

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3501

Appeal PA14-20

Ministry of Natural Resources and Forestry

June 23, 2015

Summary: The appellant sought records relating to the Minister and/or Deputy Minister's opinion regarding the enactment of a regulation under the *Endangered Species Act*, including information considered by the Minister and/or Deputy Minister when rendering their opinion. In response, the ministry issued a decision to the appellant granting partial access to the records. The ministry relied on sections 12 (Cabinet records), 13 (advice to government) and 21 (personal information) of the *Freedom of Information and Protection of Privacy Act* to deny access to the withheld records. In this order, the adjudicator orders disclosure of one of the records, and upholds the ministry's decision to withhold the remaining records.

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

OVERVIEW:

[1] The appellant made a request to the Ministry of Natural Resources (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

... all records in the possession of the [ministry] that were provided to, created by or otherwise in the possession of either or both of the Minister of Natural Resources and the Deputy Minister of Natural Resources in

relation to the enactment of regulations under the *Endangered Species Act* [*ESA*]¹ (enacted as Ontario Regulation 176/13 on May 15, 2013).

The time period for this request is December 5, 2012 to May 15, 2013.

[2] The appellant subsequently revised its request to the following:

... all records in the possession of the Minister of Natural Resources and/or the Deputy Minister of Natural Resources in relation to opinions rendered under *Endangered Species Act* by the Minister or the Deputy Minister for species that may be affected by the enactment of a regulation under the Act (Ontario Regulation 176/13 enacted on May 15, 2013). To clarify, we seek not only the opinions themselves but the information specifically considered by these two individuals at the time they made rendered [sic] their opinions. The time period for this request remains December 5, 2012 to May 15, 2013.

[3] The background to this request is described in the submissions of the ministry and the appellant. As part of a direction in the 2012 Ontario Budget, the ministry changed its approach to the protection of endangered species, moving from a system based on permits and approvals of business activities affecting endangered species, to a system based on regulation. Thus, certain activities that previously required permits are now governed by rules set out in regulation. Under section 57(1) of the *ESA*, if such regulations are before Cabinet for approval, and the Minister forms the opinion that the proposed regulation is likely to jeopardize the survival of, or have a significant adverse effect, on species at risk, additional consultation and public notification is required.

[4] In January 2013, the ministry made public the details of proposed regulatory amendments under the *ESA*. The ministry's Species at Risk Branch considered the provisions of the proposed regulation with respect to the requirements of section 57(1) and concluded that the regulation was not likely to result in the harms to affected species as described in that section. On May 1, 2013, the Minister signed a determination to that effect. The regulations were approved by the Legislation and Regulations Committee on May 13, 2013 and by Cabinet on May 15, 2013.

[5] As indicated above, the requester seeks information related to the Minister's May 1, 2013 determination with respect to these regulatory amendments.

[6] In response to the revised request, the ministry issued a fee estimate and interim decision letter in which it cited a number of exemptions that it expected might apply to an estimated 3,400 pages of responsive records. The ministry also provided fee

¹ SO 2007, c 6.

estimates based on access to the records in hard copy and on CD-ROM, and requested a 50% deposit to process the request, which the appellant paid.

[7] The appellant subsequently narrowed the time period for its request to April 15, 2013 to May 1, 2013.

[8] The ministry issued a decision granting full access to some records and denying access to other records, in part or in whole, on the basis of the exemptions at sections 12 (Cabinet records), 13 (advice to government) and 21 (personal privacy). The ministry also denied access to one portion of one page on the basis it was not relevant to the appellant's request. With its decision the ministry provided the appellant with an index of records indicating its decision on access and the exemptions claimed for each record.

[9] The appellant appealed the ministry's decision to this office. In its letter of appeal the appellant raised the possible application of the public interest override to the records.

[10] During the mediation stage of the appeal process, the appellant advised that it did not seek access to the portion of the records withheld pursuant to section 21 or to the portion identified as being not relevant to its request. As a result, the portions of the records withheld on these bases (on page 150 of record 6 and page 130 of record 4) are not at issue in this appeal.

[11] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*. I sought and received representations from the ministry and the appellant.

[12] For the reasons that follow, I order disclosure of record 1. I uphold the ministry's application of the section 12(1) exemption to the remaining records.

RECORDS:

[13] The following records are at issue in this appeal:

Record #	Record ID	Description of Records	Exemptions Claimed
1	A0203206	a) Email chain b) Minister's explanatory note	12(1) and 12(1)(b)
2	A0203796	a) Cover email b) Minister's draft speaking notes c) Inter-ministerial consultation summary	12(1)(e) and 12(1)(b)
3	A0203944	a) Email chain b) Memorandum	12(1)

4	A0203842	a) Email chain b) Memorandum	12(1) and 12(1)(a)
5	A0203846	a) Email chain b) Slide deck	12(1)
6	A0207938	a) Email chain	12(1) and 12(1)(e)
7	A0203805	a) Cover email b) Slide deck c) Communications plan	12(1) and 13
8	A0293808	a) Cover email b) Slide deck c) Communications plan d) Cover note for Cabinet submission e) Questions and Answers f) Minister's speaking notes	12(1), 12(1)(b) and 13

ISSUES:

- A. Does the mandatory exemption at section 12 apply to the records?
- B. Does the discretionary exemption at section 13(1) apply to the records?
- C. Did the institution exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

CABINET RECORDS

Issue A: Does the mandatory exemption at section 12 apply to the records?

[14] The ministry has relied on the introductory wording of section 12(1), as well as the exemptions in sections 12(1)(a), (b) and (e) to deny access to numerous records. Section 12, providing an exemption from disclosure for Cabinet records, reads as follows:

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.

[15] 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).² 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

² Orders P-22, P-331, P-894, P-1570.

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.³

Representations

The ministry

[16] The ministry submits that the introductory wording in section 12(1) provides for a broader exemption than that enumerated in sections 12(1)(a) to (f). It submits that section 12(1) applies to any record that would reveal the substance of Cabinet deliberations, or permit the drawing of accurate inferences with respect to these deliberations. The ministry also submits that section 12(1) may apply to records that were never actually put before Cabinet or its committees.

[17] The ministry's record-specific submissions are described in my analysis below.

The appellant

[18] The appellant submits that during the period of its request, Cabinet was considering a regulation under section 55(1) of the *ESA*. The appellant notes that section 57(1) of the *ESA* requires the Minister to consider whether the proposed regulation is likely to jeopardize endangered or threatened species. Therefore, the appellant submits that there must be records documenting whether the Minister formed the opinion required under section 57(1) of the *ESA*.

[19] In relation to section 12, the appellant submits that the information in the records at issue would generally be factual and scientific in nature, and would relate to the formation of a scientific opinion. The appellant claims that there is nothing in the ministry's descriptions of the records to suggest that the actual scientific opinion on the potential effect of the proposed regulation was put before Cabinet or prepared in anticipation of Cabinet discussions.

[20] The appellant also submits that in order to rely on the section 12 exemption, the ministry should have to submit evidence such as a recording of the deliberations, minutes of a Cabinet meeting, or the testimony of a person present at the meeting to determine what deliberations actually took place during the meeting.

The ministry

[21] In its reply, the ministry states that the appellant's assertion that section 12 can only apply where an institution provides evidence of what Cabinet deliberations took place would defeat the purpose of section 12. The ministry argues that since the *Act*

³ Orders P-361, P-604, P-901, P-1678, PO-1725.

prohibits institutions from disclosing records that would reveal Cabinet deliberations, there would be no way to meet the evidentiary standard proposed by the appellant without violating the *Act*.

Analysis and findings

[22] As noted earlier, the ministry claims the records at issue fall under the following mandatory exemptions: sections 12(1), 12(1)(a), 12(1)(b), and 12(1)(e). I will provide an overview of the specific sections claimed by the ministry, and then determine if the section(s) claimed by the ministry apply to each record at issue. As section 12(1) is a mandatory exemption, I will also consider whether any of the other provisions of section 12(1) apply to the records at issue.

[23] As indicated above, 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).⁴ Further, 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.⁵

[24] 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.⁶

[25] In regard to section 12(1)(a), the word “agenda” means a specific record created as an official document of Cabinet Office that identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. An entry appearing in another record that describes the subject matter of an item considered or to be considered by Cabinet is not normally considered an agenda.⁷

[26] 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 remain exempt after a decision is made.⁸

[27] Section 12(1)(e) contemplates the exemption of records prepared in advance of the types of meetings referred to in the section, and has a prospective application. This

⁴ Orders P-22, P-1570 and PO-2320.

⁵ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁶ Order PO-2320.

⁷ Order PO-1725.

⁸ Order PO-2320, PO-2554, PO-2677 and PO-2725.

section 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.⁹

[28] I will now consider the applicability of the specific section 12 exemptions claimed by the ministry for each record at issue.

Record 1

[29] The ministry describes this record as an email chain between ministry staff attaching explanatory notes to the Minister. It submits that, as this record comprised part of the package that "would be" sent to the Legislative and Regulations Committee (LRC) of Cabinet, this record falls within section 12(1)(b) as a record containing recommendations submitted to a Cabinet committee, or section 12(1) as the record would reveal the substance of Cabinet committee discussions.

[30] On my review of the record and the evidence before me, I am unable to conclude that it contains recommendations submitted to a committee of Cabinet, or that it would reveal the substance of discussions of Cabinet. The attachment to Record 1, dated April 29, 2013, is an unsigned draft of the Minister's opinion under section 57(1) of the *ESA*. It contains the analysis of the Species at Risk Branch of the ministry on the applicability of section 57(1) to the proposed regulation. The Minister subsequently signed the determination on May 1, 2013, under the heading "Minister's Opinion and Decision".

[31] Regardless of whether record 1 was part of a package forwarded to a committee of Cabinet, its content was not a matter of Cabinet discussion. While the regulatory amendments were for Cabinet to discuss and approve, the determination under section 57(1) was, by statute, for the Minister to make. As described by the appellant in its submissions, "it was a statutory condition precedent to Cabinet making a valid regulation that the Minister must first consider whether the proposed regulation is likely to jeopardize endangered or threatened species." This record contains the Minister's determination that the proposed regulatory changes do not pose the risks to endangered species described in section 57(1) of the *ESA*.

[32] In addition, the records themselves confirm that the matter under consideration by Cabinet and its committees at this time was the proposed regulation. The slide decks and speaking notes prepared for the Minister in addressing the matter at Cabinet do not suggest that the applicability of section 57(1) was intended to be or was the subject of Cabinet deliberations.

⁹ Orders P-1182, PO-2554, PO-2677, and PO-2725.

[33] The email chain to which the determination is attached neither contains recommendations submitted to Cabinet nor would reveal the substance of Cabinet deliberations.

[34] I therefore conclude that section 12(1) does not apply to exempt record 1 from disclosure. As the ministry does not claim the application of any other exemption under the *Act*, I will order its disclosure.

Record 2

[35] The ministry describes this record as a cover email with attachments, including the Minister's draft speaking notes for Cabinet and a table that summarizes the results of inter-ministerial consultation regarding the proposed amendment. The ministry claims that section 12(1)(e) applies to the Minister's speaking notes, and that section 12(1)(b) applies to both of the attachments, as they were intended to be added to binders prepared for a Cabinet committee.

[36] On my review of record 2, I find that the record qualifies for exemption under section 12(1). It is unnecessary to determine whether it qualifies for exemption under section 12(1)(c). I find that all of the documents in record 2 are exempt under the introductory wording to section 12(1), as their disclosure would reveal the substance of Cabinet deliberations, or at least permit the drawing of accurate inferences with respect to these deliberations.

Record 3

[37] The ministry describes this record as an email chain attaching a memorandum from the Deputy Minister of Natural Resources to the Deputy Minister of Energy. The ministry submits that as the memorandum contains much of the same information as the inter-ministerial consultation table in record 2, the record falls within section 12(1).

[38] On my review of the record, I agree with the ministry that its content has been incorporated into the inter-ministerial consultation table in record 2 and thus falls under section 12(1) generally. I also find that this record was used for or reflects consultation between ministers of the Crown relating to the making of government decisions and, therefore, falls more specifically under section 12(1)(d).

Record 4

[39] This record is an email chain among staff at the ministry attaching a memorandum from a Director of the Ministry of Environment setting out comments on the proposed regulatory changes. This memorandum was sent in response to the memorandum in record 3. The ministry submits that this record falls within section 12(1)(a) as it formed part of a Cabinet submission. Additionally, the ministry submits

that as the memorandum contains much of the same information as the inter-ministerial consultation table in record 2, the record falls within section 12(1).

[40] Two portions of the email chain are not responsive to the appellant's request and are therefore not at issue.

[41] While I do not agree with the ministry's position that record 4 is exempt from disclosure under section 12(1)(a), I am satisfied that disclosure of record 4 would reveal the substance of Cabinet deliberations and is therefore exempt under the introductory wording of section 12(1). It is also exempt under section 12(1)(d) as it is a record used for or reflecting consultation among ministers of the Crown on matters relating to the consideration of the proposed regulation.

Record 5

[42] The ministry describes this record as an email chain attaching a slide deck used by the Minister and a senior member of ministry management when giving a presentation at caucus. The ministry submits that section 12 generally applies to this record as the slide deck contains the proposals for amending the regulations to be submitted to Cabinet, and would reveal the substance of Cabinet deliberations.

[43] On my review of record 5, I note that the information contained within the slide deck in this record is substantially similar to information contained within the slide deck in record 8, which, I find below, was submitted to a committee of Cabinet. Although not submitted to Cabinet, record 5 therefore contains information substantially similar to that set out in a document that was submitted to Cabinet. Its disclosure would permit the drawing of accurate inferences with respect to Cabinet deliberations and is therefore exempt under the introductory wording of section 12(1).¹⁰

Record 6

[44] The ministry describes this record as an email chain between ministry staff and staff from the Premier's Office discussing the Minister's proposed comments to Cabinet. The ministry submits that section 12(1) applies to this record as it would reveal the deliberations of Cabinet. The ministry also claims that the record is exempt from disclosure under section 12(1)(e), as it is a record prepared to brief a minister in relation to a matter proposed to be brought before Cabinet.

[45] Upon review of the record, I am satisfied that the record reveals the substance of deliberations at Cabinet, and is exempt under section 12(1) generally.

¹⁰ See Orders PO-2802-I and PO-3395-I.

Record 7

[46] The ministry describes this record as a cover email attaching a slide deck used in a presentation to a Cabinet committee. The ministry submits that section 12(1) applies to this record as it would disclose the substance of the Cabinet committee's deliberations.

[47] On my review of the record, I am satisfied that its disclosure would reveal the substance of deliberations of a Cabinet committee and is exempt under section 12(1).

Record 8

[48] The ministry describes this record as a cover email attaching several documents: the slide deck described in record 7, a communications "snapshot", a cover note for the Cabinet submission, a question and answer document, and the Minister's speaking notes for the committee. The cover email indicates that the first two attached documents were submitted to the Cabinet Office, whereas the last three attached documents were "internal".

[49] The ministry argues that the record is generally exempt from disclosure as it discloses the substance of a Cabinet committee's deliberations. The ministry also submits that the "Cover Note for Cabinet Submission" is specifically exempt under section 12(1)(b) as it contains policy recommendations prepared for submission to Cabinet.

[50] The attached slide deck and communications plan are duplicates of documents contained in record 7, which I have determined to be exempt from disclosure under section 12(1).

[51] As the cover email indicates that the "Cover Note for Cabinet Submission" is an "internal" document, it does not appear that it was submitted to Cabinet, or prepared for the purpose of submitting to Cabinet, as contemplated in section 12(1)(b). However, its content is substantially similar to that found in other records that I have found exempt, including records 1 and 2. I am satisfied that its disclosure would reveal the substance of deliberations of Cabinet and its committees and I find that this document is also exempt under the introductory wording to section 12(1).

[52] The Minister's question and answer sheet and speaking notes contain the Minister's submissions to a Cabinet committee, and would reveal the substance of Cabinet committee deliberations, or would at least permit the drawing of accurate inferences with respect to Cabinet committee deliberations. Accordingly, I find that these documents are also exempt under section 12(1). As a result, all of the documents included in record 8 fall within the introductory wording to section 12(1) and are exempt from disclosure.

[53] As I have found records 2 to 8 exempt under section 12(1), it is not necessary to consider whether they are also exempt under section 13. Further, it is unnecessary to consider the appellant's arguments under section 23 (the public interest override), as section 23 does not apply to records found exempt under the Cabinet records exemption

[54] I have considered the appellant's arguments that additional evidence, in the form of a recording of Cabinet deliberations or minutes of its meetings, is necessary in order to determine whether a record would reveal the substance of its deliberations. I find such additional evidence unnecessary. The material before me, including the submissions of the ministry and the appellant and the records themselves, provide a sufficient basis for my determinations under section 12(1).

[55] I have also considered whether the records I have found exempt under section 12(1) can be reasonably severed to allow for disclosure of information that is not exempt. I am satisfied that any attempts to sever the records would serve no meaningful purpose as the resulting excerpts would be insignificant snippets, or meaningless in the context of the appellant's stated purpose of seeking information about the regulation, and more specifically, the Minister's opinion under section 57(1) of the *ESA*.

ORDER:

1. I order the ministry to provide the appellant with a copy of record 1 in its entirety by **July 24, 2015**.
2. I uphold the ministry's decision to deny access to the remaining records at issue.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original Signed By: _____
Sherry Liang
Assistant Commissioner

_____ June 23, 2015