Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3977

Appeal PA17-239-2

Ministry of the Environment, Conservation and Parks

August 1, 2019

Summary: The ministry received a two-part request relating to the evaluation required under section 71(3) of the *Climate Change Mitigation and Low-carbon Economy Act*. The ministry relied upon section 12 (cabinet records) to deny access in full to the responsive records. During mediation, the appellant narrowed his request to access to the record responsive to part 1 of his request. In this order, the adjudicator upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1), 12(1)(b) and 12(2)(b).

Orders and Investigation Reports Considered: Orders P-22, PO-2554, P-1570, PO-3710, and PO-3395-I.

BACKGROUND:

[1] In November 2015, the Government of Ontario released its Climate Change Strategy ("the Strategy") which set out the government's vision to 2050 and outlined the path "to a prosperous, climate resilient, low-carbon society where greenhouse gas reduction is part of Ontario's growth, efficiency and productivity."

[2] Part of the Strategy included the creation of a Cap and Trade program under the

Climate Change Mitigation and Low-carbon Economy Act (the CCMLEA).[1] The "cap" set a maximum limit on the amount of greenhouse gas pollution industry can produce. Over time, the cap was lowered, reducing greenhouse gas pollution. The "trade" created a market for pollution credits where industries that do not use all their credits can sell or trade with those that are over the limit.

[3] All proceeds from Ontario's cap and trade market were to be deposited into the Greenhouse Gas Reduction Account (GGRA). In turn, every dollar from this account was required to be invested back into green projects and initiatives that reduce greenhouse gas pollution and help homeowners, and businesses save energy in areas such as public transit, clean-tech innovation for industry, electric vehicles incentives, and social housing retrofits.

[4] Under section 71(3) of the CCMLEA, no amount was payable to any of these initiatives unless the minister reviews and provides an evaluation of the initiative to Treasury Board. No expenditures were permitted to be made until Treasury Board had given its approval.

[5] In this context, the requester submitted a two-part access request to the Ministry of the Environment, Conservation and Parks[2] (the ministry), pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), relating to the evaluation required under section 71(3) of the CCMLEA.

[6] Subsequently, the requester filed a deemed refusal appeal, indicating he was still awaiting the ministry's access decision. Appeal PA17-239 was opened and was resolved once the ministry issued its decision.

[7] In its decision, the ministry indicated it was denying access in full to the requested records, in accordance with the mandatory exemption at section 12 (cabinet records) of the *Act*.

[8] The requester, now the appellant, appealed the ministry's decision to this office. Consequentially, Appeal PA17-239-2 was opened.

[9] During mediation, the appellant narrowed his appeal to access to the record responsive to part 1 of his request, the record required under section 71(3) of the CCMLEA.

[10] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts a written inquiry under the *Act*.

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[1] The CCMLEA has since been repealed.
[2] Formerly the Ministry of the Environment and Climate Change.

[11] During my inquiry, I invited the ministry and the appellant to provide representations. Both parties provided representations. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, copies of the parties' representations were shared.

[12] In this order, I uphold the ministry's decision.

RECORDS:

[13] The record at issue is the 2017/2018 minister's evaluation with respect to a number of initiatives, as required under section 71(3) of the CCMLEA.

DISCUSSION:

[14] The sole issue in this appeal is whether the mandatory exemption at section 12 applies to the record at issue.

[15] The ministry relies on the introductory wording to section 12(1) and also on section 12(1)(b), which read as follows:

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

[16] Under the introductory wording of section 12(1), the ministry states that disclosure of the record would reveal the substance of Treasury Board's deliberations.

[17] The ministry states that it submitted the record to Treasury Board, a Cabinet committee, as required under section 71(3) of the CCMLEA. The ministry submits that, therefore, the record was discussed by Treasury Board/Cabinet since the expenditures would not have been permitted without Treasury Board and Cabinet's approval. Accordingly, it submits that disclosing the record would reveal the substance of the deliberations of Treasury Board and Cabinet.

[18] Concerning section 12(1)(b), the ministry states that the record was submitted to Treasury Board for approval. It states:

> Section 71 of the CCMLEA deals with the Greenhouse Gas Reduction Account (GGRA). Subsection 71(3) outlines the aspects of initiatives that the *Minister is required to evaluate prior to approving expenditures from the GGRA*. Once the Minister has performed the evaluation, the *evaluation*

> *must be given to Treasury Board for approval of the proposed expenditures*. No expenditures are permitted to be made until Treasury Board has given its approval. *The evaluation is ratified by Cabinet subsequent to Treasury Board approval.* [emphasis in the original]

[19] Thus, it submits that the record falls squarely under the exemption from disclosure set out in section 12(1)(b).

[20] Concerning whether it considered consenting to disclosure under section 12(2)(b),[3] the ministry states that the appellant did not raise any vital factors in his submissions for it to consider the circumstances, and the record at issue has information that may undermine the future of the initiatives contained in the plan, and it considered these factors when it "turned its mind to the question" of consent. Therefore, it submits that it has exercised its discretion properly under subsection 12(2).

[21] The appellant argues that the introductory wording of section 12(1) does not exempt disclosure of information that would reveal the substance of *information* that was deliberated upon. He also argues that section 12(1) does not apply simply because a document matches the description of a document described in the subsections that follow the introductory wording. He argues that it must also reveal the substance of Cabinet deliberations within the meaning of the introductory wording.

[22] Moreover, the appellant argues that disclosure of the record must meet both of the following two criteria:

1. reveal: The disclosure must be revelatory, as opposed to simply showing – again – the existence of a known policy option up for discussion, or Cabinet deliberations whose substance and outcome is already publicly known. And

2. substance: The disclosure must be substantive, as opposed to trivial. The disclosure must reveal Cabinet deliberations that are substantive enough to warrant an exemption that is consistent with the purposes of the *Act* and its meaning when read as a whole.

[23] In addition, the appellant submits that, to the limited extent its disclosure could be considered revelatory at all about Cabinet deliberations, this revelation would be *trivial*, not substantive. As it is a known fact that Cabinet approved the climate change

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[3] Section 12(2)(b) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
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> the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

initiatives which were assessed in the Minister's evaluation, the appellant submits that not much substance would be revealed by disclosing the record.

[24] In reply, the ministry submits that the appellant's interpretation of section 12(1) is not consistent with the IPC's interpretation of it. The ministry relies on Order P-22, where former Commissioner Sidney Linden held that section 12(1) contains two categories of exemptions that are separate and distinct from one another.

[25] The ministry points out that the appellant made a similar, if not identical, argument about the interpretation of section 12(1) in Order PO-3710. In that order, Adjudicator Diane Smith first considered the general exemption from the introductory wording of section 12(1), and then considered the particular test contained in section 12(1)(b).

[26] The ministry reiterates that the record outlines the aspects of initiatives the minister is required to evaluate prior to approving expenditures from the GGRA. It also reiterates that once the minister has performed the evaluation, the evaluation must be given to Treasury Board for approval of the proposed expenditures. The ministry finally submits:

> No expenditures are permitted to be made until Treasury Board has given its approval, and all the initiatives contain the substance of deliberation of the Ministry and the Cabinet's recommendations.

[27] In sur-reply, the appellant states that, in Order PO-3710, Adjudicator Diane Smith *agreed* with him, against the institution, that section 12 exemption did *not* apply to the records in question, even though the records did indeed match a description in one of the sub-paragraphs following the introductory wording.

[28] The appellant submits:

> It is not clear whether [the ministry] is similarly claiming that as long as a record happens to match the descriptions in one of the sub-paragraphs in 12(1), the record should be exempted even if disclosure would not reveal the substance of Cabinet deliberations.
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> This would be deeply problematic, especially since some of the descriptions in 12(1) are very broad. For example, section 12(1)(c) could refer to many of the background documents whose disclosure is explicitly endorsed under section 13(2), as long as the head claims it was "prepared for submission" to Cabinet. The head would not be required to prove that disclosure would reveal the substance of Cabinet deliberations, if the expansive interpretation sought by the government agency in PO-3710 was allowed to stand. It would fatally undermine the *Act*.

Analysis and findings

[29] As stated above, the ministry relies on both the introductory wording of section 12(1), submitting that disclosure of the record would reveal the substance of Treasury Board's deliberations, and subsection 12(1)(b), submitting that the record contain policy options or recommendations submitted to Treasury Board.

[30] Concerning the introductory wording of section 12(1), the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).[4]

[31] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[5]

[32] 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.[6] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[7] and
- "substance" generally means more than just the subject of the meeting.[8]

[33] As stated above, the record at issue is the 2017/2018 minister's evaluation, which was required under section 71(3) of the CCMLEA. I note that the record is marked "Cabinet confidential". I accept that Treasury Board is a Cabinet committee.

[34] The ministry submits that it submitted the record to Treasury Board as required under section 71(3) of the CCLEA. It also submits that Treasury Board/Cabinet discussed the record as they subsequently approved it.

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[4] Orders P-22, P-1570 and PO-2320.
[5] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[6] Order PO-2320.
[7] Order M-184.
[8] Orders M-703 and MO-1344.

[35] Having reviewed this record, I find that the ministry has provided sufficient evidence to establish a linkage between the contents of the record and the actual substance of Treasury Board's deliberations. As such, I find that the disclosure of the record would reveal the substance of the deliberations of Treasury Board or would permit the drawing of accurate inferences with respect to those deliberations.

[36] I note that the record before me differs from those in Order PO-3710. In that order, the records were not the actual Cabinet submissions, and Adjudicator Smith was unable to find a sufficient linkage between the content of the records and the actual substance of Cabinet deliberations. In the appeal before me, the record is the actual Cabinet submission. Further, contrary to the appellant's submissions, Adjudicator Smith did not find that the records fit within section 12(1)(b).

[37] The appellant raises the question whether anything of substance would be revealed by disclosing the record as it is a known fact that Treasury Board approved the climate change initiatives contained in the record. Although the results of the deliberations are public knowledge, I find that this fact does not lessen the confidentiality of deliberations themselves afforded by the section 12 exemption. Furthermore, I find that disclosure of the analysis and recommendations put before Treasury Board would allow the appellant to infer whether the recommendations were accepted, rejected or accepted with modifications by Treasury Board and the substance of the deliberations leading to those decisions.

[38] I acknowledge the appellant's submission that the record be severed pursuant to section 10(2) of the *Act*. This section requires the head to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions under sections 12 to 22. In this case, I am unable to order the ministry to sever the record as the record as a whole would reveal the substance of deliberations of Treasury Board. I note that the record contains the background explanation and policy analyses in support of the recommendations made by the minister.

[39] As I find that the record is exempted under the introductory wording of section 12(1), it is not necessary for me to consider the application of section 12(1)(b), nor the appellant's argument with respect to the relationship between the introductory wording of section 12(1) and section 12(1)(b).

Did the ministry turn its mind to Cabinet consent?

[40] Section 12(2) reads, in part:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
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> > b. the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[41] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.[9]

[42] I have reviewed the ministry's representations in this regard. The ministry argues that the record at issue has information that may undermine the future of the initiatives contained in the plan. It also argues that there were no vital factors raised by the appellant in his submissions for it to consider the circumstances. The ministry finally submits that it "turned its mind to the question" of whether to seek the consent of Cabinet, and chose not to do so.

[43] I am satisfied that the ministry turned its mind to the issue of consent and considered relevant factors in deciding not to seek Cabinet's consent to release the record.

ORDER:

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

Original signed by
Lan An
Adjudicator

August 1, 2019

[9] See Orders P-771, P-1146 and PO-2554.