

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4553

Appeal PA23-00313

Cabinet Office

September 25, 2024

Summary: An individual, a member of the media, seeks access to records relating to the government's consideration of changes to the Greenbelt. Cabinet Office located responsive records but denied the appellant access to them, claiming the records should not be disclosed due to the cabinet records exemption in section 12(1) of the *Act*. In this decision, the adjudicator upholds Cabinet Office's decision not to disclose the records and dismisses the appeal.

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

Orders and Investigation Reports Considered: Order PO-2787 and PO-4544.

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

OVERVIEW:

[1] The appellant, a member of the media, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Cabinet Office for the following records:

... all documents and records (memos, briefing notes, reports, correspondence, emails, texts, meeting minutes, etc.) relating to the government's consideration of changes to the Greenbelt from the office of

the Secretary of the Cabinet as well as the offices of the relevant Deputy Ministers and Assistant Deputy Ministers. Please exclude any records related to media monitoring.

[2] The appellant stated she sought records for the period April 1 to November 4, 2022.

[3] Cabinet Office issued an access decision to the appellant denying her access to the responsive records. Cabinet Office later issued a revised access decision advising her it withheld the records from disclosure under the mandatory exemption in section 12(1) (cabinet records) and the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. Cabinet Office also withheld some information as not responsive to the appellant's request.

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

[5] During mediation, the appellant confirmed her interest in obtaining access to the information withheld from disclosure under the exemptions claimed. She confirmed she does not want to pursue access to the information withheld as not responsive. Finally, the appellant raised the application of the public interest override in section 23 of the *Act*.¹ I confirm section 23 can only apply to override the application of section 13(1); it cannot apply to override the exemptions in sections 12(1) or 19.

[6] Cabinet Office maintained its access decision.

[7] 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 decided to conduct an inquiry and sought and received representations from Cabinet Office and the appellant on the issues on appeal.

[8] In the discussion that follows, I find the records at issue are exempt from disclosure under the exemption for cabinet records at section 12(1) of the *Act*.

RECORDS:

[9] There are seventeen email records and their attachments at issue. Cabinet Office located a total of 231 pages of records. However, most of the information in these records was withheld as not responsive and is not at issue. The exemptions and pages at issue are as follows:

¹ Section 23 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."

Pages	Description	Exemption(s) claimed
2	Portion of Cabinet Agenda	Portion withheld under section 12(1) (cabinet records)
6	Portion of Cabinet Agenda	Portion withheld under section 12(1) (duplicate of page 2)
9	List of items for Cabinet Approval	Portion withheld under section 12(1)
10	Portion of email dated April 22, 2022	Portion withheld under sections 12(1) and 13(1) (advice or recommendations)
13 to 20	Draft Cabinet Briefing Note	Withheld in full under sections 12(1) and 13(1)
61	Portion of document with summaries of Upcoming Items for Cabinet	Portion withheld under section 12(1)
69	Portion of Cabinet Agenda	Portion withheld under section 12(1) (duplicate of pages 2 and 6)
71	Email dated April 20, 2022	Portions withheld under sections 12(1) and 13(1)
74 to 88	Cabinet Office Briefing Note	Withheld in full under sections 12(1) and 13(1)
89	Portion of email dated April 26, 2022	Portion withheld under sections 12(1) and 13(1)
91	Email dated April 27, 2022	Withheld in full under section 12(1)
92	Email dated April 27, 2022	Withheld in full under section 12(1) (some duplication with page 91)
95	Portion of document with summaries of upcoming items for Cabinet	Withheld in part under section 12(1)
102 to 104	Email dated April 27, 2022	Withheld in part under section 12(1)
106 to 132	Slide deck	Withheld in full under sections 12(1) and 13(1)

134 to 135	Cabinet Committee Briefing Note	Withheld in full under sections 12(1) and 13(1)
137 to 154	Cabinet Committee Briefing Note	Withheld in full under sections 12(1) and 13(1)
155 to 181	Slide deck	Withheld in full under sections 12(1) and (13) (duplicate of 106 to 132)
182	Email dated April 26, 2022	Portions withheld under sections 12(1) and 13(1)
212	Draft Mandate Letter	Withheld in full under sections 12(1), 13(1) and 19 (solicitor-client privilege)

DISCUSSION:

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

[10] Cabinet Office withheld all the information at issue under section 12(1) of the *Act*. Section 12(1) protects certain records relating to meetings of Cabinet or its committees. It reads, in part:

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,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees[.]

[11] The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*² recognized three underlying rationales for Cabinet secrecy: candour, solidarity, and efficiency. The Supreme Court described these 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

² 2024 SCC 4. (*Mandate Letters Decision*)

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. ...³

Parties' representations

[12] Cabinet Office submits the introductory wording of subsection 12(1) applies to exempt the records from disclosure. Cabinet Office describes the records as emails, Cabinet briefing notes, a slide deck, a draft mandate letter, and portions of Cabinet agendas. Cabinet Office refers to IPC jurisprudence which has found a record can be exempt under the introductory words of section 12(1) if “it is obvious from the contents and the surrounding circumstances, that the document formed the substance of Cabinet deliberations.”⁴ Further, Cabinet Office submits the IPC has established records never placed before Cabinet or its committees may be exempt under the introductory wording of section 12(1) if the institution can show that “disclosing the record would reveal the substance of the deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate references with respect to these deliberations.”⁵ Cabinet Office confirms it is required to provide evidence that establishes a link between the contents of the records and the actual substance of Cabinet deliberations.⁶

[13] Applying this test, Cabinet Office submits there is a link between the contents of the records and the substance of Cabinet’s deliberations. Cabinet Office provides the following submissions on each type of record at issue:

- *Email records*: Cabinet Office submits the contents of these records contain information directly incorporated into Cabinet’s agenda and put before Cabinet. Cabinet Office also submits the emails include information that reiterates content contained in Cabinet briefing notes, which were prepared for Cabinet’s consideration.
- *Briefing notes*: Cabinet Office submits the briefing notes were prepared specifically for Cabinet deliberations and contain “key information that would allow Cabinet to deliberate and discuss an item during a meeting.” Cabinet Office submits the briefing notes were prepared by analysts in Cabinet Office for Cabinet and

³ *Mandate Letters Decision* at paras 29-30.

⁴ Orders PO-2554, PO-3624 and PO-1917.

⁵ Order PO-2989.

⁶ Orders PO-3624 and PO-2320.

presented to Cabinet Ministers to inform their decision making with the advice, analysis and recommendations found within. Cabinet Office refers to Order PO-2787, in which the IPC applied section 12(1) to exempt a record that summarized a briefing note provided to a Minister in relation to a matter ultimately discussed at Cabinet and several Cabinet committee meetings. For similar reasons, Cabinet Office submits the disclosure of the briefing notes at issue would reveal the substance of Cabinet deliberations. In its confidential submissions, Cabinet Office provided further explanation regarding the specific details in the records at issue and submitted that certain details in one record was put before Cabinet in a later meeting and its disclosure would allow for accurate inferences as to the information that was deliberated at Cabinet on a later date.

- *Slide deck:* Cabinet Office claims the slide deck at pages 106 to 132 and in duplicate at pages 155 to 181 was prepared by staff from the Ministry of Municipal Affairs and Housing. Cabinet Office submits the slide deck was put directly before Cabinet on November 2, 2022, to inform Cabinet and seek direction in the form of Cabinet approval on the issues and options set out in both records.
- *Draft mandate letter:* Cabinet Office submits it withheld a portion of a draft mandate letter from disclosure. Cabinet Office submits the draft letter was actively under review and consideration by the Premier and his senior staff at that time.
- *Cabinet agendas:* Cabinet Office submits it withheld portions of Cabinet agendas relating to the changes to the Greenbelt. Cabinet Office submits the agendas are clearly exempt under section 12(1)(a), which lists agendas as a type of record that is exempt under section 12(1).

[14] With regard to the exception to the exclusion in section 12(2)(b)⁷, Cabinet Office submits it considered the following factors in determining whether to seek Cabinet consent to the disclosure of the records:

- 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
- The fact that the government has disclosed or announced certain policy initiatives after full consideration by Cabinet

[15] After considering these factors, Cabinet Office determined it would not request

⁷ Section 12(2)(b) states, "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."

Executive Council's consent to release the records. Cabinet Office submits the Premier and Cabinet are in the best position to determine when and how the government will announce its policy initiatives or if they would like to reveal the specific factors considered in arriving at a particular decision.

[16] The appellant submits Cabinet Office did not provide sufficient evidence to establish a link between the contents of the records and the actual substance of Cabinet deliberations. The appellant refers to a briefing note that was not considered by Cabinet, although Cabinet Office submits the "substance" of the document was contained in another briefing note that was considered by Cabinet.

[17] The appellant notes the Auditor General and Integrity Commissioner each conducted investigations and released public reports with their findings in the summer of 2023. The appellant submits these reports contained detailed information from Cabinet documents provided by the government, despite the *Act's* exemptions. The appellant argues the inclusion of this information in the public reports establishes a precedent and further supports her position that the records at issue should be disclosed.

[18] The appellant also notes the Ontario legislature decided to restore all redesignated properties to the Greenbelt, reversing the government's decision to open parts of the Greenbelt for development and the Premier issued an apology. Given these circumstances, the appellant takes issue with Cabinet Office's decision to not request the consent of Cabinet to disclose the records at issue, in contrast to the *Act's* principles of openness and transparency.

[19] In its reply representations, Cabinet Office reiterates that records that were never placed before Cabinet or its committees may still be exempt under section 12 if disclosing the record would reveal the substance of the deliberations of Cabinet or its committees. Cabinet Office submits the exemption would also apply if the disclosure of the record would permit the drawing of accurate inferences with respect to the deliberations. Referring to the Supreme Court of Canada's *Mandate Letters Decision*, Cabinet Office submits it is not reasonable to require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting."⁸

Analysis and Findings

Section 12(1)

[20] I reviewed the records at issue and the parties' representations. I find the records, or portions thereof, are all exempt from disclosure under the mandatory exemption at section 12(1) of the *Act*. Specifically, I find the Cabinet agendas or emails that contain information taken from the Cabinet agendas to be exempt under section 12(1)(a) and the remainder to be exempt under the introductory wording in section 12(1).

⁸ *Mandate Letters Decision* at para 54.

[21] I appreciate the Ontario government's proposed redevelopment of the Greenbelt and subsequent reversal of that decision generated significant public attention and was the subject of investigations by the Auditor General and the Integrity Commissioner. However, none of these circumstances impact the issue of whether the exemption in section 12(1) applies to the records. The processes before the Auditor General and the Integrity Commissioner are distinct from those before the IPC.

[22] I also appreciate the appellant is being asked to comment on records she has not reviewed and is therefore unable to determine whether information withheld from disclosure would reveal the substance of the deliberations of Cabinet and/or its committees or would allow for the drawing of accurate inferences of those deliberations.

[23] However, I reviewed the records at issue and find they are exempt under section 12(1) of the *Act*. I will address each category of records as described by Cabinet Office in its representations.

- *Email records*: Reviewing the email records at issue, I find they contain information directly incorporated into Cabinet's agenda and put before Cabinet. For example, the portion withheld from page 10 is from a draft document that was put before Cabinet and would, if disclosed, reveal the substance of the deliberations of Cabinet. Similarly, the information withheld from pages 71, 89, 91, 92, 102 to 104, and 182 contain information that relates to the deliberations before Cabinet. Therefore, I find the information withheld from these records is exempt under the introductory wording in section 12(1).
- *Briefing notes*: I find the briefing notes, in draft and final form, are also exempt under section 12(1) of the *Act*. I find the briefing notes were prepared specifically for Cabinet deliberations and contain information that would inform the discussions and deliberations at Cabinet. In addition, I confirm that while one of the briefing notes was not put before Cabinet, as Cabinet Office acknowledges, I reviewed the record and find the substance of the briefing note is contained/was included in a briefing note prepared on a later date that was ultimately put before Cabinet. Based on my review, it is clear the briefing notes contain information developed by staff with relevant subject matter expertise, placed before Cabinet, and used to brief Cabinet and seek direction. Therefore, I find the briefing notes at pages 13 to 20, 74 to 88, 134 to 135, 137 to 154 are exempt from disclosure under section 12(1) of the *Act*.
- *Slide decks*: I reviewed the slide deck at pages 106 to 132 and in duplicate 155 to 181 and confirm it was prepared by staff from the Ministry of Municipal Affairs and Housing. I accept Cabinet Office's claim that it was placed directly before Cabinet on November 2, 2022 to inform Cabinet and seek direction in the form of Cabinet approval on the issues and options identified therein. I accept the Cabinet Office's claim that the slide deck was developed by staff with relevant subject matter

expertise, placed before Cabinet, and used to brief Cabinet and seek direction. Therefore, I find the slide deck is exempt under section 12(1) of the *Act*.

- *Draft mandate letter*: I uphold Cabinet Office's application of section 12(1) to withhold the draft mandate letter from a slide deck at page 212 of the records. I find the information contained in this record is information that would reveal the substance of deliberations of Cabinet.

I find support for this finding in Order PO-4544, in which the adjudicator found the introductory wording of section 12(1) applied to draft mandate letters in a slide deck. The adjudicator found the 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.⁹ I agree with this decision and find the draft mandate letter before me is exempt under the introductory wording in section 12(1) because its disclosure would reveal the substance of deliberations of the Premier and his senior staff in determining the priorities and the content of the final mandate letter to the Minister of the Ministry of Municipal Affairs and Housing.

- *Cabinet agendas*: I find the portions of Cabinet agendas withheld from pages 2, 6 and 69 are exempt under section 12(1)(a) of the *Act*, which explicitly exempts Cabinet agendas from disclosure.
- *Other*: I find the portions of the records that describe upcoming items to be considered or discussed by Cabinet at pages 9, 61 and 95 to be exempt under section 12(1) of the *Act*. I find this information is akin to that found in a Cabinet agenda and would, if disclosed, reveal the substance of deliberations of Cabinet or its committees.

Section 12(2)(b)

[24] Section 12(2)(b) establishes that the head of an institution shall not refuse to disclose a cabinet record "where, the Executive Council for which, or in respect of which, the record has been prepared consents to access being given." 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.¹⁰ Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.¹¹

[25] I reviewed Cabinet Office's representations and am satisfied it turned its mind to the question of whether to seek Cabinet's consent to disclose the records at issue. I accept it considered relevant factors in doing so. This is not changed or undermined by the fact that the government reversed its Greenbelt plans and the Premier issued an

⁹ Order PO-4544 at para. 33.

¹⁰ Orders P-771, P-1146 and PO-2554.

¹¹ Order PO-2422.

apology in response to the controversy that resulted in the Greenbelt matter. Given the circumstances, I am satisfied Cabinet Office considered whether to seek consent of Cabinet and upon consideration of the factors identified in paragraph 14 above, it decided to not do so.

Conclusion

[26] In conclusion, I find section 12(1) applies to exempt the records at issue from disclosure. The evidence provided by Cabinet Office and the records themselves establish the information at issue would reveal the substance of deliberations of Cabinet or is part of a Cabinet agenda. The appellant claimed the public interest override in section 23 applies to the records. However, as noted above, section 23 cannot apply to override a finding that section 12(1) applies to exempt the records from disclosure. Further, in light of my finding that section 12(1) applies to exempt the records from disclosure, it is not necessary for me to consider whether the records are also exempt under sections 13(1) and/or 19 of the *Act*.

[27] Accordingly, I uphold Cabinet Office's decision to apply section 12(1) to the records at issue and dismiss the appeal.

ORDER:

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

Original Signed by: _____
Justine Wai
Adjudicator

September 25, 2024 _____