

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3973

Appeal PA18-390

Cabinet Office

July 15, 2019

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* to Cabinet Office for mandate letters provided by the Premier to all Ontario government ministries and two non-portfolio responsibilities. Cabinet Office located responsive records and denied access to them on the basis of the mandatory exemption in section 12(1) of the *Act* (Cabinet Records). In this order, the Commissioner finds that section 12(1) does not apply to exempt the mandate letters at issue from disclosure and orders Cabinet Office to disclose them to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy*, R.S.O. 1990, C. F.31, as amended, sections 12(1), 12(2) and 18(1)(g); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, section 6(1)(b); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 section 12(3)(b).

Orders and Investigation Reports Considered: Orders PO-1725, PO-2320, PO-2707, PO-3719, and MO-2964-I.

Cases Considered: *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 111 BCAC 95; *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *O'Connor v. Nova Scotia*, 2001 NSCA 132; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

OVERVIEW:

[1] The requester made an access request to Cabinet Office under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

A copy of each of the mandate letters Premier Doug Ford sent to Cabinet Ministers for all of Ontario's 22 ministries, and two non-portfolio responsibilities.

For reference for what I mean by "mandate letter," please see copies of the previous government posted online here: <https://www.ontario.ca/page/mandate-letters-2016>

[2] In response, Cabinet Office issued a decision to the requester denying access in full to the responsive records, claiming the application of the mandatory exemption in section 12(1) of the *Act* (Cabinet records).

[3] The appellant appealed Cabinet Office's decision to this office.

[4] During the mediation stage, Cabinet Office provided copies of the responsive records to this office and confirmed that there were 23 responsive documents in total: 21 mandate letters to the ministries and two letters relating to non-portfolio responsibilities. Cabinet Office clarified that a mandate letter was not generated for the Ministry of Intergovernmental Affairs. In addition, Cabinet Office provided this office with a copy of the Cabinet agenda that indicates the date when the mandate letters were distributed. Cabinet Office also confirmed that it is relying on the application of the introductory wording of section 12(1).

[5] As mediation did not resolve the issues in this appeal, the matter proceeded to the adjudication stage of the appeal process, and I conducted an inquiry. During the inquiry, I received excellent representations from Cabinet Office and the appellant, which greatly assisted the inquiry and my deliberations on the issues.

[6] In this order, I find that the exemption for Cabinet records at section 12(1) does not apply and I order Cabinet Office to disclose the mandate letters to the appellant.

RECORDS:

[7] The records consist of 23 mandate letters: 21 letters to each of the ministers, but for Intergovernmental Affairs, and 2 letters directed to the ministers responsible for Francophone Affairs and Women's Issues.

DISCUSSION:

[8] The sole issue before me in this appeal is whether the opening words of the mandatory exemption at section 12(1) of the *Act* apply to the records. That section 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.

[9] The use of the term "including" in the introductory wording of section 12(1) signifies that any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees, and not just the types of records enumerated in the various paragraphs of section 12(1), qualifies for exemption under section 12(1).¹

[10] It is noteworthy that 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

¹ Orders P-22, P-1570 and PO-2320.

with respect to these deliberations.²

[11] However, 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

[12] Section 12(2) provides two exceptions to the application of the exemption in section 12(1). 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.

[13] 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.⁴ I note that neither of these exceptions have been put in issue in this appeal.

Representations of Cabinet Office

The nature of the mandate letters

[14] Cabinet Office describes the preparation of mandate letters by the Premier at the investiture of a new government as “a time-honoured tradition in Ontario and an important way in which the Premier discharges his or her constitutional duties as First Minister to develop and prioritize the policies and operational agenda of the new government.” At the outset of its submissions, Cabinet Office explains:

Mandate letters are customarily the first communication to ministers through which the Premier translates party values and policy priorities into a plan of action for the government. For this reason, mandate letters outline the key policy priorities of the Premier that each minister is responsible for leading. Policy priorities are assigned to each minister based on the operational and/or statutory mandate of their ministry.

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

³ Order PO-2320.

⁴ Orders P-771, P-1146 and PO-2554.

In addition, mandate letters can include advice, instructions and guidance to each minister in carrying out his or her ministerial duties and responsibilities. This guidance is often placed in the context of the values that are important to the Premier and party.

Each member of the Executive Council who receives a mandate letter is accountable to the Premier and his or her Cabinet colleagues for assisting the government to achieve the priorities and objectives described in that letter.

[15] Later in its submission, Cabinet Office states that "many of the policy priorities assigned to each minister in the mandate letters would require each respective minister to develop a proposal that would be brought to the Executive Council for decision-making prior to implementation."

The interpretation of section 12(1)

[16] Cabinet Office claims that the introductory wording of section 12(1) of the *Act* applies to exempt the records at issue:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees...

[17] Cabinet Office does not claim that the mandate letters fall within any of the enumerated types of records specified at paragraphs (a) through (f) of section 12(1) and, accordingly, I will not consider their possible application in this order.

[18]] Cabinet Office accepts the IPC's general approach to the interpretation of section 12(1), summarized at paras. 9 to 11 above. Citing Order PO-1917, Cabinet Office also submits that a record can be exempt under the opening words of section 12(1) if "it is obvious from the contents and the surrounding circumstances, that the document formed the substance of Cabinet deliberations".⁵

[19] Cabinet Office relies on the dictionary definitions of the words "substance" and "deliberation" adopted in Order P-131, as follows:

"Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (*Black's Law Dictionary*, 5th ed.), or "essential nature; essence or most important part of anything" (*Oxford Dictionary*).

⁵ Order PO-1917.

Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means."

[20] Cabinet Office then refers to the underlying policy reasons for maintaining Cabinet confidentiality identified in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (the Williams Commission Report), which formed the basis for the development of Ontario's current *Freedom of Information and Protection of Privacy Act*:

If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold ministers responsible for government policy would be diminished.⁶

[21] In the same vein, Cabinet Office cites the public policy interest in maintaining the confidentiality of Cabinet communications as described by the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*, as follows:

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario* [1986] 2 S.C.R. 637, at p. 659 recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism".⁷

[22] Cabinet Office also refers to unwritten constitutional conventions concerning the role of the Premier which,

"... endow the Premier with the discretion to determine the agenda of Cabinet meetings and the priorities and political strategy of Cabinet. By

⁶ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol 2 (Toronto: Queen's Printer, 1980) at 85 ("the Williams Report").

⁷ *Babcock v Canada (Attorney General)*, [2002] 3 SCR 3 at paras. 15 & 18 ("*Babcock*").

making these determinations, the Premier sets 'the tone and style of the government and... outlines... its most important policies'."⁸

[23] Cabinet Office relies heavily on Order PO-1725, a decision of former Assistant Commissioner Tom Mitchinson, finding that certain records created by a senior employee in the Premier's Office qualified for exemption under the opening words of section 12(1). The pertinent passages it reproduces from this Order draw a parallel between the deliberative processes of the Premier and those of Cabinet as a whole:

... [B]y virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown, cannot be separated from the deliberations of the Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative process. To the extent that records reflect consultations bearing on the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet.

....

To the extent that the records reveal the issues and options upon which the Premier or the named individual is reflecting in formulating and establishing Cabinet's "agenda" -- used here in its broadest sense - these records would tend to reveal the substance of this deliberative process and therefore, the substance of the deliberations of Cabinet in the context of the Premier's unique role within that body.⁹

[24] On this basis, Cabinet Office maintains that section 12(1) applies "where records reflect the policy-making and priority setting functions" of the Premier.

The application of section 12(1) to the mandate letters

[25] With this background in mind, Cabinet Office takes the position that the mandate letters qualify for exemption under the introductory wording of section 12(1) for three reasons.

⁸ Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2016), ch 9 at 9.4(c); Rene Dassault & Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed, (Carswell, 1985) vol 1 at 55, 59, 60, n 62.

⁹ Order PO-1725, paras. 54, 59.

[26] First, the mandate letters were placed on the Cabinet agenda and provided to each minister during an early Cabinet meeting. As such, disclosure of the letters would reveal the substance of the deliberations that took place at Cabinet during that meeting in connection with the guidance and policy priorities expressed in the letters. Cabinet Office submits:

While not every element of the policy priorities included in each mandate letter may have been discussed at that first Cabinet meeting, it is reasonable to expect that the Premier's key messages including advice, guidance, significant government policy commitments and other matters of particular importance to the Premier, would have been discussed with Cabinet.

[27] Cabinet Office maintains that, whether or not all priorities were discussed at the initial meeting, a purposive and expansive reading of the words "substance of deliberations" should be adopted to be consistent with their policy intention. It states that the mandate letters serve to "open the dialogue" between the Premier and other Cabinet ministers and should be seen as initiating a continuum of the deliberative process of the Cabinet. Cabinet office explains:

[The] mandate letters initiate a continuing deliberative process at Cabinet that necessarily extends beyond the initial Cabinet meeting. The content of the letters will continue to serve as a blueprint to inform discussion at the Cabinet table and/or between the Premier and ministers, as the government's agenda and priorities are addressed in subsequent meetings of the Executive Council.

[28] Second, the entirety of the information in the mandate letters forms the substance of deliberations of Cabinet because the deliberations of the Premier when setting policy priorities for Cabinet are inherently part of the deliberative process of Cabinet. Relying on Order PO-1725, Cabinet Office submits that the deliberations of the Premier, acting in his role as First Minister in both setting and expressing those priorities for members of Cabinet, cannot be separated from Cabinet as a whole:

[The] deliberations of the Premier when establishing the policy priorities of the Executive Council are necessarily part of the deliberative process of Cabinet as a whole. Accordingly, disclosure of the results of that deliberative process – the Premier's articulation of policy priorities in the mandate letters – would necessarily reveal the substance of the deliberations of the Executive Council.

[29] Third, Cabinet Office submits that the mandate letters are exempt from

disclosure because they would reveal the substance of future deliberations of Cabinet. Cabinet Office refers to *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*¹⁰ a decision of the British Columbia Court of Appeal, for the proposition that the substance of deliberations is not limited to the information considered by Cabinet, but "must be read [] widely" to include "the body of information that Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision." Cabinet Office states that many of the priorities outlined in the letters would require deliberation by Cabinet and its committees prior to implementation – for example, draft legislation or financial policy submissions made to the Treasury Board. Cabinet Office goes on to submit as follows:

In many cases, given the wording of the policy priorities outlined in the mandate letters, disclosure would allow a sophisticated reader to draw accurate inferences about the nature and substance of the content of the future deliberations of Cabinet as they relate to those policy priorities.

[30] Cabinet Office maintains that the premature public disclosure of policy initiatives that would occur if the mandate letters were made public could endanger free and frank discussion of these initiatives in future Cabinet meetings.

[31] Cabinet Office acknowledges that other governments have exercised their discretion to release mandate letters to the public, but maintains that the present administration is not bound by this precedent and that such letters remain subject to the exemption in section 12(1). Cabinet Office observes, in this connection, that the mandate letters of one Premier may differ from those of another Premier.

[32] Lastly, Cabinet Office explains the basis on which it exercised its discretion not to seek the approval of Cabinet to release the mandate letters. Its reasons essentially amount to affirming the public policy interest in maintaining the confidentiality of Cabinet deliberations and in preserving the Premier's prerogative to determine the manner and timing by which the government will disclose its policy priorities.

Representations of the Appellant

[33] The appellant takes the position that mandate letters are public documents and has provided a survey of practices regarding their disclosure, which includes the practices of previous Ontario governments, the federal government, and other provincial governments. She has provided evidence that mandate letters were not used in Ontario prior to the government of Dalton McGuinty and were first created in Ontario for the purpose of media and public consumption, serving to inform the public of the

¹⁰ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* (1998), 111 BCAC 95 (BC CA) at para. 39 (*Aquasource*).

government's priorities and provide a yardstick for measuring the government's success in reaching them. This evidence is set out in the following excerpts from the appellant's submissions:

In Ontario, prior to the Dalton McGuinty government (2003-2013), Premiers in the province did not provide formal mandate letters to their ministers.

Janet Eckhart, a cabinet minister in the Mike Harris government (1995-2002) that preceded the McGuinty government, told us that Mandate Letters did not exist at the time of her service in cabinet. Instead, she says ministers got a "fairly intensive binder" of material that she doesn't remember media ever asking to see. There were no mandate letters, Eckhart says, because the party's detailed election platform had already made it very clear to the public what the Harris government was going to do.

"I remember the Harris government for sure we had a really detailed election platform that came out the year before the election in 1995. The Common Sense Revolution was about 50 pages. We had released it the year before the election. There was this great, grand four to five-year strategic plan."

-- Janet Eckhart, former cabinet minister, Harris government in interview with CBC News, August 28 2018

Former Premier Bob Rae (1990-1995), Harris' predecessor, told us likewise that he did not issue Mandate Letters to his Ministers.

"To the best of my recollection, didn't have [mandate letters]. Was not asked about them."

-- Bob Rae, former Premier of Ontario, in a text message to CBC News on 28 August 2018

In an e-mail message to CBC News on January 14, 2019, former Premier David Peterson (1985-1990), Rae's predecessor, also told us his government "did not use mandate letters".

Premier McGuinty appears to have pioneered the use of Mandate Letters in the province. He was also the first to make the Mandate Letters public, and did so from the start. Lloyd Rang, a communications director in the McGuinty government told us the Ontario government has made Mandate Letters public, either by request or through public release, for more than a decade.

"At first we gave them to reporters. Over time, we also released them to the public - which continued under the Wynne government. Folks in hospitals, universities and businesses grew to expect and rely on them because the letters made our government's actions fully transparent and easier to understand."

-- Lloyd Rang, director of communications and senior advisor to Premier McGuinty, Statement to CBC News, 29 August 2018¹¹

[34] She submits that not only have all the Ontario governments who have used mandate letters seen them as fundamentally public documents, they appear to have created them expressly for the purpose of public consumption.

[35] The appellant also provides evidence, together with pertinent links to government websites, showing that in recent years ten of the fourteen federal, provincial and territorial governments have issued mandate letters and that all such letters appear to have been made publicly available online.¹² She submits that none of the other governments "appear to have the slightest concern that public release of the letters might reveal the substance of cabinet deliberations."

[36] The appellant acknowledges that the Cabinets of other governments may have exercised their discretion in releasing mandate letters. However, she submits that the fact does not govern the applicability of section 12(1). Rather, a government claiming the protection of this exemption must still satisfy the appropriate burden of proof. She maintains that other governments have adopted this practice because they have concluded that mandate letters would not reveal the substance of Cabinet deliberations, but instead are "[designed] to provide a necessary, useful and transparent window into the workings of Cabinet."

[37] The appellant further submits that Cabinet Office takes too broad an approach to the interpretation of "substance of deliberations", stating that:

¹¹ Appellant's initial representations.

¹² British Columbia: <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/cabinet/cabinet-ministers>; Alberta: <https://www.bcogc.ca/node/14336/download>; Alberta: <https://edmontonjournal.com/news/politics/graham-thomson-ndps-open-government-closes-door-on-mandate-letters>; Manitoba: <https://www.scribd.com/document/240059250/Mandate-Letters>; Manitoba: <https://gov.mb.ca/government/proactivedisclosure/ministerials.html>; Nova Scotia: https://novascotia.ca/exec_council/letters.html; New Brunswick: https://www2.gnb.ca/content/gnb/en/news/news_release.2014.11.1276.html; Prince Edward Island: <https://www.princeedwardisland.ca/en/information/executive-council-office/ministerial-mandate-letters>; Newfoundland: <https://www.gov.nl.ca/cabinet-ministers/>; Yukon: <https://yukon.ca/en/your-government/office-premier/find-mandate-letters>; Northwest Territories: https://www.gov.nt.ca/sites/flagship/files/documents/ministerial_mandates_0.pdf; <https://www.gov.nt.ca/en/newsroom/ministerial-mandate-letters>.

By defining "substance" as "essence" and then defining "essence" to mean "anything", the respondent claims, in effect, that any document which reveals anything about anything that might in any way surface at Cabinet now or in the future is subject to the blanket exemption from the *FIPPA* requirements.

[38] The appellant distinguishes between the substance of deliberations and the subject of deliberations and submits that the mandate letters do not reveal the content of the deliberations, but only the topics of potential deliberations. She states:

It is the meat of the discussion that is the substance. But the topic, or the subject of discussions, is not the substance. In fact, the word substance is used precisely to distinguish from the topic.

[39] The appellant disputes Cabinet Office's claim that knowing a topic would allow readers to draw accurate inferences about the substance of Cabinet discussions, particularly discussions that have not yet occurred. She further submits that if Cabinet Office's interpretation is followed, it would make nearly every document before Cabinet exempt, as each document would "necessarily [reveal] the topic or subject of the discussion to which it relates."

[40] The appellant observes that records of Cabinet discussions have not been requested and that the mandate letters, by their nature, do not contain and would not reveal anything about what a Cabinet member may or may not have said. As such, concerns about Cabinet ministers censoring themselves are not applicable to the current appeal. Instead, she characterizes the mandate letters as follows:

The Mandate Letters are not presented to Ministers in order to kick off a debate about whether they should be adopted, or amended or rejected. They are orders – job descriptions if you like. There is no decision to be arrived at. The letters are pre-made decisions being communicated from the Premier to his ministers about the priorities they are expected to execute.

[41] The appellant also disputes Cabinet Office's claim that the mandate letters reveal the deliberations of the Premier, stating that they reveal only the outcome of his deliberations in formulating policy priorities. She distinguishes the documents at issue in PO-1725 as "contextual documents reflecting policy options and considerations that went into the Premier's decision", in contrast to the mandate letters in this appeal which she characterizes as the decisions themselves.

Reply Representations of Cabinet Office

[42] In its reply representation, Cabinet Office relies on its previous submissions and addresses three main issues raised by the appellant, which it summarizes as follows:

- A. The appellant asserts that the mandate letters reflect the outcome, and not the development, of the Premier's deliberative process and are therefore are not subject to the Cabinet records exemption.
- B. The appellant asserts that the mandate letters contain topics and not deliberative content, and therefore do not reflect the substance of deliberations of Cabinet.
- C. The appellant asserts that Cabinet Office did not consider all relevant factors in making its determination not to seek the consent of the Executive Council to release the records at issue in this appeal.¹³

[43] The reply submissions of Cabinet Office under each heading are set out below.

A. The appellant asserts that the mandate letters reflect the outcome, and not the development of, the Premier's deliberative process and are therefore are not subject to the Cabinet records exemption.

[44] Cabinet Office disputes the appellant's claim that the outcomes of the Premier's deliberative processes are not also subject to exemption. Cabinet Office reiterates its description (set out in paragraph 27 of this order) of the deliberative process as a continuum extending beyond the articulation of priorities in the mandate letters. It states that the deliberative process does not cease once the Premier communicates his policy priorities in the mandate letters and that a substantial number of these priorities will involve further deliberation and decision-making by Cabinet.

B. The appellant asserts that the mandate letters contain topics and not deliberative content, and therefore do not reflect the substance of deliberations of Cabinet.

[45] Cabinet Office submits that the appellant's characterization of the Premier's priorities in the mandate letters as "topics" that may require further deliberation demonstrates that they are part of the deliberative process of Cabinet. Cabinet Office maintains that, in any event, the records contain more than mere topics of future deliberation. Rather, the manner of the Premier's expression of policy priorities, their context within the letters, and directions on how to implement them, would give a reader an accurate inference about information that would be deliberated upon by Cabinet in relation to each priority.

[46] Cabinet Office submits that section 12(1)(a) of the *Act*, which includes an

¹³ I note that the appellant does not specifically raise any issue concerning the proper exercise of discretion by Cabinet Office in refusing to release the mandate letters. Rather, the appellant maintains that release of the letters is not a matter for the exercise of discretion because Cabinet Office has not discharged its onus of establishing that section 12(1) applies.

“agenda, minute or other record of the deliberations” of Cabinet, clarifies that the topics of discussion and decisions by Cabinet form part of the deliberations of Cabinet and are to be protected in whatever form they may be documented. Cabinet Office asserts, in this connection, that there is no practical difference between policy subject matters appearing on a Cabinet committee agenda and the same subject matter appearing in a mandate letter.

[47] Cabinet Office repeats its claim, based on Order PO-1725 (as set out paragraph 23 of this order) that the mandate letters reflect the Premier’s deliberations in setting Cabinet’s policy priorities and, accordingly, reflect the prospective deliberations of Cabinet. Cabinet Office goes on to submit that the application of section 12(1) to future deliberations is consistent with the purpose of the exemption to facilitate free and frank deliberations by Cabinet members without concern for external influence or how their views will be publicly communicated, which could adversely affect Cabinet solidarity and the deliberative process. Cabinet Office suggests that requests or demands for a minister to take or commit to a public position on a topic prior to deliberating with Cabinet colleagues was “the very concern articulated by the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*.”¹⁴

[48] Finally, Cabinet Office analogizes section 12(1) to the exemption at section 18(1)(g) which shields the subject matter of policy decisions that have been made but not yet announced or implemented. It states that it would be inconsistent for the subject matter of a policy decision to be protected after it has been made and before it has been announced, but not earlier while the subject matter is undergoing the decision-making process of Cabinet.

C. The appellant asserts that Cabinet Office did not consider all relevant factors in making its determination not to seek the consent of the Executive Council to release the records at issue in this appeal.

[49] Cabinet Office states that it considered the practices of other governments in Canada and previous Ontario governments and decided that the nature of the mandate letters at issue in this appeal differs from those prepared by other governments. While other mandate letters provide a high- level summary of key priorities and were drafted for public release, they do not disclose all policy priorities communicated to each minister. By contrast, the mandate letters at issue in this appeal contain specific and detailed policy priorities tailored to each minister. Cabinet Office also states that it weighed the public interest in disclosure of the mandate letters against the countervailing public interest in preserving the efficacy of Cabinet’s deliberative process.

¹⁴ *Supra* note 7.

Sur-reply representations of the appellant

[50] The appellant submits that Cabinet Office's submissions are premised on the wrong legal test and ignore a critical distinction between the subject matter or outcome of Cabinet's deliberations on the one hand - neither of which is protected under s. 12(1) - and the substance of those deliberations on the other. She submits that "substance of deliberations" should not be "widely interpreted," as suggested in *Aquasource*, to encompass "the body of information" which Cabinet may consider in the future in making a decision. She points out that this approach has not been adopted in Ontario and was expressly rejected by the Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia*, where, interpreting a substantially similar exemption, the Court explained:

To my mind there is no need to give the kind of broad, expansive definition to "substance of deliberations" urged by either the government in the *Aquasource* case, or by the appellant in a matter before us. Rather than focusing the inquiry on the "kind" or "body" of information, the question that ought to be asked is whether by its disclosure, the substance of Cabinet deliberations would be revealed... Thus, the question to be asked is this: Is it likely that the disclosure of the information would permit the reader to draw **accurate** inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption...¹⁵

[51] The appellant observes that the *O'Connor* approach has been followed in other jurisdictions¹⁶ and reflects the test used by this office in various cases involving section 12(1) of the *Act*. This approach also advances a key purpose of the *Act* that "necessary exemptions from the right of access should be limited and specific."

[52] Regarding the proper interpretation of the phrase "substance of deliberations", the appellant refers to previous orders of this office holding that:

- a. "deliberations" refer to discussions conducted with a view towards making a decision; and
- b. "substance" generally means more than just the subject of the meeting.¹⁷

[53] In addition, in contrast to other statutory tests in the *Act* using words such as "could reasonably be expected to", "reason to believe" and "may", the appellant

¹⁵ 2001 NSCA 132 at paras. 91-92 (underlining added by appellant; bold in original)

¹⁶ See *Re Newfoundland and Labrador Liquor Corp*, 2008 CanLII 31397 (NL IPC) at para. 13; *Re Executive Council*, 2005 CanLII 29653 (NL IPC) at paras. 21-22, 33-34; *Re Executive Council*, 2012 CanLII 34263 (SK IPC) at para. 61.

¹⁷ Order PO-3720 at para. 33

submits that the words "would reveal" in section 12(1) impose a more stringent evidentiary test. Taking these definitions together, she submits that the introductory words of section 12(1) should be interpreted to apply when disclosure of the records,

... allows accurate inferences to be drawn regarding the essential nature of [Cabinet's] discussions weighing and examining the reasons for/against a contemplated act or course of conduct, with a view to making a decision.

[54] In support of this interpretation, the appellant refers to a recent decision of this office holding that "more than just the topic of the meeting" will normally be required to disclose the substance of deliberations. The result in that case was that section 12(1) did not exempt notes that "would give a reader insight into the topics under consideration" by an advisory council of the Premier.¹⁸ Similarly, the Alberta IPC has held that the phrase "substance of deliberations" refers to "more than merely a topic or issue being discussed, in that it refers to the views, advice, recommendations, pros and cons, reasons, rationales etc. that were conveyed or considered in relation to the topic or issue."¹⁹ Finally, she cites a decision of the British Columbia Supreme Court which upheld the BC IPC's finding that agenda item headings for Cabinet meetings merely set out the "issues or topics for discussion" but did not reveal the substance of deliberations.²⁰

[55] For essentially the same reasons, the appellant submits that the "outcomes" of Cabinet's deliberative process are not exempt because they do not reveal discussions weighing and examining the reasons for or against a contemplated act or course of conduct with a view to making a decision. In support of this argument, she cites two orders of this office and one order of the BC IPC interpreting the municipal "closed meeting" exemption in each statute²¹ and distinguishing the substance of the deliberations in those cases from their respective outcomes.²² The appellant also cites an order of this office where the government conceded that "while the outcome of the [specified] Cabinet deliberations is public, the substantive details of the matters

¹⁸ Order PO-3839-I at para. 73.

¹⁹ Order F2013-23, 2013 CanLII 52667 (AB OPIC) at para. 61.

²⁰ *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 93-97 [*BC AG v. BC IPC*]; Unlike British Columbia's *Freedom of Information and Protection of Privacy Act*, section 12(1)(a) of Ontario's *Act* explicitly exempts "an agenda ... of the Executive Council."

²¹ *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. s. 6(1)(b); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 s. 12(3)(b).

²² Order M0-2089, *Kingston & Frontenac Housing Corp*, 2006 CanLII 50742; Order M0-3099, *Re Tillsonburg (Town)*, 2014 CanLII 57542 (ON IPC) at para. 49; *Re New Westminster (City)*, 2012 BCIPC 15 (CanLII) at para. 12

deliberated upon by Cabinet to get to this outcome are not."²³

[56] With these principles in mind, the appellant observes that Cabinet Office does not argue that the mandate letters themselves constitute the "substance of deliberations." Instead, it argues that the mandate letters would reveal the substance of deliberations because Cabinet meetings may have been held or may be held in the future to discuss their contents. The appellant submits that these arguments must fail for several reasons.

[57] First, there is no evidence to support the assumption that every topic in the mandate letters was the subject of deliberations when they were handed out at the initial Cabinet meeting or will be the subject of future Cabinet deliberations. Moreover, even accepting these assumptions, there is no suggestion that the mandate letters disclose any deliberations by or involving Cabinet members and, therefore, no basis to conclude that their disclosure would allow readers to draw accurate inferences regarding the substance of any deliberative discussions.

[58] With reference to Cabinet Office's arguments based on section 12(1)(a), the appellant observes that Order PO-1725 draws a clear distinction between formal Cabinet meeting agendas subject to exemption under section 12(1)(a) and other records containing similar subject matter information which would not qualify for exemption under the introductory words of section 12(1):

The word "agenda" in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an "Agenda" as this term is used at section 12(1)(a). Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting."²⁴ (Appellant's emphasis)

[59] In contrast to official Cabinet meeting agendas and similar records that set out what will actually be discussed at a cabinet meeting, the appellant submits that mandate letters are "unmoored" from any particular Cabinet discussion. There is no "evidentiary link" between the mandate letters and any discussion at a specific Cabinet meeting in the future. She argues that the absence of specific language in section 12(1)

²³ Order PO-3752 at para. 40.

²⁴ Order PO-1725, at para. 60.

referencing "topics that may be the subject" of Cabinet discussions reflects a deliberate decision of the Legislature to draw the line at formal agendas when it comes to protecting topics that may be the subject of future Cabinet discussions.

[60] The appellant also maintains that there is no evidentiary foundation to Cabinet Office's claim that disclosure of the mandate letters raises the prospect of significant harm to Cabinet's deliberative process. The only example Cabinet Office offers is that disclosure might result in demands for a minister to take or commit to a public position on a topic prior to deliberating with Cabinet colleagues. The appellant submits, however, that such disclosure raises no rational or logical impediment to ministers taking whatever positions or making whatever remarks they deem appropriate in Cabinet meetings. Moreover, no court or commissioner has ever found that a minister merely hearing from constituents on a topic prior to Cabinet deliberations has had any deleterious impact on the openness or candour of the deliberative process. Finally on this point, she submits that the existence of numerous examples of other governments disclosing mandate letters belies the notion that releasing such letters would somehow undermine Cabinet's deliberative process.

[61] The appellant's sur-reply submissions conclude by addressing three additional arguments raised by Cabinet Office.

[62] First, the appellant submits that the alleged analogous exemption at section 18(1)(g) protecting against the "premature disclosure of a pending policy decision" does not assist Cabinet Office because the Legislature made a clear choice not to include parallel language in section 12(1).

[63] Second, Cabinet Office's assertion that the letters constitute the Premier's "decisions", "directions" and "the culmination of the deliberative process reflect[ing] his determinations", makes clear that the letters do not reveal the substance of the deliberations leading to those outcomes. The appellant points out that in Order PO-1725, it was found that only records reflecting the deliberative or consultative aspect of the Premier's priority-setting process - and not records reflecting the outcome of that process - were covered by section 12(1). In any event, she submits that in the 20 years since Order PO-1725 was decided, the IPC's approach to the Cabinet records exemption has evolved in the manner set out above in the appellant's other submissions.

[64] Third, the appellant addresses Cabinet Office's argument that "the Premier's articulation of policy priorities is a step on Cabinet's deliberative continuum and should not be seen as the culmination of the government's policy decision-making." She points out that governments make many decisions over months or even years before implementing a particular policy and that not all such decisions could be considered to be exempt merely because they are not the ultimate culmination of the decision-making process. Such an interpretation, she submits, would mark an extraordinary and unprincipled expansion in the scope of the section 12(1) exemption.

Sur-reply representations of Cabinet Office

[65] In its sur-reply representations, Cabinet Office provides responses to what it describes as the two main issues raised in the Appellant's sur-reply representations:

1. The appellant's contention that Cabinet Office relies on the wrong legal test to determine whether the disclosure of records would reveal the substance of deliberations and, correspondingly, that the substance of deliberations does not include the subject matter or outcome of Executive Council deliberations.
2. The appellant's assertion that the mandate letters do not reflect the substance of deliberations of the Executive Council.

The Legal Test - Reveal the Substance of Deliberations

[66] Cabinet Office takes the position that the court in *O'Connor* did not reject the test established in *Aquasource*. It states that the finding in *O'Connor* was not that a body of information could not be protected by the Cabinet records exemption, but rather that the focus of the analysis should be on whether disclosure of a record would reveal the substance of deliberations of Cabinet.

[67] Cabinet Office states that rather than following the *O'Connor* ruling, the appellant is proposing a narrower test that would limit section 12(1) to cases where disclosure would allow accurate inferences to be drawn regarding discussions weighing reasons for or against a course of action. Cabinet Office submits that this narrower test has not been followed in section 12(1) jurisprudence and is in conflict with a plain reading of that section.

[68] Cabinet Office observes that the wording of section 12(1) of the *Act* and the Cabinet records exemptions found in its British Columbia and Nova Scotia counterparts varies, in that section 12(1)(a) of the *Act* explicitly provides that the substance of deliberations includes Cabinet agendas. Cabinet Office maintains (as previously set out in paragraphs 45-46 of this order) that a plain reading of section 12(1) does not support a strict categorization between subject and substance of deliberations. Rather, "in light of subsection 12(1)(a), 'substance' in the introductory wording section 12(1) cannot necessarily exclude topics, decisions and outcomes." It submits that the appellant's test would restrict the exemption to records revealing "policy options" and "recommendations" described at section 12(1)(b).

The mandate letters reflect the substance of deliberations

[69] Cabinet Office affirms that it is not claiming the application of the exemptions at sections 12(1)(a) and 18(1)(g), but submits that those sections inform a harmonious reading of the *Act* which would protect both the subject matter of Cabinet meetings and the policy priorities contained in the mandate letters.

[70] Cabinet Office states that the mandate letters reflect both the substance and outcome of the Premier's deliberations and that the appellant's interpretation would allow all Cabinet records to be disclosed if they were redacted sufficiently to reveal only the topic, in which case "there would be no need for subsection 12(1)(a)."

[71] Regarding the "deliberative continuum", Cabinet Office states that the articulation of priorities in the letters is itself proof that their disclosure would necessarily reveal the substance of future deliberations:

Nearly all of these initiatives will require subsequent review and approval by Cabinet as a whole prior to implementation. In this respect, the articulation of the Premier's policy priorities for the government in the mandate letters is the best evidence Cabinet Office could have of the matters that will return for decision-making by Cabinet within the mandate of the current government. The mere possibility that a particular initiative may not proceed back to Cabinet or may be amended or altered at some point in the future, is not sufficient to determine that the return of all policy priorities mandated by the Premier for Cabinet decision-making are so mutable or uncertain as to be denied protection under the section 12 exemption.

[72] Cabinet Office reiterates its position that the mandate letters are more than mere lists of topics and contain substantive details that would allow for a reader to draw accurate inferences regarding Cabinet deliberations. Cabinet Office observes that *BC AG v. BC IPC*, relied upon by the appellant, indicates that even subject headings may reveal the substance of deliberations of Cabinet if they "expressly or implicitly [refer] to proposals or recommendations to Cabinet, decisions intended for Cabinet to make or the content of proposed legislative amendments."²⁵ It submits that the mandate letters contain sufficient information on policy priorities "to indicate the subject matter and approach to policy, legislative, and fiscal submission that will be subsequently deliberated by Cabinet."

[73] Cabinet Office also provides an appendix of sample policy priorities excerpted from individual mandate letters together with a brief submission as to how it is expected each priority would be addressed at future Cabinet meetings. While varied, these examples were can be broadly categorized as follows:

- *Development*: A policy priority is outlined in a mandate letter and the cabinet minister is directed to take the necessary steps to develop the policy, in some cases with the goal of taking a proposal back to Cabinet and/or its committees.

²⁵ *Supra* note 19 at para. 37, citing the BC IPC order under review.

Cabinet Office explains that the proposal would require the assent of Cabinet and potentially the passage of legislation before it can be implemented.

- *Implementation:* A Cabinet minister is directed to implement a policy priority. Cabinet Office explains that this will require work by a Cabinet committee or approval by Cabinet itself.
- *Consultation:* A Cabinet minister is directed to consult on a policy priority with other bodies of varying types and at different levels of formality. Cabinet Office explains that the outcome of those consultations will then inform future policy submissions to Cabinet on the various topics.
- *Review:* A Cabinet minister is directed to review an existing program or government venture and, in some cases, to report back to Cabinet with results and options. In other cases, Cabinet Office explains that the review will be put before Cabinet for potential action.

[74] Cabinet Office submits that the mandate letters thus contain sufficient context and description of the Premier's policy priorities to give a reader an accurate inference about the nature of the deliberations and decision-making that would be conducted by Cabinet in connection with each initiative. For this reason, disclosure of the mandate letters would inhibit the candour of Cabinet deliberations:

The mandate letters contain direction from the Premier to Ministers and detail the decision-making process as the developmental stage of policies at the highest level of provincial government. Thus, disclosure of the records' content would garner increased public scrutiny at such an early stage of policy development such that it would inhibit the proper functioning of Cabinet.

[75] Cabinet Office concludes its representations by stating that Order PO-1725 remains authoritative precedent regardless of its age, noting that the constitutional role of the Premier has not changed since that order was issued.

Analysis and findings

The nature of the mandate letters

[76] Cabinet Office describes the preparation of mandate letters as part of a time-honoured tradition in Ontario which is key to policy development and prioritization. The appellant has presented evidence showing that the preparation of mandate letters is a recent development in this province, and that previous mandate letters within Ontario, as well as those authored elsewhere in Canada, have been made publicly available. I am not persuaded that the evidence of either Cabinet Office or the appellant on this point is in any way determinative of the application of the section 12(1).

[77] Cabinet Office is correct in stating that the publication of such letters by previous governments in Ontario or elsewhere in Canada does not bind Cabinet Office to make the present mandate letters public. On the other hand, the publication of mandate letters with similar content by other governments may have some relevance to the claim by Cabinet Office that disclosure in this case would somehow impinge on Cabinet deliberations.

[78] I have reviewed the mandate letters at issue, as well as a sampling of publicly available mandate letters from the current federal government,²⁶ other provincial governments²⁷ and the previous Ontario government.²⁸ The mandate letters, though differing in terms of the goals for each government, are largely similar to their counterparts in their overall approach, level of detail and purpose.

[79] The mandate letters are directives from the Premier to each of his ministers. They contain general statements about the government's overall priorities and provide guidance to each minister as to each ministry's priorities and his or her own role. At the outset, I agree with the appellant's characterization of these letters as follows:

The mandate letters are not presented to Ministers in order to kick off a debate about whether they should be adopted, or amended or rejected. They are orders – job descriptions if you like.

The position of Cabinet Office

[80] As noted above, Cabinet Office advances three principal arguments in support of its position that disclosure of the mandate letters would reveal the substance of Cabinet's deliberations.

[81] First, the mandate letters were placed on the agenda of the initial Cabinet meeting when they were provided to each minister and the Premier's key messages on policy initiatives would have been discussed at that meeting.

[82] Second, the information in the mandate letters would reveal the substance of the deliberations of the Premier in setting Cabinet's policy priorities which are inherently part of the deliberative process of Cabinet.

[83] Third, the mandate letters would reveal the substance of future Cabinet deliberations.

[84] The overall theme of these submissions is that the mandate letters initiate and

²⁶ <https://pm.gc.ca/eng/mandate-letters>.

²⁷ See links to government websites of other jurisdictions, *supra* note 12.

²⁸ <https://www.ontario.ca/page/mandate-letters-2014-2015>.

inform the continuum of Cabinet deliberations on the various policy priorities set out in the letters and their disclosure would inhibit the free and frank discussion of those matters by Cabinet members in future Cabinet or committee meetings.

[85] In the discussion below, I will first deal with the parties' submissions concerning the interpretation of section 12(1). I will then deal with the first and third arguments advanced by Cabinet Office concerning the initial Cabinet meeting and future Cabinet deliberations. Finally, I will turn to the argument that the mandate letters would reveal the deliberations of the Premier as First Minister of Cabinet.

Interpretation of section 12(1) – "would reveal the substance of deliberations"

[86] Cabinet Office and the appellant each make submissions on the interpretation of the opening words of section 12(1). Both accept that these words should be interpreted in light of their underlying purpose to promote the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating. This purpose is reflected in several authorities referred to by the parties, including in the following passage from *Babcock v. Canada (Attorney General)* cited by Cabinet Office:

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny...If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect.²⁹

[87] I note that *Babcock* involved an appeal from the dismissal of an application brought in the course of a civil law suit to compel the production of records that had been certified by the Clerk of the Privy Council to be Cabinet confidences under s. 39 of the *Canada Evidence Act*. The purpose underlying s. 39 described by the Court in *Babcock* is not, as Cabinet Office suggests (see paragraph 47 of this Order), to shield Cabinet ministers from questions or comments from members of the public regarding public policy or other matters that are or may become the subject of Cabinet

²⁹ *Supra* note 7, at para. 18.

deliberations. Rather, the concern expressed in *Babcock* is to protect the substance of the deliberations themselves from being revealed by the disclosure of records and exposing *those deliberations* to public comment and criticism with the potential for adverse effects on Cabinet members' candour and solidarity. All of the other authorities I have been referred to in this connection support the same view.

[88] With this background in mind, I turn to the interpretation of the opening words of section 12(1).

[89] Cabinet Office and the appellant both refer to standard dictionary definitions of "substance" and "deliberations" as set out above. However, they advance competing interpretations of the exemption based on decisions of this office and of the commissioners and courts of other jurisdictions interpreting similarly worded exemptions.

[90] As a starting point, I agree with Adjudicator Diane Smith in Order PO-3719 where she stated:

"deliberations" refer to discussions conducted with a view towards making a decision; and "substance" generally means more than just the subject of the meeting.³⁰

[91] Cabinet Office relies on the British Columbia Court of Appeal decision in *Aquasource* to argue that the opening words of section 12(1) must be read widely to include "the body of information" that has been or will be presented to Cabinet in making a decision. It submits that disclosure of the mandate letters would reveal matters that could be expected to be deliberated on by Cabinet in future given Cabinet's role in providing approval for key government decisions.

[92] Cabinet Office argues that the inclusion of "an agenda" at section 12(1)(a) of the *Act* suggests that the topics or subject matters for discussion by Cabinet form part of its deliberations and are protected in whatever form they appear. It claims that there is no practical difference between a policy subject matter appearing on a Cabinet committee agenda and the same subject matter appearing in a mandate letter. Cabinet Office also maintains that it would be inconsistent to protect the subject matter of a proposed policy decision from disclosure under the exemption at section 18(1)(g) after it has been made but before it is announced, but not earlier when it is undergoing the decision-making process of Cabinet.

[93] The discussion in *Aquasource* focussed on whether an exception to the exemption served to narrow the scope of the exemption itself. The record at issue in

³⁰ Order PO-3719.

that case was a "Cabinet submission" which had been prepared at the request of and actually presented to and considered by Cabinet. Submissions prepared for future Cabinet meetings were not at issue, and there is no detailed discussion of the applicability of the exemption to submissions which may be made in future. In my view, while *Aquasource* contemplates that submissions that may be made to Cabinet in future could be exempt from disclosure as revealing the substance of deliberations, not all records that could potentially be discussed at future Cabinet meetings are necessarily exempt from disclosure on that basis. The requirement remains that there be a substantial evidentiary link between the records themselves and any deliberations past or future.

[94] The appellant observes that the Nova Scotia Court of Appeal in *O'Connor* rejected the "expansive" interpretation adopted in *Aquasource*. Rather than focussing on "the body or kind of information," the Court in *O'Connor* would simply examine whether disclosure of the information at issue would likely permit the drawing of accurate inferences with respect to the substance of deliberations. Relying on the dictionary definition of "deliberations", the appellant goes somewhat further to suggest that the information at issue must permit accurate inferences to be drawn regarding Cabinet discussions examining and weighing the reasons for or against a contemplated act or course of conduct. She submits that records which simply reveal the topic, subject matter or outcome of deliberations do not reveal the substance of the deliberations themselves and therefore would not have any chilling effect on Cabinet discussions. Similarly, she maintains that the outcome of deliberations would not necessarily reveal the substance of the deliberations leading to that outcome.

[95] The appellant also submits that the words "would reveal" impose a more stringent standard of proof than other provisions of the *Act* containing the words "could reasonably be expected to ... reveal" (see for example, sections 14(1)(c) and (h), 15(b) and (c), 17(d)). Cabinet Office does not specifically address the evidentiary standard as a matter of law, but suggests it is enough to submit that many of the policy priorities set out in the letters "would have been" discussed in a Cabinet meeting or "would" return to Cabinet in the future in the form of proposals by individual ministers for implementation.

[96] As Assistant Commissioner Mitchinson observed in Order PO-2320, evidence of a document actually having been placed before Cabinet provides "strong but not necessarily determinative evidence that disclosing its content could reveal the substance of deliberations."³¹ He emphasized that section 12(1) requires that an institution provide evidence establishing a linkage between the content of a record and

³¹ PO-2320 at page 6.

the substance of Cabinet deliberations.³²

[97] The decision in *Aquasource* is of some assistance with respect to records actually submitted to Cabinet or prepared specifically for future submission to Cabinet. However, when interpreting the opening words of section 12(1), I prefer and adopt the general approach articulated by the Nova Scotia Court of Appeal in *O'Connor* which aligns more closely with the language of the exemption and which has been followed in several decisions of the Newfoundland and Labrador IPC.³³ In my view, that approach appropriately balances the competing interests at stake in a case such as this, as identified by the Court in *O'Connor*:

This case is about striking a balance ... between a citizen's right to know *what government is doing* and government's right to consider *what it might do* behind closed doors. It pits the citizen's right to access information relating to the workings of government against the ability of Cabinet to carry out its deliberations in confidence and in private. It calls for an interpretation of an Act that attempts to balance two public rights of perhaps equal importance, the right of the public to be informed and its right to be governed by elected representatives free to frankly express perhaps unpopular views protected by traditional cabinet confidentiality from captious criticism.³⁴ (Emphasis added)

[98] At the same time, I would not limit the substance of deliberations, as the appellant appears to suggest, to records which permit accurate inferences to be drawn regarding discussion of the pros and cons of a course of action. In my view, the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process.

[99] Turning to Cabinet Office's argument that the substance of deliberations encompasses their "subject matter," I do not accept its attempt to equate a Cabinet "agenda" item protected under section 12(1)(a) with the same information appearing in another document that is not separately shown to have been the subject of Cabinet deliberations. If that were the case, then any subject matter or information generated by or originating with a Ministry would be protected on the basis that it also appears as the subject of an item on a Cabinet meeting agenda.

[100] The passage from Order PO-1725 cited by the appellant on this point supports this view and bears repeating here:

³² PO-2320 at page 7.

³³ *Supra* note 16, and *Re Newfoundland and Labrador (Innovation, Trade and Rural Development)*, 2008 CanLII 31395 (NL IPC) [*Re NL ITRD*].

³⁴ *Supra* note 15, at para. 1.

The word "agenda" in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an "Agenda" as this term is used at section 12(1)(a). Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting."³⁵ (Appellant's emphasis)

[101] The reasons of former Assistant Commissioner Mitchinson in that case indicate that, if a record was not placed before Cabinet and is not specifically listed at paragraph (a), it will only qualify for exemption under the opening words of section 12(1) if the context or other information would permit accurate inferences to be drawn as to actual deliberations at a specific Cabinet meeting. In my view, the same reasoning applies equally to the categories of records and information enumerated at paragraphs (b) to (f) of section 12(1). If a record does not appear at paragraphs (a) to (f), it will only qualify for the exemption if the context or other information would permit accurate inferences to be drawn as to actual Cabinet deliberations at a specific Cabinet meeting.

[102] I note that paragraphs (a) to (f) of section 12(1) clarify that the exemption applies to specific types of records that might otherwise be thought to fall outside the opening words of section 12(1) because they do not obviously "reveal the substance of deliberations of the Executive Council." This interpretation is supported by the judgment of the British Columbia Court of Appeal in *Aquasource* where the Court considered a similarly worded exemption. The Court in *Aquasource* cited the interpretive principle governing the use of the word "including" articulated by LaForest J. in *National Bank of Greece (Canada) v. Katsikonouris*, as follows:

... [W]hen a general term precedes an enumeration of specific examples..., it is logical to infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category.³⁶

[103] It is clear that in enacting paragraphs (a) to (f) of section 12(1), the legislature specifically turned its mind to the additional types of records and information of a deliberative nature that should be protected as Cabinet confidences. Other records or

³⁵ Order PO-1725, at para. 60.

³⁶ [1990] 2 S.C.R. 1029 at para. 12.

information not described in those paragraphs must satisfy the opening words of section 12(1) in order to qualify for the exemption.

[104] With this principle in mind, I accept the appellant's submission that the opening words of section 12(1) are not intended to encompass the outcome of the deliberative process in the formulation of government policy – i.e., the policy initiatives themselves. Section 12(1) is designed to protect deliberative communications occurring within the process by which the policies of Cabinet or its committees (and by extension, in this case, the Premier) are formulated. For example, paragraph (b) under section 12(1) refers to "*policy options or recommendations*" submitted or prepared for submission to Cabinet. Paragraphs (d) and (e) refer to various types of records prepared, submitted and/or used for "*consideration*" or "*consultation*" in the formulation of government policy. However, even though it would have been a simple matter to do so, nowhere in section 12(1) has the Legislature sought to protect the policies themselves that result from the deliberations of Cabinet.

[105] The reason for this omission appears to me to be obvious. Given the purpose of access to information to facilitate democracy and accountability, and the stated purpose of the *Act* set out at section 1, the Legislature has carefully chosen to protect Cabinet confidences from disclosure to the extent necessary to facilitate candour within the deliberative process by which policies are formulated, but not to shield the policy choices themselves.

[106] This interpretation finds support in the oft-quoted passage from *Dagg v. Canada (Minister of Finance)* where Justice La Forest stated:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.³⁷

[107] In addition, the first stated purpose of the *Act* at section 1(a) is,

³⁷ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para 61.

... to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific, and
- (iii) decisions on the disclosure of government information should be reviewed independently of government;

[108] In my view, if these central purposes of the *Act* are to be given effect, the correct interpretation of the exemption at section 12(1) – one that would protect Cabinet confidences and at the same time facilitate transparency and promote accountability - would not shield government policies that emerge at the conclusion of deliberations. In this way, to paraphrase the Nova Scotia Court of Appeal in *O'Connor*, section 12(1) strikes an appropriate balance between the public's right to know what government *is doing* and government's right to consider what it *might do* behind closed doors.

[109] I find additional support for a balanced approach to interpreting section 12(1) in a decision of the Newfoundland and Labrador Commissioner cited earlier in this Order:

I believe that by not enacting a blanket exception for Cabinet documents our legislature has struck a balance between making all public bodies more accountable and allowing Cabinet to carry out its deliberations in confidence and in private. ... [I]t is my view that the legislature was, quite appropriately, mindful of the fact that more secrecy often leads to less accountability and less transparency.³⁸

[110] Turning to Cabinet Office's argument concerning the exemption at section 18(1)(g) of the *Act*, I am not persuaded that this provision offers any insight into the interpretation of section 12(1). Section 18(1)(g) is an exemption of general application for proposed plans, policies or projects of an institution the disclosure of which could reasonably be expect to result in premature disclosure of a pending policy decision. It cannot be inferred from this provision, as Cabinet Office suggests, that the "subject matter" of a policy issue before Cabinet is protected merely because it arises an early stage of the deliberative process. As Order PO- 1725 indicates, the subject matter of a policy issue will only be protected where one or more of paragraphs 12(1)(a) to (f) applies or the context or additional information would permit accurate inferences to be

³⁸ *Supra* note 33, *Re NL ITRD*, at para. 68.

drawn as to actual deliberations at a specific Cabinet meeting.³⁹

[111] Finally, I accept that the opening words “would reveal” reflect the standard of proof described in *O’Connor* which asks whether it is “*likely* that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations.” This statement of the test reflects a standard of proof on a balance of probabilities, higher than the mid-range between possibility and probability that applies where the words “could reasonably be expected to” are used.⁴⁰ For the reasons set out below, neither the content and context of the letters themselves nor the evidence and representations of Cabinet Office persuade me that the test under section 12(1) has been met.

Would disclosure of the mandate letters reveal the substance of deliberations at the initial Cabinet meeting or subsequent Cabinet meetings?

[112] Cabinet Office submits that the mandate letters are exempt from disclosure because they were placed on the agenda of Cabinet and provided to each minister during an early meeting of the current Executive Council at which the Premier’s key messages would have been discussed. For this reason, Cabinet Office submits that disclosure of the letters would necessarily reveal the substance of Cabinet discussions relating to the guidance as set out in those letters.

[113] In contrast to the records at issue in *Aquasource*, the records at issue in the case before me are not “Cabinet submissions.” They are letters to individual ministers outlining the Premier’s policy priorities and directions for implementation by each minister. There is nothing on the face of the letters or in the representations of Cabinet Office to indicate that the letters themselves were intended to serve, or did serve, as Cabinet submissions or as the basis for discussions by Cabinet as a whole.

[114] Cabinet Office does not claim or provide evidence that the mandate letters were themselves, in fact, discussed at the Cabinet meeting when they were provided to each minister or that they were tabled or made generally available for discussion. There is no evidence that the mandate letters were distributed to Cabinet as a whole at that time or that any specific contents of the letters were actually the subject of the deliberations of Cabinet. Instead, Cabinet Office states that “*it would be reasonable to expect that the Premier’s key messages ... would have been discussed with Cabinet.*” Given the nature of the records at issue and the fact that they were separately provided to each minister, this assumption falls well short of the standard in section 12(1) that disclosure of the mandate letters *would reveal* the substance of any Cabinet deliberations at the initial

³⁹ Order PO-172 at para. 60.

⁴⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] S.C.J. No. 31 at para. 52.

Cabinet meeting.

[115] The mandate letters do not reveal any discussions weighing or examining the reasons for or against a course of action with a view to making a decision. Further, they do not reveal any views, opinions, thoughts, ideas and concerns expressed by Cabinet members in the course of the deliberative process. Without additional evidence of what transpired in the course of the initial Cabinet meeting, the mandate letters at best provide an indication of topics that *may* have arisen during that meeting. They do not provide insight into the substance of any specific deliberations that may have occurred among Cabinet ministers.

[116] Further, there is no evidence that the mandate letters themselves would be placed before Cabinet in future meetings. The evidence before me establishes only that the subject matter of a number of unspecified policy initiatives in the letters would be considered at some point in future Cabinet meetings. This, too, is insufficient on its own to establish that disclosure of the letters would reveal the substance of any specific Cabinet deliberations occurring at a future date.

[117] Consequently, even accepting the broadly framed test set out in *Aquasource* that "substance of deliberations" encompasses "the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision," the mandate letters do not meet this test. Cabinet Office offers no evidence that any specific parts of *the mandate letters themselves* were intended to be considered by Cabinet at any point in the future. Rather, Cabinet Office indicates that "many of the policy priorities assigned to each minister in the mandate letters would require each respective minister to develop a proposal that would be brought to the Executive Council for decision-making prior to implementation."

[118] In my view, it is not enough to suggest that many of the priorities would require ministers to develop proposals or other materials that may become the subject of future Cabinet meetings. Such an approach to the exemption would potentially encompass any record that was not placed or intended to be placed before Cabinet if it contains information that Cabinet Office claims may become the subject of a future Cabinet meeting. In addition, from my review of the mandate letters, it appears likely that numerous policy initiatives could be implemented without returning to Cabinet for review or approval.

[119] Cabinet Office seeks to demonstrate through the examples referred to above that there is a direct connection between the mandate letters and future Cabinet deliberations. However, none of the examples provided meet the test for exemption because they do not indicate what material relating to any specific policy initiative will ultimately return to Cabinet for consideration and deliberation. While the mandate letters may be said to reveal the subject matter of what *may* come back to Cabinet for deliberation at some point in the future, they do not reveal the substance of any minister's actual proposals or plans for implementation, or the results of any consultations or program reviews and options. Consequently, they do not reveal the

substance of any material upon which Cabinet members will actually deliberate in the future and, for that reason, do not reveal the substance of any such future deliberations.

[120] In short, the assertion that many policy priorities contemplated by the mandate letters would be deliberated on by Cabinet at some later date is not sufficient to exempt the entirety of all of the mandate letters from disclosure. As noted by Adjudicator Daphne Loukidelis in Order PO-2707:

[While] the introductory wording of section 12 contemplates the possibility of a prospective application, it does not permit an institution to deny access to records which may - at some indeterminate point in the future - inform the deliberations of Cabinet, or one of its committees.

[121] The submission advanced by Cabinet Office that the mandate letters "open the dialogue" and initiate a continuum of the deliberative process as a "blueprint" for future Cabinet discussions suffers from the same deficiency. I am asked to accept that deliberations on "nearly all" of the policy initiatives would take place at some point in future Cabinet meetings. I am also asked to find that section 12(1) applies to policy initiatives that may never return to Cabinet at all or that may be altered or amended in significant and unspecified ways. With respect, Cabinet Office has it backwards. I must be satisfied on the evidence of the likelihood that that disclosure of the letters "would reveal" or, at a minimum, permit accurate inferences to be drawn concerning the substance of future Cabinet deliberations.

[122] That is not to say that deliberations will not ensue a later date in relation to the subject matter of certain priorities. However, any such deliberations would be in relation to proposals or other materials yet to be developed by individual ministers and later brought before Cabinet. Such materials, when developed, may well reveal the substance of future Cabinet deliberations if and when they occur. However, the evidence before me does not establish that disclosure of the mandate letters themselves will permit accurate inferences to be drawn in that respect. At most, Cabinet Office's submissions indicates that the subject matter of future deliberations may be revealed by disclosure.

[123] Finally, there is no persuasive evidence or argument before me that disclosure would give rise to a chilling effect on Cabinet deliberations. While there is no question that Cabinet ministers must be free to express themselves within the confines of Cabinet without fear that their statements or views may later be revealed to the wider world, the disclosure of the mandate letters in this case does not raise that concern.

[124] To a great extent, the mandate letters bear a close resemblance to the detailed policy platforms often produced by political parties during election campaigns. For example, in her submissions cited above, the appellant refers to the statement of a former Ontario Cabinet minister to the effect that her party's detailed election platform made it very clear to the public what the government was going to do. I do not believe

anyone could seriously suggest that disclosure of the successful party's platform outlining what may come to Cabinet for deliberation at some point in the future would reveal the substance of any Cabinet deliberations or inhibit free and frank exchanges among Cabinet ministers in that context.

[125] Further, as noted above, the appellant has presented detailed evidence that the preparation of mandate letters is a recent development and that previous mandate letters within Ontario, as well as those authored elsewhere in Canada, have been made publicly available. This evidence contradicts the view that disclosure of letters of this nature would impinge on Cabinet deliberations; and I find no material difference in the nature of letters in issue before me to suggest a different result in this case.

[126] Ministers remain at liberty to express their views on policy matters in the course Cabinet meetings as they see fit, without fear that any views expressed will be made public or become the subject of comment, criticism or questions. And each minister is equally at liberty to govern his or her own public responses to questions or comments about policy matters in accordance with his or her duties as a member of Cabinet. The prospect that members of the public or the media may wish to address questions or comments to Cabinet members on the government's policy choices is a natural and, in my view, desirable feature of democratic government which does not affect any interest in maintaining the confidentiality of Cabinet deliberations.

Mandate Letters do not reveal the Premier's deliberations

[127] I turn to Cabinet Office's other main argument: that the mandate letters would disclose the substance of the deliberations of the Premier, and by doing so, would reveal the substance of the deliberations of Cabinet.

[128] Cabinet Office refers extensively to Order PO-1725 in its representations, particularly in regards to its position that the deliberations of the Premier cannot be separated from the deliberations of Cabinet:

The Premier's *consultations* with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes. *To the extent that records reflect consultations* bearing on the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet. (Emphasis added)⁴¹

[129] Much of the discussion in Order PO-1725 centres on the role of senior staff in the

⁴¹ Order PO-1725 at para. 54.

Premier's Office in considering issues and options and engaging in consultations in the course of policy development, and explains how that role is inseparable from the role of the Premier himself:

The named employee whose appointment schedule is the subject matter of these appeals is one of the most senior staff members of the Premier's Office. His job title and employment responsibilities deal directly and primarily with policy formulation and the overall priority- setting and co-ordination of the government's policy agenda. *Meetings and discussions undertaken by this employee in the context of issues under development or consideration by Cabinet relate directly to the Premier's functions in charting the deliberations of the Executive Council.* The records which are subject to the Cabinet Office's section 12(1) exemption claim must be considered from this perspective.

...

Given the particular role of the named individual within the Premier's Office, it is not possible to separate the *consideration and prioritization* of these items from the central role of the Premier in *identifying policy choices and initiatives, and establishing Cabinet's priorities.* To the extent that the records reveal *the issues and options upon which the Premier or the named individual is reflecting* in formulating and establishing Cabinet's "agenda" - used here in its broadest sense - these records would tend to reveal the substance of this deliberative process and, therefore, the substance of the deliberations of Cabinet in the context of the Premier's unique role within that body.⁴² (Emphasis added)

[130] Citing these passages, Cabinet Office maintains that section 12(1) applies "where records reflect the policy-making and priority setting functions" of the Premier. In my view, this statement frames the scope of section 12(1) in relation to the Premier's role far too broadly. Not all records that reflect the Premier's policy- making and priority setting "functions" are caught by the exemption at section 12(1). Order PO-1725 makes it clear that records detailing actual "meetings and discussions", revealing the "issues and options" and reflecting the Premier's "consultations" with a view to formulating and establishing policy initiatives may be considered to reveal the substance of deliberations subject to section 12(1). In that case, the records taken in context were deliberative in nature because they provided a roadmap revealing how and why policy choices were

⁴² Order PO-1725 at paras. 57, 59.

made by the Premier.⁴³

[131] Thus, the answer to the question addressed in Order PO-1725 - whether the opening words of section 12(1) of the *Act* apply to exempt records created by the Premier, or the Premier's office - depends on what, if anything, the records reveal about any meetings, discussions, issues, options or consultations that enter into the formulation of the Premier's policy initiatives.

[132] The documents at issue in this appeal and in Order PO-1725 differ significantly. In the case before me, the mandate letters do not reflect or reveal the substance of any meetings, discussions or consultations or the issues and options considered by the Premier bearing on policy making and priority setting. They represent the policy priorities that were established once any issues and options had been considered and any consultations in that respect by the Premier or within the Premier's Office had concluded. In short, they are the end point of the Premier's formulation of the policies and goals to be achieved by each Ministry. Because disclosure of the policy initiatives in the mandate letters would not provide any insight into the deliberative considerations or consultative process by which the Premier arrived at them, the reasoning in Order PO-1725 cannot be said to apply in this case.

[133] This conclusion is consistent with a parallel distinction adjudicators at this office have previously applied in the context of meetings of municipal councils or boards⁴⁴. The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a provision which exempts from disclosure any record "that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee" if such a meeting has been properly closed to the public.⁴⁵

[134] When applied in the context of requests for employment agreements reached after consideration by municipal councillors at closed meetings, adjudicators have found that disclosure of the contracts are not exempt under the *MFIPPA* as they do not reveal the *substance of deliberations* during the closed meetings.⁴⁶ Rather, disclosure of the contracts "would reveal the subject or the 'product' of the deliberations".⁴⁷ Similarly, the

⁴³ Order PO-1725, at para. 47: "For the great majority of these entries, Cabinet Office submits that they reflect *policy options or other matters being actively* considered by the Premier's Office, which in turn sets the priorities of Cabinet and its meeting agenda." (Emphasis added)

⁴⁴ See Order MO-1344 and Order MO-2512.

⁴⁵ The full text of section 6(1)(b) of *MFIPPA* reads as follows:

6 (1) A head may refuse to disclose a record,

...

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

⁴⁶ See for example Order MO-3684-I and Order MO-2964-I.

⁴⁷ Order MO-2964-I, at para. 44.s

mandate letters do not reveal the substance of the Premier's deliberations but, rather, the product of his deliberations.

[135] Cabinet Office's position in this case would lead to a far broader application of section 12(1) than could have been intended, with the result that all records revealing policy initiatives of Cabinet or the Premier would be exempt pursuant to the introductory wording in section 12(1). In my view, had that been the intention, the legislature would have stated so explicitly when enumerating the categories of records and information protected at paragraphs (a) to (f) of section 12(1).

[136] 136] In conclusion, I find section 12(1) does not apply to the records at issue. Having found that section 12(1) does not apply, it is not necessary for me to consider whether the s. 12(2) exceptions to the exemption apply. As no mandatory exemptions apply to the mandate letters, I will order Cabinet Office to disclose these records to the appellant.

ORDER:

I order Cabinet Office to disclose the records at issue to the appellant by **August 16th, 2019**.

Original Signed By: _____
Brian Beamish
Commissioner

July 15, 2019 _____