

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3752

Appeal PA16-165

Ministry of Energy

July 25, 2017

Summary: The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* to the Ministry of Energy (the ministry) for records related to the amended Bruce Power refurbishment agreement. The ministry denied access to the records in full citing the mandatory Cabinet records exemption in section 12(1) for portions of the records and claiming that the remainder of the records were non-responsive to the request.

In this order, the adjudicator upholds the ministry's decision on the non-responsiveness of portions of the records in part, and finds that all of the responsive information is exempt by reason of the introductory wording in section 12(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 12(1) and 24.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* to the Ministry of Energy (the ministry) for:

1. A searchable PDF copy of all cost/benefit analyses and value-for-money assessments of the amended Bruce Power refurbishment agreement (announced in early December 2015), as well as other reports, slide decks, briefing notes,

and/or explanatory notes summarizing reasons why the amended agreement is in the public interest or the interest of consumers.

2. A searchable PDF copy of all risk assessments of the amended agreement, as well as other reports, slide decks, briefing notes, and/or explanatory notes summarizing the conditions under which the contract price might be adjusted, the likelihood of such adjustments, and/or the impact of such adjustments.
3. A searchable PDF copy of all reports, slide decks, briefing notes, and/or explanatory notes that describe the so-called "off-ramps" in the amended agreement (see Article 9), including summary descriptions or assessments of the risks and costs should such "off-ramps" be used or not used
4. A list showing the amounts, or estimated amounts, of the cost and/or duration thresholds for each of the six Bruce refurbishments, as described in Article 9.1(a) of the amended agreement, and the methodologies by which these thresholds have been, or will be, determined.

[2] The appellant later narrowed his request and indicated that he was only interested in items 1 to 3 of his request.

[3] The ministry issued its access decision indicating it had located 10 records (668 pages) and that two records are Cabinet submissions and eight records are briefing decks related to the Cabinet submissions. The ministry's decision was to deny access in full, citing the exemptions in sections 12(1) (Cabinet records) and 13(1) (advice or recommendations) for all the records and the employment or labour relations exclusion in section 65(6) for part of one record.

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

[5] During the mediation stage, the ministry issued a revised access in which it indicated that in addition to sections 12(1), 13(1) and 65(6), the ministry was also claiming the exemptions in sections 17(1) (third party information) and 18(1) (economic and other interests). It also indicated it was claiming that some parts of the records were not responsiveness to the request.

[6] The appellant then advised that he would not be pursuing Records 1 and 2 which are the Cabinet submissions. Accordingly, these records have been removed from the scope of the appeal and since section 65(6) was only claimed with respect to Record 2, the application of the exclusion is no longer an issue in the appeal.

[7] Also during the mediation stage, the appellant wished to know whether the ministry might have records containing financial analysis/cost benefit information which the ministry would not consider to be exempt under section 12(1). The ministry provided online links with regard to a 2014 Independent Electricity System Operator (the IESO) report and an opinion letter to the IESO indicating that these are summaries

of more detailed confidential analysis used to support Cabinet decision-making on the Bruce Power agreement. The appellant subsequently reviewed these and advised the mediator that he still wished to pursue access to the records at issue.

[8] The appellant also asked about Record 7 (Slide Deck Presentation to Secretary of Cabinet – November 10, 2015). The ministry advised that Record 7 was prepared in response to a request for a briefing from the ministry and the IESO by the Secretary of Cabinet subsequent to the Cabinet submission. The ministry advised that the Secretary of Cabinet guides the work of Cabinet Office including their analysis of submissions. The ministry also indicated that the Secretary of Cabinet supports the Cabinet decision-making process as Clerk of the Executive Council.

[9] The ministry has also advised that the non-responsive information relates to the process and/or status of the negotiations and does not relate to the appellant's request, as he is seeking information/analysis/assessments specific to the final amended agreement.

[10] The appellant maintained his objection to the ministry's exemptions [sections 12(1), 13(1), 17(1), and 18(1)] and the non-responsive claims. In addition, he asserted a public interest in the records, thereby raising section 23. And with respect to section 13(1), he asserted that the exceptions in section 13(2) apply.

[11] The ministry further advised the mediator that with respect to the non-responsive information, it wished to assert sections 12(1), 13(1), 17(1) and 18(1), in the alternative.

[12] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. On notice to the parties, I decided to first adjudicate on the application of the mandatory section 12(1) exemption and the scope of the request. I informed the parties that if the section 12(1) exemption does not apply to the responsive information, I would then seek representations on the other exemptions.

[13] Representations were sought and exchanged between the ministry and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7* on the application of the mandatory exemption in section 12(1) and the scope of the request.

[14] In this order, I partially uphold the ministry's decision on the scope of the request and find that all of the responsive information in the records is exempt by reason of the application of the introductory wording of the section 12(1) exemption.

[15] Accordingly, I will not be considering the possible application of the remaining exemptions claimed by the ministry or the application of the public interest override to

these remaining exemptions.¹

RECORDS:

- Record 3 - IESO Slide Deck re Bruce Power - Negotiations update dated June 22, 2015
- Record 4 - IESO Briefing Note re Bruce Power Negotiations Status Update dated July 14, 2015
- Record 5 - IESO Slide deck re Bruce Power - Negotiations Update dated July 23, 2015
- Record 6 - IESO Slide deck re Bruce Power - Negotiations Updated dated September 24, 2015
- Record 7 - IESO Slide deck presentation to Secretary of Cabinet re Bruce Power Negotiations Off-Ramps dated November 10, 2015
- Record 8 - Report re Amended and Restated Bruce Power Refurbishment Implementation Agreement dated August 31, 2015
- Record 9 - IESO slide Deck Presentation re Bruce Nuclear Refurbishment dated June 23, 2015
- Record 10 - Ministry's Slide Deck re Bruce Power Negotiations dated September 24, 2015

ISSUES:

- A. What is the scope of the request? Is certain information responsive to the request?
- B. Does the mandatory Cabinet Records exemption at section 12(1) apply to the records?

¹ The remaining exemptions claimed by the ministry are sections 13(1), 17(1) and 18(1). The public interest override in section 23 does not apply to override the section 12(1) exemption.

DISCUSSION:

A. What is the scope of the request? Is certain information responsive to the request?

[16] The ministry takes the position that the following information is not responsive to the request:

- Record 3 (pages 3 to 7 in their entirety)
- Record 4 (page 1 in part, page 2 in its entirety)
- Record 5 (pages 3 to 4 in full, page 5 in part, pages 6, 7 and 8 in their entirety)
- Record 6 – page 3 in its entirety, page 4 in part, pages 5, 6 and 7 in their entirety)

[17] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[18] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²

[19] To be considered responsive to the request, records must "reasonably relate" to the request.³

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

[20] The ministry states that the appellant's request is for certain types of technical analyses and assessments related to the Amended and Restated Bruce Power Refurbishment Implementation Agreement ("ARBPRIA").

[21] The ministry states that it did not seek further clarification from the appellant on his request as the request provided sufficient detail to commence a search for and identify responsive records. It states that the appellant's request specifically lists the named subjects of analyses and information requested and that records that contained information relating to other aspects of the ARBPRIA or ARBPRIA negotiations (e.g. status updates, negotiating positions of the parties, schedule updates etc.) do not fall into the scope of the request.

[22] The ministry considered portions of Records 3, 4, 5, and 6 to be non-responsive. It states that Records 3, 4, 5 and 6 were all prepared by the IESO for senior level ministry staff for the purposes of providing progress updates on its negotiations with Bruce Power on the ARBPRIA. It states:

The responsive portion of Record 3 on slide 5 relates to the appellant's request for "descriptions of off-ramps in the ARBPRIA" and the risks of exercising them... This information is limited to the chart and two bullet points on slide 5. The rest of the information on this slide is not responsive as it provides general information on the negotiating efforts made by IESO and status of negotiations.

[23] The ministry submits that slides 3, 4, 6 and 7 of Record 3 are also not responsive as:

- Slide 3 contains a general update on the progress and status of the negotiations between IESO and Bruce Power on the ARBPRIA.
- Slide 4 outlines a general update on the progress and status of ARBPRIA term sheet negotiations with Bruce Power.
- Slide 6 provides an update on the progress and status of due diligence efforts of the counterparties in relation to the ARBPRIA.
- Slide 7 addresses the floor price review, which is a separate assessment and not one carried out directly in relation to the ARBPRIA.

[24] With respect to Record 4, the ministry states that the information under the "Background" section is not responsive as it provides a general update on the progress and status of the ARBPRIA negotiations between Bruce Power and the IESO. It also states that the information under the heading "Schedule" in Record 4 outlines the schedule for completion of key components of the ARBPRIA and agreement drafting and does not fall into the named subjects of analyses requested by the appellant.

[25] With respect to Records 5 and 6, the ministry states that

- Slide 3 in both records provides general updates on the progress and status of the ARBPRIA negotiations.
- Slide 4 of Record 5 contains the same type of information contained on slide 4 of Record 3 – a general update on the progress and status of negotiation of the ARBPRIA term sheet – and is not responsive for the same reason.
- The portion of slide 5 of Record 5 marked non-responsive is also a general status update on the ARBPRIA term sheet.
- Slide 6 of Records 5 and 6 provides a progress and status update on due diligence efforts.
- Slides 7 and 8 of Record 5 and Slides 5, 7 and 8 of Record 6 outline next steps in the negotiations and completion of the ARBPRIA.

[26] The appellant did not provide representations on this issue.

Analysis/Findings

[27] Based on my review of the information at issue in the records, I agree with the ministry that the information at issue is non-responsive, except for the following:

- Slides 4 of Records 3 and 5, which contains information about off-ramps and price adjustments. I find that these slides are responsive to part 3 of the appellant's request.
- Slide 5 of Record 5. Only the title has been marked as non-responsive. The information in the title is repeated elsewhere in the responsive information in the records.

[28] I will consider the application of section 12(1) to this information that I have found responsive to the request.

[29] Therefore, I will not consider the information that I have found to be non-responsive further in this order, namely the information at issue in:

- slides 3, 5, 6 and 7 of Record 3,
- the background and schedule information in Record 4,
- slides 3, 5, 7 and 8 of Record 5,
- slides 3 and 6 to 8 in Record 6.

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

[30] The ministry relies on the introductory wording of section 12(1), as well as section 12(1)(b), which 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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

[31] By way of background, the ministry states⁴ that:

In November 2013, Ontario's 2013 Long-Term Energy Plan ("LTEP") was approved by Cabinet. The LTEP included the government's plan to refurbish nuclear generation units at Bruce Power as well as a set of principles for the nuclear refurbishment process in Ontario to minimize risks to ratepayers and the government.

In September 2014, the Ministry of Energy's Mandate Letter directed the Ministry to work with Bruce Power to ensure the critical refurbishment of its nuclear units is completed efficiently and effectively...

In order to fulfill the LTEP's principles and Ministry's Mandate Letter, the Ontario Power Authority (now IESO) commenced re-negotiation of the BPRIA with Bruce Power to address the refurbishment of the remaining 6 nuclear units (Bruce A, Units 3 and 4; Bruce B, Units 5-8) and the long-term operation of the Bruce nuclear facility by Bruce Power. The Province/Ministry was not a party to the negotiations, but played an oversight role to ensure that negotiations led to an agreement that was in accordance with the 2013 LTEP principles, supported Ontario's interests, and was in accordance with Cabinet direction.

[T]he Ministry reported back on these items to the Communities, Resources and Justice Policy Committee ("CRJP"), which is a committee of Cabinet, and to Cabinet... Cabinet approved execution of the ARBPRIA on [date]. The ARBPRIA was executed on December 2, 2015.

⁴ The ministry provided both confidential and non-confidential representations on the application of section 12. I will be referring only to the non-confidential representations of the ministry in this order.

Section 12(1): introductory wording

[32] Concerning the introductory wording, the ministry states that Records 3 to 10 relate to the Cabinet Submission on the ARBPRIA presented to the CRJP and to Cabinet. It submits that the most essential elements of these records were incorporated into documents that were ultimately put before a committee of Cabinet, Cabinet, or the Secretary of Cabinet.

[33] The ministry states that Records 3 to 6 are similar in nature and if disclosed would directly reveal the substance of the CRJP and Cabinet's deliberations with respect to the ARBPRIA. It states that these records contain discussions of negotiations related to specific types of contractual off-ramps, as well as implications/risks to Bruce Power and/or the IESO if these off-ramps are triggered. It states that although these records themselves were not included in the ARBPRIA Cabinet Submission binder, the responsive portions of these records informed the portions of the ARBPRIA Cabinet Submission.

[34] The ministry states that Record 7 is a slide deck that was prepared by the IESO in response to the Secretary of Cabinet's request for a briefing from the ministry and the IESO subsequent to the ARBPRIA Cabinet Submission being presented to the CRJP. It states that the two points on slide 3 provide additional technical information and were outlined in the ARBPRIA Cabinet Submission. It states that Record 7 is a follow-up piece to the ARBPRIA Cabinet Submission and was specifically requested by Secretary of Cabinet, whose role is to support the Cabinet decision making process as Clerk of the Executive Council.

[35] The ministry states that the information in Record 7 would have played an integral role in CRJP and Cabinet's decision to approve the ARBPRIA and that disclosure of this information would reveal the substance of deliberations of Cabinet by revealing the analyses Cabinet relied on in making its decision.

[36] The ministry states that the Ministry of Economic Development, Employment and Infrastructure, at the request of the ministry, directed Infrastructure Ontario (IO) to conduct financial due diligence on the proposed ARBPRIA. As a result, IO hired a consultant to support its due diligence work and prepare a final due diligence report. The ministry states that Record 8 is a slide deck that outlines the final draft of the financial due diligence assessment prepared by the consultant, which directly informed and formed the basis of IO's financial due diligence review. It refers specifically to a memo in the ARBPRIA Cabinet Submission which contains a summary of the consultant's due diligence assessment.

[37] The ministry states that the essential elements of Record 9 are summarized and presented in the slide deck contained in the ARBPRIA Cabinet Submission and reveal the substance of deliberations of the CRJP and Cabinet because the assessments it outlines, in part, would have informed the CRJP and Cabinet.

[38] The ministry states that Record 10 summarizes the key elements of the memo, which was informed by and based on the consultant's due diligence assessment and the preliminary questions posed in this assessment for the Ministry/IESO's further response. The ministry submits that this record is subject to section 12(1) for the same reasons articulated for Record 8.

[39] The appellant states that the mere fact that these records may match the description in section 12(1) cannot by itself be sufficient to meet the requirements of section 12(1) as a whole. He states that if it were, then literally any record would merely need to be "prepared for submission" for any part of a Cabinet proceeding, and the head would be obliged to withhold the entire record under section 12(1) with no consideration at all of whether they actually reveal anything or not about Cabinet deliberations. The appellant refers to section 1(a)(ii) of the *Act* that states that exemptions should be limited and specific.

[40] The appellant does not believe that the ministry has met its burden under section 53 to prove that disclosure of these records would reveal the substance of deliberations of the Executive Council.

[41] In reply, the ministry states that while the outcome of the ARBPRIA Cabinet deliberations is public, the substantive details of the matters deliberated upon by Cabinet to get to this outcome are not. It also submits that Records 3 to 10 are not background documents, but are key developmental pieces upon which the ARBPRIA Cabinet Submission was based and developed.

[42] In sur-reply, the appellant states that basic factual information by itself cannot reveal the substance of Cabinet deliberations.

Analysis/Findings re: Section 12(1): introductory wording

[43] 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).⁵

[44] 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.⁶

⁵ Orders P-22, P-1570 and PO-2320.

⁶ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

[45] 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.⁷

[46] At issue is the responsive information in Records 3 to 10. The ministry provided me with the entire ARBPRIA Cabinet submission, along with a confidential submission cross-referencing the information at issue in the records to the information in the ARBPRIA Cabinet submission. I have carefully reviewed the confidential Cabinet submission and the information at issue in the records, along with the parties' representations.

[47] I find that the exemption under the introductory wording of section 12(1) applies to the information at issue in the records. Disclosure of this information would reveal the substance of deliberations of Cabinet, or would permit the drawing of accurate inferences with respect to these deliberations. The information at issue is not basic factual information as asserted by the appellant, but is information that reveals the substance of Cabinet deliberations or information that would permit the drawing of accurate inferences with respect to these deliberations.

[48] The exception in section 12(2)⁸ to section 12(1) does not apply in this appeal as the records are not more than twenty years old under section 12(2)(a) and the Executive Council for which, or in respect of which, the records have been prepared has not consented to access being given under section 12(2)(b).

[49] 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.⁹ The ministry provided detailed representations that it did turn its mind to this issue and I am satisfied that it did do so.

[50] Therefore, the responsive information in the records is exempt under the introductory wording of section 12(1) and there is no need for me to consider whether the exemption in section 12(1)(b) or the remaining exemptions in sections 13(1), 17(1) and 18(1) apply to the responsive information in the records.

⁷ Order PO-2320.

⁸ 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.

⁹ Orders P-771, P-1146 and PO-2554.

ORDER:

[51] I uphold the ministry's decision that the responsive information in the records is exempt by reason of section 12(1).

Original Signed by: _____
Diane Smith
Adjudicator

July 25, 2017 _____