

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3359

Appeal PA13-363

Ministry of Finance

July 3, 2014

Summary: The appellant made a request to the ministry for records from certain identified calendar years relating to the possibility of implementing photo radar. The ministry located a number of responsive records and denied access to them on the basis of the mandatory exemption in section 12(1) of the *Act* (Cabinet records). This order upholds the ministry's decision that section 12(1) applies, and dismisses the appeal.

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

OVERVIEW:

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

1. Final versions of any briefing notes created regarding the possibility of implementing Photo Radar produced during the calendar years of 2011, 2012 or 2013; and
2. Any cost and revenue estimates from the implementation of photo radar produced during the calendar years of 2011, 2012 or 2013.

[2] In response to the request, the ministry advised the appellant that the request had been forwarded, in part, for processing to two identified ministries in accordance with section 25(1) of the *Act*, and that it would also be processing the request, in part.

[3] The ministry then issued an access decision in which it advised the appellant that a number of pages of responsive records had been identified, and that access to the records was denied on the basis of the exemption in section 12 (Cabinet records) of the *Act*. The ministry provided the appellant with an index of the responsive records, describing them and identifying which of the exemptions in sections 12(1)(a), (b) and/or (e) apply to each of them.

[4] The appellant appealed the ministry's decision.

[5] During mediation, the ministry provided a correction of the number of pages of records. The ministry also advised that the withheld records do not all relate to the topic of photo radar, and that only portions of the records are responsive to the request. The ministry provided this office with a revised index, correcting the number of pages and indicating which portions of which records are responsive to the request.

[6] Also during mediation, the appellant confirmed that he was not pursuing access to the non-responsive information contained in the withheld records, and that he is only pursuing access to the undisclosed photo radar information.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry, initially, and received representations in response. In its representations, the ministry confirms that the responsive records consist of portions of 15 pages from seven records.

[8] I then sent the Notice of Inquiry, along with a copy of the representations of the ministry (including two affidavits and other attachments) to the appellant. The appellant also provided representations in response.

[9] In this order, the ministry's decision that the records are exempt from disclosure under section 12(1) is upheld.

RECORDS:

[10] The records at issue consist of the responsive photo radar information contained in seven records, as identified in the Index of Records provided by the ministry. They consist of the responsive portions of 15 pages.

DISCUSSION:

[11] The only issue in this appeal is whether the mandatory exemption in section 12(1) of the *Act* applies to exempt the records at issue from disclosure. That section 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.

[12] 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).¹

[13] 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.²

[14] 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.³

[15] Section 12(2) provides two exceptions to the application of the exemption in section 12(1). Section 12(2) reads:

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

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[16] 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.⁴

Representations

The ministry

[17] The ministry takes the position that the records qualify for exemption under the introductory wording of section 12(1) of the *Act*. It then divides the responsive records into two categories - either briefing notes or slide presentations or drafts thereof - and

¹ Orders P-22, P-1570, PO-2320.

² Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725.

³ Order PO-2320.

⁴ Orders P-771, P-1146 and PO-2554.

provides representations in support of its position that the records in each of these two categories qualify for exemption as follows:

Records 1, 3, 4 and 5 – briefing notes

[18] The ministry states that Records 1, 3, 4 and 5 are briefing notes that relate to Cabinet submissions on two identified dates. It states that these submissions were made to Treasury Board, a Cabinet Committee, and then states:

With respect to Records 1, 4 and 5, the ... mandatory exemption in section 12(1) applies because these Records "have gone to Cabinet and to Treasury Board, a Committee of Cabinet."

[19] In support of its position, the ministry refers to two affidavits, sworn by two ministry employees. It states that these individuals are not members of Treasury Board, but are familiar with the records at issue, as they presented them to Treasury Board and attended the Cabinet meetings where the deliberations took place.

[20] The ministry then notes that, as stated in one of the affidavits, Record 3 is a version of a record that did not go to Treasury Board, but that is identical to the material that was submitted to and deliberated by Treasury Board in Record 5. The ministry then argues that Record 3 qualifies for exemption under section 12(1) as it reflects the document that was presented to Treasury Board, and revealing it would "provide for an accurate inference of deliberations of a Cabinet Committee, namely Treasury Board."

[21] The ministry then argues that release of the responsive portions of these four records would reveal the substance of deliberations of Cabinet, as the information at issue formed the basis of Cabinet discussions. As a result, the ministry submits that the mandatory exemption in subsection 12(1) applies to them, as they were "prepared for the purpose of briefing the Minister and were brought to Treasury Board, a Cabinet Committee for deliberation."

Records 2, 6 and 7 – slide presentations

[22] The ministry states that Records 2, 6 and 7 are briefing decks or presentation slides that relate to Cabinet Submissions made on three identified dates. The ministry again refers to the affidavits sworn by the two ministry employees who are familiar with the records at issue. It also refers to one of the affidavits which confirms that the affiant is aware that Records 2 and 6 were submitted to and deliberated by Treasury Board, a Cabinet Committee, because she attended the meetings as an employee of the ministry. The ministry therefore submits that the mandatory exemption in subsection 12(1) of the *Act* applies to Records 2 and 6, since "the evidence above shows they have gone to Treasury Board, a Committee of Cabinet."

[23] With respect to Record 7, the ministry submits that this record is identical to Record 6, and “reflects the document that was presented to Treasury Board.” As a result, it submits that this record also qualifies for exemption under subsection 12(1), because revealing it would allow one to make an accurate inference as to the deliberations of a Cabinet Committee.

[24] In conclusion, the ministry submits that all of the records at issue either went to Treasury Board or are identical to the records that went to Treasury Board and, as a result, qualify for exemption under section 12(1) of the *Act*.

[25] With respect to the application of this exemption and the possible application of the exception in section 12(2)(b), the ministry acknowledges that the Cabinet privilege is not absolute, and identifies a number of factors it considered in deciding to apply the exemption, and deciding not to seek the consent of executive committee to disclose the records.

The appellant

[26] The appellant begins by stating that, based on the affidavits provided by the ministry, he agrees that the records at issue are “Cabinet Records” for the purposes of the *Act*, and that section 12(1) applies to them. He also acknowledges that they are not more than 20 years old, and that the exception in section 12(1)(a) does not apply.

[27] The appellant then refers to certain factors which he believes ought to apply, and should result in disclosure of the records. Although he acknowledges that the “public interest override” in section 23 of the *Act* does not apply to section 12(1), he provides representations in support of his position that there is a “public interest” in the release of these records relating to photo radar. He questions whether this topic is a “live issue” at the cabinet table, and refers to certain factors which he believes ought to be considered by the ministry, and ought to result in the ministry deciding to disclose the records.

Findings

[28] On my review of the records at issue and the representations of the parties, I am satisfied that the records are exempt under the introductory wording of section 12(1). The evidence confirms that five of the seven records were submitted to Treasury Board, a Committee of Cabinet, and that the other two records contain information that is identical to the material that was submitted to and deliberated by Treasury Board. Accordingly, I conclude that the responsive portions of all seven of the records at issue are exempt under the introductory wording in section 12(1).

[29] With respect to the exceptions in section 12(2), it is clear that section 12(2)(a) does not apply, owing to the age of the records. In addition, I am satisfied that Cabinet has not consented to the disclosure of these records under section 12(2)(b). I appreciate the appellant's interest in access to these records, and his position that there is a possible public interest in disclosure of them; however, I accept the ministry's exercise of discretion, as outlined in its representations, with respect to whether to seek Cabinet's consent under section 12(2)(b).

[30] As the public interest override does not apply to the section 12 exemption, I am also not able to consider the application of section 23 to these records.

ORDER:

I uphold the decision of the ministry that the records qualify for exemption under section 12(1) of the *Act*, and dismiss this appeal.

Original signed by: _____

Frank DeVries
Adjudicator

_____ July 3, 2014