



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1673

Appeal PA-980213-1

Cabinet Office



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BACKGROUND:

The Red Tape Commission (the RTC) was established by Order in Council dated December 10, 1997. It consists of 12 M.P.P.'s and is chaired by one of them. The role of the RTC is to advise and assist the provincial government in carrying out its ongoing regulatory function. The Executive Council (Cabinet) has directed the RTC to:

- review policy and regulatory proposals that are to come before Cabinet or one of its Committees and provide advice to Ministers and Cabinet on the proposals.
- review policy and regulatory proposals that are before Cabinet at the request of Cabinet or one of its Committees.
- work with Ministries to develop legislation that reduces or eliminates red tape.
- work with Ministries to implement the recommendations of the Red Tape Review Commission.
- make recommendations to Cabinet on further measures that could be taken to reduce red tape.

NATURE OF THE APPEAL:

Cabinet Office received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all correspondence, documents, reports, briefs, statements, inquiries or requests for information from the RTC, to the Minister or Ministry of Environment and Energy or the Minister or Ministry of the Environment (I will hereafter refer to these two Ministers and Ministries as "the Ministry"). The requester is an independent environmental law and policy research and education organization. The requester states that it has, over the past few years, been monitoring the rapid changes to the province's laws, regulations, policies and institutions related to the environment and natural resources management, and has also been publishing a report that documents these changes and their implications on the environment and the residents of Ontario.

The requester made a parallel request to the Ministry of the Environment for similar records. I have dealt with the outcome of that request in Order PO-1674.

Cabinet Office identified 23 responsive records and, upon payment of the requested \$142 fee, granted access in full to seven of them and denied access to the remaining 16 records, claiming exemptions under sections 12(1) and/or 13(1) of the Act.

The requester, now the appellant, appealed this decision, and also claimed that there is a compelling public interest in disclosure of the records which may qualify for exemption under section 13(1).

During mediation, Cabinet Office provided the appellant with an index describing the records and identifying the exemptions claimed for each of them. Also during mediation, the appellant agreed not to pursue access to Record 18 and the first four pages of Record 23. The remaining 15 records consist of letters, memoranda, slides, a list and a report, as described in the index produced by Cabinet Office.

A Notice of Inquiry was sent to Cabinet Office and the appellant. Representations were received from both parties. In its representations, Cabinet Office included a further decision letter to the appellant, disclosing Record 2. Accordingly, this record is no longer at issue.

The records which remain at issue are Records 3-4, 7-9, 12-15, 17, 19-20, 22, and the undisclosed 30 pages of Record 23.

PRELIMINARY MATTER:

In its representations, Cabinet Office for the first time suggests that I must make a determination on the status of the RTC under the Act before proceeding to deal with the substantive issues in this appeal.

I disagree. All records determined to be responsive to the appellant's request have been identified by Cabinet Office from among its record holdings. There would appear to be no dispute that these records are in the custody or under the control of Cabinet Office, and I find that they are. As such, they are records to which the public has a right of access under section 10 of the Act, subject of course to the proper application of any exemption claims. In my view, the fact that the RTC is not a scheduled institution under the Act is not relevant in the circumstances.

DISCUSSION:

CABINET RECORDS

Cabinet Office claims that Records 4, 8-9, 12-15, 17, 19-20, 22 and the remaining 30 pages of Record 23 qualify for exemption under section 12(1) of the Act, which states:

- (1) 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.

The appellant submits that the RTC is an ad hoc advisory body, external to the Executive Council and the executive and administrative structures of the Government and, therefore, records generated by it should not be subject to the section 12(1) exemption. The appellant relies on past orders of this office in support of its argument that this exemption is only applicable to records associated with the “normal cabinet decision-making process” (Orders 80, P-604 and P-812).

According to Cabinet Office, the RTC is inextricably connected to the Cabinet decision-making process. Ministries are asked to appear before the RTC to discuss their policy proposals or draft legislation before they appear before Cabinet or its Committees. Cabinet may also recommend that a Ministry take its proposal before the RTC for review and comment. The RTC reviews policy proposals, draft legislation, Cabinet Submissions, Cabinet presentation slides, provides Ministries with comments and directly advises Cabinet or its Committees on the proposals it has reviewed. Cabinet Office points out that since the RTC came into existence, it has served as a screening process for Cabinet and its Committees on a wide range of policy items. Cabinet Office explains that after the RTC has reviewed an item, the Chair will usually write the Minister and/or the Chair of the Cabinet Committee, raise any concerns, and provide advice and recommendations on the item. The Chair and members of the RTC are often invited to attend Cabinet Committee meetings in order to provide advice or make recommendations to the Committee on the reviewed items.

In addition to its representations, Cabinet Office provided an affidavit sworn by the Director of the Red Tape Secretariat (the Director). The Director’s affidavit supports Cabinet Office’s position on the role of the RTC. The Director explains that the Red Tape Secretariat provides policy and legal advice to the RTC and assists the RTC in carrying out its mandate. The Director states that he has personal knowledge of the records at issue in this appeal and their routing through the RTC to the various Cabinet Committees. He states that he has observed through attendance at Cabinet Committee meetings that the records setting out the RTC’s advice are considered during the deliberations of Cabinet and its Committees at these meetings.

As explained by Cabinet Office and the Director of the Red Tape Secretariat, I accept that the RTC performs an integral role in the Cabinet decision-making process in the area of regulatory review and reform. Cabinet has chosen to rely on the views and opinions of the RTC in considering reforms, and has established a process which requires various Ministers and Ministries to involve the RTC in certain matters prior to submitting them to Cabinet. Although the RTC is not a Committee of Cabinet, in discharging its

mandate it would frequently deal with matters that are subsequently placed before Cabinet or one of its Committees for deliberation.

Two important previous interpretations of section 12(1) by the Commissioner's office are relevant in this appeal. First, the use of the term "including" in the introductory wording of section 12(1) means that if the disclosure of any record would reveal the substance of deliberations of Cabinet or its Committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), the record qualifies for exemption under section 12(1) [eg. Orders P-11, P-22, P-331]. Second, it is possible that a record which has never been placed before Cabinet or its Committees may qualify for exemption under the introductory wording of section 12(1). This will occur where disclosure of the record would reveal the substance of deliberations of Cabinet or its Committees, or where its release would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its Committees [eg. Orders P-226, P-293, P-331, P-361 and P-506]. I adopt both of these interpretations for the purposes of assessing the application of the introductory wording of section 12(1) to the records at issue in this appeal.

The Director of the Red Tape Secretariat swears in his affidavit that all of the RTC's recommendations respecting the Ministry were dealt with at the Cabinet Committee on Jobs and the Economy on April 23, 1998, in addition to certain aspects that were dealt with at several preceding individual meeting dates.

Records 4, 13, 14 and 15 are all letters from the Chair of the RTC to the Minister of the Environment. They contain the results of the RTC's review of various environmental program proposals, concerns about these proposals and the RTC's advice and recommendations to the Minister regarding these proposals. Cabinet Office states that the contents of these records were placed before and considered by Cabinet or one of its Committees as follows:

- Record 4 - the Policy Coordination Committee on September 11, 18 and October 1, 1997 and Cabinet on November 26, 1997
- Records 13, 14 and 15 - Management Board of Cabinet on March 10, 1998.

Records 8, 19, 20 and 22 are letters from the Chair of the RTC to the Chair of the Legislation and Regulation Committee of Cabinet. Record 9 is a memorandum addressed to all Cabinet Ministers from the Chair of the RTC referring to Record 8, which was attached, and provides recommendations in respect of same. Record 12 is a letter from the Chair of the RTC to the Chair of the Policy Coordination Committee of Cabinet. These six records contain the RTC's concerns about certain regulations, changes to regulations and proposed changes to fee schedules that the Ministry was bringing forward to these Committees for approval. The records also include the RTC's advice and recommendations as to how to deal with the Ministry's proposals. According to Cabinet Office, the records were considered by the Cabinet and/or its Committees as follows:

- Records 8 and 9 - Cabinet on October 8, 1997
- Record 12 - Policy Coordination Committee on October 29, 1997 and Management Board of Cabinet on October 2, 1998
- Records 19 and 20 - Legislation and Regulation Committee on March 23, 1998
- Record 22 - Cabinet on April 8, 1998.

Record 17 is a letter from the Chair of the RTC to the Chair of Management Board of Cabinet. It sets out the RTC's concerns regarding the Ministry's proposal for hazardous waste service cost recovery and its recommendations to Cabinet Office in dealing with this proposal. Cabinet Office states that this letter was placed before Management Board of Cabinet on March 10, 1998 and was considered during its deliberations.

Finally, the remaining 30 pages of Record 23, according to Cabinet Office, consist of a report prepared by the Ministry for consideration by the Jobs and the Economy Subcommittee of Cabinet, dealing with the Ministry's progress on implementing the recommendations of the RTC. Cabinet Office states that this record was presented to the Jobs and the Economy Subcommittee on April 23, 1998.

The affidavit provided by the Director of the Red Tape Secretariat supports the dates and various meetings identified by Cabinet with respect to these records, to the best of his knowledge.

Having carefully considered Cabinet Office's representations and the affidavit provided by the Director of the Red Tape Secretariat, and given the nature of these records, their intended purpose, and the role and responsibilities assigned to the RTC by Cabinet, I am satisfied that Records 4, 8-9, 12-15, 17, 19-20, 22 and the remaining 30 pages of Record 23 relate directly to the issues considered and discussed by Cabinet. In my view, the disclosure of any of these records would reveal the substance of deliberations of Cabinet and/or one of its committees, and I find that they all are exempt under the introductory wording of section 12(1) of the Act.

Cabinet Office has not claimed section 12(1) as the basis for denying access to Records 3 and 7. However, because section 12(1) is a mandatory exemption claim, I will consider its possible application to these two remaining records.

Cabinet Office describes Record 3 as a 26-page slide presentation that was made by the Ministry to the RTC. (The index created by Cabinet Office lists this record as being **from** the RTC **to** the Ministry but the record, as correctly stated in Cabinet Office's representations, is **from** the Ministry **to** the RTC.) Cabinet Office states that the slides set out the Ministry's recommended course of action on a package of proposals that it would be bringing forward to Cabinet for approval. The slides deal with the specifics of each proposal, a status update, and the Ministry's recommended course of action. Cabinet Office submits that the records contain the advice and recommendations of Ministry staff. However, Cabinet Office also makes statements that speak to the section 12(1) exemption claim. Specifically, the representations state that Cabinet dealt with the proposals which were the subject matter of the slides on November 26, 1997, and that the contents of the slides were eventually the subject of a series of subsequent Cabinet meetings. The representations explain that section 13(1) was claimed, rather than section 12(1), because the record contains the advice and recommendation of Ministry of the Environment staff.

Having reviewed this record in the context of other records at issue in this appeal, and considered the representations provided by Cabinet Office, I am satisfied that it qualifies for exemption under the introductory wording of section 12(1). The fact that this record contains the advice and recommendations of Ministry staff does not preclude this finding. Cabinet Office has stated that the contents of the record were the subject matter of deliberations by Cabinet on November 26, 1997 and subsequently. In addition, when considered together with other records, it is clear from the actual content of Record 3 itself that disclosure would "reveal the substance of deliberations of Cabinet" or "permit the drawing of accurate

inferences with respect to the actual deliberations of Cabinet". As stated earlier, this is sufficient to bring this record within the scope of section 12(1) and, because of the mandatory nature of this exemption claim, I find that the record should not be disclosed, despite the fact that Cabinet Office has not included it among those records exempt under this section.

Record 7, which is in tabular form, is described by Cabinet office as consisting of a series of draft "Regulation Approval Forms" that, according to Cabinet Office, were prepared by Ministry staff and contain policy advice and recommendations to proceed with a series of amendments to proposed regulations. These forms were then presented for review by the RTC. Cabinet Office submits that the advice and recommendations contained in these forms is that of Ministry staff, and that the record qualifies for exemption under section 13(1).

I have carefully reviewed the contents of Record 7. Despite Cabinet Office's description of this record, it would appear more likely that it was prepared by the RTC. However, even if prepared by Ministry staff, it nonetheless consists of the RTC's concerns about certain Ministry regulations, and steps that can be taken by the Ministry to address them. The regulations discussed in Record 7 are the same as those contained in other records which I have found qualify for exemption under section 12(1). In my view, this record also formed part of the ongoing process of review and comment undertaken by the RTC in support of the Cabinet decision making process for regulatory issues involving the Ministry. Consequently, I find that disclosure of Record 7 is exempt from disclosure under the introductory wording of section 12(1), for the same reasons outlined above for Record 3.

In summary, I find that all records which remain at issue in this appeal qualify for exemption under the introductory wording of section 12(1) of the Act. Because of this finding, it is not necessary for me to consider the section 13(1) exemption claim. It is also not necessary for me to deal with the extensive submissions provided by the appellant with respect to the application of section 23 of the Act, since records which qualify for exemption under section 12(1) are not subject to this public interest override.

ORDER:

I uphold the decision of Cabinet Office to deny access to Records 3-4, 7-9, 12-15, 17, 19-20, 22 and the undisclosed 30 pages of Record 23.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ April 30, 1999