

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4598

Appeal PA21-00209

Ministry of Finance

January 29, 2025

Summary: An individual asked for records from the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for any final products, including reports, delivered to the ministry by a consulting company in order to fulfill its consulting contracts related to the COVID-19 pandemic. The ministry decided to withhold the records in their entirety, claiming the mandatory Cabinet record exemption in section 12(1). In this order, the adjudicator finds that most of the records are exempt from disclosure, but that others are not, in part. The adjudicator orders the ministry to disclose the portions of the records that are not exempt to the individual who requested them.

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

Orders Considered: Orders PO-3839-I, PO-4461 and PO-4553.

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

OVERVIEW:

[1] This order disposes of the sole issue in this appeal which is whether the records are exempt from disclosure under the mandatory Cabinet records exemption in section 12(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant is a journalist who submitted an access request under the *Act* to the Ministry of Finance

(the ministry) for any final products, including reports, delivered to the ministry by a consulting company to fulfill its consulting contracts relating to the COVID-19 pandemic between March 25, 2020 and the date of the request. The requester also confirmed that she was not seeking any emails as part of her access request.

[2] In response, the ministry located responsive records and notified the consulting company named in the appellant's access request. The consultant advised the ministry that it did not object to the disclosure of the records sought by the requester.

[3] The ministry then issued a decision to the requester, denying access to the records in full under the mandatory exemption in section 12(1) (Cabinet records) of the *Act*. The requester, now the appellant, filed an appeal of the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] This appeal was not resolved in mediation and was moved to the adjudication stage of the appeals process. The adjudicator assigned to the appeal sought and received representations from the ministry, the appellant and the consulting company. Representations were shared in accordance with the IPC's *Practice Direction 7*. The file was then transferred to me to continue the inquiry. I sought further representations from the appellant and the ministry on the significance of the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*¹ (*Mandate Letters Decision*), which addresses the Cabinet records exemption in section 12(1). Both the appellant and the ministry provided representations on the relevance of the *Mandate Letters Decision* to the records in this appeal.

[5] For the reasons that follow, I find that the majority of the records are exempt from disclosure under the introductory wording of section 12(1), but that portions of the remaining records are not exempt. I order the ministry to disclose these portions of certain records to the appellant.

RECORDS:

[6] There are 337 pages of records, consisting of slide decks, spreadsheets and dashboards, including frameworks, jurisdictional scans, surveys, performance indicators, evaluations, modelling, a metrics review, a workplan and best practices.

DISCUSSION:

[7] The sole issue in this appeal is whether the mandatory exemption in section 12(1) relating to Cabinet deliberations apply to the records. The ministry takes the position that the records are exempt from disclosure under the introductory wording of section 12(1). It has not claimed that any of the records fall within the categories of records listed at

¹ 2024 SCC 4.

subparagraphs (a) to (f) of section 12(1). The consulting company's position is that it neither consents nor objects to the records being disclosed.

[8] Section 12(1) protects certain records relating to meetings of Cabinet or its committees, stating:

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;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

Section 12(1): introductory wording

[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).²

[11] A record never placed before Cabinet or its committees may also qualify for

² Orders P-22, P-1570 and PO-2320.

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 substance of deliberations.³

[12] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.⁴ Such evidence is particularly important where a record at issue was never placed before Cabinet.

[13] The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*⁵ (*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. ...⁶

[14] In the *Mandate Letters Decision*, the Supreme Court of Canada also articulated specific guidance on how issues arising under the opening words of section 12(1) should be approached in light of these underlying rationales:

In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy's core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the

³ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁴ Order PO-2320.

⁵ 2024 SCC 4.

⁶ *Mandate Letters Decision*, at paras 29-30.

Premier, and Cabinet's prerogative to determine when and how to announce its decisions.

Such an approach reflects the opening words of s. 12(1), which mandate a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations, rather than categorically excluding certain types of information from protection. Thus, "deliberations" understood purposively can include outcomes or decisions of Cabinet's deliberative process, topics of deliberation, and priorities identified by the Premier, even if they do not ultimately result in government action. And decision makers should always be attentive to what even generally phrased records could reveal about those deliberations to a sophisticated reader when placed in the broader context. The identification and discussion of policy priorities in communications *among Cabinet members* are more likely to reveal the substance of deliberations, especially when considered alongside other available information, including what Cabinet chooses to do.⁷

[15] Section 12(2) establishes circumstances under which the section 12(1) exemption does not apply, stating:

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.

[16] 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.⁸ Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.⁹

Representations

[17] The ministry provided background information about the circumstances surrounding the creation and use of the records. It states that as a result of the COVID-19 pandemic, the Ontario government carried out the following activities:

- In the spring of 2020, it established the Ontario Jobs and Recovery Committee (the Recovery Committee), which was chaired by the Minister of Finance and

⁷ *Mandate Letters Decision*, at paras 61-62.

⁸ Orders P-771, P-1146 and PO-2554.

⁹ Order PO-2422.

comprised of a subgroup of Cabinet Ministers. The Recovery Committee's mandate and key responsibilities were to review "policy approach and recovery planning scenarios," and to engage with sectors to provide advice on re-opening strategies. The Chair of the Recovery Committee would brief and keep Cabinet updated,

- It also established in the spring of 2020 a standalone body named the Recovery Planning Centre (the Centre) at Cabinet Office, whose purpose was to coordinate the planning and execution of the restart and recovery of the province under the direction of Cabinet, Treasury Board and other ministries,
- The Centre was comprised of three "tables," each led by a designated Deputy Minister with support from different ministries. The Centre set the direction for the tables. One of the tables was the Economic Planning, Budgeting and Financing Table chaired by the Deputy Minister of Finance, and its mandate was to develop economic impact and a fiscal policy perspective to facilitate recovery planning,
- The Centre ensured coordination between the tables, the Recovery Committee and the Secretary of the Cabinet/Chief of Staff to the Premier, and
- The consulting company was retained to provide advice on and facilitate the "delivery" of sector strategies.

[18] As previously stated, the ministry submits that the records are exempt from disclosure under the introductory wording of section 12(1). The ministry further submits that the introductory wording of section 12(1) refers to the substance of deliberations of the Executive Council (Cabinet) or its committees. In order to qualify as a "committee" for the purposes of section 12(1), a body must be composed of Ministers where some tradition of collective ministerial responsibility and Cabinet prerogative can be invoked to justify the application of the exemption. In other words, the ministry submits, staff committees that are not made up of Ministers do not meet the definition of a "committee" in section 12(1). In this appeal, the ministry submits, the Recovery Committee qualifies as a committee of the Executive Council because it was made up of ten Ministers and the President of the Treasury Board.

[19] The ministry submits that for a record to be exempt under the introductory wording of section 12(1), it is sufficient that it be obvious from a record's content and the surrounding circumstances that the record forms the substance of Cabinet deliberations,¹⁰ and that the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.¹¹ In addition, the ministry submits that the IPC has found that "deliberations" refer to discussions conducted with a view towards making a decision and "substance" generally means more

¹⁰ The ministry cites Order PO-1917.

¹¹ The ministry cites Order PO-2320.

than just the subject of the meeting.¹²

[20] The ministry further submits that in Order PO-2227, the IPC established that records that may not have been put before Cabinet in their entirety could still qualify for exemption under the introductory wording of section 12(1) if the most essential elements of the records were the subject of Cabinet's deliberations by way of inclusion in Cabinet submissions.,

[21] The ministry argues that the records at issue are similar to "due diligence" records addressed in Interim Order PO-3839-I. In that Order, the IPC found that the due diligence records of an external advisory council, which was established to prepare advice and recommendations to the government on how to best maximize the value and performance of government business enterprises, were exempt under the introductory wording of section 12(1). The records had been prepared by staff and/or consultants retained by the advisory council. I found that they were exempt from disclosure because their disclosure would reveal the substance of deliberations of Cabinet or its committee or permit the drawing of accurate inferences with respect to these deliberations.

[22] The ministry states that the records contain the analysis and advice of the consulting company, including workshop materials (frameworks, templates, exercises and worksheets), articles, reports, surveys, jurisdictional scans, and cases studies and data on specific COVID-19-related topics.

[23] In this appeal, the ministry's position is that the disclosure of the records would reveal either the actual substance of the matters under deliberation by the Recovery Committee or would permit the drawing of accurate inferences with respect to such deliberations for the following reasons:

- The records are clearly connected to and contain the same or similar information to what was included and incorporated into the submissions made to the Recovery Committee for its consideration in making decisions,
- The disclosure of the records would permit a reader to discern the nature and scope of the recommendations formulated by the ministry, which were advanced to the Recovery Committee, and
- Given the ongoing nature of the pandemic, the information contained in the records may reasonably be expected to support further decision-making in the future.

[24] With respect to the *Mandate Letters Decision*,¹³ the ministry submits that the Supreme Court of Canada found that executive decision-making is informed at "every step along the way" by the advice of civil servants and that Cabinet privilege applies to

¹² The ministry cites Orders M-184, M-703 and MO-1344.

¹³ Cited in note 1.

such advice to the extent that its disclosure might shed light on Cabinet's deliberations. The ministry further argues that the SCC found that the IPC failed to apply a broader constitutional dimension of Cabinet confidentiality, leading to a narrow interpretation of section 12. In this appeal, the ministry urges me to apply a broad interpretation to section 12.

[25] Lastly, the ministry submits that section 12(2) does not apply because the records are not more than 20 years old and that it turned its mind to seeking the consent of Cabinet to release the records, but exercised its discretion to not seek that consent.

[26] The consulting company submits that it neither consents nor objects to the records being disclosed, but notes that the records – which contain insights and analyses - were prepared under an agreement between it and Cabinet, and that the purpose of the engagement was to advise Cabinet Office on matters related to the COVID-19 crisis response strategy. The consulting company also states that it is in no way asserting that the facts it has provided are dispositive of whether the exemption in section 12(1) applies.

[27] The appellant submits that the records are not exempt under section 12(1) because they never appeared before Cabinet or its committees, and the ministry has not provided any evidence to establish a linkage between the content of the records and the actual substance of Cabinet or its committee's deliberations. Instead, the appellant submits, the ministry simply states – without evidence – that the records contain information that is the same or similar to the submissions made to the Recovery Committee.

[28] Turning to Order PO-3839-I, on which the ministry relies, the appellant submits that the records in that case were developed amidst back and forth interactions between an advisory council and the Premier and Ministers' Table. In this appeal, the appellant argues, the records are the final products prepared by the consulting company to inform ministries – not Cabinet or its committees, stating:

The extra degree of separation between the records at hand in this appeal and Cabinet or its committees reveals a significant break in the figurative chain needed to establish a link between the responsive records and the actual substance of Cabinet deliberations required for exemption.

[29] With respect to the *Mandate Letters Decision*, the appellant submits that unlike that case in which the records were the product of the Premier or his deliberative process as a member of Cabinet, the records at issue in this appeal are the final products prepared by an external company to inform ministry staff – not Cabinet or its committees. Further, the appellant argues that while the *Mandate Letters Decision* may broaden the scope of what could be considered Cabinet deliberations, it does not necessarily mean that it covers all records in other cases. In any event, the appellant submits, the ministry has not established that the contents of these external records were a topic of Cabinet deliberation.

[30] Lastly, the appellant submits that the ministry has taken an overly broad approach to the exemption in claiming that the disclosure of the records will reveal the substance of future deliberations, and that it did not consider whether the records could be severed as set out in section 10(2) of the *Act*.

[31] In reply, regarding Order PO-3839-I, the ministry submits that the back and forth interactions between the advisory council and the Premier and Cabinet committee were only one part of what the IPC considered – the other parts being the representations and the records themselves. The ministry adds that in Order PO-4086-I, the IPC similarly considered working materials for the development of advice to Cabinet, concluding that the records would provide the reader with an accurate inference of the substance of Cabinet's deliberations. The ministry argues that, in this appeal, the records were prepared by the consulting company to "inform advice and recommendations" in the form of the sector strategies. Therefore, the ministry argues, there is a direct connection between the information contained in the records and the advice and recommendations provided to a Cabinet committee.

[32] Finally, the ministry submits that contrary to the appellant's position, it has submitted sufficient evidence that the records - the results of consultations, program reviews and options - would reveal the substance of future deliberations, and that given the wide-ranging and complex nature of the issues and policy options contained in the records, it is reasonable to anticipate that the advice and recommendations would be used to support future decision-making.

Analysis and findings

[33] I find that the majority of the records are exempt from disclosure under the introductory wording of section 12(1). In particular, I find based on the ministry's representations and on my review of the records themselves, 275 of the 337 pages of records are exempt in full under the introductory wording of section 12(1). I find that the remaining records – records 1A, 1B, 2B, 2C, 2D, 3A, 3B, 3H, 4C, 5A and 5F - are exempt only in part under section 12(1).

[34] 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), not just the types of records listed in paragraphs (a) to (f). Further, it is possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if it is established that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its disclosure would permit the drawing of accurate inferences with respect to these deliberations.

[35] First, I find that the ministry has provided evidence that the Recovery Committee qualifies as a committee of the Executive Council (otherwise known as Cabinet) for the

purpose of section 12(1) because it was a committee of Cabinet comprised of a subgroup of Cabinet Ministers and chaired by the Minister of Finance.

[36] Second, I find that while these records may not have been directly placed before the Recovery Committee, there is sufficient evidence to establish a link between the information in most of the records and the Recovery Committee's deliberations. In particular, I find that the disclosure of this information would permit the drawing of accurate inferences with respect to the Recovery Committee's deliberations.

[37] I appreciate the appellant is being asked to comment on records she has not reviewed and is therefore unable to meaningfully assess whether information withheld from disclosure would allow for the drawing of accurate inferences of the deliberations of the Recovery Committee.

[38] I have reviewed the records at issue. I find that all of the records were prepared by the consulting company for the ministry to assist the ministry in preparing its sector strategies which were eventually presented to the Recovery Committee via the Recovery Planning Centre.¹⁴

[39] In the records I find to be exempt in full, the information includes expansive jurisdictional scans, surveys, and detailed analyses and options to be considered by the ministry when preparing its sector strategies to be presented to the Recovery Committee. It is my view that the information contained in these records, both in its nature and scope, is sufficiently detailed that it is reasonable to conclude that the information in some form would have been included in materials submitted to the Recovery Committee. I have reached this conclusion on the basis of the ministry's representations and my review of the records. Accordingly, while the ministry does not argue that these actual records were placed before the Recovery Committee, I find that the disclosure of this information would permit the drawing of accurate inferences with respect to the material that was considered and deliberated by the Recovery Committee.

[40] Turning to the exceptions in section 12(2), I find that neither apply in this appeal. 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.¹⁵ I accept that the ministry turned its mind to Cabinet consent and decided not to disclose the records and, therefore, find that the exception in section 12(2)(b) does not apply to the information I find is exempt under section 12(1).

[41] I considered the appellant's argument that the ministry withheld the records in their entirety and did not consider severing the records under 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. I go on – below – to find that some of the information is not

¹⁴ Please see the second bullet on page 6 of this order.

¹⁵ Orders P-771, P-1146 and PO-2554.

exempt from disclosure and I have severed it from the records.

[42] I agree with the appellant and I find that parts of the remaining records are not exempt from disclosure under the introductory wording in section 12(1) and I order the ministry to disclose these parts to the appellant. The information that I find is not exempt consists of slides presented by the consulting company during workshops it conducted with ministry staff, and a publicly-available article written by the consulting company.

[43] The publicly available article is a general article about job creation in post-pandemic times. The slides are the materials provided by the consulting company for workshops it held with ministry staff in order to assist the ministry in preparing its sector strategies. The slides contain the following information:

- Cover pages, setting out the topic on the process to be discussed,
- Agendas and schedules, including general descriptions of the responsibilities of the ministry and the consulting company in the process of preparing the sector strategies with the timelines for doing so and,
- The framework and process to be followed in order to create the sector strategies – but not the substance of the actual strategies,

[44] I find that all of this information relates to the process which ministry staff were to use – with the consulting company’s guidance - in developing the sector strategies. I find that these records neither set out what specific information the ministry took into consideration in formulating its sector strategies nor reflect what sector strategies were developed. In its representations, the ministry relies on Interim Order PO-3839-I, comparing stakeholder notes to the records in this appeal. While in that order the IPC found that some records were exempt under section 12(1) and others were not, I find that there is not a sufficient parallel between the records at issue in this appeal – process information – and the stakeholder notes in Interim Order PO-3839-I.

[45] The slides and the article would neither reveal the substance of the Recovery Committee’s deliberations nor permit the drawing of accurate inferences regarding those deliberations. I further find that the content of these records is distinct from those I have found to be exempt in that it is sufficiently removed from and would not reveal nor infer the substance of the Recovery Committee’s deliberations.

[46] I am mindful of the *Mandate Letters Decision* in which the Supreme Court of Canada recognized three underlying rationales for Cabinet secrecy: candour, solidarity and efficiency. However, adopting and applying that approach, the ministry’s representations do not address and I am unable to determine how the remaining information advances any of these rationales. I disagree with the ministry that the *Mandate Letters Decision* permits the exemption to be applied in such a broad manner to apply to all of the information in the records. As previously stated, the information that I find is not exempt was prepared by the consulting company in order to guide ministry

staff through the process of developing sector strategies. The information in these records include general topics and templates for the process to be used in developing the sector strategies, but not the specific information that the ministry staff considered in developing the sector strategies or the sector strategies themselves which were presented to the Recovery Committee. I find that the information in these records is sufficiently removed from the specific information that was considered and deliberated by the Recovery Committee such that its disclosure would not reveal the substance of the Recovery Committee's deliberations. As a result, I find that this information is not exempt from disclosure.

[47] The ministry has not claimed that any other exemptions apply to the records. As a result, I order the ministry to disclose portions of certain records to the appellant, as set out in the order provisions.

ORDER:

1. I order the ministry to disclose records in part to the appellant, as set out in the Appendix by **March 10, 2025** but not before **March 3, 2025**. To be clear, the information set out in the Appendix is to be disclosed to the appellant.
2. I otherwise uphold the ministry's claim that the section 12(1) exemption applies to the records.
3. I reserve the right to require the ministry to provide the IPC with a copy of the records it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ January 29, 2025

APPENDIX

Record Number	Pages to be disclosed
1A	1-4, 7-8, 14-16, 20, 22-25 and 29
1B	1-4, 5, 10, 15, 19-20, 25 and 28
2B	1-2
2C	1-2
2D	1-2
3A	1
3B	1
3H	1
4C	1-3
5A	1-7, 10, 13, 17, 19-20 and 23
5F	1-4, 6-9 and 11-13