

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4063

Appeal PA19-00147

Cabinet Office

August 27, 2020

Summary: Cabinet Office received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to polling commissioned by and/or provided to the Premier's Office or Cabinet Office between June 8, 2018 and January 18, 2019. Cabinet Office denied access to portions of one responsive record based on the mandatory Cabinet records exemption in section 12(1) of the *Act*. The record at issue relates to monthly polling of Ontarians' attitudes, opinions, and perceptions of the Government of Ontario, including topics such as the government's visual identity and branding. In this order, the adjudicator finds that section 12(1) does not apply and orders Cabinet Office to disclose the withheld portions of the record to the appellant.

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

Orders and Investigation Reports Considered: Orders P-131, PO-3624, and PO-2707.

OVERVIEW:

[1] Cabinet Office received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all polling commissioned by and/or provided to the Premier's Office or Cabinet Office from June 8, 2018 to January 18, 2019.

[2] Cabinet Office issued a decision granting partial access to the records that it identified as responsive to the request, which were polling slide decks¹ for October, November, and December 2018. Cabinet Office withheld portions of the November slide deck based on the Cabinet records exemption in section 12(1) of the *Act*, and portions of the October, November, and December slide decks based on the advice or recommendations exemption in section 13 of the *Act*.

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

[4] During the mediation stage of the appeal, the appellant advised the mediator she only wished to pursue access to the portions of the November 2018 slide deck that were withheld under section 12(1). The appellant confirmed that she was not seeking access to portions withheld under section 13.

[5] A mediated resolution was not achieved and the appeal was transferred to the adjudication stage of the appeal process. I decided to conduct an inquiry under the *Act*, which I began by inviting and receiving written representations from Cabinet Office addressing the facts and issues set out in the Notice of Inquiry. I then sent a Notice of Inquiry to the appellant, inviting her representations on the issues. The non-confidential portions of Cabinet Office's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.² The appellant provided representations for my consideration.

[6] In this order, I find that the exemption in section 12(1) does not apply and I order Cabinet Office to disclose the withheld portions of the record to the appellant.

RECORD:

[7] The record at issue is a polling slide deck titled, "Monthly Omnibus Poll | Detailed Report | November Research - Draft Report" (the slide deck). The appellant seeks access to pages 32 to 35, inclusive, which were withheld under section 12(1) of the *Act*.

DISCUSSION:

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

[8] The sole issue before me in this appeal is whether the mandatory Cabinet

¹ i.e. PowerPoint presentations summarizing monthly polling results.

² Although I only refer to the non-confidential portions of Cabinet Office's representations in this order, I have considered the entirety of its representations.

records exemption in section 12(1) of the *Act* applies to the withheld portions of the slide deck. Section 12(1) of the *Act* 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 opening words of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees, and not just the types of records enumerated in the various subparagraphs of section 12(1), is exempt under section 12(1).³

[10] In the context of this appeal, it is worth noting that a record that has never been placed before Cabinet or its committees may qualify for exemption under the opening words of section 12(1), if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or if disclosure would permit the drawing of accurate

³ Orders P-22, P-1570 and PO-2320.

inferences with respect to these deliberations.⁴

[11] In order to meet the requirements of the opening words 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

[12] Section 12(2) provides two exceptions from 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 20 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 the issue.⁶

Representations

Cabinet Office's representations

[14] As background, Cabinet Office explains that the government of Ontario (the government) is in the process of reviewing and evaluating its visual images, logos, and branding, which includes modernizing the slogans on various Ontario licence plates. In order to gain insight into the public's views and impressions of the government's visual identity, Cabinet Office commissioned a marketing research company to conduct a monthly tracking survey of Ontarians about their attitudes, opinions, and perceptions of the government and other topics. Cabinet Office maintains that the polling was intended to provide information about public opinions to inform Cabinet deliberations and decisions respecting potential changes to the government's branding and visual identity. According to Cabinet Office, the disputed portions of the slide deck contain information collected through this polling, including the questions that were asked of members of the public, their responses, and analysis of that information.

[15] Cabinet Office relies on both the opening words of section 12(1), and the background explanations or analyses exemption under paragraph (c), as a basis for

⁴ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁵ Order PO-2320.

⁶ Orders P-771, P-1146, and PO-2554.

withholding portions of the slide deck. According to Cabinet Office, both the opening words and paragraph (c) of section 12(1) contemplate a prospective application if there is evidence of a plan to submit a record to Cabinet for deliberation in the future.

[16] In support of its reliance on the opening words and paragraph (c) of section 12(1), Cabinet Office reiterates that the government is in the process of reviewing its visual images, logos and branding. Therefore, it maintains that it is "reasonably anticipated that the polling information contained in the record at issue, together with related analysis, options and recommendations, will be included in the information that will be presented to Cabinet for decision making." As evidence of the likelihood of this occurring, Cabinet Office submits that monthly polling results are to be included on the agendas of Cabinet for discussion by Ministers of the Executive Council.

[17] Given its position that the information contained in the withheld portions of the record are reasonably anticipated to be presented to Cabinet for decision making, Cabinet Office submits that disclosing those portions would allow accurate inferences to be drawn about the substance of Cabinet's future deliberations.

[18] In addition to its written representations, Cabinet Office provided an affidavit sworn by a senior policy advisor in the Premier's office.⁷ In the non-confidential portions of the affidavit, the senior policy advisor attests to the government's anticipated use of the information at issue. In doing so, he acknowledges that certain branding decisions have already been made and announced, such as those relating to Passenger and Commercial licence plate slogans; however, he says that additional decisions remain to be made. In light of the decisions that remain to be made, the senior policy advisor says that it is reasonably anticipated that "the polling information contained in the record at issue [...], together with related analysis and recommendations, will be included in the information that will be presented to Cabinet for decision making." The senior policy advisor also provided a general time for when he "anticipate[s] that the submission [to Cabinet] may likely take place."

The appellant's representations

[19] The appellant maintains that, based on Cabinet Office's non-confidential submissions, it does not appear that the record at issue has been placed before Cabinet; therefore, she submits that Cabinet Office needs to establish a direct link between the record and the actual substance of Cabinet deliberations. The appellant maintains that Cabinet Office has not established this direct link.

[20] In the appellant's view, even if the four pages at issue are presented to Cabinet, disclosing the polling data contained on those pages would not reveal anything about

⁷ Cabinet Office also provided additional confidential documentation in support of its position.

the process by which Cabinet discusses the findings, if it discusses them at all. The appellant submits that disclosure would not reveal how or if Cabinet weighs and examines the material; how Cabinet as a whole looks at the reasons for or against a course of action; who makes arguments for or against a course of action; what Cabinet members think of the data; or any substance of debate that may one day occur. Accordingly, the appellant maintains that disclosing the withheld portions of the record would not undermine Cabinet confidence.

[21] The appellant also argues that disclosing the disputed portions of the record would not permit the drawing of accurate inferences about future Cabinet deliberations. At the most, she says accurate inferences may be drawn about the topic of discussion at a future Cabinet meeting, but not about the substance of any deliberations that occur. The appellant says,

if disclosing a possible topic at a possible future Cabinet meeting somehow reveals the substance of deliberations and is captured by section 12, then it follows that every document ever prepared by or for Cabinet Office would be exempt. That would make it a rule, not an exemption to a rule.

[22] According to the appellant, this interpretation would be contrary to the spirit of the *Act*, which is to “provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that exemptions should be limited and specific.”

Analysis and findings

[23] As summarized above, Cabinet Office relies on the opening words of section 12(1), as well as the background explanations and analyses exemption in section 12(1)(c), to withhold the portions of the record at issue. For the following reasons, I find that the Cabinet records exemption does not apply.

Background explanation or analyses exemption - section 12(1)(c)

[24] The exemption in section 12(1)(c) applies to records containing background explanations or analyses of problems and that have been submitted to Cabinet or its committees for consideration in making a decision, or prepared for that purpose.⁸ This exemption is prospective in its application. It will apply to exempt records containing background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact.⁹

⁸ Order 60.

⁹ Orders PO-2554 and PO-2677.

[25] For a record to qualify under paragraph (c) of section 12(1), this office has held that the institution must establish that:

1. the record contains background explanations or analyses of problems to be considered; and
2. the record itself was submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions; and
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; and
4. the decision at issue either:
 - i. has not been made; or
 - ii. has been made but not implemented.¹⁰

[26] As mentioned above, Cabinet Office has withheld pages 32 to 35 of the slide deck at issue. Page 32 consists of a title slide, while pages 33 to 35 reveal some of the questions that were asked of members of the public, and statistics regarding, or a rudimentary summary, of the responses. Cabinet Office maintains that section 12(1)(c) applies to the withheld pages because it is "reasonably anticipated" that the polling information, together with related analysis, options, and recommendations, will be included in information presented to Cabinet for decision making in the future.

[27] Based on the information before me, I understand that the slide deck at issue was prepared by a marketing research company to report to Cabinet Office on its monthly survey of Ontarians. The fact that the research was commissioned by Cabinet Office does not, on its own, bring the information at issue within the ambit of the exemption. To find otherwise would make any document commissioned by Cabinet Office exempt, regardless of whether it ultimately satisfies the requirements of the exemption under section 12(1). In order for the exemption in section 12(1)(c) to apply, I must be satisfied that the record was "submitted or prepared for submission to the Executive Council or its committees."

[28] Cabinet Office's submissions and affidavit evidence do not establish that the slide deck itself will be presented for discussion by Ministers of the Executive Council. Rather, the evidence indicates that it is "reasonably anticipated" that the withheld polling information will be included in the information that is presented to Cabinet along with related analysis, options, and recommendations. As I read Cabinet Office's submissions, a document or materials other than the slide deck at issue will be placed before Cabinet

¹⁰ Orders P-1623, PO-2186-F.

for consideration.

[29] In my view, the rationale for the second requirement of the section 12(1)(c) test - that "the record itself was submitted or prepared for submission" to Cabinet, as opposed to some other document - is to ensure that the exemption of background explanations or analyses of problems is not cast too broadly. The disclosure of background information, which may shed light on the basis for government decision-making or policy-making, is one of the fundamental tenets of freedom of information legislation. This is one of the reasons that the section 12(1)(c) exemption operates prospectively - so that Cabinet may freely and frankly consider the background explanations or analyses in a record when decisions and their implementation are pending, but not afterwards when its disclosure will not impact on the decision-making process or the implementation of government policy.

[30] Similarly, records containing this information are only protected to the extent that they are actually "submitted or prepared for submission" to Cabinet. Information in documents that are not themselves submitted or prepared for submission to Cabinet may be summarized, re-interpreted, altered, or amended in unknown ways before appearing in the records that may ultimately be submitted to Cabinet. As such, there is less likelihood that disclosing "source" documents will have any impact on Cabinet deliberations before decisions are made and implemented.

[31] I note that in Order PO-3624, Assistant Commissioner Sherry Liang found that section 12(1)(c) may apply when the record at issue differs from that presented to Cabinet if "changes are minor and the essential content and format from one version to another remained the same." It is significant that in Order PO-3624, Assistant Commissioner Liang was in a position to reach this conclusion because she was able to compare the records at issue with the final version of the document that was submitted to Cabinet. In contrast, I do not have the benefit of comparative evidence in this appeal. Moreover, Cabinet Office has indicated that whatever material would be presented to Cabinet would include analysis, options, and recommendations. Without more specific evidence regarding what may ultimately be presented to Cabinet in this case, I am not in a position to ascertain the extent to which the withheld information will (or will not) be summarized, re-interpreted, altered, or amended before being included with any other information that may ultimately be presented to Cabinet.

[32] In the absence of persuasive evidence that the slide deck at issue was actually prepared for submission to Cabinet, or that the withheld portions will be reproduced directly into the materials presented to Cabinet (or that the essential content and format will be unchanged), I am not satisfied that the second requirement of the test for section 12(1)(c) is established. Accordingly, I find that the exemption in paragraph (c) of section 12(1) does not apply to the withheld portions of the slide deck.

Exemption in the opening words of section 12(1)

[33] As set out above, previous orders of this office have determined that the use of

the term “including” in the opening words of section 12(1) means that any record that would reveal the substance of deliberations of Cabinet or its committees is exempt under section 12(1).¹¹ It is possible for a record that has never actually been placed before Cabinet to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations or permit the drawing of accurate inferences with respect to Cabinet deliberations.¹²

[34] In its submissions, Cabinet Office maintains that it is “reasonably anticipated” that the polling information, together with related analysis, options, and recommendations, “will be included in the information that will be presented to Cabinet for decision-making.” In its confidential submissions, Cabinet Office mentioned a general timeline for when it anticipates these Cabinet deliberations occurring. Cabinet Office also submits that monthly polling results are to be included on the agendas of Cabinet for discussion by Ministers of the Executive Council. On this basis, Cabinet Office maintains that disclosing the withheld portions of the record would allow accurate inferences to be drawn about the substance of Cabinet’s future deliberations, such that the exemption in the opening words of section 12(1) applies.

[35] As mentioned above, the withheld portions of the record reveal questions that were asked of the public, and statistics or a crude summary of the responses received. Cabinet Office maintains, however, that it also anticipates providing “analysis, options, and recommendations” to Cabinet to inform its deliberations. Based on my reading of the evidence, it appears that much more information will be presented to Cabinet than what is at issue in this appeal. Cabinet Office has not provided evidence demonstrating what, specifically, those submissions might contain, and in what format they will appear. For example, Cabinet Office has not indicated whether the content of the withheld slides will be replicated in the Cabinet submission, summarized, or combined with other polling information (such as data from research conducted in other months) which does not appear in the slide deck at issue. While I accept that at least some portions of the withheld information *may* be incorporated in some fashion into a Cabinet submission at some point in time, I am not persuaded on that basis alone that its disclosure would reveal the substance of Cabinet deliberations or allow accurate inferences to be drawn about those deliberations.

[36] Moreover, I note the following statement made by Adjudicator Daphne Loukidelis in Order PO-2707:

I accept that there may be an intention to submit the matter to Cabinet. However, the Ministry did not provide evidence of a more specific or

¹¹ Orders P-22, P-1570 and PO-2320.

¹² Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

detailed plan to do so and, in my view, intention alone is not sufficient to establish the exemption. Moreover, 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.

[37] In my view, a timeline for possible submission to Cabinet spanning a period of months is not sufficiently definite for the purpose of section 12(1), particularly when the evidence only indicates that it is “reasonably anticipated” that the information at issue will be presented to Cabinet at a later point in time. In the appeal before me, Cabinet Office has not satisfied me that it is more likely than not that the withheld information will actually be considered by Cabinet at a reasonably proximate point in time in the future; it has only provided evidence that it is reasonably anticipated to be the case on a general and uncertain timeline. In my view, this is akin to the circumstances described in Order PO-2707, which, as noted by Adjudicator Loukidelis, is not sufficient for the purpose of section 12(1).

[38] I also note that although Cabinet Office maintains that monthly polling results are to be included on the agendas of Cabinet on a go-forward basis, the confidential evidence before me appears to relate to a point in time only. It does not support a finding that the monthly polling results will be discussed at a series of meetings of the Executive Council as the results are produced. In my view, this evidence underscores the indeterminate nature of the timing of any meeting or meetings at which the information at issue is “reasonably anticipated” to be discussed.

[39] Absent evidence regarding what, more precisely, will be submitted to Cabinet and when, I find that the opening words of the exemption have not been established.

[40] Given the speculative timing and content of the Cabinet submission, I am also not persuaded that disclosing the withheld information would reveal the substance of the deliberations of Cabinet or its committees, nor would it permit the drawing of accurate inferences with respect to those deliberations. The key terms here, being “substance” and “deliberations,” were defined in Order P-131 as follows:

"Substance" is 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).

"Deliberation" is defined 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."

[41] Cabinet Office is relying on the exemption to withhold information that may be considered by Cabinet based on speculation about what future Cabinet deliberations

might occur. This kind of application overlooks the requirement that institutions establish an evidentiary link between the content of the record and the *actual substance* of past or future Cabinet deliberations.¹³

[42] Considering both the content of the record and the entirety of Cabinet Office's submissions, I am not satisfied that disclosing pages 32 to 35 would reveal, or allow accurate inferences to be drawn about, the actual substance of Cabinet's future deliberations, or those of Cabinet committees.

[43] As a result, I find that the exemption in the opening words of section 12(1) does not apply. Having found that section 12(1) does not apply, it is not necessary for me to consider whether either of the section 12(2) exceptions to the exemption apply. As no mandatory exemption applies, and no discretionary exemptions have been claimed, I will order Cabinet Office to disclose the withheld portions of the record to the appellant.

ORDER:

1. I order Cabinet Office to disclose pages 32 to 35 of the slide deck to the appellant by **September 17, 2020**.
2. In order to verify compliance with this order, I reserve the right to require Cabinet Office to provide me with a copy of its correspondence to the appellant, disclosing the pages at issue in accordance with order provision 1.
3. The timeline noted in order provision 1 may be extended if Cabinet Office is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by: _____
Jaime Cardy
Adjudicator

August 27, 2020 _____

¹³ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.