



Information and Privacy  
Commissioner/Ontario

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

# **ORDER PO-1831**

Appeal PA-990428-1

Ministry of Consumer & Commercial Relations



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## **NATURE OF THE APPEAL:**

This appeal is brought by the Ontario Liquor Board Employees Union (the Union) which represents the approximately 4,600 employees of the Liquor Control Board of Ontario (the LCBO). The Union submitted a request under the *Freedom of Information and Protection of Privacy Act (the Act)* to the Ministry of Consumer and Commercial Relations (the Ministry) for access to a document referred to as the “LCBO Modernization Report” (the Report). As well, the Union requested copies of other related “documents and reports”, including a “listing of fees paid by the Ministry to outside consultants”.

The Ministry issued a decision letter in which it denied access to the Report on the basis that its disclosure would reveal the substance of Cabinet deliberations. Specifically, the Ministry claimed that the exemptions in sections 12(1)(b), (c) and (e) of the *Act* applied to the Report. Subsequently, the Ministry provided the appellant with the requested information relating to consultation fees.

The Union appealed the Ministry's decision to deny access to the Report and raised the possible application of section 12(2)(b) of the *Act*. Section 12(2)(b) provides that an institution shall not refuse to disclose otherwise exempt Cabinet records if Cabinet consents to the disclosure. The Union seeks an order requiring the Minister to re-consider the application of section 12(2)(b).

During mediation of this appeal, the Ministry indicated that it intended to issue a separate decision with respect to the request for related “documents and reports”, and it has now done so. On this basis, it was agreed by the parties that the only record at issue in this appeal is the Report itself, which it referred to in the representations as the “Modernization Report”. The title of the report appears on its cover page as follows: “Report for the Minister of Consumer and Commercial Relations[:] Modernization of the Liquor Control Board of Ontario”.

All parties have submitted representations on the issues in this appeal. The Ministry submitted initial representations which relied on the exemptions in sections 12(1), 13(1) and 18(1). The Union was asked for representations on the application of section 12(1) only. The Ministry's representations on section 12 were forwarded to the Union, with portions severed on the basis that disclosure would reveal information which is claimed to be exempt from disclosure. In its responding representations, the Union stated, among other things, that the Ministry had not met its burden of proof in claiming the exemptions in section 12(1); that the representations lacked adequate particulars; and that the Modernization Report is properly characterized as a report prepared for the Liquor Control Board of Ontario, and not a Cabinet document.

After considering the Union's submissions, this Office requested that the Ministry submit reply representations on some of the issues raised by the Union, including the alleged failure to meet its burden of proof and the lack of particulars. The reply submissions were not shared with the Union.

I have now reviewed both sets of representations from the Ministry and the representations of the Union. This is the decision on the merits of this appeal.

## **ISSUES IN DISPUTE**

There are only two issues in this appeal:

- whether or not the Modernization Report is exempt from disclosure on the basis that disclosure would reveal the substance of deliberations of Cabinet;
- whether or not the Ministry has appropriately exercised its discretion in making a decision to not request that Cabinet consent to disclosure of the Report.

### **DECISION:**

I find that the Modernization Report is exempt from disclosure, under section 12(1), on the basis that disclosure would reveal the substance of Cabinet deliberations. The decision of the Ministry to deny access to the Modernization Report is upheld.

Further, I am satisfied that the Minister has exercised its discretion under section 12(2)(b) in deciding not to request the consent of Cabinet for the disclosure of the Report, and has done so in consideration of relevant factors. I deny the request of the Union for an order requiring the Minister to re-consider the decision not to seek Cabinet consent.

### **RELEVANT SECTIONS OF THE LEGISLATION**

The Ministry has relied on section 12(1), and particularly paragraphs (b)(c) and (e), in denying access to the Modernization Report.

The Union has cited section 12(2)(b) in seeking an order requiring the Ministry to request that Cabinet consent to disclosure of the Report.

Section 12 reads:

- (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.
- (2) 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.

## **REASONS FOR DECISION**

My reasons for decision are set out below with reference to each of the two questions raised by this appeal.

### **Is the Modernization Report exempt from disclosure on the basis that disclosure would reveal the substance of Cabinet deliberations?**

I have had the opportunity to review the Report itself, as well as the factual information in the severed portions of the representations filed by the Ministry, and in the reply submissions. On the basis of this material, I am able to make findings which support the application of section 12(1). Given my findings, I do not need to specifically consider the application of section 12(1)(c) or (e).

The key facts are as follows:

- The Report formed the basis for a written Cabinet submission which was in fact considered by Cabinet on a date specified in the representations.
- The Report contains policy options which were considered by Cabinet on that date.
- Although the Report itself was not submitted to Cabinet, the policy options contained in the Report were prepared for the Minister as the basis of the submission to Cabinet and in fact were submitted to Cabinet.

Previous decisions of this Office 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 deliberations qualifies for exemption whether or not the record falls within one of the enumerated categories in the various subparagraphs of section 12(1): Orders P-22, P-331, P-894, P-1570.

Where disclosure of a record would reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences with respect to these deliberations, the mandatory exemption in section 12(1) applies and access to the record must be denied, whether or not the record has itself been placed before Cabinet: Orders P-361, P-604, P-901, P-1678, PO-1725.

In this case, the Report itself was not submitted to Cabinet. Although it is arguable that the application of section 12(1)(b) requires that the Report, and not just its contents, be submitted to Cabinet, it is unnecessary for me to address that argument. Where, as in this case, the policy options in the record at issue were developed for submission to Cabinet, and were submitted to Cabinet, there is a firm basis for concluding that disclosure of the record would reveal the substance of the Cabinet deliberations. Accordingly, the Modernization Report is subject to the mandatory exemption from disclosure established by the introductory language of section 12(1).

**Has the Minister appropriately considered, in the circumstances of this appeal, the application of section 12(2)(b) which requires disclosure of a record where Cabinet consents?**

Previous orders of this Office have held that this provision does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at minimum, is that the head turn his or her mind to this issue: Orders P-334, P-894 and P-1146.

Moreover, if it is established that a Minister has exercised his or her discretion, under section 12(2)(b), to decide if Cabinet consent should be sought, this Office has held that it lacks authority under the statute to substitute its own discretion for that of a Minister. If, in the circumstances of a particular appeal, an adjudicator is satisfied that the Minister has made an error in the exercise of discretion under this section, by, for example, failing to consider relevant factors, the adjudicator may issue an order requiring the Minister to reconsider the exercise of discretion: Order P-1390.

In this case, the Ministry addressed, in its reply submissions, the factors which it considered in exercising its discretion to not seek Cabinet consent for disclosure of the record. Based on these representations, I am satisfied that the Minister has exercised his discretion under section 12(2)(b), and has considered relevant factors in doing so.

The Union, in its submissions, raised other factors which, in its view, should have been considered in making a determination as to whether or not to seek Cabinet consent, including its own duty to represent the interests of its members adequately. I agree that the interests and welfare of the employees are appropriate factors for the Union to ask the Minister to consider in exercising his discretion under section 12(2)(a). However, based on the actual factors considered by the Minister in the exercise of discretion, as cited in the reply representations, I am satisfied that the additional factors put forward by the Union would not have affected the decision of the Minister not to seek Cabinet consent for disclosure of the Report. Accordingly, there is no appropriate basis upon which to order reconsideration of the decision declining to seek Cabinet consent.

**ORDER:**

I uphold the decision of the Ministry to withhold the Modernization Report from the Union. The appeal is dismissed.

Original signed by: \_\_\_\_\_  
Katherine Laird  
Adjudicator

\_\_\_\_\_  
November 7, 2000