

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4537

Appeal PA23-00112

Ministry of Transportation

July 29, 2024

Summary: An individual asked the ministry for records about the cost of the environmental assessment of the GTA West Corridor Highway, and the cost of the highway itself. The ministry created a record with this information and provided partial access to it, but denied access to the information about the cost of the highway for two reasons (exemptions) set out in the *Act*, sections 12(1) (Cabinet records) and 18(1)(d) (economic and other interests).

The adjudicator agrees that some of the information is not required to be provided under the *Act* because its disclosure would reveal the substance of Cabinet deliberations, allowing it to be withheld under section 12(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1) and 12(2)(b).

Order Considered: Order PO-3199.

Case Considered: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

OVERVIEW:

[1] The Ministry of Transportation (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

Copies of all records relating to the cost of the environmental assessment for the GTAW Corridor highway. And all records relating to the estimated cost of the GTAW Corridor highway

[2] The time period for the request was from January 1, 2007 to March 18, 2021.

[3] The ministry created a record containing the requested information and issued a decision granting partial access to the record. Access to current cost estimates was denied under sections 12 (Cabinet records) and 18(1) (economic and other interests) of the *Act*. The requester (now the appellant) appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] During mediation, the ministry confirmed that it was maintaining its position to rely on sections 12 and 18(1)(d) of the *Act* to deny access to the withheld portion of the record. The appellant confirmed that he continues to seek access to the withheld portion of the record.

[5] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I conducted an inquiry where I sought and received representations from the ministry and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] For the reasons that follow, I find that the withheld portion of the record is exempt from disclosure under section 12 of the *Act*. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[7] The record at issue is a document that the ministry created in response to the request. The information at issue pertains to the estimated cost of the GTA West Corridor Highway.

DISCUSSION:

[8] The sole issue in this appeal is if the withheld information in the record is exempt from disclosure under section 12 of the *Act*. As discussed below, having found that the record is exempt under section 12, I do not need to consider if it is also exempt under section 18(1).

[9] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. In its representations, the ministry claimed that the introductory wording of section 12(1) applies to the record. The introductory wording of section 12(1) 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, ...

[10] The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*¹ (*Mandate Letters Decision*) recognized three underlying rationales for Cabinet secrecy: candour, solidarity and efficiency. It described these underlying rationales as follows:

... Collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny [...]. This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to by scholars as the "candour" and "solidarity" rationales for Cabinet confidentiality [...]. At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity [...].

Scholars also refer to a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process [...]. Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government. ...²

[11] 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. 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).³

[12] 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.⁴

[13] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.⁵

[14] Section 12(2) establishes circumstances under which the section 12(1) exemption does not apply. Neither party has claimed that section 12(2)(a), which relates to records

¹ 2024 SCC 4.

² *Mandate Letters Decision* at paras 29-30.

³ Orders P-22, P-1570 and PO-2320.

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

⁵ Order PO-2320.

older than 20 years, applies to the appeal. Section 12(2)(b) relates to the consent of Cabinet and reads:

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

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

[15] The head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record. However, the head must at least turn their mind to it.⁶ Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.⁷

Representations

Ministry representations

[16] The ministry submits that the information at issue went to the Treasury Board Secretariat (TBS) at a specified date, as part of the 2023-2024 Strategic Planning Process (SPP). It submits that its disclosure would therefore reveal the substance of Cabinet deliberations. In its confidential representations, the ministry provides additional information about what the SPP submission contained, the substance of the TBS deliberations and how the information at issue would reveal the substance of deliberations.

Appellant representations

[17] The appellant summarizes the request's underlying context and provides an overview of the history of the request. He generally takes issue with the ministry's response to his request, questioning if the record that the ministry created constitutes "all records" as identified in his request. In response to the ministry's exemption claims, the appellant submits that the ministry has not provided proof of the information's inclusion in Cabinet submissions, or on whether the information has in the past or will in the future influence Cabinet discussions.

[18] He refers to Order PO-3199, where the adjudicator considered the evidentiary requirements to support claims that a record's disclosure would reveal the substance of the deliberations of Cabinet. He also references past disclosures by the ministry where costs related to Highway 413 were disclosed. He explains that the ministry's submission that the record went to the TBS on the specified date is vague and, considering the size and potential impact of the infrastructure project, seems inadequate in denying the public release of information about the project. He also submits that there is a compelling public

⁶ Orders P-771, P-1146 and PO-2554.

⁷ Order PO-2422.

interest in releasing the information.

Ministry reply representations

[19] In response to the appellant's representations, the ministry reiterated its position that the information in the record had appeared before the TBS. It further explains that the undisclosed information, consisting of funding estimates prepared for Cabinet submissions, contains information that Cabinet was required to consider for policy formulation. It states that the information was intended to be considered by Cabinet to set policy priorities and plans for the province.

[20] It explains that it exercised its discretion to not seek the consent of Cabinet in disclosing the information in the record. It referenced the fact that the information in the record is not available elsewhere in the public domain and that the submissions pertaining to the information are considered by Cabinet to determine capital funding decisions and strategic plans for the province as factors in this decision.

[21] The ministry submits that the decision to not disclose the information in the record is in accordance with section 12 of the *Act* and the *Mandate Letters Decision*. It states that the majority decision in the *Mandate Letters Decision* emphasized the importance of "engaging meaningfully with the ... constitutional conventions and traditions surrounding Cabinet confidentiality and Cabinet's decision-making process, including the role of the Premier within that process."⁸ It reiterates that the undisclosed information would reveal the substance of deliberations of the Cabinet, and that it contains information that was required to be considered by the Cabinet to set policy priorities and plans for the province. It also states that the *Mandate Letters Decision* emphasized the balancing role of the *Act*, referencing the balance between the public's need to know and the confidentiality the executive requires for effective governance. It submits that withholding the information at issue represents a limited and specific necessary exemption from the right of access, and is in line with the balancing role of the *Act*.

Appellant sur-reply representations

[22] In sur-reply, the appellant continued to take issue with the ministry's response to his access request, stating that it created a record in response to his request. He states that this disregarded that he was seeking access to "all records" in his access request.

[23] The appellant submits that the records at issue are vastly different from the records in the *Mandate Letters Decision*, referencing that the records in this appeal were not written by a member of Cabinet for fellow Cabinet members. He also questions if it is "fully fair" to ask for either himself or the ministry to comment on the decision, noting the time period between his initial access request and when the *Mandate Letters Decision* was issued, and the differences between the records in each underlying request. Referring to the ministry's submission that the undisclosed information is exempt because

⁸ The ministry's citation is from the *Mandate Letters Decision* at para 8.

it is part of a 2022 submission to Cabinet, he submits that accepting this argument means that the ministry can effectively negate the entire *Act* by claiming that the redacted information has been, or someday might be, reviewed by Cabinet.

[24] He notes that in the *Mandate Letters Decision*, the court emphasized that the opening words of section 12(1) demand a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations. Referencing the decision, he further notes that “substance of deliberations” encompasses Cabinet’s deliberative process from beginning to end, including policy directives and policy priorities communicated by the Premier to individual ministers. The appellant submits that this is a sensible analysis when referring to the Premier’s mandate letters, but the record at issue in this appeal is in no way similar to the mandate letters, and the *Mandate Letters Decision* is therefore not compellingly relevant to the present appeal.

Analysis and finding

Scope of the request and reasonable search

[25] As a preliminary issue, in his representations and sur-reply representations, the appellant briefly stated that the records that the ministry created in response to his request did not encompass his request for “all records” related to the cost of the environmental assessment for the GTA West Corridor Highway and the estimated cost of the GTA West Corridor highway itself, potentially raising whether the records at issue were responsive to the request and if the ministry conducted a reasonable search. The remainder of the appellant’s representations dealt with the section 12 and 18 exemptions claimed by the ministry.

[26] The appellant has not explained why the record that the ministry created would not be responsive to the request and, based on his representations, it does not appear that he is seeking to raise whether the records are responsive to his request or the ministry’s search efforts as an issue in the appeal. However, given his comments in the representations, I will address the issue.

[27] Neither the scope of the request of the ministry’s search was identified as an issue during mediation, in the mediator’s report, or by the appellant after he received the mediator’s report.⁹ The appellant’s appeal form also does not state that additional records should exist, only that he is appealing the exemption claims.

[28] The appellant only briefly mentioned this in his representations, stating the ministry did not answer his request for “all records.” In his sur-reply representations, he stated the ministry had “thwarted and disregarded” his request for all records, and then stated that he appealed the denial of the records requested and redactions to the IPC.

⁹ Section 6.05 of the IPC’s *Code of Procedure* addresses how parties may request corrections to a mediator’s report. The appellant did not seek to add either of these issues to the mediator’s report at this time.

Although he made these comments in his representations, at no point did the appellant state that the mediator's report was inaccurate, or specifically request that the scope of the request or search efforts of the ministry be added as an issue in the appeal. In any case, the appropriate time to do so would have been during or prior to the mediation stage, rather than as part of his representations at the adjudication stage. As such, I have considered the record that the ministry created in response to the appellant's request to be responsive to the request.

Section 12(1) – Cabinet records

[29] The record at issue in this appeal is a summary of costs for the GTA West Corridor Highway that the ministry created in response to the appellant's access request. The withheld information consists of information related to the estimated cost of the highway.

[30] Based on my review of the information and the parties' representations, I find that disclosure of the withheld information would reveal the substance of Cabinet deliberations, and I uphold the ministry's decision. It is not disputed, and I find that the TBS is a committee of Cabinet.¹⁰ The TBS is responsible for the province's expenditure management,¹¹ and, based on the ministry representations, I accept that the information at issue appeared in a submission to TBS involving capital funding decisions and strategic plans for the province. I am persuaded that the specific cost estimates and related information that the TBS is considering when formulating policy priorities would provide information about how these priorities were set. Although only a limited amount of information has been withheld in the record, the nature and context of the information – cost estimates of a major infrastructure project being discussed by an organization involved in funding the project – would on its face reveal the substance of the TBS' deliberations, engaging the section 12(1) exemption.

[31] The appellant referenced Order PO-3199, where the adjudicator found that a ministry had not established that a record that was not before Cabinet would still reveal the substance of Cabinet deliberations. I find that the situation in this appeal, involving information that was before Cabinet, is distinct from that in Order PO-3199. From the ministry's submissions, both confidential and non-confidential, it is clear that the withheld information appeared before the TBS on a specified date. Considering this, and the context regarding how the information at issue was used in TBS submissions (discussed above), I find that, in this case, it has been established that the withheld information would reveal the substance of Cabinet deliberations.

[32] I also find that, as the ministry submits, withholding the record is consistent with the balance between the public's need to know and the confidentiality the executive requires to function, as articulated in the *Mandate Letters Decision*. I do not agree with the appellant's submission that this application of section 12(1), where specific

¹⁰ This has been found in previous orders, such as PO-4400.

¹¹ As described on its website: <https://www.ontario.ca/page/treasury-board-secretariat>.

information that appeared before the TBS is exempt from disclosure, allows the ministry to bypass the access provisions in the *Act*. In upholding the ministry's section 12(1) claim, I am not finding that all information that appeared before the TBS or other Cabinet committees is automatically exempt from disclosure. Rather, I am finding that in this case, considering the nature of the TBS and the context of the Cabinet deliberations in relation to the information at issue (as explained in the ministry's confidential representations), the withheld information would reveal the substance of Cabinet deliberations, and is therefore exempt from disclosure under section 12(1).

[33] I appreciate the appellant's submissions on why he believes that the information should be disclosed, notably that previous information on the costs of Highway 413 was disclosed. However, the fact that similar information has been previously released does not mean that information that appeared before Cabinet is not exempt from disclosure under the *Act*. While I understand the appellant's arguments on the merits of releasing this information and that Cabinet could choose to do so, it has not done so here.

[34] The appellant also raises concerns about portions of the ministry's initial and reply representations that were withheld from him. The portions of the representations that were withheld would reveal the substance of Cabinet deliberations, and as such met the confidentiality criteria in *Practice Direction 7*. I acknowledge the appellant's concerns that he has been provided minimal evidence about how the withheld information actually appeared before Cabinet. The introductory wording of section 12 protects information that would reveal the substance of deliberations of Cabinet and, in the circumstances, providing further details about how the withheld information appeared before Cabinet would itself reveal the substance of Cabinet deliberations. As such, with an understanding that it is difficult for the appellant to successfully argue against evidence that he has not seen, the ministry is entitled to rely on these confidential submissions.

[35] Other IPC adjudicators have commented on the difficulty appellants have in commenting on records they have not seen, and I find that this same difficulty applies to the present appeal.¹² However, having reviewed the information and the ministry's confidential representations on what Cabinet discussed, I find that the information's disclosure would reveal the substance of Cabinet deliberations, and section 12(1) therefore applies.

Section 12(2)(b) and public interest override

[36] As discussed above, section 12(2)(b) requires that the head of an institution turn their mind to whether Cabinet consent applies. The appellant did not provide specific representations on this exception to the exemption. Having considered the ministry's representations on the issue and the factors it considered, I am satisfied that the ministry considered whether the consent of Cabinet should be sought to disclose the record, and

¹² See, for example, Order PO-4500, where the adjudicator noted this difficulty.

properly exercised its discretion in choosing to not do so.

[37] I also note that the appellant provided representations on there being a compelling public interest in disclosing the record. However, as the section 23 public interest override does not apply to records withheld under section 12, I will not address his claims.

ORDER:

I dismiss the appeal.

Original Signed by: _____
Chris Anzenberger
Adjudicator

July 29, 2024 _____