reform during the relevant period. It also states that the records at issue contain policy options, recommendations and background explanations and analyses that are still to be brought forward for decision by the Executive Council or its committees.

[20] FSCO states that it sought input from the IBC as it is knowledgeable on how legislation and regulations affect the automobile industry, has a direct relationship with that industry and is able to advise FSCO and the government on the impact of reform proposals on that industry. It states that these considerations are relevant for discussions at Cabinet Committee meetings where policy decisions are made.

[21] In relying on the introductory wording of section 12(1), FSCO states that the contents of the records were presented to and discussed at a Cabinet Committee meeting and/or Cabinet. The issues in the records were also considered for discussion at Cabinet meetings.

[22] FSCO states that it requested that Record 4 be prepared for it by the IBC as part of a package of proposals for automobile insurance policy reform. It states that the topics identified in this record were incorporated into briefing materials that were discussed at the Jobs and Economic Policy Committee of Cabinet and that many of the topics discussed in it were put forward for consideration by Cabinet. FSCO states that although not submitted to or used to brief Cabinet, the topics identified in this record were incorporated into briefing materials that were used to brief Cabinet and one of its committees.

[23] FSCO states that Record 7 is an email sent by the IBC to FSCO and the ministry indicating which regulations the proposals in the attached Record 8 relate to. It states that Record 8 was prepared by the IBC and contains proposed changes to insurance regulations that were being considered for auto insurance reform.

[24] FSCO states although Record 8 was not submitted to or used to brief Cabinet or its committees, it was used as a basis for preparing briefing materials that were

presented to and discussed at the Jobs and Economic Policy Committee of Cabinet meeting. It states that disclosure of Records 7 and 8 would permit the drawing of accurate inferences with respect to decisions of a Cabinet Committee on auto insurance reform matters.

[25] FSCO submits that disclosure of the topics and issues covered in the records would reveal the substance of deliberations of Cabinet and of its committees on certain issues or would permit an accurate inference of the deliberations on other issues, even though the records themselves may not have been placed before Cabinet.

[26] The appellant states that the records at issue are not FSCO or government records and as such cannot be reclassified as government records let alone Cabinet records. He states that simply because the IBC records indicate their wishes for favourable regulatory treatment as sent and received by FSCO's AIPU does not transform those records into government or Cabinet records.

[27] The appellant states that FSCO is supposed to be an arms-length regulatory body for setting auto insurance rates and that, in communicating with third party stakeholders, it is not an arm of Cabinet let alone an advisory spokesman for the government. He states that to suggest that stakeholders' views form a seamless part of the Ontario government record and the policy/Cabinet system abuses the very integrity of external and public groups independence. He states:

Utilizing the records of relevant stakeholders does not then make their views or their records government controlled, or give them a seat at the Cabinet table, or imply they have inside knowledge of Cabinet deliberations.

To assert that important auto insurance matters come before Cabinet and some of the contents, issues or topics raised by IBC were distilled and discussed in Cabinet does not make three-short 2012 and 2013 IBC records government or Cabinet records.

IBC itself dropped its own appeal in this FOI file to protect as commercially sensitive its fairly well known views and priorities and has not sought to hide its representations in this case...

Simply because government officials want to hide their continued efforts at further adopting auto insurance changes from denied IBC positions is not grounds to protect third party records...

Widening the Cabinet exemption in the manner proposed to independent third party stakeholder records would set a dangerous unwarranted precedent. There is no previous Information Commissioner order that covers such an incredible widening of Cabinet privileges claims...

[28] In reply, FSCO relies on its original representations and provides further detail about the records. It states that Record 4 is a briefing note that contains proposals, options and recommendations related to specific auto insurance reform items that were being considered by Cabinet and one of its committees at the time. It states that this record was directly sought from the IBC by it and prepared for the purpose of advising the Government on emerging auto insurance issues, and includes the IBC's rationale for its proposals.

[29] FSCO states that Record 8 contains specific proposed changes to insurance regulations that were being considered by Cabinet and one of its committees for reform, and was prepared for the purpose of advising the Government on specific sections of auto insurance regulations that should be considered for reform, along with the rationale for such reform.

[30] FSCO reiterates that although the records themselves were not submitted to, or used to brief Cabinet, the topics discussed in the records were incorporated into briefing materials that were used to brief Cabinet and one of its committees and, as such, the disclosure of these records would reveal the substance of deliberations of Cabinet and one of its committees and would permit the drawing of accurate inferences with respect to these deliberations.

[31] FSCO submits that the IPC has recognized the application of the section 12 exemption for Cabinet Records in the past to third party records, provided that such records are not distributed outside of government without the appropriate confidentiality protections.²

[32] FSCO specifically relies on Order PO-2793 which states:

...if it is established that the disclosure of information provided by a third party would reveal the substance of deliberations of Cabinet or its committees, the section 12(1) exemption could apply to that information.

[33] FSCO further states that, as in IPC Order P-956, the records at issue contain issues identified by and views of a third party on changes to a government initiative, namely the regulation of automobile insurance, that relate directly to the deliberations of Cabinet and one of its committees. It submits that because the specific issues and topics discussed in the records at issue were incorporated into briefing materials that were used to brief Cabinet and one of its committees, disclosure of the information would reveal the deliberations of Cabinet and one its committees during a time when changes to automobile insurance regulations were being considered.

[34] FSCO further states that the records at issue have been treated as confidential, in order to preserve the ability of the named organization to provide full and frank input

² FSCO relies on Orders P-956, P0-2596, P0-2793, P0-2053-F.

on automobile insurance matters that were being considered by the government for reform.

[35] FSCO agrees with the requester that the IBC does not have inside knowledge of the deliberations of Cabinet. It states that stakeholders, especially those that represent a regulated sector with specialized understanding of the sector, regularly provide input to Government and government agencies on reform proposals and on the impact of contemplated reforms. It states that this input regularly gets incorporated into policy submissions and other materials that are presented to Cabinet and its committees to inform the policy making and decision making process.

[36] FSCO states that because of the fundamental and longstanding tradition of protecting the confidence of Cabinet deliberations (and hence the existence of the exemption for Cabinet records in section 12 of the *Act*), the existence or specifics of any input submitted by stakeholders that gets incorporated into materials for Cabinet and/or its committees is not made public, even to the stakeholders that provided the input.

Analysis/Findings re: section 12(1): introductory wording

[37] The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees [not just the types of records enumerated in the various subparagraphs of section 12(1)], qualifies for exemption under section 12(1).³

[38] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.⁴

[39] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.⁵

[40] Concerning the introductory wording of section 12(1), I note that previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;⁶ and

³ Orders P-22, P-1570 and PO-2320.

⁴ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁵ Order PO-2320.

⁶ Order M-184.

- "substance" generally means more than just the subject of the meeting.⁷

[41] The records in this appeal were not placed before Cabinet or one of its committees. Therefore, I must consider whether disclosure of the records would permit the drawing of accurate inferences with respect to the substance of the deliberations of Cabinet or one of its committees.

[42] Based on my review of the records and the parties' representations, I find that I do not have sufficient evidence to determine that the introductory wording of section 12(1) applies. In particular, I do not have sufficient evidence to determine that disclosure of the records would reveal the substance of deliberations of Cabinet or its committees. From my review of FSCO's representations, I find that although the topics of the records may have been deliberated upon, the substance of the deliberations would not be revealed by disclosure of the records.

[43] I find that in its representations, FSCO has provided conflicting evidence as to whether the contents of the records were provided to Cabinet or one its committees for deliberations.

[44] I note that FSCO states that it does not make public the existence or specifics of any input submitted by stakeholders that gets incorporated into materials for Cabinet and/ or its committees is not made public. However, FSCO could have provided the IPC with confidential representations or documents demonstrating the actual extent to which the information in the records was incorporated into the materials reviewed by Cabinet or one of its committees.

[45] FSCO did not provide a copy of any documents submitted to Cabinet or one of its committees. In particular, it did not provide any documents that would show what information, directly or indirectly, from the records was included in the documents that were provided to these bodies.

[46] FSCO also provided conflicting information in its representations as to whether the topics or the actual substantive information in the records was actually deliberated upon by Cabinet or one of its committees.

[47] The records are dated November 13, 2012⁸ and November 22, 2013.⁹ FSCO's representations were submitted in 2016. By the time the representations were submitted, FSCO should have also been able to provide a clear indication of what specific information from the records was deliberated upon and when. Instead, it provided vague representations as to this issue, as follows:

⁷ Orders M-703 and MO-1344.

⁸ Record 4.

⁹ Records 7 and 8.

AIPU Records 4, 7 and 8 contain proposals and recommendations submitted by the named organization [the IBC] on specific items for reform consideration. These records contain policy recommendations that were subsequently the subject of Cabinet committee discussions on automobile insurance reform during the relevant period and also contain policy options, recommendations and background explanations and analyses that I understand are still to be brought forward for decision by the Executive Council or its committees. [emphasis added by me]

[48] In addition, FSCO representations contain conflicting information as to what information from the records was deliberated upon by Cabinet or its committees. It states:

...disclosure of the topics and issues covered in AIPU Records 4, 7 and 8 would reveal the substance of deliberations of Cabinet and of its committees on certain issues or would permit an accurate inference of the deliberations on other issues, even though the records themselves may not have been placed before Cabinet.¹⁰

...Although the Record [4] itself was not submitted to or used to brief Cabinet, the topics identified in the record were incorporated into briefing materials that were used to brief Cabinet and one of its committees.¹¹
[emphasis added by me]

Although the Record [8] itself was not submitted to or used to brief Cabinet or its committees, it was used as a basis for preparing briefing materials that were presented to the Cabinet Committee meeting¹²...
[emphasis added by me]

[49] In its reply representations,¹³ FSCO refers to these specific representations from its initial submission, as follows:

[FSCO's] previously delivered submissions stated that although the records themselves were not submitted to, or used to brief Cabinet, the topics discussed in the records were incorporated into briefing materials that were used to brief Cabinet and one of its committees. [emphasis added by me]

[50] In its reply representations, FSCO states that it sought the input of various stakeholders representing interests in the automobile insurance sector, such as the

¹⁰ Paragraph 37 of FSCO's initial representations.

¹¹ Paragraph 39 of FSCO's initial representations.

¹² Paragraph 42 of FSCO's initial representations.

¹³ Paragraph 11 of FSCO's reply representations.

legal and healthcare communities as well as the IBC, on possible reforms that would assist with the achievement of a reduction in the automobile insurance premiums.

[51] I find that I have not been provided with sufficient evidence to satisfy me that a discussion of the topics or the issues set out in the records at issue would reveal the substance of deliberations of Cabinet or one of its committees.

[52] In addition, I note that the records at issue, which originated outside of government, have all been distributed among a number of individuals. This appears to me to be in conflict with FSCO's submission, set out above, about the confidentiality of the records at issue.

[53] Record 4 is a briefing note prepared by the IBC, and Record 8 is a comment paper prepared by the IBC. The cover email for Record 4, Record 1 (dated November 13, 2012, a record that has been disclosed to the appellant), indicates that the IBC sent Record 4 to a number of individuals. Record 1 indicates that Record 4 was also handed out at meeting on November 13, 2012.

[54] Record 7, the cover email for Record 8 (which is dated November 22, 2013), indicates that the IBC distributed this record to even more individuals than it did for Record 4.

[55] At least one, if not more of the recipients of the records, as indicated on the cover emails in Records 1 and 7, are not government or IBC employees.

[56] For example, Record 1, the cover email to Record 4, indicates that Record 4 was sent to an individual at an organization that consists of a collaboration of government, financial services industry and academic bodies.

[57] Records 4 and 8, the substantive records, originate from the IBC, a non-governmental organization, and do not indicate thereon that these records are confidential. Record 1, the cover email for Record 4, indicates that Record 4 was handed out by the IBC at an "Open for Business" meeting. This type of meeting is described as a government held meeting with representatives of Ontario's financial services sector.¹⁴

[58] Taking into account the age of the records and the number and type of individuals the records at issue were distributed to, I also find that I do not have sufficient evidence to determine that these records were not distributed outside government without the appropriate confidentiality protections.

[59] FSCO has only claimed the application of the introductory wording of section 12(1), which I find does not apply in this appeal. As the mandatory exemption in

¹⁴ See <https://www.ontario.ca/page/financial-services-sector-meeting-report>

section 12(1) does not apply to the records at issue, and no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order disclosure of Records 4, 7 and 8.

ORDER:

I order FSCO to disclose Records 4, 7 and 8 to the appellant by **May 15, 2017** but not before **May 9, 2017**.

Original Signed by: _____
Diane Smith
Adjudicator

_____ April 7, 2017