

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3664

Appeal PA14-475

Ministry of Finance

October 31, 2016

**Summary:** The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Finance for records relating to a transfer payment program to benefit cattle, hog and horticulture farmers. The ministry located responsive records and granted the appellant partial access, and denied access to some information on the basis that the mandatory exemption at section 12(1) (cabinet records) and discretionary exemption at section 13(1) (advice or recommendations) apply. The appellant appealed the ministry's decision to this office and takes the position that the public interest override in section 23 applies in the circumstances of this appeal. In this order, the adjudicator finds that the records qualify of exemption under section 12(1) and upholds the ministry's decision. The appeal is dismissed.

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

**Related Orders:** Order PO-3613.

### OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Finance (the ministry) for records relating to the government of Ontario Cattle Hog and Horticulture Payment (OCHHP) program. The OCHHP was a past initiative where the government made financial payments to eligible cattle, hog and horticulture farmers.

[2] The request sought access to<sup>1</sup>:

For the period of January 1, 2007 to December 31, 2010:

1. All of the Treasury Board submissions for the Ontario Cattle Hog and Horticulture Payment (OCHHP), as well as all and any "background" material submissions, any other documents and "defining expectations (with program objectives and eligibility criteria)" for this funding that were submitted by OMAFRA to the Ministry of Finance/The Treasury Board/management Board of Cabinet to obtain approval and funding for the OCHHP transfer Payment funds.

2. Any and all documents/reports/risk based reviews that measured and reported on the effectiveness and results achieved of the OCHHP program submitted by OMAFRA and/or Agricorp to the Minister of Finance/the Treasury Board/the Management Board of Cabinet in regards to the OCHHP programs.

[3] The ministry located nine responsive records but claimed that eight of the records qualified for exemption under sections 12(1) (cabinet records) or 13(1) (advice to government) of the *Act*. The ministry claimed that section 22 (Information published or soon to be published) applied to the remaining record and advised the appellant that this record could be located on the Office of the Auditor General of Ontario website.

[4] The appellant appealed the ministry's decision to this office and a mediator was assigned to the appeal. During mediation, the appellant confirmed that she was not appealing the ministry's decision to claim that Record 6 was publicly available but continued to seek access to the remaining records withheld under sections 12(1) and 13(1). The appellant claimed that the public interest override under section 23 applies to the records the ministry claims are exempt under section 13(1).

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry, the parties provided representations which were shared in accordance with this office's confidentiality criteria.

[6] In its representations, the ministry withdrew its claim that section 13(1) applies to some of the records.

[7] In this order, I find that the records the ministry describes as cabinet records

---

<sup>1</sup> The appellant also submitted two requests under the *Act* to the Ministry of Agriculture, Food and Rural Affairs (Ministry of Agriculture) for records relating to the OCCHP program. The appellant appealed the Ministry of Agriculture's decision to withhold the responsive records under sections 12(1) and 13(1) to this office. In Order PO-3613, I dismissed the appellant's appeal and upheld the Ministry of Agriculture's decision. Some of the records at issue in this appeal, such as the meeting minutes, Treasury Board documents and a Report prepared by the Ministry of Agriculture were also at issue in the former appeal.

qualify for exemption under 12(1). As the public interest override under section 23 cannot apply to records found exempt under section 12(1)<sup>2</sup>, the ministry's decision to withhold these records are upheld.

## **RECORDS:**

[8] The records at issue are described in the chart below:

<b>Record</b>	<b>Description of Record</b>	<b>Date</b>	<b>Number of pages</b>	<b>Exemption Claimed</b>
1	Treasury Board Minute	December 13, 2007	4 pages	Section 12(1)
2	Briefing note	Not dated	2 pages	Section 12(1)
3	Treasury Board Documents	March 27, 2008	2 pages	Section 12(1)
4	Treasury Board Documents (x2), Submission/Application and Report to Treasury Board	March 6 to 27, 2008	11 pages	Section 12(1)
5, 7 and 8	Briefing Note.*	Prepared for a March 27, 2008 Meeting	3 pages	Section 12(1)
9	Email attaching a draft Minute	December 10, 2007	2 page	Section 12(1) and 12(1)(a)

[9] The ministry's representations confirmed that Records 5, 7 and 8 contained a 3-page briefing note. Records 7 and 8 also contained one-page emails exchanged between ministry staff attaching a copy of the 3-page briefing note before the March 27, 2008 meeting. The ministry released the emails to the appellant but for a small portion in Record 8 which it claims contains the personal information of a ministry employee. Record 8 also contains an additional 3-page briefing note at pages 5 to 7 which the ministry claims is not-responsive to the appellant's request.

[10] I have reviewed Record 8 and am satisfied that the withheld portion of the email contains information which appears to constitute the "personal information" of identifiable individuals within the meaning of section 2(1) and as result may qualify under the mandatory personal privacy exemption under section 21(1). In the circumstances of this file, I have removed this information from the scope of this appeal.

[11] I have also removed pages 5 to 7 of Record 8 as I am satisfied that this briefing

---

<sup>2</sup> Section 12 is not identified in the wording of section 23 as one of the exemptions which could be subject to the public interest override.

note is not responsive to the appellant's request.<sup>3</sup>

## **DISCUSSION:**

[12] The sole issue in this appeal is whether the mandatory exemption under section 12(1) applies to records the ministry identified as cabinet records.

[13] The ministry takes the position that the records qualify for exemption under the introductory wording of section 12(1) and that the cabinet minutes at Record 9 meet the requirements for exemption under section 12(1)(a). These sections read:

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.

[14] Section 12(2) provides exceptions to section 12(1), it 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.

[15] 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).<sup>4</sup>

[16] 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.<sup>5</sup>

[17] 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

---

<sup>3</sup> To be considered responsive to the request, records must "reasonably relate" to the request (see Orders P-880 and PO-2661).

<sup>4</sup> Orders P-22, P-1570 and PO-2320.

<sup>5</sup> Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

content of the record and the actual substance of Cabinet deliberations.<sup>6</sup>

### **Representations of the parties**

[18] The ministry submits that disclosure of the records would reveal or permit the drawing of actual inferences regarding the substance of the Treasury Board's deliberations regarding the subject-matter of the request. The ministry states that disclosure of the records would "...undermine the purpose of the exemption, which is to preserve the integrity of the Cabinet decision-making process and to ensure the confidentiality of Cabinet's deliberations". In support of its position, the ministry provided an affidavit from a manager from the Ministry of Agriculture, Food and Rural Affairs who was involved in the Treasury Board approval process related to the OCHHP program.

[19] The ministry's affidavit states:

- The key purpose of most of the records was to "assist and advise Treasury Board/ Management Board of Cabinet of the fiscal options available and recommendations for the OCHHP program".
- Record 1 is the Minute of the Treasury Board's December 13, 2007 meeting. The ministry's affiant advises that this record was created to "summarize the deliberations and decisions of that meeting".
- Record 2 is Briefing Note prepared for the December 13, 2007 meeting. The ministry's affiant advises that he was involved in preparing this document and it was included in a binder of background material for the Treasury Board's December 13, 2007 meeting.
- Record 3 and 4 include the Ministry of Agriculture's submission documents including a Report, dated March 6, 2008. Also included is the board's approval minute and other documents, dated March 27, 2008.
- Records 5, 7 and 8 is a Briefing Note prepared by the affiant who advises it was prepared for the Treasury Board's March 27, 2008 meeting.
- Record 9 is an email the affiant received from a staff member from the Ministry of Agriculture on December 10, 2007 which attaches a draft Minute which was prepared for the December 13, 2007 Treasury Board meeting. The affiant affirms that disclosure of the draft Minute would reveal or permit accurate inferences to be made regarding the substance of the Treasury Board's deliberation.

[20] The appellant's submissions did not specifically address the ministry's evidence on whether exemption at section 12(1) applies to the records. However, the appellant takes the position that if section 12(1) is found to apply, the ministry should be required to make inquiries with the Treasury Board to determine whether it would consent to the

---

<sup>6</sup> Order PO-2320.

release of the records.

[21] The ministry's representations indicate that it considered whether it would be appropriate to approach the Treasury Board to seek its consent under the circumstances and decided against it for various reasons including that cabinet is now constituted with new board members and the ministry stills treats the records in a manner that indicates a concern for confidentiality.

### **Decision and analysis**

[22] I have reviewed the records along with the submissions of the parties and am satisfied that the records are subject to the mandatory exemption under section 12(1).

[23] The Treasury Board is a cabinet committee of the Executive Council.<sup>7</sup> In my view, disclosure of the records would reveal the substance or would allow accurate inferences to be made regarding the Treasury Board's deliberations made at its December 13, 2007 and March 27, 2008 meetings. Accordingly, I find that the requirements of the introductory wording of section 12(1) has been met.

[24] I also accept the ministry's submission that the exception at section 12(2)(b) does not apply and no other exception could apply. In making this decision, I note that section 12(2)(b) does not impose a requirement on institutions to seek the consent of the Cabinet committee to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.<sup>8</sup> In the circumstances, I am satisfied that the ministry's evidence demonstrates that it considered the possibility of seeking consent under section 12(2)(b) but decided against it.

[25] Given my findings above, it is not necessary that I also consider whether Record 9 also qualifies for exemption under section 12(1)(a).

### **ORDER:**

I uphold the ministry's decision to withhold the records under section 12(1).

Original Signed By: \_\_\_\_\_

Jennifer James  
Adjudicator

October 31, 2016 \_\_\_\_\_

---

<sup>7</sup> Section 1.0.1 of the *Financial Administration Act*, RSO 1991.

<sup>8</sup> Orders P-771, P-1146 and PO-2554.