

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3039

Appeal PA10-377

Ministry of Energy

January 18, 2012

Summary: The Ministry of Energy received a request under the *Act* for access to records containing multi-year projections for the retail and/or industrial cost of electricity in Ontario. Access to the responsive records was denied under the mandatory Cabinet records exemption in section 12(1). The ministry's decision to deny access to the records is upheld on the basis that the records are exempt under the introductory wording to section 12(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 12(1)

Orders and Investigation Reports Considered: Orders PO-2277, PO-2466 and PO-2725

OVERVIEW:

[1] The Ministry of Energy (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

- 1) any reports produced by the Ministry's Energy Economics section (Energy Supply and Competition Branch) since Aug. 1, 2009, that contain multi-year projections for the retail and/or industrial price of electricity in Ontario

- 2) any records, including memos, correspondence, emails, media lines or briefing notes, that were generated in relation to the reports described in 1.

[2] The request excluded newspaper articles or any other mainstream media reports already published. The ministry located two responsive records and issued a decision denying access to them, citing the application of the mandatory Cabinet records exemption in section 12(1) of the *Act*. The appellant appealed the decision.

[3] During the mediation stage of the inquiry process, the ministry advised that it was relying on sections 12(1)(c) and (e), as well as the introductory wording of section 12(1). The appellant took the position that the ministry was not entitled to raise the possible application of sections 12(1)(c) or (e) at this stage of the appeal and the late raising of these exemptions was added as an issue. No other mediation was possible and the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[4] The decision maker initially assigned to the appeal sought and received representations from the ministry. The non-confidential portions of those representations were shared with the appellant, who also made submissions. The ministry was then asked to provide further submissions by way of reply, which it did. Finally, the appellant was again asked to respond to the non-confidential portions of the ministry's reply submissions with his own sur-reply representations, and he did.

[5] Following the conclusion of the inquiry process, the file was assigned to me for final disposition.

RECORDS:

[6] The records at issue in this appeal consist of one 15-page report and 14 pages of email correspondence relating to it.

ISSUES:

- A. Is the ministry entitled to rely on the mandatory exemptions in sections 12(1)(c) and (e)?
- B. Are the records exempt from disclosure under the introductory wording to the mandatory Cabinet records exemption in section 12(1) or, if the answer to Issue A is yes, sections 12(1)(c) and (e)?

DISCUSSION:

A. Is the ministry entitled to rely on the mandatory exemptions in sections 12(1)(c) and (e)?

[7] The appellant argues that the ministry only claimed the application of the introductory wording of section 12(1) in its decision letter and did not raise the possible application of the additional subsections in sections 12(1)(c) and (e) until the mediation stage of the appeals process.

[8] I note that sections 12(1)(c) and (e) are mandatory exemptions and I am, therefore, obliged to consider them regardless of when in the course of processing the appeal they were raised by the ministry. Accordingly, I will consider the application of these exemptions when making my determination about whether the records are exempt.

B. Are the records exempt from disclosure under the introductory wording to the mandatory Cabinet records exemption in section 12(1) or, if the answer to Issue A is yes, sections 12(1)(c) and (e)?

Cabinet records

[9] The introductory wording to section 12(1) and sections 12(1)(c) and (e) 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,

(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;

Section 12(1): introductory wording

[10] 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].

[11] 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].

[12] 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)(c): background explanations or analyses of problems

[13] Like section 12(1)(e), this section is prospective in its application. It will apply to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact [Orders PO-2554 and PO-2677].

Section 12(1)(e): record prepared to brief a minister

[14] This section contemplates the exemption of records prepared in advance of the types of meetings referred to in the section. Like section 12(1)(c), it has a prospective application. Section 12(1)(e) cannot apply to records that have been dealt with by the Cabinet or its committees, although such records may still be exempt under the introductory wording of the exemption [Orders P-1182, PO-2554, PO-2677, and PO-2725].

Analysis and findings

[15] The ministry takes the position that the disclosure of the report and the email communications at issue in this appeal would reveal the substance of the deliberations of Cabinet’s Priorities and Planning (P & P) Committee, or would permit the drawing of accurate inferences about those deliberations.

[16] Relying on the decisions in Orders PO-2725, PO-2466 and PO-2277, the ministry submits that "even though a record may not have been put before Cabinet in its entirety, it could still qualify for exemption under the introductory wording of section 12(1) if the most essential elements of the record were the subject of Cabinet's deliberations by way of inclusion in a Cabinet submission." The ministry goes on to argue that the information contained in the records was incorporated into documents that were ultimately submitted to the P & P Committee or would permit the drawing of accurate inferences with respect to those deliberations. In addition, the ministry indicates that the contents of the 15-page report, which is one of the records at issue, were incorporated into an "options document" that was put before the P & P Committee and was intended to brief the Minister of Energy in advance of that meeting.

[17] The ministry goes on to submit that the emails identified as responsive to the request accompanied the 15-page report as it was sent electronically within the ministry. The emails refer to the information in the report and seek to clarify and record changes made to it. Again, the information contained in the emails also found its way into the report submitted to the P & P Committee, according to the ministry.

[18] In its initial representations, the appellant takes the position that the disclosure of report and the emails that accompanied it would not reveal the substance of the deliberations of the P & P Committee of Cabinet. It suggests that numerical projections and figures relating to electricity prices that may be contained in the records would have been the substance of the discussion that took place at the P & P Committee, as opposed to simply representing the subject matter of those discussions. The appellant also urges me to consider severing any information that represents the substance of the deliberations from the remaining, non-exempt information.

[19] In its reply representations, the ministry provided me with additional evidence in support of its contention that the contents of the records formed the basis for the actual substance of the P & P Committee's deliberations. To this end, the ministry provided me with an affidavit and the actual document (the options document) which was submitted to the P & P Committee at its meeting. The ministry also provided an explanation and comparison between the contents of the options document that was put before the P & P Committee and the records at issue in this appeal. Because any discussion of the details of these submissions would reveal the contents of the records, I am unable to describe them in greater detail. Comparing the contents of the options document and the records, I am satisfied that the report and the accompanying emails contain information that is very similar in nature to that put before the P & P Committee in the options document.

[20] The appellant's sur-reply representations focus on asserting the need to carefully determine that the records contain information whose disclosure would reveal, or permit accurate inferences about, "the discussions at and content of a Cabinet or Cabinet committee meeting, and not just the subjects that were discussed."

[21] I have carefully reviewed the contents of the report and accompanying emails and have compared them to the contents of the options document that was actually presented to a meeting of the P & P Committee. Based on my review of the records, the representations of the ministry and the comparison of their contents with those of the options document, I am satisfied that the disclosure of the information contained in the records would reveal the substance of the deliberations of the P & P Committee, a committee of Cabinet. With respect to those portions of the records which do not directly appear in the options document submitted to the P & P Committee, I am satisfied that their disclosure would permit the drawing of accurate inferences with respect to the contents of the options document and the committee's deliberations.

[22] Accordingly, I find that the records at issue qualify for exemption from disclosure under the introductory wording of section 12(1). Because of my finding with respect to the records, it is not necessary for me to consider whether they also qualify for exemption under sections 12(1)(c) and/or (e).

ORDER:

I uphold the ministry's decision and find that the records are exempt from disclosure.

Original Signed by: _____
Donald Hale
Adjudicator

_____ January 18, 2012