

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3934

Appeal PA17-335

Ministry of Energy

March 5, 2019

Summary: The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ministry of Energy (the ministry) for all reports provided to the government for a specific period relating to the Darlington Nuclear Plant refurbishment. The ministry located one record and denied the appellant access to it, in full. The appellant appealed the ministry's decision. In this order, the adjudicator finds the record is exempt under section 12(1) of the *Act* 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(1).

OVERVIEW:

[1] The appellant submitted a multi-part access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Energy (the ministry). The relevant part of the request reads,

... all reports, including power point presentations, provided to the government in the last quarter of 2016 and the first quarter of 2017 by the independent oversight adviser hired by the ministry to monitor and report on the progress of the [Darlington Nuclear Plant] refurbishment.

[2] The ministry located a single responsive record, a consultant's report, and issued an access decision to the appellant denying the appellant access to the report, in full. The ministry advised the appellant it withheld the record under the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in

section 18(1) (economic and other interests) of the *Act*.

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

[4] During mediation, the ministry issued a revised access decision to the appellant. In its revised decision, the ministry advised the appellant that it also claimed the mandatory exemption in section 12(1) (Cabinet records) to withhold the record in full.

[5] The appellant confirmed its interest in pursuing access to the record.

[6] Mediation did not resolve the issues in this appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I began my inquiry by inviting the ministry and two parties whose interests may be affected by the disclosure of the records (the affected parties) to submit representations in response to a Notice of Inquiry, which outlined the facts and issues in the appeal. The ministry and one affected party submitted representations. I then invited the appellant to submit representations in response to the Notice of Inquiry and the ministry's and affected party's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[7] In the discussion that follows, I find that the record is exempt under section 12(1) of the *Act*. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[8] The record at issue is a consultant's report dated February 2017.

DISCUSSION:

[9] The sole issue in this appeal is whether the exemption in section 12(1) applies to the report. The ministry relies on the introductory wording of section 12(1), as well as sections 12(1)(b) and (c) to withhold the record. These sections state,

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;

(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;

[10] Section 12(2) provides exceptions to section 12(1) and reads as follows:

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.

[11] 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

[12] 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

[13] 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

Representations

[14] As background, the ministry states that Cabinet approved Ontario Power Generation (OPG) to proceed with refurbishing four units of the Darlington Nuclear Generation Station in December 2015. Cabinet approved both the overall budget and schedule for the refurbishment project (the Project). As part of the approval process, the ministry states that it was directed to report back to Treasury Board (a committee of Cabinet). The ministry states the submission it presented to Treasury Board and Cabinet (TB Submission) as part of its "report back" is confidential and privileged.

[15] The ministry states it retained a consultant as an independent oversight advisor

¹ Orders P-22, P-1570 and PO-2320.

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

³ Order PO-2320.

as part of the oversight structure developed for the Project. The consultant's role is to monitor the Project and report on a semi-annual basis to the Minister and ministry.

[16] The ministry states that the record is one of the three semi-annual reports on the performance and progress of the Project prepared by the consultant. The ministry submits that the record was prepared to support and inform the ministry's status update to Treasury Board and Cabinet.

[17] The ministry submits that the record contains the consultant's confidential findings regarding the progress of the Project for the period of July 1, 2016 to December 31, 2016. The ministry states that the key elements of the record are

- An assessment of the progress of the Project;
- An assessment of overall project management process;
- An evaluation of OPG's risk management strategy with respect to emerging Project risks;
- Review of processes and ongoing process on the coordination of work; and
- Objectives and plan for the next Project review period.

[18] The ministry states that the record also contains two briefing slide decks that OPG presented to the ministry. The ministry submits that these briefing decks provide information on OPG's own assessment of Project performance, budgeting, scheduling, contract management and next steps. According to the ministry, the consultant relied on the information contained in these briefing decks when it prepared the report at issue.

[19] While OPG owns and operates the nuclear station, the ministry states the Province of Ontario is the sole shareholder of OPG and plays a critical role in decision-making over the Project. The ministry states that OPG's net income, payments in lieu of taxes and net assets are consolidated into the Province's financial statements and thus OPG's income or loss from its nuclear business is reflected in the Province's books. Therefore, the ministry submits that oversight is important to ensure that OPG is carrying out the Project in a fiscally responsible manner to maximize value to the Province and minimize the impact on the public rate-payers.

[20] The ministry submits that the record is exempt under the introductory wording of section 12(1) of the *Act*. In this case, the ministry submits that the record would reveal the substance of deliberations of a committee of Cabinet or Cabinet or would permit the drawing of accurate inferences with respect to those deliberations. The ministry submits that the record forms part of the TB Submission that was put before a committee of Cabinet (namely, Treasury Board) and Cabinet for approval. The ministry submits that the TB Submission would inform Treasury Board and Cabinet's deliberations on the

“report back” and the Project. In the confidential portions of its representations, the ministry identifies the specific areas to be deliberated by Treasury Board and Cabinet and asserts that the TB Submission, which includes the record, will help inform Treasury Board and Cabinet’s discussions and decisions.

[21] The ministry provided an affidavit sworn by its Director, Nuclear Supply, Energy Supply Policy Division (the Director) to support its representations. The Director confirms that the information contained in the record forms part of the TB Submission that was submitted to the Treasury Board and Cabinet. In addition, the ministry provided copies of the relevant portions of the TB Submission it presented to Treasury Board and Cabinet.

[22] In addition, the ministry submits that the information contained in the record is referred to in the consultant’s final Due Diligence Report that is attached as an appendix document to the TB Submission slide deck. The ministry also states that some of the information contained in the record is also included in various slide decks contained in the TB Submission.

[23] The ministry concludes that disclosure of the record would reveal the substance of deliberations of a committee of Cabinet or Cabinet or would permit the drawing of accurate inferences with respect to those deliberations. Further, the ministry submits that the most essential elements of the record were incorporated into documents that were ultimately put before a committee of Cabinet or Cabinet.

[24] The ministry addressed the possible application of section 12(2)(b) to the records. The ministry states it did not consider seeking Cabinet consent to release the record due to the possible impact on the Province and OPG from its disclosure. The ministry also notes that the purpose of section 12 is to ensure full and frank deliberations of Cabinet and disclosure would jeopardize the frankness of those deliberations. Finally, the ministry submits that there was no reasonable expectation that Cabinet would consent to disclosure based on the circumstances.

[25] In its representations, the appellant submits that the ministry applied section 12(1) in an “unjustifiably broad manner.” The appellant alleges that the ministry has applied section 12(1) to withhold information that should be released to the public as a general practice.

Analysis and Findings

[26] Based on my review of the record and the ministry’s representations, I find that the ministry has provided sufficient evidence to demonstrate that the introductory wording of section 12(1) applies to exempt the record from disclosure. Specifically, I find that the ministry has provided sufficient evidence to determine that disclosure of the record would reveal the substance of deliberations of Treasury Board and Cabinet.

[27] I have reviewed the ministry’s materials, which include portions of the TB

Submissions presented to the Treasury Board and Cabinet. Upon review, it is clear that the record at issue was provided to Treasury Board and Cabinet for deliberation and discussion. Further, the ministry's representations have demonstrated that Cabinet and Treasury Board would have reviewed and considered the record in their discussions about the Project. As submitted by the ministry, the record formed a part of the TB Submission that was provided to Treasury Board and Cabinet to inform their deliberations and decisions with respect to the Project. Based on my review, I find that the information contained in the record would reveal the substance of Cabinet deliberations or information that would permit the drawing of accurate inferences with respect to these deliberations.

[28] I have reviewed the exceptions to section 12(1) in section 12(2) and find that neither apply. First, the record is not more than twenty years old; as such, section 12(2)(a) has no application. Second, 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. The section requires a head to turn his or her mind to the issue at a minimum.⁴ In this case, the ministry provided detailed representations demonstrating that it did turn its mind to this issue and I am satisfied that it did so.

[29] Therefore, I find the record at issue is exempt under the introductory wording in section 12(1) of the *Act*. As a result of my finding, there is no need to consider whether the exemptions in sections 12(1)(b) and (c) or 17(1) and 18(1) apply to the record. Further, I note that the public interest override in section 16(1) cannot apply to information exempt under section 12(1). Accordingly, I uphold the ministry's decision to withhold the record under the introductory wording in section 12(1) of the *Act* and dismiss the appeal.

ORDER:

I uphold the ministry's decision to withhold the record under section 12(1) of the *Act*. I dismiss the appeal.

Original signed by _____

Justine Wai
Adjudicator

_____ March 5, 2019

⁴ Orders P-771, P-1146 and PO-2554.