

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3657

Appeals PA15-205-2 and PA15-241-2 and PA15-242-2

Ontario Electricity Financial Corporation

September 30, 2016

Summary: The Ontario Electricity Financial Corporation (the OEFC) received three requests pursuant to the *Freedom of Information and Protection of Privacy Act (FIPPA)* for information used in the deliberations to put in place a regulation under the *Electricity Act, 1998* to govern the Minister of Finance's annual determination and publication of the residual stranded debt amount. This order determines that the introductory wording of the mandatory section 12(1) Cabinet records exemption applies to exempt the records.

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

BACKGROUND:

[1] The Ontario Electricity Financial Corporation (the OEFC) received three requests pursuant to the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to the following information:

1. In the 2011 Auditor General report on OEFC, the report discusses the formation of OEFC, noting that, "the government developed a long-term plan (around the time OEFC was created) to provide the OEFC with revenue streams to service the existing debt and ultimately retire the stranded debt." (p. 122) Please provide a copy of the "long-term plan" referred to by the Auditor General in the referenced remark.

2. In its 2003/2004 annual report OEFC states, "The long-term plan supports estimates that OEFC's obligations will likely be defeased in the years ranging from 2012 to 2020." Please provide a copy of the long term plan referred to in this referenced statement.
3. In its 2010/2011 annual report OEFC states, "The stranded debt will likely be defeased between 2015 and 2018." (p.2) Please provide a copy of the long term plan referred to in this referenced statement.

[2] In its decisions, the OEFC denied access to the responsive records pursuant to section 22 of the *Act* as they were available online. The requester, now the appellant, appealed these decisions on the basis that further records should exist and appeals PA15-205, PA15-241 and PA15-242 were opened to deal with these matters.

[3] The appellant advised the mediator that he was seeking the detailed financial plan, including projected revenue streams broken out by source that supported specific quoted defeasance date ranges. The OEFC then conducted further searches for records. The OEFC issued revised decisions dated July 31, 2015 and advised that additional records were located. Access to these records was denied pursuant to sections 12 (Cabinet records), 13 (advice or recommendations), 17 (third party information), and 18 (economic and other interests) of the *Act*. As the OEFC's search was no longer at issue, appeals PA15-205, PA15-241, and PA15-242 were closed.

[4] The appellant appealed the decisions dated July 31, 2015 and appeal files PA15-205-2, PA15-241-2, and PA15-242-2 were opened.

[5] As mediation did not resolve the issues in these appeals, these matters proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought the representations of the OEFC and two affected parties initially.

[6] The OEFC then requested that the section 12 Cabinet records exemption be adjudicated first, and that the remaining exemptions only be adjudicated upon if section 12 did not apply to exempt all of the information at issue in the records. This request of the OEFC was approved and the affected parties were informed of this decision.

[7] As a result, the affected parties were not required at this stage of the inquiry to provide representations on the applicability of the third party information exemption in section 17 to the records. The affected parties were sent a Notice of Inquiry seeking their representations on section 12. They did not provide representations on the section 12 exemption.

[8] The OEFC provided representations on the section 12 exemption in response to the Notice of Inquiry sent to it. These representations were then sent to the appellant,

along with a Notice of Inquiry. Portions of the OEFC's representations were withheld due to confidentiality concerns in accordance with section 7 of the Information and Privacy Commissioner of Ontario's (the "IPC's") *Code of Procedure and Practice Direction 7*. The appellant did not provide representations in response to the OEFC's representations.

[9] In this order, I uphold the application of the mandatory section 12(1) exemption to the records.

RECORDS:

[10] The records at issue are:

- a presentation to the OEFC board, dated December 1999, in appeal file PA15-205-2;
- two briefing notes with attachments, dated June 3 and 25, 2004, in appeal file PA15-241-2; and
- three briefing notes and attachments, dated June 2011, in file PA15-242-2.

[11] More specifically, the records are described in the non-confidential representations of the OEFC, as follows:¹

Appeal PA15-205-2

Record No.	Description
1.1	Slide deck, Presentation to the OEFC Board: Ontario Electricity Financial Corporation, December 10, 1999.

Appeal PA15-242-2

2.1	Briefing notes and attachments, June 2011: <ul style="list-style-type: none"> • Briefing Note, Electricity Finance Branch, June 13, 2011
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¹ The OEFC provided both confidential and non-confidential representations. In this order I will only be referring to the non-confidential representations.

	<ul style="list-style-type: none"> • OEFC attachment based on June 2010 and June 2011 Base Case • Table from June 7, 2010 to June 13, 2011, dated June 13, 2011 • Table Base Case June 13, 2011
2.2	<p>Briefing notes and attachments, June 2011:</p> <ul style="list-style-type: none"> • Briefing Note, Electricity Finance Branch, June 13, 2011 • OEFC dated June 13, 2011 based on June 2011 Base Case, and based on June 2010 Base Case • OEFC Notes • Table, From June 7, 2010 to June 13, 2011, dated June 13, 2011 • Tables, Total • Table, Base Case June 13, 2011 • Spreadsheet page, Model Summary Sheet - Base Case 2011
2.3	<p>Memo with attachments. Dated June 16, 2011:</p> <ul style="list-style-type: none"> • Covering Memo, from the Ontario Financing Authority, Electricity Finance Branch (June 16, 2011) • OEFC dated June 13, 2011 based on June 2011 Base Case, and based on June 2010 Base Case • OEFC Notes dated as June 13, 2011 • Briefing Note, Electricity Finance Branch, June 13, 2011 • Table, From June 7, 2010 to June 13, 2011, dated June 13, 2011 • Tables • • Spreadsheet page, Model Summary Sheet – Base Case 2011

Appeal PA15-241-2

Record No.	Sub-Record	

	No.	Description
3.1	-	Briefing notes and attachments, June 25, 2004: <ul style="list-style-type: none"> • OEFC, Electricity Finance Branch, June 25, 2004 based on the 2004 Base Case • Table, Base Case June 3, 2004
3.2	3.2.1	• Memo from the Ontario Financing Authority, Electricity Finance Branch, June 3, 2004
	3.2.2	• OEFC dated June 3, 2004 based on June 2003 Base Case, and based on June 2004 Base Case
	3.2.3	• OEFC dated as June 3, 2004.
	3.2.4	• Table from June 19, 2003 to June 3, 2004 • Preliminary Draft. Dated June 3, 2004.
	3.2.5	• Tables includes Total - Dated June 3, 2004
	3.2.6	• Spreadsheet: Model Summary Sheet Base Case 2004, Dated June 3, 2004
	3.2.7	• Printed June 3, 2004
	3.2.8	• Spreadsheet: Printed June 3, 2004
	3.2.9	• Draft Briefing Note, Dated June 3, 2004

DISCUSSION:

Does the mandatory Cabinet records exemption at section 12(1) apply to the records?

[12] 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.

[13] The OEFC provided specific details about the actual information in the records, much of which was confidential. In addition to its representations, it also provided a detailed affidavit from the Assistant Deputy Minister (ADM) of the Corporate and Electricity Finance Division (CEFD) of the Ontario Financing Authority (OFA), who is also the Vice President of the OEFC.²

[14] By way of background, the OEFC states it is a Crown agency whose mandate includes servicing and retiring the debt and other liabilities of the former Ontario Hydro. The OEFC states that it inherited an estimated \$7.8 billion in residual stranded debt (RSD) from the former Ontario Hydro when the Ontario electricity sector was restructured on April 1, 1999. The OEFC retains the services of the OFA and Ministry of Finance (MOF) to carry out its daily operations.

² This individual has also held the position of Director, Electricity Finance Branch in the CEFD of the OFA. In this capacity, he was primarily responsible for overseeing the Branch's functions. He was also previously a Manager and then Senior Manager in the CEFD and a Senior Economist in the Ontario Electricity Restructuring Secretariat (OERS) of the Ministry of Finance until OERS was restructured into the CEFD.

[15] The OEFC states that in response to the 2011 Auditor General's Report,³ the government took efforts to put in place a regulation under the *Electricity Act, 1998* (the *EA*) to govern the Minister of Finance's annual determination and publication of the RSD amount. It states that:

The process for putting in place the regulation included a posting on Ontario's Regulatory Registry in December 2011, various briefings for the Minister of Finance, Fiscal Prep Committee and Treasury Board/Management Board of Cabinet (TB/MBC) for policy approval, and submitting the proposed regulation to the Legislation and Regulations Committee [LRC] for approval. The submission on the proposed regulation was reviewed by TB/MBC on February 29, 2012, and the proposed regulation was considered by Legislation and Regulations Committee on March 19, 2012.

[The staff of the Corporate and Electricity Finance Division]⁴ worked on developing the analysis and options which formed the basis of the Cabinet deliberations related to the drafting of this regulation. CEFD staff in 2011 and 2012 carried out analysis, compiled detailed materials regarding the financial analysis, scenarios and sensitivities on the estimated stranded debt defeasance and RSD estimations in prior years, and provided various options in support of the proposed RSD regulation. These materials were compiled by CEFD staff into a package that was submitted to TB/MBC prior to its meeting on February 29, 2012 and included the slide deck,⁵ which informed the policy options used in the development of the submission made to TB/MBC.

[16] The OEFC states that the records were originally prepared by the Electricity Finance Branch of CEFD, or Ontario Electricity Restructuring Secretariat (OERS) of the Ministry of Finance prior to late 2003, for use by the OEFC. It submits that all of the records formed part of the underlying analysis used to develop the submissions to TB/MBC and/or LRC, and reflect the substance of the deliberations of these Cabinet committees on options for the proposed RSD regulation.

[17] The OEFC submits that the records consist of either final versions of materials, substantially identical versions of materials, or support/inputs into the materials that

³ The 2011 Auditor General's Report, stated that the Minister of Finance should provide an update on the outstanding amount of RSD in the near future.

⁴ According to the OEFC's representations, the Ontario Financing Authority (OFA) is the agency of the Province of Ontario responsible for provincial borrowing and debt management, and its objects include providing such other financial services as are considered advantageous to the Province or any public body.

⁵ Record 1.1.

were provided to TB/MBC by CEFD/MOF staff, which then formed the basis of the deliberations of Cabinet in the policy decision on the establishment of O.Reg 89/12. Therefore, the OEFC submits that disclosure of the records would reveal the substance of deliberations of Cabinet or its committees and further, would permit the drawing of accurate inferences with respect to those deliberations.

[18] The OEFC divided the records into three categories.

Records 2.1, 2.2, 2.3, 3.1, 3.2.1 and 3.2.5 (the "Submitted Records")

[19] The OEFC states that Records 2.1, 2.2, 2.3, 3.1, 3.2.1 and 3.2.5 were included in their entirety in the Supporting Package that was submitted to the February 29, 2012 TB/MBC meeting and, therefore, disclosure of the policy and analyses contained in these records would clearly reveal the substance of deliberations of a committee of Cabinet.

[20] The OEFC states that a submission to TB/MBC would typically be expected for a Cabinet item that potentially has a fiscal or financial impact on the province, including regulations being proposed to be submitted to LRC. The OEFC states that in order for the proposed RSD regulation to proceed to LRC, the Submitted Records, including any analysis contained therein, would have been necessary and relevant to TB/MBC in its deliberations.

[21] It states that the records provided financial modelling and scenario analysis on the impacts on the OEFC, which would also affect the province, as the OEFC is consolidated line-by-line into Public Accounts.

Records 1.1, 3.2.3, 3.2.4, 3.2.7, and 3.2.9 (the "Substantially Similar Records")

[22] The OEFC states that Records 1.1, 3.2.3, 3.2.4, 3.2.7, and 3.2.9 contain the same fundamental contents, presentation format, concepts, considerations, and options as contained in the materials which were submitted to TB/MBC. It relies on numerous orders⁶ that have established that it is possible for records that have not been placed before the Executive Council or its Committees to qualify for exemption under the introductory wording of section 12(1) of *FIPPA*, where disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or permit the drawing of accurate inferences with respect to those deliberations.

[23] The OEFC also submits that draft submission materials used in the preparation of a Cabinet submission can be found to be exempt under section 12(1), as releasing this draft would reveal the substance of deliberations of Cabinet.

⁶ The OEFC relies on Orders P-604, P-641, P-654, P-771, P-901, P-1137, PO-2786, and PO-3395-I.

[24] The OEFC provided detailed representations on the similarity and differences in each of Records 1.1, 3.2.3, 3.2.4, 3.2.7, and 3.2.9 to the records that were submitted directly to TB/MBC. In its non-confidential representations, the OEFC outlines the differences between the Submitted Records in the Supporting Package provided to TB/MBC and the Substantially Similar Records, as follows:

- Record 1.1: the version in the Supporting Package has a chart missing on p.3.
- Record 3.2.3: the version in the Supporting Package has a placeholder date "June XX, 2004" on page 2, the Substantially Similar Record has "June 3, 2004". The version in the Supporting Package has "Ministry of Finance (MOF)" on page 2, the Substantially Similar Record has "Ontario Financing Authority (OFA)".
- Record 3.2.4: the version in the Supporting Package has a placeholder date "June XX, 2004" on the title of the charts, the Substantially Similar Record has "June 3, 2004". In addition, the version in the Supporting Package has an extra column for [name of item], missing in the Substantially Similar Record.
- Record 3.2.7: the version in the Supporting Package provides [time period information], the Substantially Similar Record provides the same data [for a shorter time period] ...
- Record 3.2.9: the version in the Supporting Package has a placeholder date "June XX, 2004" on the first page, the Substantially Similar Record lists June 3, 2004...

[25] The OEFC submits that these records should be accorded the same treatment by the IPC as draft submission materials as disclosure would reveal the substance of deliberations of Cabinet committees in relation to O.Reg 89/12 and would permit the drawing of accurate inferences with respect to these deliberations.

Records 3.2.2, 3.2.6, and 3.2.8 (the "Supporting Records")

[26] The OEFC submits that Records 3.2.2, 3.2.6, 3.2.8 were used as the basis for the development of Records 2.1, 2.2, 2.3, 3.1, 3.2.1 and 3.2.5. These records include OEFC and the summary sheet of the model assumptions and financial projections that was incorporated into the Supporting Package submitted to TB/MBC. It states that the disclosure of these records could allow people to re-create or make inferences on the remaining records, such as modelling assumptions. Therefore, the OEFC submits that these records reflect the deliberations of Cabinet committees in relation to O.Reg 89/12 and would permit the drawing of accurate inferences with respect to these deliberations.

Analysis/Findings

[27] The OEFC relies on the introductory wording in section 12(1), which provides that a head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees.

[28] 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).⁷

[29] 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.⁸

[30] 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.⁹ I find that in its very detailed representations, the OEFC has provided sufficient evidence to establish such a linkage.

[31] TB/MBC are committees of Executive Council. As part of the process for putting in place the RSD regulation, the submission on the proposed regulation was reviewed by TB/MBC on February 29, 2012, and the proposed regulation was considered by Legislation and Regulations Committee on March 19, 2012.

[32] I agree with the OEFC's submission that copies of most of the records were submitted to TB/MBC for its February 29, 2012 meeting as part of the Supporting Package. The other records at issue are either versions of material included in the Supporting Package with minor variations that are not considered material, or contain analysis that was used to develop the Supporting Package.

[33] The records contain materials that informed the development of the RSD regulation O. Reg. 89/12, as it provided context, analysis and scenarios that informed policy options on the determination of RSD proposed to be set out in the regulation.

[34] As submitted by the OEFC, CEFD staff worked on developing the analysis and

⁷ Orders P-22, P-1570 and PO-2320.

⁸ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁹ Order PO-2320.

options which formed the basis of the Cabinet deliberations related to the drafting of the regulation. Specifically, CEFD staff carried out analysis, compiled detailed materials regarding OEFC's estimations with respect to RSD in prior years, and provided various options in support of the proposed RSD regulation. These materials were compiled by CEFD staff into a package and provided to TB/MBC prior to its meeting on February 29, 2012 (the "Supporting Package").

[35] I find that the records are either records that were submitted directly to committees of Cabinet or contain information that which would reveal portions of the substance of the records that were submitted to committees of Cabinet.

[36] Based on my review of the records and the OEFC's detailed confidential and non-confidential representations, I find that the substance of deliberations of committees of Cabinet would be revealed by disclosure of the records, as the records were submitted directly to TB/MBC or contain much of the information that was incorporated into the Supporting Package submitted to TB/MBC. I find that the introductory wording of section 12(1) applies to the records.

[37] Accordingly, as none of the exceptions in section 12(2) apply,¹⁰ I find that section 12(1) applies to exempt the information in the records. As section 12(1) applies to exempt the records, it is not necessary for me to consider the application of the other claimed exemptions to the records.

ORDER:

I uphold the OEFC's decision and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

September 30, 2016 _____

¹⁰ 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.