



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

# **ORDER PO-1674**

Appeal PA-980281-1

Ministry of the Environment



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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:**

The Ministry of the Environment (the Ministry) 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 to the RTC, from the Minister or Ministry of Environment and Energy or the Minister or Ministry of the Environment. The requester later clarified the scope of the request to include records relating to the waste management approvals process, the proposed revisions to the province's standards for air pollutants and the proposed amendments to Regulation 347 posted on the Environmental Bill of Rights Registry on October 21, 1997. This regulation concerns the definition of waste and the regulation of 'chop line residue' and photochemical waste recycling, and the use of spent pickle liquor in sewage treatment plants. 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 Cabinet Office for similar records. I have dealt with the outcome of that request in Order PO-1673.

The Ministry identified 24 records responsive to the request and, upon payment of the requested fee of \$176.50, granted access in full to 14 records, partial access to three others, and denied access to the remaining seven records. The exemptions provided in sections 12(1), 13(1), and/or 14(1)(a), (b) and (f) of

[IPC Order PO-1674/April 30, 1999]

the Act were identified by the Ministry as the basis for denying access. The Ministry also provided the appellant with an index describing the records and identifying the exemptions claimed for each.

The requester, now the appellant, appealed the Ministry's 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, the appellant agreed not to pursue access to Record 22. Because this is the only record subject to the section 14(1)(a), (b) and (f) exemption claims, these exemptions are no longer at issue in this appeal. The remaining nine records (seven in whole and two in part) consist of letters, memoranda, slides, and presentation materials.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

The records which remain at issue are Records 4, 6, 12, 13 (in part), 15-16, 18 (in part), 19 and 24.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry claims that Records 4, 12, 13 (in part), 15, 16, 18 (in part), 19 and 24 are exempt from disclosure by virtue of 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).

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.

In Order PO-1673, I discussed the role of the RTC and its relationship to the Cabinet decision making process as follows:

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

[IPC Order PO-1674/April 30, 1999]

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 the 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. . . .

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.

The records at issue in this appeal are similar in nature to those dealt with in Order PO-1673, and I will follow the same approach in discussing the application of section 12(1) to these records.

Record 4 is a covering memorandum with a series of attachments that, according to the Ministry, was forwarded to the RTC as part of the ongoing regulatory review. The Ministry states that this record is an earlier draft of a Cabinet Submission dated November 17, 1997. Record 12 is a series of slides dated October 1997 that were presented to the RTC when it reviewed the Ministry's status on implementing various regulatory reforms. The Ministry states that the information contained in both of these records was included in the Cabinet Submission that was presented to the Policy and Priorities Committee of Cabinet on November 24, 1997.

Record 13 is a December 1, 1997 letter from the Deputy Minister to the Director of the RTC, updating the RTC on matters respecting regulatory reforms. All but three paragraphs of this letter have been disclosed. Record 15 is a series of slides that the Ministry states were presented to the RTC with respect to the Ministry's proposal for hazardous waste service cost recovery. The Ministry states that the content of Record 15 and the undisclosed information in Record 13 was contained in and formed part of a Cabinet Submission that was subsequently presented to the Cabinet Committee on Jobs and the Economy on April 23, 1998, and to Cabinet on May 6, 1998.

Record 16 is a letter from the Minister of the Environment to the Chair of the RTC. According to the Ministry, it clarifies the Ministry's position with respect to regulatory reform matters that were presented to

and discussed by the Cabinet Committee on Jobs and the Economy and the Policy Coordination Committee of Cabinet on April 23, 1998, and Cabinet on May 6, 1998. Record 18 is also a letter to and from the same individuals, one paragraph of which has been withheld. The Ministry submits that disclosure of the information in these two records would reveal the substance of the deliberations of Cabinet and its Committees at these meetings.

Record 19 is a memorandum, with an attachment, from the Deputy Minister to the Director of the RTC wherein he comments on the content of a draft Cabinet Submission that was subsequently finalized and presented by the RTC to Cabinet in May 1998. The Ministry states that the memorandum reflects the changes to the draft submission, and that the attachment is the revised wording that was appended to the RTC's Cabinet Submission.

Finally, Record 24 is a memorandum from a Ministry employee to a staff person at the RTC. According to the Ministry, this record was used by the RTC to prepare comments to Cabinet on the Ministry's Cabinet Submission concerning Regulation 327. The Ministry states that this Cabinet Submission was discussed at the Legislative and Regulations Committee of Cabinet's March 23, 1998 meeting, and by Cabinet on March 25, 1998. The RTC's comments and the draft wording of the revised Regulation appears on page 2 of this record, and the Ministry submits that disclosure of this information would reveal the substance of deliberations at these various meetings.

The Ministry submits that disclosure of all remaining records or partial records would reveal the substance of deliberations of Cabinet or one of its committees, since they indicate the matters to be, and that were ultimately, considered by Cabinet.

Having carefully considered the Ministry's representations, 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, 15-16, 19, and the remaining portions of Records 13 and 18 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.

The Ministry includes Record 6 in its index of records, but makes no reference to this record in its representation. Because section 12(1) is a mandatory exemption claim, I will consider its possible application to this record. Record 6 consists of a series of slides dated October 28, 1997. The index describes this record as "progress on recommendations" and the document is titled "Ministry of Environment Meeting with Red Tape Commission".

Having reviewed this record in the context of other records at issue in this appeal, I am satisfied that it qualifies for exemption under the introductory wording of section 12(1). The regulations discussed in Record 6 are the same as those contained in other records which I have found qualify for exemption under section 12(1), in particular Record 12, which is a more detailed progress report also prepared in October 1997. In my view, Record 6 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. In

addition, when considered together with other records, it is clear from the actual content of Record 6 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 this record should not be disclosed, despite the fact that the Ministry has not included it among those records exempt under this section.

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 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 Ministry’s decision to deny access to Records 4, 6, 12, 15-16, 19, 24 and the undisclosed portions of Records 13 and 18.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

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April 30, 1999