

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3199

Appeals PA10-99-2 and PA10-175

Ministry of Transportation and Ministry of Natural Resources

May 14, 2013

Summary: The appellant made a request to the Ministry of Transportation and the Ministry of Natural Resources for natural heritage reports in relation to the Detroit River International Crossing Project. The ministries granted partial access, but withheld other records, claiming the application of the mandatory exemption in section 12 (Cabinet records) and the discretionary exemption in section 21.1 (species at risk). In this order, the adjudicator does not uphold the section 12 exemption, and orders the ministries to disclose the records, in part, to the appellant.

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

OVERVIEW:

[1] This order disposes of the issue raised as a result of access decisions made by the Ministry of Transportation (MTO) and the Ministry of Natural Resources (MNR) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

[A]ll natural heritage reports in the possession of the MTO and/or MNR related to the joint Canada-Ontario Environmental Assessment process, and/or MNR permit under the *Endangered Species Act* for the Detroit River International Crossing Project (DRIC).

. . .

[I]t requires all documents prepared for the MTO and/or the MNR by [a named company], a private environmental consulting firm retained by the DRIC Study team.

[2] The MTO notified the requester's representative that it was transferring the request to the MNR under section 25(1) of the *Act*, as the MNR was the institution with custody and/or control of some of the records. In addition, the MTO advised the requester's representative that its access decision would relate to those records within the MTO's custody and/or control.

[3] Following third party notification, the MTO issued a decision letter to the requester's representative, granting access to the records, in part. The MTO withheld portions of the records, claiming the mandatory exemption in section 12(1) (Cabinet records) and the discretionary exemption in section 21.1 (species at risk).

[4] The MNR issued a decision letter, granting access to the records, in part. The MNR denied access, either in whole or in part, to other records, claiming the application of the mandatory exemptions in sections 12 and 21 (personal privacy), and the discretionary exemption in section 21.1.

[5] The requester's representative (now the appellant) appealed both ministries' decisions to this office. In response, this office opened two appeal files: appeal PA10-99-2 (the MTO's decision) and appeal PA10-175 (the MNR's decision).

[6] During the mediation of the appeals, the appellant advised that she did not wish to pursue access to the portions of the records that were subject to the ministries' section 21.1 claim. Consequently, those portions will not be disclosed to the appellant and section 21.1 is no longer at issue in both appeals.

[7] In addition, with respect to appeal PA10-175, the appellant removed a number of records from the scope of the appeal, and the MNR agreed to reconsider its decision with respect to some additional records. As a result, the MNR issued a supplementary decision letter, disclosing additional records to the appellant. The appellant advised the mediator that she was no longer seeking information withheld on the basis of section 21(1). Consequently, that information will not be disclosed to the appellant and section 21(1) is no longer at issue in this appeal.

[8] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeals sought representations from the MTO, the MNR and the appellant.

[9] The MNR provided representations and reply representations. The appellant also provided representations. The MTO did not provide representations, but advised this office that it adopted the MNR's representations.

[10] The appeals were then transferred to me for final disposition. For the reasons that follow, I find that the mandatory exemption in section 12 does not apply to the records and I will order both institutions to disclose the records to the appellant, with the exception of those portions withheld under section 21.1 of the *Act*.

RECORDS:

[11] The records at issue consist of permit applications, species-at-risk impact assessment reports with supplemental documentation, memoranda regarding alternatives, preliminary design and highway design, and aerial photographs.

DISCUSSION:

[12] The sole issue in these appeals is whether the mandatory exemption in section 12(1) applies to exempt the records from disclosure.

Background

[13] Both the MNR and the appellant provided extensive background information relating to the records at issue, which I summarize here.

[14] A partnership has been established among the governments of Canada, the United States, Ontario and Michigan with the purpose of improving the movement of people and goods across the border between the two countries in the Windsor-Detroit area.

[15] The current cross-border bridge is the Ambassador Bridge. There are approximately 17 traffic signals between Highway 401 in Canada and the Ambassador Bridge. Consequently, in 2011, the MTO started the construction of the Windsor-Essex Parkway, which is a new six-lane urban freeway in Windsor and neighbouring municipalities.¹ This parkway will connect the existing Highway 401 to a proposed customs plaza and international crossing over the Detroit River, and in turn, to the Interstate highway system in Michigan.

[16] In the late summer or early fall of 2009, the Ministry of the Environment (MOE) issued a Notice of Approval, with associated conditions, for the Environmental Assessment (EA) of the proposed parkway. This approval was based, in part, on the

¹ The name of the parkway has been subsequently changed to the Rt. Hon. Herb Gray Parkway. For purposes of this order, it will remain the Windsor-Essex Parkway.

MOE's opinion that all concerns raised during the consultation portion of the EA process had been satisfactorily addressed by the MTO through commitments made during the EA process, or by conditions of approval for the EA, or would be addressed as part of other approvals required for the project. One of the other approvals necessary for the MTO to proceed with the project was the issuance of a Type D permit by the Minister of Natural Resources under the *Endangered Species Act, 2007 (ESA)*.

[17] The *ESA* includes provisions which provide protection for species that have been identified as being endangered or threatened. These identified species may not be killed, harmed, harassed, possessed or transported. In addition, their habitat may not be damaged or destroyed. The Windsor area includes a rare tallgrass prairie habitat that supports a diverse array of plants and animals, some of which are found nowhere else in Canada. The MTO's project would impact eight species classified as endangered or threatened under the *ESA*.

[18] An individual who wishes to engage in a prohibited activity under the *ESA* must be authorized to do so. The *ESA* allows for the issuance of four types of permits for such authorizations, including the Type D category of permit, which is the subject of these appeals.

[19] Section 17(2)(d) of the *ESA* authorizes the Minister of Natural Resources (the Minister) to issue a Type D permit, allowing impacts to species at risk and their habitats, only if certain conditions are met, such as:

- The Minister is of the opinion that the activity will result in significant social or economic benefit to the province;
- The Minister has consulted with an independent² expert on the possible effects of the activity on the species;
- The independent expert has submitted a written report to the Minister, including the expert's opinion on whether the activity will jeopardize the survival or recovery of the species in the province;
- The Minister is of the opinion that the activity will not jeopardize the survival or recovery of the species;
- The Minister is of the opinion that alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted;

² Independent of the person who would be authorized by the permit to engage in the activity.

- The Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; and
- The Lieutenant Governor in Council has approved the issuance of the permit.

[20] According to the ministry, the MTO made an application for the Type D permit, and the following steps were taken with respect to the issuance of the permit for the parkway:

1. The Minister was provided with documentation of an analysis based on consultation with experts regarding potential impacts on eight identified species, alternatives considered, and proposed mitigation of identified adverse impacts. The experts' conclusions and the terms and conditions of the proposed permit involved a consideration of the particular locations of the identified species.
2. The Minister considered the information provided to her, including the information summarized in the analysis document, and recorded her opinion regarding the tests set out in section 17(2)(d). Specifically, the Minister's opinion was:
 - the activities authorized by the permit would result in significant social and economic benefit to the province;
 - the activities authorized by the permit would not jeopardize the survival or recovery of the identified species in Ontario;
 - reasonable alternatives had been considered, including alternatives that would not adversely affect the species, and the best alternative had been adopted; and
 - reasonable steps to minimize adverse effects on individual members of the species were required by conditions of the permit.
3. The Lieutenant Governor approved the issuance of the Type D permit after considering the material that had been provided to the Minister, together with the Minister's opinions on the matters outlined in section 17(2)(d) of the *ESA*.

[21] In February of 2010, the Minister issued a Type D permit to the MTO under the *ESA* to facilitate the construction of the parkway, and authorizing the MTO to impact eight endangered and threatened species.³ Cabinet then approved the permit. The

³ Eastern Foxsnake (Carolinian population), Butler's Gartersnake, Colicroot, Common Hoptree, Dense Blazing Star, Dwarf Hackberry, Kentucky Coffee-tree and Willowleaf Aster.

permit was subsequently amended and a new permit was issued to address changes to the classification of two of the identified species.

[22] Among the records which are the subject matter of these appeals are impact assessment reports authored by a consulting firm (the consultant's reports). The consultant's reports were subsequently reviewed by independent experts, who also produced reports (the expert reports). The expert reports are not at issue in these appeals.

[23] As previously stated, the sole issue in these appeals is whether the mandatory exemption in section 12(1) applies to exempt the records at issue from disclosure.

[24] Section 12(1) reads:

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.

Representations

The ministry

[25] As the MNR was the institution that provided the representations in these appeals, I will refer to them as the ministry for the remainder of this order.

[26] The ministry submits that section 12 applies generally to the records, as the introductory words of section 12(1) set out a broader scope for the application of the exemption than that enumerated in section 12(1)(a) to (f). Accordingly, the ministry states, if a record does not fall within section 12(1)(a) to (f), it may still fall within the introductory words of section 12(1). The ministry submits 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 Cabinet deliberations qualified for exemption whether or not the record falls within one of the enumerated categories in the subparagraphs of section 12(1).

[27] The ministry goes on to argue that where disclosure of a record would reveal the substance of deliberations of Cabinet, an Executive Council or its committees, or permit the drawing of accurate inferences with respect to these deliberations, the mandatory exemption applies, whether or not the record was placed before Cabinet, an Executive Council or its committees.

[28] The ministry submits that in these circumstances, disclosure of the records would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences with respect to these deliberations around the issuance of the Type D permit.

[29] The ministry states:

In this instance the Minister is obliged under the Act⁴ to consult with experts and must take a number of factors into consideration as discussed above. The severed information will figure prominently in the Minister's considerations or the formulation of the Minister's opinion. As these are statutory requirements that are necessary before the issuance of the permit may be approved by the Lieutenant Governor in Council, logic dictates that Cabinet will seek assurances from the Minister that these

⁴ *Endangered Species Act, 2007.*

statutory requirements are met. The Minister in briefing Cabinet on the permit and in providing the assurances will discuss the severed material. As approval of the permit is the issue for Cabinet, logic dictates that the severed material should be prime source material for Minister in her discussions with Cabinet. Accordingly, disclosure of the material would either reveal the substance of Cabinet deliberations or permit an accurate inference with respect to such deliberations; thus the material is exempt under section 12(1) of the *Act*.

The appellant

[30] The appellant states that it specifically requested all documents prepared for the MTO and/or the MNR by a private environmental consulting firm retained by the DRIC Study team (the reports). The reports relate to the potential impact of the bridge project for species at risk along an 11 km access road leading to a customs plaza for the proposed international crossing.

[31] The appellant submits that the reports could not reveal the substance of the deliberations of Cabinet or its committees, and also that the reports were not even before the Minister or Cabinet.

[32] The appellant submits that the ministry has failed to set out a rational basis why the requested information would reveal the substance of Cabinet deliberations, and that the ministry's interpretation of section 12(1) is so expansive that it would preclude the release of any information even remotely or tangentially related to a decision before a Minister or Cabinet.

[33] The appellant states:

In their submission, the Ministries argue that because the Minister may rely on the information in the formation of her opinion under the ESA "logic dictates" that the Minister would have discussed the substance of the material with Cabinet. Either the Minister did review the documents and discuss the substance of the material with Cabinet, or she did not. If she did not, the exemption cannot apply.

[34] The appellant notes that it is involved in legal proceedings⁵ with the MNR and the MTO and that the ministry's factum, which was filed with the Divisional Court, indicates that the reports were never before the Minister at all.

⁵ The legal proceeding is an application for judicial review of the Minister's decision to issue the permit under the *ESA*.

[35] The appellant states:

It is the Minister's opinion that forms the basis for the Minister's and Cabinet's decision, not the [consulting firm] reports, which were not even before her. Moreover, it is the Minister's opinion which would properly be before Cabinet in this instance, not the [consulting firm] reports. There is no evidence that Cabinet considered or deliberated upon any item other than the Minister's opinion, as embodied in the Minister's Record of Decision,⁶ in this instance.

[36] The appellant goes on to argue that the consultant's reports are natural heritage reports, containing a factual assessment of potential impacts of the access road, not policy recommendations. This information, the appellant states, is provided as background information, even if it is before Cabinet, which is not the case in this instance, is not exempt under section 12(1).⁷ Similarly, the appellant submits, section 12(1) does not apply where there is only a speculative link between a record and a potential Cabinet submission which might be derived from it.⁸

[37] The appellant further submits that:

- The ministry's claim that the disclosure of hundreds of pages of scientific information would reveal or are capable of revealing the deliberations is sweeping in nature and not plausible;
- Independent experts reviewed the consultant's reports and produced independent expert reports, which were publicly disclosed as part of the consultation process prior to the issuance of the permit. The independent expert reports were before the Minister in making her decision under the *ESA*. The consultant's reports (the subject matter of this appeal) were not before the Minister; and
- The permit itself was made publicly available and can be found online.⁹ Given the requirement under the *ESA* that Cabinet approve the issuance of the permit, it is more likely that the permit itself would reveal Cabinet deliberations than the reports.

⁶ This document formed part of the ministries' submissions before the Divisional Court.

⁷ Order P-323.

⁸ Order P-424.

⁹ http://partnershipborderstudy.com/pdf/AY-D-001-09_RedactedCopy.pdf. The permit, including appendices, is 61 pages in length.

The ministry's reply

[38] In reply, the ministry submits that an Order in Council approving the permit was obtained January 18, 2010. Cabinet approved the granting of the Order in Council. The ministry submits that information from reports was summarized in the Cabinet Submission relating to the request for an Order in Council under a heading "Analysis of Type D Permit Requirements," and that while the reports were not appended to the submission, release of the reports would reveal the substance of a Cabinet Submission and thus the deliberations of Cabinet. Accordingly, contrary to the assertion by the appellant, the ministry states, it has not taken an expansive interpretation of the exemption as there is a clear link between the records and the deliberations of Cabinet.

[39] I asked the ministry to comment on the appellant's assertion that the expert reports had been publicly disclosed. The ministry advised that severed versions of the expert reports were provided to specific individuals, at their request, in 2009. The ministry also advised that the consultant's reports have not been publicly disclosed, nor were they disclosed to the appellant as part of the judicial review.

Analysis and Findings

[40] 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).¹⁰

[41] 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.¹¹

[42] There are over 950 pages of records in these appeals. As previously stated, the ministry has advised that information from "reports" was summarized in the approximately 20-page Cabinet Submission relating to the request for an Order in Council under the heading "Analysis of Type D Permit Requirements," and that while the reports were not appended to the submission, release of the reports would reveal the substance of a Cabinet Submission. The ministry does not indicate whether the "information from reports" contained in the Cabinet Submission refers to information gleaned from the consultant's reports,¹² or the experts' reports, or both. I do not have sufficient evidence before me to conclude with certainty that the summary provided to

¹⁰ Orders P-22, P-1570, PO-2320.

¹¹ Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725.

¹² The consultant's reports are the majority of the records at issue.

Cabinet is a summary of the consultant's reports and may, in fact, be a summary of the experts' reports. However, even if I came to the conclusion that the summary put before Cabinet contained a summary of the consultant's reports, it is impossible for me to determine which portions of over 950 pages of consultant's reports and other records at issue were contained in the summary, as the ministry has not provided those particulars.

[43] If a record is actually placed before Cabinet or a committee, that in itself is strong, but not necessarily determinative evidence that disclosing its content could reveal the substance of deliberations. However, as the ministry makes clear, the records were not placed before Cabinet. Therefore, in order to meet the requirements of the introductory wording of section 12(1) the ministry must provide evidence and argument sufficient to establish a linkage between the content of the records and the actual substance of Cabinet deliberations. In my view, the ministry has failed to do so here. The ministry has provided general representations that there is a link between the summary placed before Cabinet and the entire contents of the consultant's reports and other records at issue, without providing specific information about which portions of the consultant's report were contained in the summary.

[44] It is also significant that the ministry has not provided me with the Cabinet Submission that was actually placed before Cabinet or its Committees to support its position regarding the records at issue. In my view, the ability to compare the content of the records to the actual Cabinet Submission considered in the permit application process would be a logical and more compelling evidentiary basis for arguing the application of the introductory wording of section 12(1) than the generalized submissions provided by the ministry.

[45] Consequently, I find that the ministry has not provided sufficient evidence to satisfy me that the contents of the records would reveal the substance of the deliberations of Cabinet or one of its committees, or that its disclosure would permit the drawing of accurate inferences with respect to these deliberations. Therefore, I find that the records are not exempt under the introductory wording of section 12(1) of the *Act*. This finding applies to the records of both ministries, as the Ministry of Transportation indicated that it was relying on the representations of the Ministry of Natural Resources.

ORDER:

1. I order the Ministry of Natural Resources and the Ministry of Transportation to disclose all of the records to the appellant by **June 19, 2013** but not before **June 14, 2013**, except those portions of the records that were withheld under section 21.1 of the *Act*.

2. In order to verify compliance with this order, I reserve the right to require the ministries to provide me with a copy of the record disclosed to the appellant pursuant to provision 1.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ May 14, 2013