Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4048

Appeal PA19-00232

Ministry of Health

June 16, 2020

Summary: The Ministry of Health received a request under the *Freedom of Information and Protection of Privacy Act* for access to a copy of the regulatory impact assessment regarding draft amendments to regulations under the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*. The ministry denied access to the responsive record relying on the mandatory Cabinet records exemption in section 12(1).

In this order, the adjudicator finds the record exempt under the introductory wording of section 12(1) and upholds the ministry's decision to deny access to the record.

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

OVERVIEW:

[1] The Ministry of Health[1] (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following information:

[1] Previously the Ministry of Health and Long-Term Care.

> … a copy of all the responses during the consultations for O.Reg. 201/96 (ODBA) and Reg. 935 (DIDFA)[2] known as Reducing Regulatory Burden for Private Label Products [and] a copy of the regulatory impact assessment for this proposed change, or the latest draft of that assessment. Time period: October 29, 2018 to February 12, 2019.

[2] The ministry issued a decision denying access to 33 responsive records pursuant to section 12(1) (Cabinet records) of the *Act*. The ministry advised that all records responsive to this request were part of a Cabinet submission. The ministry further advised that some of the records also contained information that is severed pursuant to sections 13(1) (advice or recommendations), 18(1)(g) (proposed plans, projects or policies of an institution) and 21(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During mediation, the appellant confirmed its interest in pursuing access to the regulatory impact analysis and that it is no longer pursuing access to the other responsive records. The appellant also raised the issue of the possible application of the public interest override at section 23 of the *Act*.

[5] The ministry confirmed its decision to deny access to the regulatory impact analysis pursuant to section 12(1) of the *Act*. The ministry also advised that it is no longer relying on sections 13(1) and 18(1)(g) to withhold certain portions of the regulatory impact analysis.

[6] The mediator conveyed to the appellant that the ministry was maintaining its position that the regulatory impact analysis is exempt under section 12(1) of the *Act* and also explained that section 12(1) is not one of the exemptions listed in the public interest override at section 23 of the *Act*.

[7] The appellant advised the mediator that it would like to pursue the appeal at adjudication, where an adjudicator may conduct an inquiry.

[8] I sought the ministry's representations, initially. In its representations, the ministry raised the application of sections 13(1) and 18(1)(g) once again to the regulatory impact analysis. I added these exemptions to the inquiry, as well as the issue of whether the ministry should be allowed to claim these exemptions anew after having withdrawn its reliance on them at mediation. I obtained representations from the ministry on the application of the discretionary exemptions in sections 13(1) and 18(1)(g) and I also sought and received the ministry's representations on the application of the public interest override in section 23 to those exemptions.

---

[2] The *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*.

[9] I then sent a Notice of Inquiry and a copy of the ministry's representations, except the confidential portions,[3] to the appellant to seek the appellant's representations in response. The appellant did not provide representations.

[10] In this order, I uphold the ministry's decision that the record is exempt under section 12(1) and dismiss the appeal.

RECORD:

[11] One record is at issue, Record 33, the regulatory impact analysis on draft amendments to regulations to allow private label products to be designated as benefits and/or interchangeable products on the Ontario Drug Benefit Formulary.

DISCUSSION:

Does the mandatory Cabinet records exemption at section 12(1) apply to the record?

[12] The ministry relies on the opening words of section 12(1), as well as section 12(1)(b), which read:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> ...
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees.

Representations re section 12(1): introductory wording

[13] The ministry provided the following information about the record's creation:

> The ministry consulted on draft amendments to regulations under the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act* that, if approved, would allow private label products to be designated as benefits and/or interchangeable products on the Ontario

[3] In this order, although I am only referring specifically to the ministry's non-confidential representations, I have considered the entirety of its representations.

> Drug Benefit Formulary. The amendments, if approved, would reduce the regulatory burden on companies that wish to develop and sell private label products, and align Ontario's rules for private label products with other provinces and territories in Canada.
>
> The ministry posted a summary and the text of the draft amendments on the Regulatory Registry website between October 29, 2018 [and] November 27, 2018 where stakeholders were able to provide comments and/or feedback on the draft amendments. Record 33 is the regulatory impact analysis for these proposed amendments.

[14] The ministry states that it provided a full copy of the record to Cabinet and that the disclosure of the record would necessarily and inevitably reveal the substance of deliberations of Cabinet or its committees. In particular, the ministry states that one submission to Cabinet included a full copy of the record, while another submission to the Legislation and Regulations Committee of Cabinet included content from the record.

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

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

[16] 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.[5]

[17] Based on my review of the record and the confidential and non-confidential representations of the ministry, I am satisfied that disclosure of the record would reveal the substance of Cabinet deliberations about the regulatory impact analysis of the draft amendments to regulations under the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act* .

[18] Therefore, subject to my review of the exception in section 12(2)(b),[6] the record is exempt under the introductory wording of section 12(1).

---

[4] Orders P-22, P-1570 and PO-2320.
[5] Order PO-2320.
[6] The exception in section 12(2)(a) does not apply as the record is not more than 20 years old as required by that section.

Section 12(2)(b) exception re Cabinet consent

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

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

Representations

[20] The ministry submits that in making its access decision, it considered whether to seek the consent of Cabinet regarding the disclosure of the record and decided not to do so. The ministry states that it did not seek Cabinet's consent because:

- A full copy of the record had actually been submitted to Cabinet; and
- The disclosure of the record would reveal the substance of Cabinet's deliberations.

[21] The ministry also submits that it can only exercise its discretion to seek Cabinet's consent under the exception if the "Executive Council for which…the record [was] prepared" still exists and can therefore provide its consent. The ministry submits that the record was submitted to a Cabinet that no longer exists because of the change in government in June 2019. Consequently, at this time, the ministry submits that following the change in government, it would have no discretion to exercise under section 12(2)(b) because the conditions of the provision do not apply in this fact situation.

Analysis/Findings re section 12(2)(b)

[22] 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.[7]

[23] Based on my review of the ministry's representations, it is clear to me that the ministry turned its mind to the issue of seeking Cabinet's consent to disclose the record.

[24] In particular, 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.

---

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

[25] The ministry, in particular, considered the fact that the record was prepared for a Cabinet that no longer exists due to a change in government. Section 12(2)(b) requires the seeking of consent from the Cabinet for which, or in respect of which, the record has been prepared. Whether the same Cabinet is still in place at the time the ministry considered the application of section 12(2)(b) has been found to be a relevant consideration as to the seeking of consent to allow access to the record.[8]

[26] Accordingly, I find that the exception to section 12(1) in section 12(2)(b) does not apply and the record is exempt under the mandatory section 12(1) exemption, by reason of the introductory wording to section 12(1).

[27] As the introductory wording in section 12(1) applies to exempt the record, it is not necessary for me to consider whether it is also exempt under section 12(1)(b) or under the discretionary exemptions in sections 13(1) and 18(1). Furthermore, as the public interest override in section 23[9] cannot apply to override the section 12(1) exemption, it is also not necessary to consider it.

ORDER:

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

Original Signed by: June 16, 2020
Diane Smith
Adjudicator

[8] See Orders P-1351 and P-1390.
[9] Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.