

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4461

Appeal PA21-00198

Ministry of Education

November 28, 2023

Summary: This order deals with an access decision made by the Ministry of Education (the ministry) under the *Act* for any final products, including reports, delivered to the ministry by a named company during a specified time frame in order to fulfill its consulting contracts related to COVID-19. The ministry denied access to the records, claiming the application of the mandatory Cabinet Record exemption in section 12(1). In this order, the adjudicator finds that the records are exempt from disclosure under the introductory wording in section 12(1), and the appeal is dismissed.

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

Orders Considered: Order PO-4290.

OVERVIEW:

[1] This order resolves the sole issue raised as a result of an appeal of an access decision made by the Ministry of Education (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for any final products, including reports, delivered to the ministry by a named company during a specified time frame in order to fulfill its consulting contracts related to COVID-19.

[2] The appellant, a journalist, confirmed that she was not seeking any emails as part of her access request. In response, the ministry located records responsive to the

request and denied access to them in full, claiming the mandatory Cabinet records exemption in section 12(1) of the *Act*.

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

[4] The appeal was then moved to adjudication, where an adjudicator may conduct an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the ministry, the appellant and the company named in the access request (the affected party).

[5] The file was then transferred to me to continue the inquiry. I reviewed the parties' representations and determined that I did not need to hear further from the parties before making my decision. For the reasons that follow, I find that the records are exempt from disclosure under section 12(1) and I dismiss the appeal.

RECORDS:

[6] There are 290 pages of records consisting of five slide decks (Decks A through E), a compendium attached to Deck E, and a preliminary checklist.

DISCUSSION:

[7] The sole issue in this appeal is whether the records are exempt from disclosure under the mandatory Cabinet records exemption in section 12(1).

[8] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. The ministry is relying solely on the introductory words of section 12(1) to all of the records. The introductory wording 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,

[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).¹

[11] The institution must provide sufficient evidence to show a link between the

¹ Orders P-22, P-1570 and PO-2320.

content of the record and the actual substance of Cabinet deliberations.²

[12] Section 12(2) establishes circumstances under which the section 12(1) exemption does not apply.

[13] 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.

Representations

The ministry

[14] The ministry submits that the introductory words of the mandatory exemption in section 12(1) apply to exempt from disclosure all of the records in full. The ministry further submits that the confidentiality of Cabinet deliberations is a necessary feature of the freedom of information scheme, referring to the *Williams Commission* report.³

[15] With respect to the introductory wording on section 12(1), the ministry submits that any record that would reveal the substance of Cabinet deliberations or its committees – not simply the types of records set out in the clauses that follow – qualifies for exemption under section 12(1). As a result, the introductory wording of section 12(1) is considered to be a category separate from the categories set out in subsections (a) through (f).⁴

[16] The ministry goes on to argue that previous IPC orders have found, in the introductory wording, 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.⁵ The ministry further submits that even though a record may not have been put before Cabinet in its entirety, it could still qualify for exemption under the introductory wording of section 12(1) if the most essential elements of the record were the subject of Cabinet’s deliberations by way of inclusion in Cabinet submissions,⁶ and that the IPC has gone further to find that a record that has never been placed before Cabinet may be exempt under the introductory wording of section 12(1) where the

² Order PO-2320.

³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen’s Printer, 1980).

⁴ See, for example, Orders P-22, P-331 and P-1570.

⁵ See Orders M-184, M-703 and MO-1344.

⁶ See Order PO-2227.

disclosure of the record would reveal the substance of the deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to the deliberations. In these cases, the test requires that the institution provide evidence that establishes a link between information in the record and actual Cabinet deliberations.⁷

[17] The ministry submits that Decks A through D are each marked as a “Confidential Cabinet Document,” and that there is a significant overlap between those slide decks and the contents of the other records (the checklist and Deck E) to the extent that the confidential Cabinet label would apply to them as well.

[18] The ministry further submits that all of the records and the information drawn from them were provided to Cabinet. The ministry goes on to argue that the records provide extraordinarily detailed questions and discussion points for Cabinet, and because of the way the questions are framed, would provide clear insight into the substance of Cabinet’s deliberations on the issues before it.

[19] It is also the ministry’s position that the way in which the information at issue is organized and evolves in the records could be used to draw accurate inferences about Cabinet deliberations. For example, the ministry states:

Where information changes or is expanded upon through the various responsive records, tracking those changes could provide insight into the substance of deliberations of Cabinet as it dealt with the challenges of the pandemic in its early stages, allowing a sophisticated reader to draw accurate inferences into the types of questions that Cabinet was grappling with as it determined how the Province could allow schools and child care to open.

[20] With respect to the exceptions to the section 12(1) exemption, the ministry submits that the records are not more than 20 years old [section 12(2)(a)], and that the head did consider seeking consent from the Executive Council under section 12(2)(b), but exercised its discretion not to do so because the information in the records:

- is not known to the public,
- may continue to be under review and consideration by the provincial government,
- may form the basis of further formulation of government policy-making and decision-making, and

⁷ See Orders PO-2889, PO-2320 and PO-3973.

- may form the basis of further submissions to the Executive Council and its committees.

The affected party

[21] The affected party submits that it neither consents nor objects to the records being disclosed, while acknowledging that the section 12(1) exemption is for the ministry to claim, not the affected party.

[22] The affected party goes on to submit that the records, referred to as the "work product," were prepared under a "Statement of Work" (SOW) entered into with Cabinet Office. The only parties to the SOW were Cabinet Office and the affected party, and the purpose of the SOW was for the affected party to advise Cabinet Office on Covid crisis response strategies. The affected party notes that the SOW states that the work product will provide analysis to support policy and trade-off decisions made by Cabinet and argues that, as a result, the content of the work product may contain insights or analyses that could reveal the substance of the deliberations of Cabinet.

The appellant

[23] The appellant's position is that the records are not subject to the exemption in section 12(1) because the ministry has failed to provide any supporting evidence to demonstrate that the records were actually provided to Cabinet. Instead, the appellant argues, the ministry has simply provided examples as to how aspects of the records might be exempt from disclosure by potentially revealing the substance of Cabinet deliberations.

[24] The appellant submits that the established test to meet the requirements of section 12(1) is that the ministry must provide evidence and argument sufficient to establish a linkage between the content of the records and the actual substance of Cabinet deliberations. The appellant further submits that while the questions and discussion points referred to by the ministry in its representations may be subject to the section 12(1) exemption if they were presented to and deliberated by Cabinet, that does not necessarily exempt the rest of the records from disclosure. The appellant argues that the ministry fails to articulate how the remaining content of the records provides insight into the substance of Cabinet deliberations, and that under section 10(2), the ministry is required to disclose as much of any record that can be reasonably severed without disclosing material that is exempt.

Analysis and findings

[25] I find that all of the records are exempt from disclosure under section 12(1). In particular, I am satisfied, based on the ministry's representations and on my review of the records themselves, that they are all exempt under the introductory wording of section 12(1). As stated above, previous IPC decisions 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).

[26] I accept the ministry's evidence that all of the records at issue were placed before Cabinet for discussion. I also find that there is sufficient evidence to establish a link between the content and detailed nature of the records themselves and Cabinet deliberations, and that the disclosure of these records would either reveal the substance of the deliberations of Cabinet or permit the drawing of accurate inferences with respect to these deliberations.

[27] Turning to the exceptions in section 12(2), I find that neither apply. First, the records are not over 20 years old. Second, the head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record, but must at least turn their mind to it.⁸ Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.⁹ I accept that the ministry turned its mind to Cabinet consent and therefore find that the exception in section 12(2)(b) does not apply.

[28] Lastly, the appellant asks that I consider whether the records could be severed under section 10(2) of the *Act* to disclose any information that is not exempt under section 12(1). I acknowledge the appellant's submission that the records should be severed pursuant to section 10(2) of the *Act*. This section requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions under sections 12 to 22. In this case, having considered the records themselves in addition to the representations, I agree with the ministry that disclosure of any part of the records would reveal the substance of Cabinet committee deliberations. The records were all placed directly before Cabinet for consideration of and deliberation on their content. I find that the records at issue are, in their totality, subject to the mandatory exemption in section 12(1) of the *Act*.

[29] As a result, I find that all of the records at issue are exempt from disclosure under the introductory wording in section 12(1).

ORDER:

1. I uphold Cabinet's decision and dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

November 28, 2023 _____

⁸ Orders P-771, P-1146 and PO-2554.

⁹ Order PO-2422.