

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4379

Appeal PA22-00086

Infrastructure Ontario

April 19, 2023

Summary: Infrastructure Ontario (IO) received an access request under the *Freedom of Information and Protection of Privacy Act* for maps related to a high-speed internet project in Ontario. IO located the responsive records and disclosed them, except for one line in each that it applied the mandatory Cabinet records exemption in section 12(1) to.

In this order, the adjudicator upholds IO's decision under section 12(1) and dismisses the appeal.

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

OVERVIEW:

[1] This order concerns whether certain information in Census Divisions¹ maps related to a high-speed internet project in Ontario is exempt from disclosure because its disclosure would reveal the deliberations of Cabinet or one of its committees.

[2] Infrastructure Ontario (IO) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

¹ Census divisions are specific areas in provinces that were established to facilitate regional planning, as well as to facilitate the provision of services that can be more effectively delivered on a scale larger than a municipality.

The "Service Area Maps" mentioned in the Request for Proposals (RFP) document published on Infrastructure Ontario's Ontario Connects webpage.

If not included in the above, the maps and/or locations of the "Wired Service Area" and the "Wireless Service Area," as defined in Schedule 3 of the RFP document.

[3] IO issued a decision advising that it conducted a search and identified 93 maps in response to the request. IO advised that it was denying access to the responsive records under section 18(1) (economic and other interests) of the *Act*.

[4] The appellant appealed IO's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[5] During mediation, the appellant advised the mediator that he wished to pursue full access to the records at issue. In addition, the appellant raised the possible application of the public interest override at section 23 of the *Act*.

[6] No further mediation was possible and the appellant confirmed that he wished to proceed with the appeal to adjudication where an adjudicator may conduct an inquiry.

[7] During the inquiry, IO issued a supplementary access decision letter and disclosed most of the information at issue. It only withheld a small portion of each map under the mandatory section 12(1) Cabinet records exemption.² I sought the parties' representations on the application of this exemption to the information remaining at issue in the records. Their representations were shared between them in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I uphold IO's decision and find that the information at issue in the records is exempt under section 12(1).

RECORDS:

[9] At issue is one line in each of the 93 Service Area Maps related to the Ontario High-Speed Internet project (the project). Each of the 93 lines has been withheld under section 12(1).

² Although the public interest override in section 23 may apply to information withheld under section 18(1), it does not apply to information withheld under section 12(1).

DISCUSSION:

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

[10] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. IO relies on the introductory wording of section 12(1), which reads:

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...

[11] The Executive Council referred to in section 12(1) is more commonly known as Cabinet, and is a council of ministers of the Crown chaired by the Premier of Ontario.

[12] As indicated above, IO originally withheld the maps in full under section 18(1). It later issued a supplementary access decision disclosing the maps, other than one line in each. It withheld this information under a new exemption, section 12(1), indicating that the information at issue was included in a submission to Treasury Board/Management Board of Cabinet (TB/MBC). TB/MBC are both committees of Cabinet.³

Representations

[13] When the appellant received the redacted maps and the new exemption claim, he provided the following submission opposing the withholding of the information at issue on the basis of the section 12(1) exemption:

...it appears that such information was previously disclosed to internet service providers [ISPs] as part of the briefing deck disclosed under [another request] (the deck included a sample area service map, and IO similarly claimed a section 12 exemption for the same portion of the map). It seems highly unlikely that information freely disclosed by IO to several private internet service providers would be Cabinet records subject to the mandatory section 12 exemption...

[14] In response, IO states⁴ that the information at issue is sensitive confidential information, which was not shared with the public. It admits that it shared the information during the procurement process with ISPs who signed Confidentiality and Non-Disclosure Agreements (NDAs) in the context of a market sounding that preceded the procurement for the project. It disputes that the information at issue was freely

³ See *Financial Administration Act*, R.S.O. 1990, c. F.12 and *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1.

⁴ IO provided both confidential and non-confidential representations. I will only be referring to its non-confidential representations in this order, however, I have considered the entirety of IO's representations in making my determinations in this appeal.

shared with third parties.

[15] IO states that although it partially disclosed the requested records to the appellant, it withheld information that was included in the TB/MBC submission, which submission provided a detailed implementation plan for the project for each service area across Ontario. (The submission is not a record at issue in this appeal.)

[16] IO further submits that there is a direct linkage between the redacted content in the records at issue and the TB/MBC submission. It submits that disclosing the information at issue would reveal the substance of the deliberations of Cabinet.

[17] IO provided an affidavit from its Director, Commercial Projects, who has familiarity with the project the records relate to. She states that IO supported the preparation of the TB/MBC submission in which the information at issue in the records is contained. She states that IO worked jointly with the Ministry of Infrastructure who submitted the materials for TB/MBC review and approval in June 2021. She states:

This submission provided a detailed implementation plan for the Broadband procurement [the project], including the information that is being redacted in the records at issue.

[18] The appellant submits that a mere linkage to any TB/MBC submission does not in all cases reveal the substance of Cabinet deliberations and that the linkage alone is not sufficient to establish an exemption under section 12.

[19] The appellant refers to several orders in which some linkage was established, but the IPC nonetheless found that disclosure of records that arguably have a stronger linkage to a Cabinet proceeding than the information at issue in this case, would not reveal the substance of cabinet deliberations.⁵

[20] The appellant submits that although evidence of a document actually having been placed before Cabinet provides “strong but not necessarily determinative evidence that disclosing its content could reveal the substance of deliberations,” section 12(1) requires that an institution provide evidence establishing a linkage between the content of a record and the substance of Cabinet deliberations.

[21] The appellant cites my order, Order PO-3719, where I found that “deliberations” refer to discussions conducted with a view towards making a decision; and “substance” generally means more than just the subject of the meeting.

[22] The appellant submits that on his review of IO’s representations, it is his view

⁵ The appellant relies in particular on Order PO-2320 and Order PO-3973, Decision upheld by the Divisional Court in *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 (CanLII); Decision upheld by the Ontario Court of Appeal in 2022 ONCA 74 (CanLII); Leave to appeal to the Supreme Court of Canada granted in 2022 CanLII 40784 (SCC).

that IO has not proven that disclosure of the redacted information at issue would reveal the substance of Cabinet deliberations.

[23] He reiterates his submission that it seems very unlikely that IO would share information with several private third parties, whether or not they signed an NDA, if IO truly believed this information was likely to reveal the substance of Cabinet deliberations, threatening the free and frank deliberations that are the purpose of the section 12 exemption. He submits that it is unlikely that information revealing the substance of Cabinet deliberations would even be necessary in a briefing deck presented to private third parties seeking to bid on ISP contracts.

[24] In reply, IO relies on its previous representations.

Findings

[25] IO relies on the introductory wording of section 12(1). 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 the 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).⁶

[26] In order to meet the requirements for exemption under 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.⁷

[27] Concerning the introductory wording of section 12(1), as noted above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;⁸ and
- "substance" generally means more than just the subject of the meeting.⁹

[28] In Order P-131, former Commissioner Sidney B. Linden, in referring to section 12(1), stated:

"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 also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons

⁶ Orders P-22, P-1570 and PO-2320.

⁷ Order PO-2320.

⁸ Order M-184.

⁹ Orders M-703 and MO-1344.

for and against a contemplated act or course of conduct or a choice of acts or means”.

[29] In Order 72, former Commissioner Linden considered the wording of section 12(1) and stated:

Can records that are incorporated into a Cabinet submission or records that are used as a basis for developing a Cabinet submission, if disclosed, reveal the “substance of deliberations” of the Cabinet or its committees? In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the “substance of deliberations” of Cabinet, as required by the wording of subsection 12(1). Documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary [advice or recommendations] exemption provided by subsection 13(1) of the *Act*.

[30] The evidence before me is that the information at issue in the records was placed before Treasury Board/Management Board of Cabinet, which are committees of Cabinet. Based on my review of IO’s representations, including its confidential representations, I agree with IO that the information at issue in the records qualifies for exemption. Disclosure would reveal the substance of deliberations of Cabinet committees, namely TB/MBC, or would permit the drawing of accurate inferences about the deliberations.¹⁰

[31] I find that IO has provided sufficient evidence to show a link between the information at issue in the records and the actual substance of Cabinet committee deliberations.¹¹ Based on my review of IO’s representations in their entirety and the records, I do not agree with the appellant that the information at issue reveals only perhaps a decision resulting from a Cabinet committee deliberation, but not the substance of the deliberations themselves.

[32] Therefore, as disclosure of the information at issue in the records would reveal the actual substance of the deliberations of Cabinet committees, or permit the drawing of accurate inferences with respect to those deliberations, I find that the information at issue in the records is exempt from disclosure under the introductory wording of section 12(1).

[33] In making this finding, I have considered that the information at issue has been disclosed in a confidential manner under an NDA to ISPs so that they would be able to participate in the RFP process for the project. I accept IO’s evidence that the information at issue is confidential information that was not shared freely and is not publicly available.

¹⁰ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707, and PO-2725.

¹¹ Order PO-2320.

[34] Finally, I am satisfied that IO turned its mind to seeking Cabinet consent but that, for reasons described in its confidential representations, decided not to do so.¹²

ORDER:

I uphold IO's decision that the information at issue in the records is exempt by reason of section 12(1) and I dismiss the appeal.

Original signed by: _____

Diane Smith
Adjudicator

April 19, 2023

¹² Specifically, none of the exceptions to section 12(1) in section 12(2) 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.