

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3839-I

Appeal PA16-678-2

Cabinet Office

May 10, 2018

**Summary:** The access request in this appeal is for meeting minutes, meeting notes and briefing notes produced by the Premier's Advisory Council on Government Assets relating to wine and spirit retailing and distribution in Ontario. The institution, Cabinet Office, denied access to the records, claiming the application of the mandatory exemptions in sections 12(1) (Cabinet records) and 17(1) (third party information) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), as well as a number of discretionary exemptions, including sections 13(1) (advice or recommendations), 18 (economic and other interests) and 19 (solicitor-client privilege). In this interim order, the adjudicator finds that most of the records are exempt from disclosure under section 12(1). The issue of whether the remaining records are exempt under section 17(1) will be determined after the notification of third parties.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12 and 17(1).

**Orders and Investigation Reports Considered:** Orders PO-1725 and PO-2793-I.

### OVERVIEW:

[1] The requester made an access request to Cabinet Office under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

For the period of October 1, 2014 to October 1, 2016, meeting minutes, meeting notes and briefing notes produced by the Premier's Advisory

Council on Government Assets that reference the following [named] organizations in conjunction with the key words "wine and spirit retailing and distribution,"

[2] In response, Cabinet Office issued a decision to the requester, denying access in full to the records responsive to the request, claiming the application of the mandatory exemptions in sections 12(1) (Cabinet records) and 17(1) (third party information), as well as the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*.

[3] The requester, now the appellant, appealed Cabinet Office's decision to this office.

[4] During the mediation of the appeal, the appellant indicated that he would be willing to remove any duplicate records from the scope of the appeal.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. Representations were sought and received from Cabinet Office and the appellant. Portions of Cabinet Office's representations met this office's confidentiality criteria and will not be set out in this order, but were considered.

[6] For the reasons that follow, I find that most of the records at issue are exempt under section 12(1). As a result, it is not necessary to determine whether sections 13(1), 18 and 19 apply to the records I have found exempt under section 12(1). With respect to the remaining records at issue, which I find are not exempt under section 12(1), I will determine whether section 17(1) (the only other exemption claimed for these records) applies to them, pending notification of third parties.

## **RECORDS:**

[7] The records consist of briefing notes (final and draft), working materials, stakeholder meeting notes and minutes of meetings.

## **ISSUES:**

- A. Does the mandatory exemption at section 12(1) apply to the records?
- B. Does the mandatory exemption at section 17(1) apply to the records?

## **DISCUSSION:**

### **Issue A. Does the mandatory exemption at section 12(1) apply to the records?**

[8] Section 12(1) states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

### ***Representations***

#### *Cabinet Office's representations*

#### Background

[9] Cabinet Office advises that as a result of the breadth of the request, a large number of responsive records were located that relate to the Advisory Council's work on beer, wine and spirit retailing and distribution, and that reference the organizations

listed by the requester. Cabinet Office then provides the following detailed review of the background to the creation of the records.

[10] The responsive records include briefing materials provided to the Premier and Executive Council and/or the Ministers' Table on Government Assets (a Committee of Cabinet). In responding to the request, the term "briefing notes" was interpreted by Cabinet Office to include final briefing material or any related material that was used to brief individuals about the relevant subject matter. In this regard, working materials that the Advisory Council developed internally, which were subsequently used for developing information and materials later presented to Cabinet or the Ministers' Table were included as responsive to the request.

[11] The term "meeting notes" was interpreted broadly by Cabinet Office to include material prepared for discussions at meetings, as well as meeting notes that were generated during the course of meetings with stakeholders.

[12] For the purposes of making representations, Cabinet Office grouped the responsive records into the following categories:

- Final versions of briefing material that were presented to the Executive Council or the Ministers' Table on Government Assets (a Committee of Cabinet) (also referred to as "Submissions");
- Working material that was developed for the purpose of preparing for briefings to the Premier and Executive Council, and the Ministers' Table on Government Assets. Within the category of working material, included are:
  - a. Draft versions of briefing notes

In this set of records there are many iterations of draft briefing notes. These versions are substantially similar to the final versions of briefing material presented to the Executive Council or the Ministers' Table;

- b. Due diligence materials

These records represent the due diligence work that the Advisory Council conducted in order to make recommendations to the Premier and Executive Council. In particular, Advisory Council staff produced a large number of background documents that informed the briefings and advice and recommendations that were made to members of the Advisory Council and subsequently the Premier and the Executive Council. This body of material necessarily includes records that identify issues and contain potential options that were explored and analyzed as part of the process of developing and providing advice and recommendations to the Executive Council.

Further, many of these records contain assessments of the operational and stakeholder impacts of certain beverage alcohol retailing and distribution options, as well as evaluations of fiscal, operational, legal and other impacts of options under consideration. The working materials represent the "due diligence" undertaken by the Advisory Council in formulating its recommendations to Cabinet.

c. Notes taken by the Advisory Council during meetings with stakeholders.

[13] In April of 2014, the Premier established the Premier's Advisory Council to Provide Advice on Government Assets ("the Advisory Council"). The mandate of the Advisory Council, established by Order-in-Council through a Terms of Reference, required the Advisory Council to provide analysis, advice and recommendations directly to the Premier, on how best to maximize the value and performance of government business enterprises and other Provincial assets in order to help delivery on the government's multi-year targets set out in the 2014 Budget.

[14] The membership of the Advisory Council was made up of senior leaders in the public and private sectors comprised of: the former Group President and Chief Executive Officer of the TD Bank Group; the former President and CEO of the Canada Pension Plan Investment Board; the former Minister of Finance and CEO of the Toronto Financial Services Alliance; the President and CEO of Cineplex Entertainment; and a former MPP and Minister, and former President and CEO of the United Way, Toronto.

[15] In addition, the work of the Advisory Council was supported by a dedicated project team in Cabinet Office. This project team provided direct support to the Chair of the Advisory Council and members of the Advisory Council as well as coordination and project management support for the Advisory Council's work with other government ministries and its government business enterprises.

[16] The general functions and responsibilities of the Advisory Council were further described in the Terms of Reference. The Premier requested that the Advisory Council review and report on government asset optimization opportunities, including considering possible asset mergers, acquisitions and divestments. The initial mandate of the Advisory Council also included providing advice on possible changes to the corporate structure of government business enterprises, including private-public sector partnerships. The Advisory Council was also asked to provide advice to the Premier on any other matters related to maximizing the value of provincial assets.

[17] The formal work of the Advisory Council commenced in April of 2014. The members of the Advisory Council met frequently and through the course of their deliberations, which included extensive consultations and dialogue through the Chair of the Advisory Council with staff in the Premier's Office, senior government officials, the Premier and a committee of her Ministers - the Advisory Council focused their review on

three large Government Business Enterprises: beverage alcohol (including The Beer Store) and the Liquor Control Board of Ontario (LCBO), Hydro One and Ontario Power Generation (OPG).

[18] The Advisory Council structured its review in two phases. Phase I, which is described in the Advisory Council's November 2014 Report, *Retain and Gain: Making Ontario's Assets Work Better for Taxpayers and Consumers*, involved detailed reviews of three government business enterprises beverage alcohol and the LCBO, Hydro One and OPG.

[19] The Advisory Council conducted its Phase I review in three work streams. The Advisory Council analyzed each organization and its operations, and evaluated options for performance improvement, cost savings and/or the optimization of asset value. In undertaking this work, the Advisory Council engaged a number of consultants to assist the Advisory Council analyze and develop recommendations. The Advisory Council also held meetings with, or received submissions from, selected industry associations and stakeholders who are either employed by, regular clients of, or competitors with, the three government business enterprises.

[20] The initial findings and recommendations of the Advisory Council were, at the direction of the Premier and the Executive Council, published in a report entitled *Retain and Gain: Making Ontario's Assets Work Better for Taxpayers and Consumers* as the Initial Report from the Premier's Advisory Council on Government Assets.

[21] In Phase II, the Advisory Council conducted detailed valuations and due diligence relating to the beverage alcohol sector in Ontario. The Advisory Council conducted this review in two work streams: the beer retailing and distribution in Ontario; and the wine and spirits retailing and distribution in Ontario. The Advisory Council, at the direction of Cabinet, undertook a comprehensive review of the beer and wine retailing and distribution systems. Further details of the work and recommendations of the Advisory Council in relation to wine and spirits are described in the Advisory Council's report: *Striking the Right Balance: Modernizing Wine and Spirits Retailing and Distribution in Ontario*.

[22] The LCBO controls the distribution and sale of beverage alcohol in the Province of Ontario. The company owns approximately 640 stores and has 220 agency stores (privately operated) across the province. The LCBO has approximately \$5 billion in revenues and, in 2012-13, paid a dividend of approximately \$1.7 billion to the Province.

[23] Outside of the LCBO's network, 491 Winery Retail Stores ("WRS") are authorized to sell wine in Ontario. Winery Retail Stores may be divided into two broad categories: on-site Winery Retail Stores: located at winery production site; and off-site Winery Retail Stores: not required to be located at winery production site.

[24] As part of the review of wine and spirits retailing and distribution in Phase II, the

Advisory Council retained a consultant to assist in its examination of the LCBO and off-site Winery Retail Stores, as competitive entities that participate in the retailing of beverage alcohol.

[25] Since its inception, the Advisory Council, and its Chair were engaged in a direct and ongoing dialogue with the Premier and members of the Executive Council. As noted previously, the work of the Advisory Council was supported by a dedicated project team (housed in the Cabinet Office.) In the initial stages of the Advisory Council's work, the Chair of the Advisory Council would liaise directly with the Premier and her Chief of Staff. Subsequently, a table of Ministers began meeting during summer 2014 to receive reports from and provide direction to the Advisory Council in respect of its ongoing work. This committee (also referred to as the "Ministers' Table on Government Assets") was comprised of the Premier and key Ministers. The Ministers' Table on Government Assets (Ministers' Table) was supported by senior executives from the Office of the Premier and the Ontario Public Service. The Ministers' Table initially met on a monthly, and then subsequently on a bi-weekly, basis to receive reports of and discuss the Advisory Council's ongoing work, and to provide direction to the Advisory Council on each dimension of the Advisory Council's work informing the development of recommendations to Cabinet.

[26] The Advisory Council's work with the Premier and the Ministers' Table was iterative and highly interactive. At the initial stages of the Advisory Council's work with the Premier and the Ministers' Table, the initial broad scope of the Advisory Council's work was refined to focus on a review of three of the Province's key business enterprises: the LCBO, Hydro One and Ontario Power Generation. At the direction of the Premier and Ministers' Table, the Advisory Council engaged in comprehensive reviews of the three companies, including meeting with stakeholders and engaging the services of consultants to assist the Advisory Council in the development of its first phase of recommendations. In this regard, the Advisory Council commissioned and received detailed consultant reports in relation to the three government business enterprises. These reports provided the basis for the Advisory Council's work developing recommendations to Cabinet.

[27] Through the fall of 2014 and then 2015, the Advisory Council would regularly meet with the Premier and Ministers' Table to provide updates on the Advisory Council's ongoing work and the development of recommendations in both phases of its mandate. The discussions at the Ministers' Table were in-depth and typically included discussions about what the Advisory Council was hearing from stakeholders, the substance of the information the Advisory Council received from consultants and advisors and the Advisory Council's ongoing work and analysis relating to the development of recommendations. In addition, the Ministers' Table was also a forum for the Premier and Ministers to ask questions, deliberate, and provide ongoing direction to the Advisory Council on the work it was undertaking.

[28] As part of its Phase I review, the Advisory Council also reached out to, and heard

from stakeholders, who had interests in future government plans with respect to beverage alcohol. The Premier and Ministers were specifically interested to understand the interests and reaction of various stakeholders. Accordingly, the Advisory Council, assisted by staff, undertook a series of consultations with various stakeholders in the beverage alcohol industry. The meeting notes of members of the Advisory Council and staff document the stakeholder consultations and the information that the stakeholders provided to the Advisory Council with respect to the government's plan for the beverage alcohol sector. The results of these consultations were reported back into the Ministers' Table by the Advisory Council as part of the ongoing dialogue relating to the development of the Advisory Council's recommendations. Several of these consultations were an iterative process given various stakeholders' prominence in their respective sectors.

[29] At the end of the Phase I review, the Advisory Council was then asked by the Premier and Cabinet to, among other things, review and provide recommendations specifically about beverage alcohol. This work was directed by the Treasury Board and the Cabinet and subsequently described in a Terms of Reference document for Phase II of the Advisory Council's work.

[30] As discussed in further detail below, the Advisory Council engaged the services of expert consultants to provide information, analysis and advice about various beer and wine and spirits retailing and distribution options. The consultations included formal consulting reports from a consulting firm retained by the Advisory Council, as well as numerous submissions from stakeholders in the beverage alcohol production, distribution and retail industry.

### Section 12(1)

[31] Cabinet Office submits that the introductory words of section 12(1) apply to exempt all records at issue in this appeal. Section 12 is a mandatory exemption, and the *Acts* "compelling public interest override" provision in section 23 does not apply to Cabinet records.

[32] Cabinet Office argues that the use of the word "including" in subsection 12(1) means that any record that would reveal the substance of deliberations of Cabinet or its committees (not just the types of records listed in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1). Therefore, the "introductory wording" of section 12(1) is considered a category separate from those category of documents enumerated in subsections (a) through (f).<sup>1</sup>

[33] For a document to be exempt under the introductory words of subsection 12(1), it is sufficient that it be "obvious from [a record's] contents, and the surrounding

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<sup>1</sup> Orders P-1570, P-22 and P-331.



circumstances, that the document form[s] the 'substance of Cabinet deliberations.'<sup>2</sup>

[34] In order to be considered a "committee" under section 12(1), a body must be composed of Ministers where some tradition of collective ministerial responsibility and Cabinet prerogative can be invoked to justify the application of this exemption. Therefore, staff committees that are not made up of ministers, do not meet the definition of "committee" in section 12(1).<sup>3</sup> Cabinet Office submits that the Ministers' Table was a committee of the Executive Council, as it was made up of the Premier and five Ministers.

[35] Cabinet Office refers to Order 131, which adopted the following definitions of "substance" and "deliberation": Substance is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (Black's Law Dictionary, 5th ed.), or "essential nature; essence or most important part of anything" (Oxford Dictionary). Black's Law Dictionary defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means."

[36] Cabinet Office goes on to cite Order PO-1725, which considered the special role of the Premier of Ontario in connection with setting the agenda of Cabinet and its deliberations:

By virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown cannot be separated from the deliberations of Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes .. .[r]ecords which]reflect consultations bearing on policy making and priority setting functions may be seen as reflecting the substance of deliberations of the whole Cabinet.

[37] Cabinet Office argues that, to the extent that the records reflect consultations regarding the policymaking and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet. As such, for the purposes of section 12(1), Order PO-1725 emphasizes the indivisibility of the Premier's deliberations from the deliberations of Cabinet as a whole.

[38] Cabinet Office states that in Order PO-1725 this office also found that the Premier must necessarily function through senior staff within his or her Office. Accordingly, information presented to Senior staff that informs their advice to the

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<sup>2</sup> Order PO-1917.

<sup>3</sup> Order P-604.

Premier, in support of his or her priority-setting role, may also qualify for exemption under section 12(1):

.. .in our modern parliamentary democracy, the Premier functions by and large through the instrumentality of staff within his Office. Some of the more senior staff members assume responsibilities and perform delegated tasks for which the Premier himself is answerable. In so doing, they facilitate the Premier's priority-setting role by identifying problems and possible solutions, making the Premier aware of the pros and cons of various options, and conveying the positions of those affected by particular decisions. In a very real sense, the Premier's senior staff constitute his eyes and ears, and the information thus presented to them will often have considerable influence of the decisions which the Premier must make.

The named employee whose appointment schedule is the subject matter of these appeals is one of the most senior staff members of the Premier's office. His job title and employment responsibilities deal directly and primarily with policy formulation and the overall priority-setting and co-ordination of the government's policy agenda. Meetings and discussions undertaken by this employee in the context of issues under development or consideration by Cabinet relate directly to the Premier's functions in charting the deliberations of the Executive Council. The ... section 12(1) exemption claim must be considered from this perspective.

[39] Cabinet Office also submits that this office has also established that records that have never been placed before Cabinet or its committees may be exempt under the introductory wording of subsection 12(1), if the institution can show that "disclosing the record would reveal the substance of the deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations". This test requires that the institution provide evidence that establishes a link between information in the record at issue and actual Cabinet deliberations.

[40] Cabinet Office has claimed the mandatory Cabinet records exemption for all of the records at issue in this appeal. It argues that the breadth and scope of the appellant's request captures not only the records that were prepared for submission to Cabinet as the Executive Council, but also many underlying records that were used to develop and inform the Advisory Council's briefings and dialogue with the Premier and Cabinet in relation to beverage alcohol. For this reason, disclosure of the working materials and other records would, separately, and in their totality, give the reader a very good idea of what was deliberated by Cabinet, either directly or by necessary inference.

[41] Cabinet Office advises that while the application of this exemption is clear in respect of the submissions made to the Advisory Council and the Ministers' Table, the

application of the mandatory Cabinet records exemption to the Advisory Council's working materials, and notes taken by Advisory Council staff, requires some additional context and background describing how these records were developed and used by the Advisory Council in executing its mandate.

[42] Cabinet Office argues that what is particularly unique to the Advisory Council's work is the amount of interaction and dialogue between the Chair of the Advisory Committee and the Premier, as well as members of the Advisory Council and the Ministers' Table in the course of the Advisory Council's work. The discussions at the Ministers' Table were in-depth and wide ranging: the meetings were the opportunity for the Advisory Council to discuss and explain the work they were undertaking and receive direction and guidance from the Premier and the Ministers' Table.

[43] Cabinet Office submits that the degree of interaction between the Chair and the Advisory Council with the Premier and Cabinet, was different from the typical policy development and approval process within the Ontario Public Service, where discrete Cabinet submissions on topics are developed by public servants and made to a policy and/or financial committee of Cabinet and then subsequently approved by Cabinet as a whole. In contrast, the Advisory Council and its Chair were directly and repeatedly engaged in a dialogue with the Premier and Ministers' Table in the work of the Advisory Council and the formation and development of its recommendations. This dialogue may be inferred from the numerous briefing materials submitted to the Ministers' Table on beverage alcohol.

[44] Given this context, Cabinet Office submits that the findings of the IPC in Order PO-1725 relating to the role and function of senior staff in the Premier's office (and their direct connection to the Premier's role as head of Cabinet), also apply to the role and function of the Chair and the Advisory Council. The Advisory Council's function was to facilitate the Premier's priority-setting role in Cabinet and assist the Premier in setting the Cabinet's agenda, in relation to government assets. The Advisory Council performed this function by identifying problems and possible solutions, making the Premier aware of the pros and cons of various options, and conveying the positions of those affected by particular decisions.

[45] Moreover, Cabinet Office argues, the Advisory Council, aided by the Project team, also formed the eyes and ears of the Premier with respect to the views and implications of stakeholders when the Advisory Council conducted interviews and meetings with, and received the submissions of stakeholders. In this regard, the work of the Advisory Council mirrors the description of the Premier's senior staff representing the Premier's eyes and ears with stakeholders as described in Order PO-1725.

[46] It goes on to state that the ongoing work of the Advisory Council assisted the Premier to determine the priorities and agenda of Cabinet with respect to the management and optimization of government assets. Accordingly, as noted by this office in Order PO-1725, the application of the section 12(1) exemption to the briefing

notes, submissions and related working papers of the Advisory Council supporting the Premier's priority and agenda setting role as head of Cabinet must be considered from this perspective.

[47] As a starting point, Cabinet Office submits that all of the records bundled together and described as submissions to Cabinet (both to Cabinet as a whole and to the Ministers' Table), qualify for exemption under the opening words of section 12(1) because the records were deliberated by Cabinet, and that disclosure of any of the records would reveal the substance of those deliberations.

[48] It states that the second group of records constitutes the briefing notes, consultant reports and other drafts and working papers of the Advisory Council and project team staff. These records were prepared by staff and/or consultants retained by the Advisory Council, in support of the Advisory Council's work developing analysis and recommendations to the Premier and Cabinet. The records all directly relate to the development and analysis of various options and recommendations under consideration by the Advisory Council.

[49] A substantial number of records in this category are clearly connected to, and contain similar information contained in the final submissions made to the Premier and Cabinet, and the Ministers' Table. In this case, many of the records explore in detail the policy, regulatory, financial, operational and legal implications of options under consideration and presented to Cabinet. Disclosure of these records, in the context in which they were created, would provide a reader with an accurate inference of matters deliberated by the Premier, the Ministers' Table and Cabinet.

[50] In other cases, the records relate to matters under deliberation and consideration by the Advisory Council. In this regard, the records reflect the various options and approaches, some of which are draft have been modified or rejected in the development of the options provided to the Premier and Cabinet, which the Advisory council considered. These records reflect the deliberative process undertaken by the Advisory Council and its staff and consultants. In this respect, there are two important points to make about these records. First, because the records, taken together, provide insight into the deliberative process of the Advisory Council, that is, what was under consideration and when, what was advanced and what was modified or rejected, these records fall squarely within the sphere of records that the Supreme Court in *John Doe v. Ontario (Finance)* described when the Court stated that advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption at subsection 13(1) of the *Act*.

[51] Second, disclosure of these records, given the context in which they were created as part of the Advisory Council's development of advice and recommendations specifically for the Premier and Cabinet, would also give a sophisticated reader the ability to draw inferences about topics being considered by the Premier and Cabinet, as well as the nature and scope of the recommendations being formulated by the Advisory

Council and staff. Notably, each of these records falls within the mandate and work stream undertaken by the Advisory Council in Phase I and Phase II of its work in relation to beverage alcohol.

[52] Cabinet Office further submits that because all of the work of the Advisory Council (including project team staff and consultants supporting the Advisory Council) was for the purpose of providing advice and recommendations to the Premier and Cabinet, it is difficult to extract or isolate any of these records, outside of the context in which they were created, and demonstrate how they do not relate to, or would not otherwise inform a reader about matters under consideration by the Premier and Cabinet in connection with the Advisory Council's review of wine retail and distribution. These records must be considered in the context of the ongoing dialogue taking place between the Premier and Ministers and the Chair, members and staff of the Advisory Council. The scope and nature of these briefings are evident in the information sent to the Ministers' Table and Cabinet in 2014 and 2015.

[53] At its core, the development and consideration of this working material was necessary and relevant to inform the advice and discussion by Advisory Council members taking place with the Premier and Ministers at the Ministers' Table. As such, Cabinet Office submits that disclosure of these records would reveal either directly the substance of the deliberations of the Premier and Cabinet relating to the same subject matter, or provide a sophisticated reader with accurate inferences about the matters under deliberation by the Premier and Cabinet.

[54] As noted above, as part of the ongoing dialogue with the Premier and Ministers' Table, the Advisory Council also provided updates about the views of and impacts on stakeholders in the beverage alcohol industry. At the direction of the Premier and the Ministers' Table, successive consultations and discussions were conducted with key stakeholders given their relative importance in the beverage alcohol industry by staff and consultants to the Advisory Council. Project team staff, accordingly, prepared a number of records detailing the meetings and submissions made by stakeholders.

[55] These notes were used by the support staff in Cabinet Office and consultants to assist the Advisory Council members to formulate recommendations to the Premier and Cabinet. Disclosure of the stakeholder meeting records would give a reader insight into not only the topics under consideration by the Advisory Council that informed recommendations to the Premier and Cabinet, but disclosure would also allow a sophisticated reader to infer what was deliberated by Cabinet and how stakeholder views and impacts factored into the development of recommendations made to the Premier and Cabinet. Notably, several of the Cabinet submissions contain summaries of stakeholder impacts.

[56] Cabinet Office states it is important to note that the Premier's Advisory Council on Government Assets, reported into Cabinet all work completed by the Premier's Advisory Council including supporting materials and research analysis completed for the

Advisory Council's Phase 1 Report provided to the Government on April 15, 2015. Accordingly, the project team supporting the Advisory Council provided a voluminous report, which included all consultant reports, records relating to stakeholder consultations and submissions and records that detailed the Advisory Council's analysis.

[57] Notably, the records provided to Cabinet include background briefing materials that went to the Premier and Ministers' Table, and the Minister of Finance as well as other analysis documents, consultant reports and stakeholder submission and meeting notes that are responsive to the request. In sum, Cabinet Office submits that all of these records are also subject to the exemption provided for by subsection 12(1) as disclosure would reveal information that was provided for review and deliberation by members of Cabinet.

*The appellant's representations*

[58] The appellant states that the purpose of the access request was to scrutinize the policy development process of the Premier's Advisory Council on Government Assets to determine if the policy for wine and spirit retailing and distribution was made in the public interest of all Ontarians.

[59] The appellant submits that wine and spirit retailing and distribution generates a significant portion of revenue for the Government of Ontario. This revenue is, in turn, used to fund and operate public services critical to the well-being of all Ontarians, including healthcare, frontline social services, transportation and infrastructure. The appellant states:

Therefore, considering the importance of this revenue to the operation of the Provincial Government and these services, I believe it is truly in the public interest to disclose these records in order to properly review and scrutinize the Premier's Advisory Council policy and decision-making approach.

[60] Regarding the exemption in section 12(1), the appellant argues that the policy decisions to which the records relate have already been decided by the Executive Council and implemented as of December 2015. Therefore, the appellant submits, sections 12(1)(c) and 12(1)(e) do not apply to these records.

[61] In addition, the appellant submits that the role and function of the Premier's Advisory Council is not the same as a senior staff person in the Premier's office. The Premier's Advisory Council was formed outside traditional policy making structures within the Executive Council and comprised of non-elected persons from outside the Public Service of Ontario, including members of the private sector and non-for-profit enterprises. For these reasons, the appellant states that disclosure of the records prepared by the Premier's Advisory Council is in the public interest.

[62] Lastly, the appellant submits that it is in the public interest that private and not-

for-profit sector advisors be held to a higher level of scrutiny than elected office holders and public servants. The records should be disclosed to the public for transparency purposes, and to maintain the public's trust in the capability of the Government of Ontario to make sound policy decisions that benefit all Ontarians.

### ***Analysis and findings***

[63] 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).<sup>4</sup>

[64] 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.<sup>5</sup>

[65] 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.<sup>6</sup>

[66] For ease of reference, I will categorize the records in the same manner done by Cabinet Office, as follows:

- Final versions of briefing materials presented to the Executive Council or the Minister's Table on Government Assets;
- Draft versions of briefing notes;
- Due diligence materials created by the Advisory Council; and
- Stakeholder meeting notes.

[67] I find that the final and draft versions of briefing materials, as well as the "due diligence" materials are exempt from disclosure under the introductory wording of section 12(1). As stated above, 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 qualifies for exemption under section 12(1), and that it is possible for a record that has never been placed before Cabinet or its committees to qualify for

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<sup>4</sup> Orders P-22, P-1570 and PO-2320.

<sup>5</sup> Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

<sup>6</sup> Order PO-2320.

exemption under the introductory wording of section 12(1), if it is established that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its disclosure would permit the drawing of accurate inferences with respect to these deliberations.

[68] Cabinet Office submits that the degree of interaction between the Chair and the Advisory Council with the Premier and Cabinet, was different from the typical policy development and approval process within the Ontario Public Service, where discrete Cabinet submissions on topics are developed by public servants and made to a policy and/or financial committee of Cabinet and then subsequently approved by Cabinet as a whole. In contrast, the Advisory Council and its Chair were directly and repeatedly engaged in a dialogue with the Premier and Ministers' Table in the work of the Advisory Council and the formation and development of its recommendations.

[69] I am satisfied that, on my review of the representations and the records, and given the "back and forth" manner in which the interactions between the Advisory Council and the Premier and the Ministers' Table took place, disclosure of the final and draft briefing materials, as well as the "due diligence" materials, would reveal the substance of the deliberations of Cabinet or its committee or permit the drawing of accurate inferences with respect to these deliberations.

[70] In particular, many of the records were submitted directly to the Premier and the Ministers' Table for deliberation. Other records: refer directly to information which was submitted to the Premier and the Ministers' Table; detail the changes which are to be made to the information forming the basis for subsequent submissions to the Premier and the Ministers' Table; or contain policy options or recommendations submitted to the Premier and the Ministers' Table, the disclosure of which would reveal the substance of Cabinet or its committee's deliberations, or permit the drawing of accurate inferences regarding those deliberations.

[71] Having found these records to be exempt under section 12(1), it is not necessary for me to determine whether they are exempt under sections 13(1), 18, and 19, which Cabinet Office had also applied to these records.

[72] The appellant has submitted that there is a public interest in the disclosure of the records. Section 12(1) is a mandatory exemption, to which the public interest override in section 23 does not apply. I also note that there are reports (previously referred to) that were issued by the Advisory Council, which are publicly available.

[73] Turning to the remaining records at issue, which are the stakeholder notes, I find that they are not exempt under section 12(1), because they neither reveal the substance of Cabinet deliberations nor permit the drawing of accurate inferences regarding those deliberations. I agree with Cabinet Office that disclosure of the stakeholder meeting records would give a reader insight into the topics under consideration by the Advisory Council. However, I am not persuaded that disclosure of



the stakeholder notes by themselves would allow a “sophisticated reader” to infer what was deliberated by the Premier and the Ministers’ Table, especially given that I have found the other records at issue to be exempt from disclosure.

[74] The only other exemption Cabinet Office has claimed with respect to the stakeholder meeting notes is the mandatory exemption in section 17(1), which I consider below.

**Issue C: Does the mandatory exemption at section 17(1) apply to the records?**

[75] Cabinet Office is claiming the application of the mandatory exemption in section 17(1)(b) to the notes taken during the stakeholder meetings by the Advisory Council. Section 17(1)(b) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[76] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>7</sup> Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>8</sup>

[77] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

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<sup>7</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>8</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

## ***Representations***

### *Cabinet Office's representations*

[78] Cabinet Office submits that disclosure of the stakeholder records could reasonably be expected to harm the Crown's ability to work with stakeholders in a confidential manner in the future, as it would undermine the confidence that such stakeholders place in the presumed confidentiality of these types of consultations. Accordingly, Cabinet Office argues, this would result in similar information, which is important to the government when making informed policy choices and decisions, no longer being provided.

[79] With respect to part one of the three-part test, Cabinet Office submits that the records contain the financial and commercial information of third parties, including information about the organizations' finances, business and operational plans, sales, pricing, profit and loss, and competition.

[80] Concerning the second part of the test, Cabinet Office submits that the information in the stakeholder notes was supplied to Cabinet Office by way of oral submissions that were captured in writing by the Advisory Council and, in some cases, the oral presentations were accompanied by a written submission from the third party. Cabinet Office argues that while the notes were taken by the Advisory Council, the supplied portion of the second part of the test is met because the notes reflect direct submissions made by stakeholders during the meetings about options in connection with the alcohol beverage industry.

[81] Turning to whether the information that was supplied by the third parties was done so in confidence, Cabinet Office advises that when staff of the Advisory Council undertook consultations with external stakeholders, the organizations that were consulted were asked to enter into a confidentiality agreement with the Advisory Council, where both parties agreed that all consultations were confidential, thus creating an explicit expectation of confidentiality. In addition, Cabinet Office argues that the information the stakeholders provided to the Advisory Council would not otherwise be made available to the public, and was not intended to be made public.

[82] With respect to the harms contemplated in section 17(1)(b), Cabinet Office submits that without the participation of the stakeholders, the Advisory Council would not have had the benefit of the views of third parties when formulating its advice and recommendation to the government. In this regard, Cabinet Office states, the confidential consultation process enabled the Advisory Council to provide the Premier and Cabinet with the best advice, informed by an in-depth understanding of stakeholder views, reactions and impacts.

[83] Cabinet Office goes on to argue:

The consultation process undertaken by the Advisory Council demonstrates how full and complete information sharing and candour is critical during the policy-development process particularly with respect to economic and business policies that may impact participants in the marketplace. For this reason, if confidential submissions of stakeholders were to be disclosed, it is reasonable to expect that future consultations with a similar stakeholder community will be less frank and candid.

On this basis, Cabinet Office respectfully submits that by disclosing the meeting notes, the information provided by stakeholders during the confidential meetings and consultations detailing finances, business and operational plans, sales, pricing, profit and loss and competition could result in the stakeholders declining to participate in future consultation processes, which would undermine the Crown's ability to develop and implement informed economic policy in the public interest.

### *The appellant's representations*

[84] The appellant questions whether the third parties listed in the access request would resist disclosure of the records or would no longer supply information to Cabinet Office in the future if the disclosure of these records took place. The appellant further submits that the changes to the province's wine and spirit retail and distribution have already taken place, and, therefore, the disclosure of records provided by third parties no longer provides any commercial or financial value to any competitors or other relevant third parties.

[85] In addition, the appellant calls on Cabinet Office to prove or demonstrate that the disclosure of records has been or would be resisted by all of the third parties listed in the access request.

### ***Analysis and findings***

[86] Based on my review of the representations of both Cabinet Office and the appellant, and due to the mandatory nature of the exemption in section 17(1), I will be notifying the third parties (the affected parties), whose information may be contained in the stakeholder notes, prior to making a final determination on the application of section 17(1) to those records. Cabinet Office is asked to provide this office with the contact information of the affected parties in the stakeholder notes.

### **ORDER:**

1. I find that most of the records at issue are exempt under section 12(1). I will make a final determination regarding the records for which Cabinet Office claimed the application of section 17(1) (the stakeholder meeting notes) pending notification of the affected parties.

2. I remain seized of this matter pending the final determination on the application of section 17(1) to the remaining records at issue.

Original Signed by: \_\_\_\_\_

Cathy Hamilton  
Adjudicator

\_\_\_\_\_ May 10, 2018