

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4099

Appeals PA15-246 and PA15-396

Cabinet Office

December 30, 2020

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Cabinet Office for records related to reports issued by the Premier's Advisory Council on Government Assets in 2014 and 2015. Cabinet Office denied access to the records, claiming the application of the mandatory exemptions in section 12(1) (Cabinet records) and 17(1) (third party information) of the *Act*, as well as the discretionary exemption in sections 13(1) (advice or recommendations) and 18(1) (economic and other interests). In this order, the adjudicator upholds Cabinet Office's decision that records at issue are exempt from disclosure pursuant to section 12(1) of the *Act* and she dismisses the appeal.

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

Orders Considered: Order PO-1725.

OVERVIEW:

[1] This order addresses two multi-part requests to Cabinet Office under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for records related to public reports issued by the Premier's Advisory Council on Government Assets (the Advisory Council) in 2014 and 2015.

[2] The Advisory Council was established by the Premier in 2014, the Honourable Kathleen Wynne, to provide analysis, advice and recommendations on how best to maximize the value and performance of government business enterprises and other Provincial assets. It was comprised of five senior leaders from the public and private

sectors and assisted by a project team from Cabinet Office. The Advisory Council published two public reports, *Retain and Gain: Making Ontario's Assets Work Better for Taxpayers and Consumers*,¹ and *Striking the Right Balance: Improving Performance and Unlocking Value in the Electricity Sector in Ontario*.² The appellant's requests for information relate to the underlying analysis and supporting research for the conclusions in the two public reports.

[3] After clarification, the appellant's first request, now Appeal PA15-246, reads as follows:

The time period for all records is from April 11, 2014 to March 20, 2015:

1. Contracts for any third party consulting services that have been retained by the Premier's Advisory Panel on Government Assets or a listing of consulting contracts that includes the name of the consulting firm, the value of the contract and a description of the service would suffice for this part of the request.
2. Reports (slide decks, correspondence) from third party consultants to the Premier's Advisory Panel on Government Assets.
3. Correspondence among Advisory Panel Members regarding possible recommendations for modernizing government business enterprises.
4. Studies regarding energy ratepayer impacts of different plans for Hydro One.

[4] With respect to part 1 of the request, Cabinet Office granted partial access to a listing of consulting contracts. Access to the remaining information relating to part 1 was denied pursuant to section 12(1) (Cabinet records) of the *Act*. With respect to parts 2 and 3 of the request, access was denied pursuant sections 12(1), 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*. Cabinet Office also denied access to records relating to part 4 of the request in accordance with sections 12(1) and 18(1) of the *Act*.

[5] The appellant appealed Cabinet Office's decision to this office. The appeal was initially assigned to a mediator pursuant to section 51 of the *Act*. During mediation, Cabinet Office produced a fee estimate and the appellant narrowed the scope of his appeal, indicating that he is no longer appealing Cabinet Office's decision with respect

¹ Published November 2014 and available at: <https://www.ontario.ca/page/initial-report-premiers-advisory-council-government-assets>.

² Published December 2015 and available at: <https://www.ontario.ca/page/improving-performance-and-unlocking-value-electricity-sector>.

to parts 1 and 3 of his request. With respect to part 2 of the request, the appellant advised that he is only seeking final reports from third party consultants to the Advisory Council.

[6] Further mediation was not possible and the appellant advised the mediator that he would like to proceed to adjudication with respect to application of the exemptions claimed in relation to part 2 of the narrowed request, as well as the application of the exemptions claimed in relation to part 4 of his request. In addition, during mediation the appellant advised the mediator that he believes there is a public interest in the disclosure of the records remaining at issue. As a result, the application of section 23 of the *Act* was added as an issue in this appeal. The fees claimed by the ministry are not at issue in this appeal.

[7] The appellant's second request, now Appeal PA15-396, was clarified as follows:

The period April 11, 2014 to May 6, 2015:

1. Terms of Reference, including any revisions, provided to the Premier's Advisory Council on Government Assets;
2. Submissions (both solicited and unsolicited) and input made to the Council;
3. Records of stakeholder meetings held by the Council including records of attendance at meetings;
4. Any records that show the "detailed valuations and due diligence" conducted by the Council referenced on Page 8 of "Striking the Right Balance: Improving Performance and Unlocking Value in the Electricity Sector in Ontario."

[8] The request originally included a fifth part, but Cabinet Office and the appellant agreed that the fifth part would be dealt with as a separate request.

[9] With respect to part 1 of the request, Cabinet Office granted access to two Terms of Reference documents. With respect to parts 2 and 3 of the request, access was denied pursuant to sections 12(1), 13(1), 17(1) (third party information) and 18(1) of the *Act*. Cabinet Office also denied access to records relating to part 4 of the request pursuant to sections 12(1), 13(1) and 18(1) of the *Act*.

[10] The appellant appealed the decision of Cabinet Office to this office. During mediation the appellant raised the application of section 23 of the *Act*. Mediation did not resolve the issues and the appellant confirmed with the mediator that he would like to proceed to adjudication on the application of the exemptions claimed for the representative sample of records Cabinet Office identified in relation to parts 2 and 3 of his request. For the purposes of this appeal, and as confirmed in the Notice of Inquiry

sent to the appellant, the appellant has, in effect, limited the scope of parts 2 and 3 of the request to the records included in the representative sample. In addition, he is appealing the application of the exemptions claimed to the records responsive to part 4 of his request.

[11] Further mediation of the two appeals was not possible and they moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*. An adjudicator decided to conduct a joint inquiry into both appeals and representations were sought and received from Cabinet Office and the appellant. Portions of Cabinet Office's representations met this office's confidentiality criteria, as set out in Practice Direction Number 7 of the *Code of Procedure*. Those portions were not shared with the appellant and will not be set out in this order, but I have considered them in coming to my findings.

[12] During the inquiry stage, Cabinet Office issued a supplementary decision to the appellant for Appeal PA15-246. It clarified that it had located a Cabinet submission that was responsive to part 4 of the appellant's request. Cabinet Office provided a copy of the submission to this office and it is now at issue in this inquiry.

[13] There are therefore five groups of records that remain at issue in this joint inquiry, as set out below.

[14] In this order, I find that all of the records at issue are exempt from disclosure pursuant to the introductory wording of section 12(1) of the *Act*. As a result, it is not necessary for me to determine whether sections 13(1), 17(1) and/or 18(1) also apply to the records at issue. Furthermore, as the public interest override in section 23 cannot apply to override the section 12(1) exemption, it is also not necessary to consider that issue.³

RECORDS:

[15] The five groups of records at issue in this joint inquiry are comprised of the following:

Group Number	Cabinet Office's description of the records at issue	Records reviewed by this office
1	Final Reports from third party consultants to the Advisory Council	- Five separate reports ranging from approximately 25 to 200

³ 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.

		pages each - Report 5 is separated into 4 parts
2	Records that show the valuations and due diligence undertaken by the Advisory Council relating to Hydro One	- A slide deck of approximately 100 pages
3	Studies that show ratepayer impacts and different rate plans for Hydro One	
4	Submissions and input made to the Advisory Council	- Agendas, briefing notes, slide decks, backgrounders, and reports totaling approximately 320 pages
5	Records of stakeholder meetings held by the Advisory Council, including attendance at the meetings	- 29 copies of meeting notes, one to three pages in length each

DISCUSSION:

[16] The sole issue in this appeal is whether section 12 applies to the records at issue. Section 12(1) 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.

[17] 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

[18] 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

[19] 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

[20] As explained in more detail below, I have found that the records at issue are all exempt under section 12 because either they would reveal the substance of the Premier’s own deliberations, or would reveal the substance of deliberations of either Cabinet, and/or a Cabinet Committee (the Ministers’ Table referred to below).

Cabinet Office’s representations

[21] Cabinet Office provided the following background and contextual information about the nature of the records at issue. It submits that in April of 2014, the Premier, the Honourable Kathleen Wynne, established the Premier's Advisory Council to Provide Advice on Government Assets (the Advisory Council, or the Council).

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.

[22] It says that the mandate of the Advisory Council, established by the Premier through a Terms of Reference document, required the Advisory Council to provide analysis, advice and recommendations directly to the Premier on how best to maximize the value and performance of government business enterprises and other Provincial assets.

[23] Cabinet Office says that the Advisory Council was comprised of five senior leaders from the public and private sectors, assisted by a project team from Cabinet Office that provided direct support to the Council and its Chair.

[24] In support of its representations, Cabinet Office provided an affidavit from the Advisory Council's Project Director and Secretariat (the Project Director). The Project Director attests that he served in that position from the announcement of the Advisory Council in April 2014. His affidavit confirms the information set out above about the origins of the Advisory Council and, for the most part, repeats the remainder of Cabinet Office's representations, which I will outline now.

[25] The Project Director says that general functions and responsibilities of the Advisory Council were described in the Terms of Reference document, attached to his affidavit. He attests that:

- the Premier requested that the Advisory Council review and report on government asset optimization opportunities, including possible asset mergers, acquisitions and divestments;
- the initial mandate of the Advisory Council also included providing advice on possible changes to the corporate structure of government business enterprises, including private/public sector partnerships; and
- the Advisory Council was also asked to provide advice to the Premier on any other matters related to maximizing the value of Provincial assets.

[26] The Project Director states that the formal work of the Advisory Council commenced in April of 2014. He says that the members of the Council met frequently and had extensive consultations and dialogue through their Chair with the Premier and a committee of her Ministers.

[27] The Project Director says that the Advisory Council focused their review on three enterprises: beverage alcohol (including The Beer Store and the Liquor Control Board of Ontario (LCBO)), Hydro One and Ontario Power Generation (OPG). He attests that the Advisory Council's work was structured in two phases and resulted in two separate public reports:

- Retain and Gain: Making Ontario's Assets Work Better for Taxpayers and Consumers;⁷ and
- Striking the Right Balance: Improving Performance and Unlocking Value in the Electricity Sector in Ontario.⁸

[28] According to the Project Director, during Phase I the Advisory Council analyzed each organization and its operations, and evaluated options for performance improvement, cost savings and/or the optimization of asset value. In undertaking this work, the Project Director states that the Advisory Council engaged a number of consultants to assist it in analyzing and developing recommendations. He says that the Advisory Council also held meetings with, or received submissions from, selected industry associations and stakeholders who were either employed by, regular clients of, or competitors of the government business enterprises.

[29] During Phase II, the Project Director says that the Advisory Council conducted detailed valuations and due diligence relating to the possible sale of a portion of the government's ownership stake in Hydro One. He says that the Advisory Council, at the direction of Cabinet, undertook a comprehensive review of Hydro One and its various subsidiaries, including Hydro One Brampton Networks Inc. He specifies that this review involved an in-depth analysis of the company and its operations that were relevant to the value of the company, including issues such as company accounting, labour relations, company debt, and pension and tax issues.

[30] Cabinet Office made specific representations, which were reiterated in the Project Director's affidavit, about the relationship between the Advisory Council and the Premier and Executive Council. They state that since its inception, the Advisory Council was engaged in a direct and ongoing dialogue with the Premier and members of the Executive Council. Specifically, they note that in the initial stages of the Advisory Council's work, the Chair of the Advisory Council would liaise directly with the Premier. Subsequently, they submit, a committee of Ministers began meeting during summer 2014 to receive reports from, and provide direction to, the Council in respect of its ongoing work. This committee, which they say was referred to as the Ministers' Table on Government Assets (the Ministers' Table) was comprised of the Premier and key Ministers.

[31] The Project Director attests to the following:

⁷ Published November 2014 and available at: <https://www.ontario.ca/page/initial-report-premiers-advisory-council-government-assets>.

⁸ Published December 2015 and available at: <https://www.ontario.ca/page/improving-performance-and-unlocking-value-electricity-sector>.

- The Ministers' Table met initially on a monthly, and subsequently bi-weekly, basis to receive reports and discuss the Advisory Council's ongoing work, to provide direction to the Advisory Council on each dimension of its work, and to inform the development of recommendations to Cabinet.
- The Advisory Council's work with the Premier and the Ministers' Table was iterative and highly interactive.
- At the initial stages of the Advisory Council's work with the Premier and the Ministers' Table, the scope of its work was refined to focus on the LCBO, Hydro One and the OPG.
- At the direction of the Premier and Ministers' Table, the Council engaged in comprehensive reviews of the three companies, including meeting with stakeholders and engaging the services of consultants.
- In this regard, the Advisory Council commissioned detailed consultant reports in relation to the three government business enterprises. These reports provided the basis for the Council's work in developing recommendations to Cabinet.
- Through the fall of 2014 and through 2015, the Advisory Council met regularly with the Premier and Ministers' Table to provide updates on the Council's ongoing work and the development of recommendations in both phases of its mandate.
- The discussions at the Ministers' Table were in-depth and typically included discussions about what the Advisory Council was hearing from stakeholders, the substance of the information the Council received from consultants and advisors, and the Council's ongoing work and analysis relating to the development of recommendations.
- In addition, the Ministers' Table was also a forum for the Premier and Ministers to ask questions, deliberate, and provide ongoing direction to the Advisory Council.

[32] Cabinet Office and the Project Director specify that as part of its Phase I review, the Council also reached out to, and heard from, stakeholders who had interests in future government plans with respect to the beverage alcohol, Hydro One and OPG. The Project Director attests that the Premier and Ministers were specifically interested to understand the interests and reactions of various stakeholders, so the Council undertook a series of consultations with those stakeholders. The Project Director says that the results of these consultations were reported back into the Ministers' Table by the Council as part of the ongoing dialogue relating to the development of the Council's recommendations.

[33] The Project Director says that at the end of the Phase I review, the Council was

asked by the Premier and Cabinet to, among other things, review and provide recommendations specifically about Hydro One. According to Cabinet Office and the Project Director, this work was directed by the Treasury Board and Cabinet and is described in a Terms of Reference document for Phase II of the Council's work.

[34] Cabinet Office says that the Advisory Council began its detailed review of Hydro One in the fall of 2014 and engaged the services of expert consultants to provide information, analysis and advice. The Project Director attests that, on a confidential basis, several financial institutions were asked to provide the Advisory Council with their views on the value of Hydro One using a variety of potential transaction scenarios and that the substance of those submissions was discussed at the Ministers' Table.

[35] The Project Director specifies in his affidavit that there was a substantial amount of dialogue taking place between members of the Advisory Council and the Premier and Ministers' Table leading up to the development of the Council's recommendations in both Phase I and Phase II of its mandate. In addition, he says, the Advisory Council also prepared a number of formal submissions and updates to the Executive Council relating to its work for both phases. The Project Director attests that these submissions provide in-depth analysis and recommendations to Cabinet, supported by, and developed from, the information it collected from the consultants, legal advisors, stakeholders and other interested groups. The Project Director says that these submissions represent the summary of the work, analysis and recommendations of the Advisory Council.

[36] The Project Director provided additional specific evidence about why he believes the records at issue were deliberated on by Cabinet, but this portion of the Affidavit has been withheld pursuant to the confidentiality criteria set out in *Practice Direction Number 7*.

[37] Cabinet Office and the Project Director also provided additional representations and evidence about each specific group of records, which I will outline below.

1) The consultant's reports

[38] Cabinet Office and the Project Director both state that there are five consultant reports that are responsive to the appellant's request. They say that these reports were commissioned for the Advisory Council by the government to assist the Council's Phase I work.

[39] Cabinet Office takes the position that each of the consultant reports is subject to the exemption provided for by section 12(1) of *FIPPA*, because disclosure of the records would reveal the substance of the deliberations of the Executive Council (Cabinet) and the Ministers' Table Cabinet committee. In this regard, Cabinet Office and the Project director say:

- the substance of each one of the Phase 1 reports was discussed during meetings between the Advisory Council and the Premier and Ministers' Table; and
- the reports were used by the Council to consider and formulate its specific recommendations to the Executive Council in respect of the LCBO, Hydro One and OPG;
- the detail in the consultant reports, when read in connection with the published report of the Council's phase I recommendation, would provide a sophisticated reader with insight into, and inferences about, the options and considerations discussed at the Ministers' Table, as well information provided to and discussed by Cabinet; and
- the reports were provided to Cabinet as part of a report prepared by the Advisory Council that was deliberated on at both the Ministers' Table, and by Cabinet on a date specified in a confidential portion of the Project Director's affidavit.

[40] As such, Cabinet Office submits that disclosure of the reports would reveal the substance of information provided to, and deliberated on, by the Premier and Cabinet.

[41] The Project Director provided additional evidence in his affidavit in support of Cabinet Office's assertion that the consultants' reports were deliberated on by Cabinet. This part of the Project Director's affidavit was kept confidential as it met this office's confidentiality criteria set out in *Practice Direction Number 7*. In summary, the Project Director provided specific details about the dates and circumstances in which members of Cabinet received and deliberated on the consultants' reports.

[42] The Project Director also attests that the Premier and Cabinet engaged in frequent dialogue with the Advisory Council about matters addressed in the consultants' reports at the ongoing Ministers' Table meetings.

[43] Finally, the Project Director specifies that the Advisory Council prepared and presented a number of formal submissions to Cabinet in both 2015 and 2016 that were informed by and reflect information and analysis supplied to the Advisory Council in the consultant reports. In this regard, the Project Director says that it is his view that a sophisticated reader, upon reviewing the five consultant reports, and having regard to the information already published by the Council, could make very accurate inferences about the information, options and analysis supplied to and deliberated on by Cabinet.

2) Valuations and due diligence; and 3) Ratepayer impacts

[44] Cabinet Office also made further specific representations about the appellant's request for valuations reports and records relating to ratepayer impacts. These representations were also reiterated in the Project Director's affidavit.

[45] With regard to the part of the appellant's request for records that show the "detailed valuations and due diligence" conducted by the Council referenced at page 8 of *Striking the Right Balance: improving Performance and Unlocking Value in the Electricity Sector in Ontario*, Cabinet Office and the Project Director specify that this work is described in detail in a Cabinet submission made by the Advisory Council to Cabinet on a specified date (the Submission).⁹

[46] They say that the Submission addressed all dimensions of the Council's work and recommendations on Hydro One, including providing detailed valuations, and presenting the policy, regulatory, financial, operational, and legal requirements the Council investigated and addressed as part of its due diligence.

[47] With regard to the appellant's request for "studies regarding energy ratepayer impacts of different plans for Hydro One," Cabinet Office submits that the analysis and recommendations regarding protecting ratepayers in connection with recommendations about Hydro One are also in the Submission.

4) Submissions and input to the Advisory Council

[48] With regard to the appellant's request for "submissions and input made to [the Advisory] Council," Cabinet Office says that the work of the Council involved meetings and consultations with stakeholders, including the companies under review, as well parties and organizations that could be impacted by government decisions in respect of the LCBO, Hydro One and OPG. Cabinet Office submits that these submissions can be grouped into two categories: submissions and representations received by the Advisory Council in respect of its work on Phase I recommendations, and submissions specific to the Council's Phase II work in relation to the potential sale of Hydro One.

[49] Cabinet Office says that the Phase I submissions were received from a wide variety of stakeholders who had an interest in the Council's work with respect to the three companies. Cabinet Office submits that the information and views provided by the stakeholders were communicated by the Advisory Council to Cabinet in a number of ways, including formal presentations to Cabinet, as well as updates at the Ministers' Table. According to Cabinet Office and the Project Director, the views of stakeholders were of particular interest to Cabinet and the Premier during each phase of the Advisory Council's work.

[50] Cabinet Office says that records related to submissions received by the Council in Phase 1 were also provided to Cabinet further to the direction of the Treasury Board and that as a result, it has applied the exemption provided for by section 12(1) of the

⁹ Cabinet Office provided this office with a copy of the Submission, as well as confidential details about how and when it was provided to Cabinet. As noted above in the records section, it is a slide deck comprised of approximately 100 slides.

Act because the disclosure of the submissions would reveal the substance of information that was the subject of deliberation by the Executive Council. The Project Director provided additional specific information about the direction from the Treasury Board and the Executive Council's deliberations in his affidavit. I am not able to provide further details about this information as it met the confidentiality criteria in *Practice Direction Number 7*.

[51] In Phase II, Cabinet Office says that the Council undertook market sounding, and received detailed submissions from key financial institutions regarding a Hydro One share sale. The Project Director attested that the substance of these submissions, and the identity of the stakeholders providing their views, was shared with the Ministers' Table and Cabinet as a whole. The Project Director provided a list of the submissions and information that were provided to Cabinet for its deliberation in a confidential appendix attached to his affidavit.

5) Records of stakeholder meetings held by the Advisory Council

[52] Cabinet Office and the Project Director say that submissions were also sought from key stakeholders that may be impacted by a share sale, including bargaining agents. They submit that the views of these stakeholders were shared with the Ministers' Table and were reflected in a formal submission made to Cabinet on a date specified in the Project Director's affidavit, which has been kept confidential in accordance with *Practice Direction Number 7*. As such, they submit that the exemption at section 12 of *FIPPA* applies to this information as disclosure would give an inference of the information shared with and deliberated on by Cabinet.

The appellant's representations

[53] The appellant says that the mandatory exemption at section 12(1) does not apply to the information at issue.

[54] The appellant says that Cabinet Office relies the statement of the Project Director for the Advisory Council that, "disclosure of the reports would reveal the substance of information provided to and deliberated on by the Premier and her Cabinet" that that a sophisticated reader "could make very accurate inferences about the information, options and analysis supplied to and deliberated on by Cabinet." He submits that these statements do "not support, much less prove, an argument for an exemption under section 12."

[55] The appellant says that section 12 exempts disclosures that would "reveal the substance of deliberations of the Executive Council or its committees." He says that it does not exempt disclosures that would reveal the substance of information that was deliberated on unless the documents themselves reveal the substance of Cabinet deliberations. He further asserts that information deliberated upon by Cabinet is not exempt from disclosure under section 12 simply because it was deliberated upon and that section 12 requires the exemption only of information that reveals the substance of

the deliberations themselves.

[56] He says that the evidence provided by the Project Director does not meet the Cabinet Office's burden under section 53 to prove that disclosure of these records would reveal the substance of deliberations of the Executive Council. He submits that the Project Director's submission only proves that the disclosure of information would reveal the information that was disclosed. Specifically, he says that he is not seeking Cabinet meeting minutes or agendas, or anything that would reveal the substance of Cabinet deliberations and that the records he is seeking are background documents, not records of Cabinet deliberations.

[57] He says that Cabinet Office argues that since the background documents were provided to Cabinet, disclosure of these documents would *ipso facto* reveal the substance of Cabinet deliberations. He says that while it is possible that a background document, even one that was never even deliberated upon by Cabinet, may reveal the substance of Cabinet deliberations, one should not infer that this must always be the case simply because it may sometimes be the case. He says that the test under the *Act* is whether disclosure of the document would actually reveal the substance of Cabinet deliberations, and the Cabinet Office has offered no evidence that it would.

[58] The appellant submits that in order to meet the test under section 12(1) of the *Act*, the record must meet both of two criteria that are implied in the text:

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

[59] The appellant argues that for all the records in question, to the limited extent their disclosure could be considered at all revelatory of Cabinet deliberations, this revelation would be trivial, not substantive. He says that it is a known fact that Executive Council deliberated over the disposition of government assets (for example, the LCBO, Hydro One and the OPG), and chose to proceed with the sale in stages of a majority of shares of Hydro One. The various policy options and Cabinet's decisions about those dispositions are also well known, having been spelled out in some detail in the Advisory Council's Terms of Reference (attached to the Project Director's affidavit) and the various press releases and backgrounders released by the government with respect to the Advisory Council.

[60] The appellant says that it cannot be sufficient to show simply that the documents describe policy options known to all and that formed the basis of Cabinet deliberations whose outcome is known to all. He submits that Cabinet Office has offered no evidence

that disclosure of these background documents would reveal anything more substantial about Cabinet deliberations than what has already been publicly disclosed.

[61] According to the appellant, mandating an exemption for all records submitted to Cabinet simply because they were submitted to Cabinet would be an overly broad interpretation of the section 12(1) exemption, and would have serious consequences. Specifically, he says that under the government's relatively new Program Review, Renewal and Transformation program, nearly all major government expenditures are now subject to review by the Treasury Board. As a result, nearly all background documents prepared by a ministry or agency with respect to a major project could potentially be considered as "prepared for submission" to the Treasury Board, and thus be subject to the mandatory exemption from disclosure under section 12. This includes background documents, whose disclosure was clearly intended by the *Act's* drafters by their inclusion under section 13(2).

[62] The appellant says that it would fatally undermine the purposes of the *Act*, to give Cabinet Office near-total power to deny the statutory right to information based on an overly-broad interpretation of "reveal the substance of deliberations of the Executive Council." The *Act* is clear that necessary exemptions should be limited and specific.

[63] The appellant also states the following:

Cabinet Office argues that third-party submissions, including unsolicited submissions, could somehow fall under the section 12 exemption. The Cabinet Office says some of these submissions were "candid" and "commercially sensitive," as if section 12 was intended to provide discretion for these third parties, rather than protecting Cabinet confidence. While commercial sensitivities are addressed elsewhere in the *Act*, section 12 has nothing at all to say about protecting the confidence of third parties, government staffers or anyone other than the Executive Council.

[64] Finally, the appellant says that if there is information that would reveal the substance of Cabinet deliberations as per section 12(1), section 1(a) of the *Act* says that exemptions should be limited and specific and that it should be possible to sever this information, as per section 10, to allow as much of the record to be disclosed as possible.

Findings and analysis

[65] 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 at issue and the actual substance of Cabinet deliberations.¹⁰ Previous orders of this office have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;¹¹ and
- “substance” generally means more than just the subject of the meeting.¹²

[66] For the reasons that follow, I find that Cabinet Office has established the link between each of the records at issue in this inquiry and the substance of the deliberations of Cabinet or its committees and as a result, all of the records are exempt from disclosure pursuant to the introductory wording of section 12(1) of the *Act*.

[67] In reaching this decision, I have reviewed all the parties’ representations, even if I have not referred to them, and considered all of the evidence before me, including the following:

- The Premier’s Advisory Council to Provide Advice on Assets – Terms of Reference, a document disclosed to the appellant;
- The “Retain and Gain: Making Ontario’s Assets Work Better for Taxpayers and Consumers” public report dated November 13, 2014;
- The Premier’s Advisory Council on Government Assets – Terms of Reference – Phase Two, Implementation Planning, also disclosed to the appellant;
- The “Striking the Right Balance: Improving Performance and Unlocking Value in the Electricity Sector in Ontario” public report dated April 16, 2015; and
- All of the records at issue in this joint inquiry.

[68] Based on all of the evidence I reviewed, I accept Cabinet Office’s representations about the nature and origins of the Advisory Council. Specifically, I accept that the Premier established the Advisory Council to provide analysis, advice and recommendations on how best to maximize the value and performance of Provincial assets. I also accept Cabinet Office’s representation that the Premier formed a Cabinet committee, referred to as the Ministers’ Table, comprised of the Premier and key Ministers, to receive information from, and provide direction to, the Advisory Council.

[69] The evidence before me also supports Cabinet Office’s assertion that the

¹⁰ Order PO-2320.

¹¹ Order M-184.

¹² Orders M-703 and MO-1344.

Advisory Council consulted extensively with the Premier and members of the Executive Council. For example, I note that Terms of Reference for the first phase of the Advisory Council's work specify that the Advisory Council will report directly to the Premier. For the second phase, the Terms of Reference state that the Advisory Council will provide regular reporting to the Premier, to the Ministers of Energy and Finance, and to the President of the Treasury Board.

[70] It is my view, based on all of the information before me, that the Premier was actively involved in all aspects of the Advisory's Council's work. In this respect, I agree with Cabinet Office that the following paragraph in Order PO-1725 is relevant:

[...] by 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 Cabinet as a whole. 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.

[71] I also agree with Cabinet Office that many of the records at issue reflect consultations regarding the policy-making and priority-setting functions within the sphere of the Premier's authority as first minister. Records that 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 may be seen as reflecting the substance of deliberations of the whole Cabinet. In this case, the records at issue, if considered with the publicly available information, would provide a roadmap revealing how and why the Premier made certain policy choices.

[72] I also accept Cabinet Office's representations, and the Project Director's attestation, that the Ministers' Table met regularly to receive reports from, and provide direction to, the Advisory Council on each dimension of its ongoing work, informing the development of the ultimate recommendations to Cabinet. While I cannot describe the contents of the records at issue, I find that they support Cabinet Office's assertions in this regard.

[73] I have set out my findings on each group of records below. In making these findings, I have considered the appellant's concern that the records at issue do not reveal the actual substance of the deliberations of the Executive Council or its committees, and that only the subject matter of the deliberations would be revealed. I disagree. Based on the evidence before me, I am satisfied that the information in the records at issue is the actual information that was deliberated on by Cabinet. Furthermore, it is clear to me that if a reader in possession of the records at issue

considered those records in conjunction with the public *Retain and Gain* and *Striking a Balance* reports, they could make accurate inferences about how Cabinet weighed the options and information it deliberated on, and how it came to its ultimate conclusions.

1) Consultant Reports

[74] There are five reports at issue in this section, one of which has four parts. I have reviewed the reports and I accept that disclosing the reports would reveal the substance of Cabinet deliberations.

[75] First, I accept that the substance of each of the reports was discussed during meetings between the Advisory Council and the Premier and the Ministers' Table, and moreover, that the reports were specifically submitted to, and considered by, Cabinet under the circumstances described in the confidential portions of the Project Director's affidavit.

[76] Furthermore, given that the consultants' reports relate specifically to the options and related considerations that formed the basis of the Advisory Council's ultimate recommendations to Cabinet in the *Retain and Gain* report, and given the nature of the relationship between the Advisory Council and the Ministers' Table leading up to that report, I am also persuaded by Cabinet Office's assertion that a sophisticated reader in possession of the consultants' reports would be able to deduce the options and considerations that would have been considered and weighed by Cabinet and gain insight into its deliberations.

[77] Finally, while not determinative of the issue, I note that most of the reports are marked as "confidential advice to cabinet." Some of the reports also specify that they contain cabinet deliberations. For the reports that do not specifically state that they are confidential advice to cabinet, there is a page prefacing the report that explains the context in which the report was being provided to the Advisory Council. In my view, the fact that the consultants were aware that the information they were providing in their reports was being passed on to Cabinet, in one way or another, supports Cabinet Office's representations that that the reports were deliberated on by Cabinet.

[78] As a result, I am satisfied on my review of evidence before me, that the mandatory exemption in section 12(1) of the *Act* applies because the disclosure of the consultants' reports would reveal the substance of deliberations of Cabinet, or its committees, or would permit the drawing of accurate inferences with respect to those deliberations.

2) Valuations and Due Diligence; and 3) Ratepayer Impacts

[79] Cabinet Office provided a copy of a Cabinet submission prepared by the Advisory Council that it says is responsive to the appellant's request for "detailed valuations and due diligence" conducted by the Council, referenced at page 8 of the *Striking the Right Balance* Report and its request for "studies regarding energy ratepayer impacts of

different plans for Hydro One.” This record is the 100-page slide deck, referred to above as the Submission. Cabinet Office says that the Submission is subject to the mandatory Cabinet records exemption provided for by section 12(1) of the *Act* and I agree, for the following reasons.

[80] First, I have reviewed the Submission and confirm that it was clearly prepared to be submitted to Cabinet. The entire record is marked “Confidential Advice to Cabinet” and it is signed by a Minister and a Deputy Minister. Page three of the Submission states that purpose of the Submission is to seek Cabinet policy and legislative approval relating to aspects of the Advisory Council’s work. I cannot describe the record further without revealing the content of the submission. However, based on the content of the record, and the other records and evidence before me in this inquiry, I am satisfied that it was submitted to, and deliberated on, by Cabinet.

[81] Having found that this record was submitted to a committee of Cabinet for its consideration and deliberation, I find that the disclosure of the Submission would reveal the substance of Cabinet deliberations, or would permit the drawing of accurate inferences with respect to those deliberations, particularly if the records were considered in conjunction with the *Retain and Gain* and *Striking a Balance* reports. Therefore, I find that the mandatory exemption in section 12(1) applies to this record.

4) Submissions and input to council

[82] Cabinet Office provided this office with five groups of records it says are responsive to the appellant’s request for submissions and input to the Council. The groups of records are separated by date. The first record in four of the five groups is a Cabinet Agenda and the subsequent items in each of those groups correspond with the agenda.

[83] The items following the agendas are comprised of Cabinet briefing notes and related attachments, slide decks, Cabinet reports, Cabinet submission decision documents, and other items marked “Cabinet Confidential Document.” Based on my review, I confirm that these records relate to submissions and input made to the Advisory Council, and that each was prepared for, and submitted to, Cabinet for its deliberation on the dates specified in each of the agendas.

[84] The remaining record is a Treasury Board/Management Board of Cabinet Report that also contains information related to the appellant’s request.

[85] The nature of each of the records in the five groups and the actual information in the records makes it clear to me that all of these records contain information that was submitted to Cabinet. Based on my review of all of the evidence before me, I am also satisfied that disclosure of these records would reveal the actual substance of the deliberations of Cabinet, or permit the drawing of accurate inferences with respect to those deliberations. As a result, I find that these records are exempt from disclosure under the introductory wording of section 12(1).

Stakeholder Meetings

[86] The last group of records that Cabinet Office says are subject to the section 12 exemption is a group of records relating to stakeholder meetings. Cabinet Office says that the views of various stakeholders were shared with the Ministers' Table and referenced in a formal submission to Cabinet. The records provided to this office consist of 29 separate copies of "meeting notes" that range from one to three pages. Each meeting note follows the same format. It lists the organization met with, the attendees, the date, and provides background information, an overview of the discussions, and the key takeaway points.

[87] Of particular note is that all but four of the meeting notes are marked "privileged and confidential" and include the following disclaimer at the bottom of each page:

Strictly confidential. This confidential document was prepared to provide advice to the Executive Council, one or more of its committees and/or a Minister of the Crown.

[88] The four meeting notes that do not include the disclaimers are otherwise formatted in the same manner, and appear to have been prepared for the same purpose.

[89] Based on my review of the meeting notes, and all of the other evidence before me in this inquiry, I accept Cabinet Office's representations that the views of the stakeholders were shared with the Premier and/or the Ministers' Table. I accept the evidence provided by Cabinet Office and the Project Director that the views of the stakeholders, as set out in the meeting minutes at issue, were of particular interest to the Premier, and that the Advisory Council served as the "eyes and ears of the Premier and her Executive Council" when collecting the views and opinions of the stakeholders who may be affected by the government's decision-making related to the LCBO, Hydro One and the OPG.

[90] Furthermore, I find that the disclaimer on the majority of the meeting notes specifying that they prepared for the purpose of providing advice to Cabinet, or a committee of Cabinet, in combination with my finding above, weighs in favour of a finding that these records were, in fact, considered and deliberated on by the Premier and/or the Ministers' Table. As a result, I find that disclosure of the meeting notes would reveal the substance of deliberations of the Premier and/or a committee of Cabinet (the Ministers' Table), or would permit the drawing of accurate inferences with respect to those deliberations. As a result, I find that these records are exempt from disclosure under the introductory wording of section 12(1).

Conclusions regarding all of the records at issue

[91] While I cannot describe the contents of the records at issue in any more detail than I have done above, I find that the records themselves support Cabinet Office's

assertions that the information at issue was the subject of in-depth deliberations by the Premier, the Ministers' Table and/or Cabinet as a whole.

[92] For example, one of the records at issue specifies that Cabinet was to receive, as a report, all work completed by the Advisory Council up to a specific date, including all supporting materials and research analysis. This evidence supports Cabinet Office's assertions in that regard.

[93] Similarly, I note that more than one of the records at issue refers to the regular meetings between the Advisory Council Chair and the Premier and various Ministers. In my view, evidence of this nature supports Cabinet Office's representations about the "back and forth" nature of the relationship between the Premier, the Ministers' Table, and the Advisory Council, and supports its assertions that the Premier the Ministers' Table considered and deliberated on the records at issue.

[94] Given the nature of the records at issue and the amount of information that is already publicly available, I disagree with the appellant's assertion that the information at issue is trivial, or would not be reveal anything new about Cabinet deliberations. I confirm that revealing the information at issue would reveal substantially more about Cabinet deliberations that that which has already been publicly disclosed.

[95] Furthermore, I do not accept the appellant's assertion that my findings "mandate[e] an exemption for all records submitted to Cabinet simply because they were submitted to Cabinet..." or that the purpose of the *Act* would be undermined by my finding that the records at issue fit within the introductory wording of section 12(1). My findings are based on the specific context of these appeals and the nature of the records before me.

[96] Finally, I acknowledge the appellant's submission that the records should 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 Cabinet Office to sever the records as the records as a whole would reveal the substance of Cabinet deliberations. The background explanations, policy analyses, data, and other supporting information were all provided to Cabinet, a Cabinet committee and/or the Premier for their deliberations on the Advisory Council's work so that they could provide the Council with continuing direction regarding the same. The records at issue are, in their totality, subject to the mandatory exemption in section 12(1) of the *Act*.

Did Cabinet Office turn its mind to Cabinet consent?

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

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[98] 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.¹³

[99] I have reviewed Cabinet Office's representations in this regard. It submits that the factors the head must consider when determining whether to seek the consent of the Executive Council are similar to the factors the head should consider when exercising discretion to claim a discretionary exemption for information contained in records. Accordingly, Cabinet Office says that the head gave careful consideration to seeking the consent of the Executive Council, and exercised discretion not to do so based on the following factors:

1. The recommendations of the Advisory Council, together with supporting rationale have been published in two reports of the Council. Accordingly, the head considered that the public interest in transparency of the Council's work has reasonably been served through the disclosure of the two reports;
2. Some of the records at issue continue to be relevant to the ongoing agenda setting of the Premier and decision-making of Cabinet;
3. The head considered the potential harms that may flow from the disclosure of the records, and considered that Cabinet would be particularly concerned about the disclosure of information that could harm stakeholders, including the government's relationship with stakeholders. In addition, given Cabinet's ongoing mandate to consider and implement strategies and to raise revenues and optimize government assets, the head considered that Cabinet would not wish to disclose records that could negatively impact the ability of the Crown to derive value and revenue from those assets.

[100] Based on these representations, I am satisfied that Cabinet Office turned its mind to the issue of consent and considered relevant factors in deciding not to seek Cabinet consent to release the records. Accordingly, I find that the exception to section 12(1) in section 12(2)(b) does not apply and all of the records at issue are exempt under the mandatory section 12(1) exemption, by reason of the introductory wording to section 12(1).

[101] As the introductory wording in section 12(1) applies to exempt the records, it is not necessary for me to consider whether they are also exempt under the discretionary

¹³ See Orders P-771, P-1146 and PO-2554.

exemptions in sections 13(1), 17(1) and/or 18(1). Furthermore, as the public interest override in section 23 cannot apply to override the section 12(1) exemption, it is also not necessary to consider it.

ORDER:

I uphold Cabinet Office's decision and dismiss the appeal.

Original signed by _____
Meganne Cameron
Adjudicator

December 30, 2020 _____