



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

ORDER PO-2227

Appeal PA-030054-1

Ministry of Agriculture and Food



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NATURE OF THE APPEAL:

The Ministry of Agriculture and Food (the Ministry) received a request for a copy of the work done by an identified group for the Ontario government “regarding the costs farmers will face with the implementation of *Nutrient Management Act* regulations.”

The Ministry responded to the request by identifying the responsive report as “a draft report dated November, 2002”. The Ministry then identified that access to the report was denied on the basis of sections 12(1), 12(1)(d) and 12(1)(e) (cabinet records) and section 13(1) (advice or recommendations) of the *Act*.

The requester, now the appellant, appealed the Ministry’s decision to deny access. In the appeal letter, the appellant identified that the information he was requesting was basically research and opinion information. The appellant also identified that the government had invited public comment on the proposed regulations, and that information regarding costs to farmers would assist the public in making informed comment. The appellant also identified the public interest in the release of the record.

Mediation did not resolve the issues in this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. In its representations, the Ministry identified that it was now also relying on section 12(1)(b) and (c), in addition to the introductory wording in section 12(1), and sections 12(1)(e), and 13(1) of the *Act*, to deny access to the record.

I then sent a modified Notice of Inquiry, along with the non-confidential portions of the Ministry’s representations, to the appellant. The appellant provided representations in response.

DISCUSSION:

CABINET RECORDS

The Ministry has relied on sections 12(1), 12(1)(b), (c) and (e), in denying access to the record. The appellant has identified section 12(2)(b) as relevant in this appeal. These sections read as follows:

(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,

...

(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;

...

- (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;

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Introductory wording of section 12(1)

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 or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also 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 an institution can establish that disclosing 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 [See Orders P-361, P-604, P-901, P-1678, PO-1725].

The Ministry submits:

Disclosure of the record would reveal matters relating to Cabinet’s deliberations and decisions regarding the implementation of nutrient management in Ontario. ... The *Nutrient Management Act, 2002*, (which was introduced in June 2002, received Royal Assent on June 27, 2002 and came into force on July 1, 2003), provides the statutory framework to implement the strategy through regulations that are made by the Lieutenant Governor in Council.

Cabinet and its committees have been deliberating issues relating to nutrient management implementation, including the content and timing of regulations, costs of implementation and possible cost-sharing programs since August of 2002. **The record that is the subject of this appeal was in fact prepared at the request of [the Ministry], in response to a direction from Cabinet for [the Ministry] to report back with certain background information and proposals relating to costs of nutrient management implementation and cost-sharing programs.**

While all of the detail in the record that is the subject of this appeal, has not yet been placed before Cabinet or its committees, some of the most essential elements of the record have already been incorporated in preliminary reports back to Cabinet and its committees and have been the subject of deliberations and decisions by Cabinet and those Committees. Disclosure of the record would therefore clearly reveal key considerations that have already been deliberated by Cabinet and its committees and will continue to be deliberated by these bodies, or would allow a reader of the record to draw accurate inferences about the substance of these deliberations. It is therefore submitted that the record is exempt from disclosure under the introductory words of subsection 12(1). (emphasis in original).

In this case, although the record itself was not submitted to Cabinet, the Ministry takes the position that some of the most essential elements of the record have been the subject of deliberations and decisions by Cabinet and its committees. In its confidential representations the Ministry has specifically identified those portions which have been the subject of deliberations and discussions. Based on the Ministry's representations and the record at issue, I am satisfied that disclosure of those portions of the record would reveal the substance of deliberations of Cabinet or its committees. Furthermore, I am satisfied that release of the other portions of the record would permit the drawing of accurate inferences with respect to the substance of those deliberations. Accordingly, the record is subject to the mandatory exemption from disclosure established by the introductory language of section 12(1).

Section 12(2)(b)

As identified above, the appellant has taken the position that the exception in section 12(2)(b) applies. The appellant seems to be taking the position that it is not possible for the Ministry to address the section 12(2)(b) exception if the consent of Cabinet has not been sought.

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 head 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 the head. If, in the circumstances of a particular appeal, an adjudicator is satisfied that the head 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 head to reconsider the exercise of discretion (See Orders P-1390, PO-1831).

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

Given my finding that section 12(1) applies, I do not need to consider the application of sections 12(1)(b), (c) or (e), or section 13. Furthermore, because the “public interest override” found in section 23 does apply to section 12 of the *Act*, it is not necessary for me to decide whether section 23 applies.

ORDER:

I uphold the decision of the Ministry to withhold the record on the basis of the exemption found in section 12(1) of the *Act*, and I dismiss the appeal.

Original signed by: _____
Frank DeVries
Adjudicator

January 19, 2004