



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2002

Appeal PA-010311-1

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to:

all information (correspondences, briefing notes, etc.) on talks by the province on tolling existing highways.

The requester subsequently confirmed that he was seeking all records since the current government was first elected in June 1995.

The Ministry identified seven responsive records. It provided the requester with access to Records 2 and 3, subject to severances of certain portions on the basis of section 21(1) (invasion of privacy), and denied access to Records 1 and 4-7 on the basis that they qualified for exemption under section 12(1) of the Act (Cabinet records).

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant agreed not to pursue access to the undisclosed portions of Records 2 and 3, so section 21(1) and these two records are no longer at issue in this appeal. The Ministry also changed its position on Record 4 and disclosed it to the appellant during mediation.

Further mediation was not successful and the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. I then sent the Notice to the appellant, along with the non-confidential portion of the Ministry's representations. The appellant did not submit representations.

RECORDS:

The following records remain at issue in this appeal:

- Record 1: 2-page briefing note, dated April 26, 2001
- Record 5: 2-page cover letter dated January 24, 2001, and 5-page attachment, both prepared by an outside consultant (the consultant) and sent to the Ministry
- Record 6: 29-page undated slide presentation prepared by the consultant
- Record 7: 3-page letter dated May 3, 2001, and 1-page attachment, both prepared by the consultant and sent to the Ministry

The Ministry claims section 12(1) as the only basis for denying access to these four records.

DISCUSSION:

Cabinet records

The Ministry identified the following paragraphs of section 12(1) as applying to one or more of the four records:

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,

- (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

It has been determined in a number of previous orders that the use of the term “including” in the introductory wording of section 12(1) means that any record which 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)), qualifies for exemption under section 12(1) (Orders P-11, P-22 and P-331).

It is also possible that a record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This could occur where an institution establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations (Orders P-226, P-293, P-331, P-361 and P-506).

The Ministry points out in its representations that a discussion paper tabled with the 2001 Ontario Budget announced the government’s intent to undertake a series of major transportation corridor assessment studies in order to help “prepare Ontario’s transportation network for the future”. The discussion paper identified specific highways that would be considered as part of

this review and stated: “the government will examine public-private partnerships as a way to finance, build and operate highway infrastructure, including tolling options”. The Ministry and the Ontario SuperBuild Corporation (OSBC) were assigned co-leadership of an inter-ministry task force to review financing options associated with the expansion of the province’s ‘400-series’ highways.

As the Ministry states in its representations, the records at issue in this appeal “reflect and flow directly from the review by [the Ministry] and OSBC”. According to the Ministry:

The [records] were produced in response to direction the Ministry received to permit Cabinet, and/or its committees, to deliberate on the subject matter of the review and to develop policies and plans with respect thereto.

As part of the review, the task force was required to report back to the Cabinet Committee on Privatization and SuperBuild (CCOPS). The Ministry provided me with copies of two “preliminary” Cabinet agendas and a project management template that would appear to substantiate these report-back requirements.

The Ministry acknowledges that none of the records at issue in this appeal have been presented to Cabinet. The Ministry submits:

It is essential to the understanding of this appeal to recognize that the records, with the exception of Record 6, are prospective in nature in that the records or their subject matter have not yet been put into the format of Cabinet Submissions or taken forward to the Executive Council or its committees in response to the direction given thereby in early 2001.

In that regard, the Ministry refers to Order P-167, where former Commissioner Tom Wright made the following statements:

In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the “substance of deliberations” of Cabinet ...

The Ministry argues that the records at issue in this appeal come within the “rare and exceptional circumstances” identified by former Commissioner Wright. It submits:

The fact that Cabinet commissioned the study of which these records are an intrinsic part, and that it was publicly announced through the Budget Papers and other media that the report on the study would be brought before Cabinet and its committees for deliberation and policy formulation, brings them within these “rare and exceptional circumstances”.

Introductory wording to section 12(1)

Former Commissioner Sidney B. Linden stated in Order P-22 that: “the use of the word ‘including’ in subsection 12(1) provides of the Act should be interpreted as providing an expanded definition of records which are deemed to qualify as subject to the Cabinet records exemption.” I concur. Any record that would reveal the substance of deliberations of Cabinet or its committees, not just the types identified in the various paragraphs of section 12(1), would qualify for exemption.

The Ministry identifies the introductory wording of section 12(1) in its representations as applying to the various records at issue in this appeal. However, based on these representations and my review of the records, I find that they are all appropriately considered within the context of the type of records outlined in the various paragraphs of section 12(1) identified by the Ministry. As the Ministry acknowledges, none of the records have actually been placed before Cabinet or its committees, and the arguments put forward by the Ministry to address this atypical situation speak to one or more of the types of records specifically described in the various paragraphs of this exemption claim.

Section 12(1)(c)

For a record to qualify under section 12(1)(c), the Ministry must establish that:

1. the record contains background explanations or analyses of problems to be considered; and
2. the record itself was submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions; and
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; and
4. the decision at issue either:
 - (i) has not been made; or
 - (ii) has been made but not implemented.

(Order P-1623)

According to the Ministry, Record 6, the slide presentation, was prepared for presentation to “SuperBuild and the Executive Council”. [It would appear from the context of the Ministry’s representations that the term “SuperBuild” refers to OSBC rather than CCOPS.] The Ministry submits that Record 6 “with or without modifications, will go forward to Cabinet or a committee thereof, but a date therefore has not yet been assigned”. The Ministry explains that there have been delays in the project schedule.

The Ministry also submits that Record 5 “provided information that fed into the production of Record 6”.

Having reviewed Record 6, I find that it contains a background analysis of one aspect of the Ministry/OSBC task force review. Based on the Ministry’s representations, I accept that this record, or a similar record in final form, was prepared for submission to CCOPS, a committee of Cabinet. Although the timetable for considering this issue has been delayed, based on its relative currency and the Ministry’s submissions, I also accept that it continues to be under active pending consideration by CCOPS and subsequently by Cabinet. Accordingly, I find that all four requirements of section 12(1)(c) are present with respect to Record 6, and it qualifies for exemption on that basis.

As far as Record 5 is concerned, I do not accept that it is the type of record that would ever be placed before Cabinet or one of its committees for consideration. It is a letter and attached report provided to the Ministry by the consultant. However, having reviewed Record 5, I find that its content is highly similar to the presentation slides that comprise Record 6, and clearly formed the basis for creating these slides. As such, I find that disclosure of Record 5 would reveal the substance of Record 6 and thereby permit one to draw accurate inferences with respect to the contents of an exempt record (ie. Record 6). Accordingly, I find that Record 5 also qualifies for exemption under section 12(1)(c) of the *Act*.

I feel differently about Record 7. This record has not been nor is it the type of record that would be placed before Cabinet or one of its committees for consideration. With the exception of the first paragraph of the letter, which reiterates some of the contents of Records 5 and 6 and should not be disclosed, I find that Record 7 can most accurately be described as a proposal submission for a study to be undertaken by the consultant. It describes a specific project, along with a general outline of the approach the consultant proposes to take in conducting the study. It is similar in nature to Record 4, also a proposal letter from the consultant to the Ministry, which has already been disclosed to the appellant. The Ministry submits that “[t]he information contained in [Record 7] provided information that fed into the production of Record 6, which provided the basis for deliberations by SuperBuild and for the Executive Council and/or its committees when they assign a date therefore.” Having carefully reviewed the content of the two records, I am unable to accept the Ministry’s position. Unlike Record 5, there is no overlap in the contents of Record 7 with Record 6. Record 6 is a broad-based analysis of one aspect of the Ministry/OSBC task force’s work, while Record 7 deals with a specific initiative. The only reference to the topic of the study proposed in Record 7 is a single phase that appears on page 27 of Record 6. [I am constrained from describing this further without disclosing the content of Record 6.]

Based on the representations provided by the Ministry, I find that it has failed to discharge the onus of establishing the requirements of section 12(1)(c). In my view, although a subsequent report submitted by the consultant in accordance with the content of the proposal outlined in Record 7 might, depending on future circumstances, qualify for exemption under section 12(1)(c) for the same reasons as Record 5, the proposal itself fails to satisfy the second requirement of this exemption claim.

The Ministry does not identify section 12(1)(c) as a basis for denying access to Record 1.

Section 12(1)(b)

The Ministry identifies section 12(1)(b) as an alternative basis for denying access to Record 7.

The two criteria the Ministry must satisfy in order to exempt a record under this section are:

1. the record must contain policy options or recommendations; and
2. the record must have been submitted or prepared for submission to Cabinet or its committees.

(Order 73)

For the same reasons outlined in my discussion of section 12(1)(c), I find that the Ministry has failed to discharge the onus of establishing the requirements of section 12(1)(b) for Record 7. In my view, it was not submitted or prepared for submission to Cabinet or its committees; rather, it is a proposal submitted by the consultant for work on a particular project. If accepted, the resulting report may, depending on the circumstances, fit within the scope of section 12(1)(c), for the reasons outlined above regarding Record 5, but the contents of Record 7 are too far removed from the deliberative process of Cabinet or its committees to fall within the scope of either section 12(1)(b) or (c). I also find that Record 7 does not contain “policy options or recommendations” as required by section 12(1)(b). It is a proposal to undertake a study into a specific highway initiative; not the outcome of that study.

Section 12(1)(e)

The Ministry claims section 12(1)(e) as the basis for denying access to Record 1.

To qualify for an exemption under 12(1)(e), the Ministry must establish that the record itself has been prepared to brief a Minister in relation to a matter that is either:

- (a) before or proposed to be brought before Cabinet or its committees; or
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

(Order 131)

The Ministry submits that Record 1, which is a briefing note, was “prepared and delivered to Cabinet Office on behalf of the Executive Council and its committees.” According to the Ministry, it was intended to update Cabinet Office on the status of one aspect of the review being undertaken by the Ministry/OSBC task force.

Given the fact that the work of the task force has not yet reached the report-back stage, it would appear highly unlikely that Record 1 was actually submitted to Cabinet or its committees. In any event the Ministry has not suggested that it was.

Having reviewed Record 1, I would describe it as a communications-related briefing note, prepared for the apparent purpose of providing suggested comments that could be made by a Minister or government official if called upon to respond to questions concerning the status of the topic identified in the briefing note. Its content is factual in nature and does not include any of the specific information included on the Record 6 presentation slides.

In my view, Record 1 is a time-sensitive document prepared in April 2001 for the purpose of dealing with public statements on the work of the task force to that point in time. It deals with an issue that arguably could have been, but in fact was not, considered by Cabinet or one of its committees at that time. When the work of the task force is ready for consideration by CCOPS and Cabinet, Record 1 would have limited if any value and, in my view, it is reasonable to conclude that an updated and different briefing note would be prepared, if required, to reflect the status of the matter at that time. Accordingly, I find that Record 1 was not prepared for the purpose of briefing a Minister on a matter that **is or is proposed to be** before Cabinet or its committees, and therefore does not qualify for exemption under section 12(1)(e) of the *Act* [my emphasis].

Because of my finding that Record 6 falls within the scope of section 12(1)(c), it is not necessary for me to consider whether it also qualifies for exemption under section 12(1)(d), as claimed by the Ministry.

In summary, I find that Records 5 and 6 in their entirety, and the first paragraph of page 1 of Record 7, qualify for exemption under section 12(1)(c); and that the remaining portions of Record 7 and Record 1 in its entirety do not qualify for exemption under the introductory working of section 12(1) or any of the specific paragraphs of section 12(1) identified by the Ministry.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 5 and 6, and the first paragraph of page one of Record 7.
2. I order the Ministry to disclose Record 1 and the portions of Record 7 not covered by Provision 1 of this order to the appellant by **April 17, 2002**.

3. In order to verify compliance with Provision 1, I order the Ministry to provide me with a copy of the records disclosed to the appellant, only upon my request.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ March 22, 2002