



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

ORDER PO-2989

Appeal PA11-68

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The appellant is a member of the media. He submitted a request to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to five reports prepared by Ministry staff, including a report titled, “Review of the Community Care Information Management Program (June 25, 2010).”

The Ministry issued a decision extending the time to search for four of the reports requested. In its decision, the Ministry also indicated that it had located one other responsive report, relating to the Review of the Community Care Information Management Program (June 25, 2010). The Ministry denied access to this record in full on the basis that it is part of a Cabinet submission and is exempt from disclosure under the mandatory exemption at section 12(1)(b) of the *Act*.

The appellant appealed this decision.

During mediation, the appellant confirmed that he is seeking access to the report withheld under section 12(1)(b). He also confirmed he is not taking issue with the time extension relating to the other four reports. Mediation did not resolve this appeal, and the file was forwarded to the adjudication stage of the appeal process.

During the inquiry into the appeal, I sought and received representations from the Ministry and the appellant. The Ministry’s representations were shared in accordance with section 7 of the IPC’s *Code of Procedure and Practice Direction 7*.

RECORDS:

There is one record at issue, entitled “Review of the Community Care Information Management Program.”

DISCUSSION:

The sole issue to be determined in this appeal is whether the mandatory exemption at section 12(1) applies to the record at issue.

The Ministry initially claimed that section 12(1)(b) applies. In its representations, however, the Ministry also claimed that the record is exempt pursuant to the introductory wording of the section 12(1) exemption. The relevant portions of section 12 state:

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;

Section 12(1): introductory wording

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 an Executive Council (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-22, P-1570, PO-2320].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725].

In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations [Order PO-2320].

Section 12(1)(b)

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made [Order PO-2320, PO-2554, PO-2677 and PO-2725].

Representations

The Ministry states that the record at issue is an integral part of a Ministry submission to Treasury Board/Management Board of Cabinet (TB/MBC), which, it states, is a committee of Cabinet that provides advice on how the government manages its money. The Ministry notes that the record at issue is attached as an appendix to the Cabinet submission and that reference is made to the record in the submission. The Ministry points out that the first page of the submission indicates that it was duly authorized and submitted to the Cabinet committee on a specified date.

The Ministry submits that the record at issue contains policy options and recommendations “integral to the TB/MBC submission” and therefore, falls within the mandatory exemption at section 12(1)(b).

Moreover, relying on previous orders of this office, the Ministry submits that the record is also exempt under the introductory wording of the section because, “it is clear on the face of the Record that the ‘Review of the Community Care Information Program FINAL Report, June 2010’ was attached as Appendix 4 to the TB/MBC Submissions that was submitted to, and was the subject of actual deliberations, of TB/MBC.” The Ministry takes the position that the information contained in the record “would have formed the basis of the deliberations of TB/MBC.”

The appellant submits that the Ministry has failed to establish that disclosure of the record would reveal the substance of deliberations of Cabinet, arguing that:

The institution must provide sufficient evidence that disclosure of the records at issue 'would either reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences regarding the substance of any deliberations' [Order PO-2943]. Order PO-2943 (Jan. 18, 2011) is particularly instructive. The adjudicator sets as criteria for this exemption that one must be able to infer from the records (or the Ministry's representations) what decision was before Cabinet. The adjudicator writes: 'the fact that records...may have been included in the documentation provided to Cabinet is not enough,'

The appellant points out that the Ministry has only established that the record was an attachment to the Cabinet submission and argues:

An Appendix is by definition not an integral part of a Cabinet submission. Appendices are typically fact-based documents added for reference and background. I cannot see how an appendix could reveal the substance of Cabinet deliberations.

With respect to the Ministry's claim that the record is exempt under section 12(1)(b), the appellant states:

The document in question is an audit or review conducted by Internal Audit Division of Treasury Board. Audits such as this are frequently carried out by the Ontario Internal Audit for particular ministries. They are not carried out for Cabinet. I would submit that the record in question was not prepared for Cabinet or a Cabinet committee. Typically, the audits do make recommendations, but they are recommendations to the Ministry for which the audit was prepared, not for Cabinet. I would suggest that the Ministry cannot prove that the recommendations or policy options contained in this document were made to Cabinet.

The appellant notes that he has made requests for and received other audits conducted by the Internal Audit Division of Treasury Board and cannot understand why this one should be treated differently. He states:

Fundamentally, these audits such as the one in question are factual reports on how government programs are being run and how public money is being spent. The fact that this particular audit was later submitted to Cabinet as an Appendix should not exempt it from disclosure. Cabinet is given all sorts of background information and research and factual documents as part of its decision-making process. If you are to exempt this particular document from disclosure on this basis, it could all ministries to withhold all sorts of fact-based research documents simply because they were included as background documentation to a Cabinet submission.

Finally, the appellant notes that even if portions of the record are exempt, the remaining portions should be disclosed.

Analysis and findings

After reviewing the submissions made by both parties and the record at issue, along with the Cabinet submission to which it was attached, I am satisfied that the record is exempt, in its entirety, under the introductory wording of section 12(1). I also find that portions of the record are exempt under section 12(1)(b).

The appellant acknowledges in his submissions that the record itself forms part of the evidence upon which I will base my decision. Although the Ministry's submissions only briefly describe how disclosure of the record at issue would reveal the substance of deliberations of the Executive Council or its committees, they confirm that the record was submitted to a Committee of Cabinet on a specified date. Moreover, my review of the complete Cabinet submission reveals that the record at issue is an "integral" part of the submission and that it is very likely that the record, in its entirety, would have been reviewed and significant portions of it included in the discussions of the Committee members. Accordingly, I find that the record, as a whole, is exempt under the introductory wording of section 12(1).

In making this finding, I acknowledge the appellant's concerns that other fact-based records attached to Cabinet submissions as background information might, as a result of this decision, now be withheld. However, I am not persuaded that this decision will result in an unbridled attempt by the government to remove factual audit reports from public purview. The circumstances of individual cases will determine whether a record of this nature is exempt under the *Act*. In the current appeal, I am satisfied that there is a direct linkage between the content of the record and the actual substance of Cabinet deliberations.

With respect to the application of section 12(1)(b) to portions of the record, I am satisfied that discrete portions contain policy options and recommendations. I do not accept the appellant's argument that because the record was prepared by Internal Audit Division of Treasury Board, it cannot have been "prepared" for Cabinet within the meaning of section 12(1)(b). There is no requirement in section 12(1)(b) that the record be prepared only for a Cabinet submission. Section 12(1)(b) states that a record containing policy options or recommendations will be exempt if it is "submitted", or "prepared for submission", to the Executive Council or its committees. The evidence clearly establishes that the record was "submitted" to the Cabinet committee on a specified date.

Section 12(2): exceptions to the exemption

Section 12(2) reads, in part:

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.

Section 12(2)(b) 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 a minimum, is that the head turn his or her mind to this issue [Orders P-771, P-1146 and PO-2554].

The Ministry states that consideration was given to whether to seek the consent of Cabinet to release the record. However, it decided to exercise its discretion not to seek such consent due to the fact that the record formed “an integral part of a TB/MBC Submission that contains information on program reform in future funding years,” and because it was actually submitted to the TB/MBC committee of Cabinet.

Based on the Ministry’s submissions, I am satisfied that it has satisfied the requirements of section 12(2)(b). Accordingly, I find that the record is exempt pursuant to the mandatory exemption at section 12(1).

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____
Laurel Cropley
Adjudicator

August 24, 2011