

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4221

Appeal PA19-00101

Ministry of Education

December 22, 2021

Summary: The appellant filed an access request under the *Act* for summary reports from a consultation conducted by the ministry in the fall of 2018. The ministry located records responsive to the appellant's request and denied it access to them, in full. The ministry claimed the application of the mandatory exemption in section 12(1) (Cabinet records) of the *Act*. The appellant appealed the ministry's decision. In this order, the adjudicator finds the records are exempt from disclosure under the introductory wording of section 12(1) and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders PO-1725, PO-3719, and PO-3973.

OVERVIEW:

[1] In the fall of 2018, the Ministry of Education (the ministry) undertook a large-scale public consultation spanning issues such as "STEM" (science, technology, engineering, and math) in the curriculum, job skills in the curriculum, standardized testing, life skills (such as financial literacy) in the curriculum, the use of cellphones in schools, the Health and Physical Education curriculum, and a new Parents' Bill of Rights. The ministry states the consultation also provided the public with an opportunity to

acknowledge and provide examples of teaching excellence. According to the ministry, the consultations resulted in significant public participation, with over 72,000 engagements by the time the consultation closed on December 15, 2018. The ministry published aggregated information and responses to the consultation questions on its website in March 2019.

[2] The appellant, an association, submitted a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for records relating to this consultation process. The ministry and the appellant clarified the request to the following:

Any weekly reports prepared by Ministry staff for management within the Ministry summarizing the input received during the consultation(s) on education beginning in September 2018.

[3] The ministry located records responsive to the clarified request and issued an access decision to the appellant denying access to them, in full. The ministry advised the appellant it withheld the records under the mandatory exemption in section 12 (Cabinet records) of the *Act*.

[4] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] Mediation did not resolve the issues and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator who initially had carriage of the appeal began the inquiry by inviting the ministry to make submissions in response to a Notice of Inquiry, which summarized the facts and issues under appeal. The ministry submitted representations, in which it argued the records are exempt under the introductory wording in section 12(1), as well as sections 12(1)(c) (background explanations or analyses for Cabinet) and 12(1)(e) (briefs of Ministers on Cabinet matters). The adjudicator then sought representations from the appellant in response to the Notice of Inquiry and the ministry's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. The adjudicator then sought and received reply representations from the ministry, sur-reply representations from the appellant and supplementary sur-reply representations from the ministry and the appellant.

[6] The appeal was then transferred to me to complete the inquiry.¹ In the discussion that follows, I find the records are exempt under the introductory wording of section 12(1) and dismiss the appeal.

¹ I have reviewed all the file materials and representations and have determined that I do not require further information before making my decision.

RECORDS:

[7] There are twelve records at issue totalling 129 pages. According to the ministry, there are two categories of records. The first category contains twelve weekly summary reports prepared by ministry staff and produced for the week ending Tuesday October 9, 2018 through the week ending Monday December 17, 2018. The ministry calls these records the *weekly summaries*. The second category of records contains a single summary prepared by ministry staff containing detailed submissions provided by approximately 70 organizations during the consultation period. The ministry calls this the *organizational summary*.

DISCUSSION:

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

[8] The ministry submits the records qualify for exemption under the introductory wording of section 12(1) as well as sections 12(1)(c) and/or 12(1)(e). Section 12(1) protects certain records relating to meetings of Cabinet or its committees. The relevant portions of section 12(1) 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,

(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;

(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[.]

[9] The Executive Council, which is more commonly known as Cabinet, is a council of ministers of the Crown and is chaired by the Premier of Ontario.

[10] Any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just

the types of records listed in paragraphs (a) to (f).²

[11] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.³

[12] The ministry must provide sufficient evidence to show a link between the contents of the records and the actual substance of deliberations.⁴

[13] Section 12(2) establishes circumstances in which the section 12(1) exemption does not apply. Section 12(2) reads:

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

(a) the record is more than twenty years old; or

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

The records were created in the fall of 2018, so section 12(2)(a) is not relevant in this case. However, I will consider the application of section 12(2)(b), below.

Parties' Representations

Section 12(1)

[14] The ministry explains that, at the beginning of the consultations, a Steering Committee came together to manage the project. The Steering Committee included staff from the Minister's Office, as well as the Deputy Minister and staff, Assistant Deputy Ministers responsible for divisions relevant to the consultations, Directors and other staff working on the consultation. The ministry states the Minister's Office monitored the consultation closely and liaised with the Premier's Office and ministry staff. Over the course of the consultation, the ministry states the Steering Committee met regularly and the information from these meetings would be shared with the Premier's Office, which would offer input and feedback. At the end of the consultation period, some of the Steering Committee members met with staff from the Premier's Office and Cabinet Office.

[15] The ministry states that Cabinet has a continuing mandate to improve public education in the province. As such, the records, which relate to a number of topics concerning public education, may reasonably be expected to support future decision-

² Orders P-22, P-1570 and PO-2320.

³ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁴ Order PO-2320.

making of the Premier and Cabinet. The ministry submits the information in the records continues to be relevant to the ongoing agenda-setting of the Premier and the decision-making of Cabinet.

[16] The ministry submits the records at issue were “central” to the ongoing dialogue between the Steering Committee, staff from the Minister’s Office, staff from the Premier’s Office and Cabinet Office. The ministry submits the information contained in the records was shared with the Premier’s Office and Cabinet Office both during and after the consultation period to support policy making and priority setting. The ministry refers to Order PO-1725, in which the IPC recognized that senior staff of the Premier’s Office function as the Premier’s “eyes and ears” on important policy matters.

[17] The ministry submits the ongoing discussions among the Steering Committee, Minister’s Office, and the Premier’s Office informed changes to the weekly summaries over the period of the consultations. These changes reflected the concerns and questions that would, if disclosed, shed light on the deliberations of Cabinet. The ministry submits the disclosure of the weekly summaries could reasonably be used to draw accurate inferences about the deliberations of Cabinet as the summaries reflect the weight assigned to various pieces of the consultation feedback.

[18] In addition, the ministry submits the weekly summaries were used as the basis of information in a submission to the Health and Social Policy Committee of Cabinet in late February 2019 and another document.⁵ The ministry provided copies of these two documents to the IPC in support of its representations.

[19] The ministry submits the organizational summary was informed by the Steering Committee’s discussions with the Minister’s Office members and the discussions between the Minister’s Office and the Premier’s Office. The consultation submissions of approximately 70 stakeholder groups were summarized in this record in a manner that the ministry submits is unique to the province and to government policy making and priority setting deliberations. Similar to the weekly summaries, the ministry submits the organizational summary was used as the basis for information in a submission to the Health and Social Policy Committee of Cabinet in late February and another document⁶ that was presented to Cabinet.

[20] In its representations, the appellant submits section 12(1) should not apply to the records at issue because they were created by the Steering Committee, which is not a committee of Cabinet. Rather, the appellant states the IPC has found that, for a body to be considered as a Cabinet *committee* for the purposes of section 12(1), it “must be composed of Ministers where some tradition of ministerial responsibility and Cabinet prerogative can be invoked to justify the application of this exemption.”⁷ The appellant submits a *committee* would not include a committee comprised of staff from a ministry.

⁵ The ministry identified this document in the confidential portions of its representations.

⁶ See note 4.

⁷ Order P-604.

In this case, the appellant states the ministry did not identify anyone other than staff involved in the “dialogues” to which the records relate.

[21] The appellant also refers to the wording of its request, which was for “summaries prepared by Ministry staff for management within the Ministry.” The appellant states this wording does not suggest that the summaries were prepared for Cabinet, as it is not “within the ministry.” The appellant notes that the ministry submits the records were central to a dialogue between the staff from the ministry and the Premier’s Office, not the ministers themselves. Given this context, the appellant submits there is “no rational basis” upon which to conclude the records and the data requested would reveal the substance of deliberations of Cabinet or its committees or that they would provide insight into the substance of any specific deliberations that may have occurred among Cabinet ministers.

[22] In addition, the appellant takes issue with the ministry’s interpretation of *substance of deliberations*. Referring to Order PO-3973, the appellant notes the IPC has found there is a distinction between the *substance* and *subject* of deliberations. The appellant submits the records do not reveal the content of the deliberations of Cabinet; rather, the records reveal the topics of potential deliberations.

[23] Finally, the appellant states it does not seek commentary from the ministry about the information obtained from the public consultations. Instead, the appellant states it seeks access to summaries of the information obtained from the consultations, which is a request made at the suggestion and urging of the ministry. The appellant states some of the underlying data was disclosed to it already and so, there should not be any blanket exemption applied to the summaries. Furthermore, if the information collected changed over time, due to changes in the questions asked in the survey, this would not be sufficient to establish a link between the content of the record and Cabinet’s deliberations.

[24] The appellant submits the purpose of access to information laws is to facilitate democracy and accountability. As such, exemptions to disclosure ought to be read narrowly. The appellant also submits that the purpose of public consultation is for the government to hear what the public has to say to inform its policy decisions. This does not mean the government must act in accordance with what the public says, but there is no way to hold the government accountable if the information obtained through the consultations cannot be disclosed. The appellant submits the ministry persuaded it not to request the raw data obtained during the consultation on the basis that it would be too costly and time-consuming to produce. However, despite the appellant amending its request to the summary information prepared for management, the ministry takes the position that these records are exempt from disclosure, therefore avoiding having to disclose anything to the appellant. The appellant submits that allowing the ministry to withhold the records by applying a broadly interpreted blanket exemption would result in a lack of accountability and transparency.

[25] In its reply representations, the ministry submits there is a clear link between the information in the records at issue, and the information that was communicated to the Premier's Office for decision-making. The ministry submits the disclosure of records would allow inferences to be drawn about the substance of Cabinet deliberations. The ministry refers to Order PO-1725, which found that the Premier has a unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet. Due to this role, Order PO-1725 found that the Premier's deliberations could not be separated from the deliberations of Cabinet as a whole.

[26] The ministry also disagrees with the appellant's claim that the ministry interpreted *substance of deliberations* too broadly. The ministry submits the information in the records summarize the information gleaned from the consultation in a way that would reveal what was considered the most important information from the consultation, which information was provided to the Premier's Office to support and assist government policy-making, priority setting, and decision-making.

[27] In response, the appellant submits the ministry did not establish that the records would, if disclosed, reveal deliberations or the decision-making process that was undertaken in relation to that information. The appellant also submits the ministry has not sufficiently addressed the difference between *substance* of deliberations and the *subject* of deliberations. According to the ministry, the records summarize information provided to the Premier's Office to support and assist government decision-making. However, the appellant submits that revealing what information decision-makers had when they deliberated is not the same thing as revealing the deliberative process they engaged in. Further, the appellant notes the ministry admitted the records themselves were not put before Cabinet and the fact that staff members had certain information and may have engaged in a deliberation is not sufficient to establish an exemption to the disclosure of that information.

[28] In further sur-reply representations, the ministry reiterates the weekly and organizational summaries were created through an iterative process, in a way that uniquely reflects input relating to government policy making and priority setting. The ministry submits the summaries changed in nature and content in response to feedback conveyed to the Steering Committee by the Minister's Office Staff to reflect the input of the Premier's Office. The ministry submits the evolution of the summaries over time would, if disclosed, allow an attentive reader to draw accurate inferences about the feedback provided, which would give insight into the Premier's thinking on these matters and the weight and importance assigned to various pieces on the consultation feedback in decision-making. The ministry refers to Order PO-3973, which found that the section 12 exemption may "extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process."

[29] The appellant was invited to make further supplementary sur-reply representations in response to the ministry's sur-reply representations. The appellant

declined to make representations, but reiterated its position that the ministry's broad interpretation of the exemption creates less accountability and less transparency, which is contrary to the purpose of the *Act*.

Section 12(2): Exceptions to section 12(1)

[30] With regard to section 12(2)(b), the ministry submits it gave "careful consideration" to the possibility of seeking consent from Cabinet to release these records, and exercised its discretion not to do so based on the following factors:

- The government has published aggregated information and aggregated responses received during the public online consultation. Accordingly, the ministry submits that the public interest in transparency has been reasonably served.
- At the time the request was made, no decisions had been made relating to the matters that were the subject of the consultations.
- The information at issue may reasonably be expected to support future decision-making given Cabinet's continuing mandate to improve public education in the province.

[31] The ministry submits it exercised its discretion in good faith and for purposes consistent with the policy intention of the exemption. In addition, the ministry submits it took into account all relevant considerations and did not rely on irrelevant considerations.

[32] The appellant submits the ministry failed to consider relevant factors such as the duty it owes to the public when conducting a public consultation and the importance of being able to hold the ministry accountable for any future action it takes with respect to education. The appellant submits that transparency and accountability require disclosure in this case.

[33] In response, the ministry submits that the appellant has improperly attempted to apply the public interest considerations in section 23 of the *Act* to the exercise of discretion in seeking Cabinet consent to disclose the records at issue. The ministry submits that section 23 cannot apply to override a finding that section 12(1) applies to exempt information from disclosure. The ministry acknowledges there is a public interest in nearly all Cabinet decisions. However, the exemption provides the government with the right to protect its deliberations.

Analysis and Findings

[34] The records at issue are comprised of weekly summaries of public consultations and an organizational summary containing detailed submissions provided by approximately 70 organizations during the consultation period on various topics related

to public education.

[35] Based on my review of the records and the parties' representations, including the ministry's confidential representations, I find the ministry has provided sufficient evidence to demonstrate the introductory wording in section 12(1) applies to exempt the records from disclosure. Specifically, I find the ministry provided sufficient evidence to demonstrate that disclosure of the records would reveal the substance of deliberations of Cabinet (including the Premier himself) and/or its committees.

[36] The introductory wording in section 12(1) reads as follows:

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

In Order PO-3973,⁸ the adjudicator considered the introductory wording in section 12(1). He noted there was agreement between the institution and the appellant that the opening words "should be interpreted in light of their underlying purpose to promote the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating."⁹ I agree with this interpretation of the wording of section 12(1) and adopt it for the purposes of this analysis.

[37] The appellant is correct in stating that the Steering Committee, which created the records, is not a committee of Cabinet. However, section 12(1) does not require that the records be *prepared by* Cabinet or one of its committees. Rather, the exemption only requires that the disclosure of the records would reveal the substance of deliberations of Cabinet or its committees. While I acknowledge these records were not prepared by Cabinet nor were they provided directly to Cabinet, the ministry has provided me with sufficient evidence to demonstrate the information in the records was reviewed and considered by Cabinet and its committees in discussions about public education.

[38] The appellant claims the ministry applied an overly broad interpretation of the term *substance of deliberations* to exempt the records from disclosure. The appellant emphasizes in its representations that it seeks only summary information relating to the consultation and was directed by the ministry clarify its request to include only this information. Given this clarification, the appellant submits that the information responsive to the clarified request should be disclosed to it. I do not agree with the appellant. Upon review of the appellant's representations, it appears the ministry

⁸ I note Order PO-3973 is currently under judicial review. The records before me are distinguishable from those before the adjudicator in that decision and I will not be relying on his findings in this decision. However, Order PO-3973 was referred to in both the ministry and the appellant's representations and provides a recent and succinct explanation of the IPC's jurisprudence with respect to section 12(1).

⁹ Order PO-3973, para. 89.

encouraged the appellant to alter its request from all the raw data generated during the consultations to the summary information to reduce a potentially costly and time-consuming search and preparation of records. It does not appear the ministry provided any guarantee to the appellant that the responsive summaries would be disclosed to it if it clarified its request. Whether the responsive records would qualify for exemption could not have been decided until the ministry reviewed them.

[39] In any case, upon review of the records, I find they contain more detailed information than simply the topics or subjects of deliberations, as the appellant claims. In Order PO-3719, the adjudicator defined *substance* and *deliberations* as follows:

“deliberations” refer to discussions conducted with a view towards making a decision; and “substance” generally means more than just the subject of the meeting.

I agree with these definitions and will adopt them for the purposes of this analysis. Based on my review of the records, I find the ministry has established a sufficient link between the records and the deliberations of Cabinet and/or the Health and Social Policy Committee of Cabinet. The records at issue contain specific concerns and issues raised by the consultation participants that the ministry has demonstrated would reasonably have factored into the deliberations of the Premier’s Office and Cabinet when discussing the decisions and policies relating to public education. I find the ministry has provided sufficient evidence to demonstrate how disclosing the information at issue in the records would reveal the deliberations of the Premier, Cabinet and/or its committees.

[40] Specifically, the ministry provided copies of two documents, one of which is a submission to the Health and Social Policy Committee of Cabinet in February 2019, that were put before Cabinet and/or its committees that contain information in the records. It is clear from these two documents¹⁰ and the mandate of Cabinet to set policy and make decisions regarding public education that the information at issue in the records would have been reviewed and discussed as part of the discussions and deliberations of the Premier’s Office, Cabinet and/or its committees. Therefore, I find the ministry has demonstrated the information would reveal the substance of deliberations of Cabinet and/or its committees if it were disclosed.

[41] Aside from these specific documents that show that the information at issue was deliberated on by Cabinet and/or its committees, I have also taken into account the role of the Premier’s Office in relation to the iterative consultation process described by the ministry. In its representations, the appellant refers to the evolving nature of the records at issue which reflect the dialogue between ministry staff and the Premier’s Office during the consultation. The appellant submits the ministry did not provide

¹⁰ There is specific information in these documents that satisfied me that they formed the basis of the deliberations of Cabinet and/or its committees. I cannot be more specific without revealing the contents of those documents.

sufficient evidence to show a link between the records and Cabinet's decision-making process, if the information at issue changed over time due to changes in the questions asked in the survey. I do not agree. I have reviewed the ministry's representations as well as the attachments it provided to support its representations and find it provided sufficient evidence to demonstrate that the records would, if disclosed, reveal the substance of the deliberations of the Premier's Office. As the ministry submits, in Order PO-1725, the IPC found the Premier's deliberations cannot be separated from those of Cabinet due to his unique role in government. I agree with this principle from Order PO-1725 and will follow it for the purposes of this analysis.

[42] The ministry confirmed the consultation was an evolving process and the survey questions were changed to reflect the concerns and requests of the Premier's Office. As such, the records, particularly the weekly summaries, reflect the evolution of the Premier's considerations and concerns. The ministry submits that the weekly summaries both reflected the Premier's previous week's concerns and interests and informed the following week's decisions. Based on my review of the records and the ministry's representations, I find the records would, if disclosed, reveal the concerns, issues and deliberations of the Premier throughout the consultation process. Given the Premier's unique role in government, I accept that the records would reveal the substance of the deliberations of Cabinet.

[43] The appellant refers to the findings in Order PO-3973 to support its position that the records should not be exempt under section 12(1). In Order PO-3973, the adjudicator found that the introductory wording in section 12(1) did not apply to exempt mandate letters from the Premier to the members of his Cabinet from disclosure. The records at issue in Order PO-3973 were described as "directives from the Premier to each of his ministers" and "contain general statements about the governments overall priorities to each ministry's priorities and his or her own role."¹¹

[44] As the ministry notes, Order PO-3973 is the subject of a judicial review application and the Court of Appeal's decision is under reserve. In that case, the adjudicator determined that Cabinet Office had not provided sufficient evidence to establish that section 12(1) applied to exempt the records at issue.

[45] In any case, Order PO-3973 is distinguishable from the appeal before me on the facts. Based on my review of the records at issue, I find the ministry has demonstrated the records at issue would reveal the substance of Cabinet or its committees if they were disclosed. Unlike the records before the adjudicator in Order PO-3973, the ministry provided me with a submission to a Cabinet committee (and another document) that in conjunction with my review of the records themselves, satisfies me that disclosing the records at issue would reveal the deliberations of Cabinet or its committees.

¹¹ Order PO-3973, at para 79.

[46] As for the Premier himself, I find the summaries at issue contain more than only the subject or product of the Premier's deliberations. Based on my review of the records and the ministry's representations, and for the reasons set out above, I find the information contained in the records would reveal the substance of his deliberations on the topics covered in the consultation.

[47] Therefore, based on my review of the records and the parties' representations, I find the records qualify for exemption under the introductory wording of section 12(1) of the *Act*.

[48] I have reviewed the exceptions to section 12(1) in section 12(2) and find that neither apply. First the record is not more than twenty years old; as such, section 12(2)(a) has no application. Second, section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant records. The second requires a head to turn his or her mind to the issue at a minimum.¹² In this case, the ministry provided detailed representations demonstrating that it turned its mind to this issue and I am satisfied it did so. While I appreciate the appellant is not satisfied with the ministry's decision, the ministry considered a number of relevant factors in its consideration of section 12(2)(b) in deciding not to seek Cabinet's consent to release the records.

[49] Accordingly, I find that the exception to section 12(2)(b) does not apply and the records are exempt under the mandatory section 12(1) exemption, by reason of the introductory wording to section 12(1).

[50] As the introductory wording in section 12(1) applies to exempt the records in full, it is not necessary for me to consider whether they are also exempt under sections 12(1)(c) or (e). Furthermore, while the appellant has raised a number of public interest concerns, the public interest override in section 23 cannot apply to override section 12(1). As such, it is not necessary to consider the application of section 23 to the records.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: _____

Justine Wai
Adjudicator

December 22, 2021 _____

¹² Orders P-771, P-1146 and PO-2554.