

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4544

Appeal PA23-00181

Cabinet Office

August 19, 2024

Summary: An individual sought access under the *Act* for records referencing Ontario's Greenbelt that were prepared by the Premier's office staff for a particular ministry. Cabinet Office denied the appellant access to two pages from a slide deck under the mandatory exemption under section 12(1) (cabinet records). The adjudicator upholds Cabinet Office's decision and dismisses the appeal.

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).

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

OVERVIEW:

[1] Cabinet Office received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like to request any files (transmitted by email, USB drives, SharePoints, or any other file transfer service) prepared by the Premier's Office staff for the Ministry of Municipal Affairs and Housing that reference Ontario's Greenbelt.

Timeframe: 2022/08/01 – 2022/11/04.

[2] Cabinet Office issued a decision denying the appellant access to two pages of a slide deck taking the position that the mandatory exemption for cabinet records in section 12(1) applies. Cabinet Office says that these two pages are the only records which respond to the request. Cabinet Office also claims that a number of discretionary exemptions under the *Act* apply to these two pages.¹

[3] The appellant appealed Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to explore settlement with the parties.

[4] During mediation, Cabinet Office provided the IPC with a covering email to illustrate the context in which the slide deck was distributed to senior staff within the Premier's Office. Cabinet Office stated that it disclosed part of the same covering email to the appellant in response to another request.

[5] At the end of mediation, the appellant confirmed that she continues to seek access to the responsive information withheld in the two slide deck pages. The appellant also told the mediator that she wants to pursue access to the withheld information in the covering email. The appellant claims that the public interest override at section 23 applies in the circumstances of this appeal.

[6] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may commence an inquiry. During the inquiry, the parties were invited to submit written representations, which they did.²

[7] For the reasons set out below, I uphold Cabinet Office's decision to withhold the responsive slide deck pages under section 12(1) (cabinet records). I also find that the covering email is not responsive to this request. Given my finding, this order does not consider whether the other exemptions claimed by Cabinet Office apply or whether the public interest override applies.³

¹ In its decision, Cabinet Office claimed that the slide deck pages also qualified for exemption under the solicitor-client privilege exemption under section 19, the advice or recommendation exemption in section 13(1) and the economic or other interests exemption under section 18(1).

² The parties' representations were shared under the confidentiality provisions regarding the sharing of representations set out in the *IPC's Code of Procedure*. The non-confidential portions of Cabinet Office's representations were provided to the appellant who made representations in response. Cabinet Office submitted reply representations. A complete copy of Cabinet Office's reply representations were provided to the appellant along with the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 with an invitation to provide sur-reply representations. The appellant declined making further representations but confirmed that she continued to seek access to the withheld records.

³ In its representations, Cabinet Office indicated that it no longer relied on the exemption under section 18(1) (economic or other interests). Accordingly, this exemption was removed from the scope of appeal during the inquiry. I did not review Cabinet Office's decision that the exemptions at sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) also apply to the information at issue given my finding that the cabinet record exemption under section 12(1) applies. Accordingly, I did not need to

RECORDS AND PRELIMINARY ISSUE:

[8] The parties agree that the information relating to the Ontario Greenbelt set out in two slide deck pages constitutes a record at issue in this appeal.

[9] The parties do not agree as to whether the covering email (minus portions of the chain already disclosed to the appellant pursuant to another request submitted by the appellant) constitutes a record at issue in this appeal. Cabinet Office did not identify the covering email as responsive to the present request. It says that the covering email was identified as responsive to another request, which it refers to as the appellant's "follow-up request." The appellant confirms in her representations that a copy of the covering email was partially disclosed to her as part of that follow-up request.

[10] Though parties can agree to add additional records to an open appeal, in this case, Cabinet Office objects to the covering email being treated as responsive. As noted above, Cabinet Office takes the position that it only provided the record to the IPC during mediation to illustrate the context in which the slide deck was distributed to senior staff within the Premier's Office.

[11] Cabinet Office says that any concerns the appellant has regarding information withheld in the covering email should have been addressed in the context of the appellant's follow-up request. Cabinet Office also argues that the covering email should not be considered responsive to the request before me on the basis that one of the emails in the exchange falls outside the time frame specified in the appellant's request.

[12] In my view, the covering email is not responsive to the request before me. To be considered responsive, the record must "reasonably relate" to the appellant's request.⁴ I note that the appellant's request specifically seeks access to records prepared by the "Premier's Office staff" for "the Ministry of Municipal Affairs and Housing." I have reviewed the email and am not satisfied that it constitutes a communication prepared by the Premier's Office for the ministry identified in the request. In addition, I am satisfied that the request sufficiently described the records sought and as a result it was appropriate for the ministry to respond only to the specific request.⁵

[13] Having regard to the above, I find that the covering email falls outside the scope of this appeal and as a result I will not review Cabinet Office's decision to withhold portions of the covering email from the appellant. Any further mention of the covering

consider the appellant's evidence that Cabinet Office did not properly exercise its discretion in applying the discretionary exemptions under section 13(1) (advice or recommendations) and 19 (solicitor-client privilege). I also did not consider the appellant's argument that the public interest override at section 23 applies to any information found exempt because the public interest override does not apply to information found exempt under section 12(1).

⁴ Orders P-880 and PO-2661.

⁵ See Orders P-134 and P-880 for the proposition that generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.

email in this order will be limited to the context in which Cabinet Office says it provided it to the IPC.

[14] Should the appellant wish to pursue access to the withheld portions of the covering email, she must pursue other remedies outside this appeal.

DISCUSSION:

[15] The sole remaining issue in this appeal is whether the exemption for cabinet records at section 12(1) applies to the two slide deck pages identified as responsive to the request.

[16] Section 12(1) protects certain records relating to meetings of Cabinet or its committees.⁶ Cabinet Office claims that the two slide deck pages are exempt under the introductory wording of that section, 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...

[17] The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*⁷ (*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. ...⁸

⁶ Paragraphs (a) to (f) contain examples of the types of records exempt under section 12(1), none which Cabinet Office says apply to the circumstances of this appeal.

⁷ 2024 SCC 4.

⁸ *Mandate Letters Decision* at paras 29-30.

Section 12(1): introductory wording

[18] 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.

[19] 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).⁹

[20] 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.¹⁰

[21] The Supreme Court of Canada in the *Mandate Letters Decision* found that a series of policy priorities reflected in the Premier's mandate letters to his Cabinet ministers were a "central" component of the deliberative process of cabinet decision-making which would have a harmful effect on those processes if prematurely disclosed. For these reasons, the Court concluded that the mandate letters were exempt from disclosure under section 12(1).

The parties' representations

[22] Cabinet Office takes the position that the introductory wording of section 12(1) applies to exempt the slide deck pages. Cabinet Office raised confidentiality concerns regarding portions of its initial representations. For the remainder of this order, I will refer to these portions of Cabinet Office's representations as its confidential submissions.

[23] In its confidential submissions, Cabinet Office described the content of the slide deck pages and the context in which they were created.

[24] The non-confidential portions of Cabinet Office's submissions were provided to the appellant. In response, the appellant says that Cabinet Office failed to argue that disclosure would reveal the contents of actual deliberations of any specific policy or legislation at a specific Cabinet meeting. The appellant also says that the act of setting priorities is "an outcome of deliberations, not the substance of deliberations." The appellant goes on to state:

Selection of priorities is merely setting the topics of future deliberations. When the Premier is setting priorities for Cabinet, he is communicating decisions to Ministers for them to execute, based on considerations and deliberations that have already concluded. They reveal only the outcome of his deliberations, not their substance.

⁹ Orders P-22, P-1570 and PO-2320.

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

[25] In the alternative, the appellant says that if the Premier sets out his policy priorities in the slide decks pages, the record is “inherently setting the stage for future discussions, which have not happened yet.” The appellant says that disclosure of the record in this context could not possibly harm Cabinet’s ability to freely deliberate as it is not possible to infer the substance of discussions that have not yet occurred.

[26] The appellant also says the introductory wording of section 12(1) does not apply if the record contains background information provided to senior staff for the purposes of informing their advice to the Premier.¹¹

[27] Finally, the appellant says that if the record relates to or consists of mandate letters, then section 12(1) cannot apply given the IPC’s decision in Order PO-3973.¹² In setting out her position, the appellant requested an opportunity to make further representations regarding mandate letters, which at the time, was still pending the Supreme Court of Canada’s review of Order PO-3973.

[28] After its consideration of the appellant’s representations, Cabinet Office submitted reply representations which it did not object to being shared with the appellant. Cabinet Office’s reply representations mark the first time it shared with the appellant that it takes the position that the two pages of the slide deck constitutes a draft mandate letter. It states:

... Cabinet Office notes that the two pages of the slide deck at issue is the draft mandate letter for the Minister of Municipal Affairs and Housing. In this regard, the record is not a final version of a mandate letter and is not properly characterized as an “outcome” as suggested by the appellant. Cabinet Office submits that there is no reasonable basis to conclude that this draft version of a mandate letter would reveal an outcome rather than deliberations. Particularly because this is a draft document, Cabinet Office submits that disclosure of its contents would reveal the substance of the deliberations between the Premier and the Premier’s senior staff in determining what the final mandate letter would contain. In this regard, disclosing the draft mandate letter would directly reveal the substance of the deliberations.

[29] Cabinet Office also rejects the appellant’s submission that the slide deck pages contain only background information distributed among staff for information purposes.

[30] A copy of the *Mandate Letters Decision*, which reversed the IPC’s findings in Order PO-3973 along with a copy of Cabinet Office’s reply representations was provided to the appellant. The appellant did not make sur-reply representations in response but

¹¹ The appellant cites Order PO-4063 in support of this argument.

¹² The IPC in Order PO-3973 found that section 12(1) did not apply to mandate letters. However, this decision was set aside by the Supreme Court of Canada in the *Mandate Letters Decision* referenced above.

confirmed that she wanted to pursue access to the record.¹³

Findings and analysis

[31] As noted above, the Supreme Court of Canada in the *Mandate Letters Decision* found that a series of policy priorities reflected in the Premier's mandate letters to his Cabinet ministers were a "central" component of the deliberative process of cabinet decision-making.

[32] Based on my review of the slide deck pages and the parties' representations, including Cabinet's confidential submissions, I uphold Cabinet Office's decision and find that the records qualify for exemption under the introductory wording of section 12(1).

[33] In making my decision, I agree with Cabinet's characterization of the slide deck pages given the context and timing of when it was distributed to senior staff. Given the Premier's role in setting the agenda of Cabinet, I am satisfied that disclosure of the slide deck pages would reveal the substance of deliberations between the Premier and his senior staff in determining the content of the final mandate letter to the Minister of Ministry of Municipal Affairs and Housing.

[34] Section 12(2) establishes circumstances under which the section 12(1) exemption does not apply. In this case, the only situation which could apply is section 12(2)(b) which reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[35] The head of an institution is not required to seek the consent of Cabinet to release the record under section 12(2)(b). However, the head must at least turn their mind to it.¹⁴

[36] Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.¹⁵

[37] In its representations, Cabinet Office confirmed that it considered a number of factors and determined that it would not request consent of Cabinet to release the records. In particular, Cabinet Office says it considered:

¹³ I note in her representations, the appellant states that she can see from the covering email that the "subject record was generated on June 28, 2022 and the sender of the email indicated it was for use the following day, June 29, 2022. The appellant also states that the Auditor General of Ontario in a report titled "Special Report on Change to the Greenbelt" found that mandate letters were issued to Cabinet on June 29, 2022. I note that the Auditor General of Ontario confirmed the date on page 32 of her report.

¹⁴ Orders P-771, P-1146 and PO-2554.

¹⁵ Order PO-2422.

- the public policy purpose of the Cabinet records exemption,
- the nature of the records and the information they contain,
- the potential harms to the confidentiality of the Cabinet deliberative process that may arise from disclosure, and
- the fact that the government has disclosed or announced certain policy initiatives after full consideration by Cabinet.

[38] Cabinet Office also takes the position that “the Premier and Cabinet are in the best position to determine, in accordance with Cabinet’s deliberative process, when and how the government will announce its policy initiatives.”

[39] The appellant questions whether Cabinet Office gave this issue proper consideration given the “extremely high levels of public interest” in the subject-matter addressed in the records. In addition, the appellant says that Cabinet Office should reconsider its decision not to seek consent given that the government’s policy initiatives have already been announced to the public.

[40] Although the *Act* has a provision in which the public interest in a record can override the application of an exemption, this public interest override does not apply to records found exempt under section 12.¹⁶ Accordingly, I cannot consider the appellant’s arguments that there is a compelling public interest in the disclosure of the records in the context of this appeal.

[41] The question I must answer in the circumstances of this appeal is whether Cabinet Office turned its mind to whether it would seek the consent of Cabinet to release the record under section 12(2)(b).¹⁷ I have considered the representations of the parties regarding the exception at section 12(2)(b) and am satisfied that Cabinet Office’s representations demonstrate that it turned its mind to the question of whether to seek consent of Cabinet to release the record. Accordingly, Cabinet Office has discharged its responsibilities related to section 12(2)(b).

[42] Having regard to the above, I find that the mandatory exemption at section 12(1) applies to the slide deck pages and I uphold Cabinet Office’s decision to deny the appellant access.

¹⁶ Section 23 of the *Act* states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

¹⁷ As noted above, the appellant raised the possible application of the public interest override in section 23 to the records. However, section 23 cannot be applied to records found exempt under section 12(1).

ORDER:

I uphold Cabinet Office's decision to withhold the slide deck pages under section 12(1) of the *Act* and dismiss the appeal.

Original signed by: _____
Jennifer James
Adjudicator

August 19, 2024 _____