

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4291

Appeal PA20-00023

Ministry of Municipal Affairs and Housing

August 18, 2022

Summary: The ministry received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a report prepared by two special advisors appointed by the minister to conduct a review of regional governments in Ontario. The ministry denied access to the report pursuant to the exemption for Cabinet records in section 12(1) of the *Act*. The requester appealed. In this order, the adjudicator finds that the record qualifies for exemption under section 12(1) and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders P-226, PO-2227, PO-2320, PO-2989, PO-3844, and PO-3973.

BACKGROUND:

[1] On January 15, 2019, the Minister of Municipal Affairs and Housing (the minister) announced that two special advisors (the advisors) had been appointed to conduct a review of regional governments in Ontario. The review covered Ontario's eight regional municipalities, Simcoe County, and their lower-tier municipalities. The advisors were asked to answer nine specific questions related to the effectiveness of regional governments, divided into two categories of municipal governance and decision-making, and municipal service delivery.

[2] The advisors consulted with the subject municipalities, including council members and heads of council, businesses and residents of those municipalities, and

stakeholder groups. Following the consultation and review, the advisors submitted a report to the minister on September 20, 2019, in which they made recommendations based on the questions posed to them. It is this report that is at issue in this appeal.

[3] Based on the findings in the report, policy options and recommendations were put forward in a submission to the Priorities and Planning Committee of Cabinet, which met on September 25, 2019. On October 25, 2019, the minister announced that the ministry would not be pursuing a “top-down” approach, and would be providing municipalities with the resources to support local decision-making. On November 1, 2019, the minister sent a letter to heads of council, stating that the ministry would work collaboratively and in partnership with municipalities, and would not impose any changes on them.

[4] The appellant, a reporter, submitted an access request to the ministry, under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the special advisors’ report.

[5] The ministry’s decision was to deny access to the report on the basis of section 12 of the *Act* (Cabinet records).

[6] The appellant appealed the ministry’s decision to the Information and Privacy Commissioner of Ontario (IPC). The appeal moved directly to the adjudication stage, and I conducted an inquiry under the *Act*.

[7] I first sought representations from the ministry. The ministry provided representations which were shared with the appellant, with portions of the ministry’s representations withheld pursuant to the confidentiality criteria set out in the IPC’s *Practice Direction 7: Sharing of Representations*. In its representations, the ministry clarified that it relies on the opening words of section 12(1) and section 12(1)(b).

[8] The appellant provided representations in response, which were provided to the ministry in full. The ministry provided representations in reply, which were provided to the appellant in full. I then shared additional portions of the ministry’s initial representations with the appellant (with the ministry’s consent) and invited further representations from the appellant. The appellant did not provide further representations. I have taken all of the parties’ representations into account, but cite only their non-confidential representations in this order.

[9] For the reasons that follow, I uphold the ministry’s decision and dismiss the appeal.

RECORD:

[10] The record at issue is a report prepared by the special advisors (the report).

DISCUSSION:

[11] The sole issue in this appeal is whether the mandatory exemption for Cabinet records at section 12 applies to the report.

[12] The Executive Council, which is more commonly known as Cabinet, is a council of ministers of the Crown and is chaired by the Premier of Ontario. Section 12(1) reads, in part:

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;¹

[13] Any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f).²

[14] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.³

[15] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.⁴

[16] The ministry relies on the introductory wording of section 12(1). For the reasons that follow, I find that the report is exempt under the introductory wording. Given my finding, I do not need to consider the ministry's argument that the report is also exempt under section 12(1)(b).

Representations

The ministry's representations

[17] The ministry provides background submissions on the policy reasons for

¹ Paragraphs (a) to (f) set out specific types of records that are exempt under section 12(1). I do not set out all those paragraphs in this order because they were not raised by the ministry and because I find that the report is exempt under the introductory wording of section 12(1).

² Orders P-22, P-1570 and PO-2320.

³ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁴ Order PO-2320.

maintaining Cabinet confidentiality, citing the report of the Williams Commission⁵ and *Babcock v Canada (Attorney General)*.⁶ Generally, the ministry states that Cabinet confidentiality is needed to ensure that Cabinet can deliberate freely. The ministry notes that section 12(1) is a mandatory exemption and that the public interest override contained in section 23 does not apply to it.

[18] The ministry concedes that the report itself was not placed before Cabinet or its committees, but submits that a record can be exempt under the introductory words of section 12(1) if “it is obvious from the contents and the surrounding circumstances, that the document formed the substance of Cabinet deliberations.”⁷

[19] The ministry submits that the report formed the basis of the policy options and recommendations put forward in a submission to the Priorities and Planning Committee of Cabinet. The ministry provided me with a copy of the submission in question and says that it was considered by the Priorities and Planning Committee on September 25, 2019. The ministry also provided me with a copy of the agenda for the committee’s September 25, 2019 meeting.⁸

[20] The ministry also points to the minister’s statements in his November 1, 2019 letter to heads of council, which indicates that the report was discussed with Cabinet colleagues. It states that the disclosure of the record would therefore reveal the substance of deliberations of Cabinet and its committees. It submits that the report forms part of the “body of information” presented to Cabinet,⁹ and that disclosure of the information contained in the record would allow a reader to draw accurate inferences about the substance of deliberations of Cabinet.

[21] The ministry notes that the issues the advisors were asked to consider would require legislative amendments to implement, and submits that the record was prepared to inform Cabinet decision-making in that regard.

[22] With respect to severance of the record pursuant to section 10(2), the ministry submits that the purpose of section 12(1) must be considered when determining whether information can reasonably be severed. It states that the entire report was prepared for the purpose of Cabinet deliberations, and that Cabinet confidentiality is interwoven with the facts, recommendations, considerations, policy options, and opinions in the report. It states that for that reason, severance is not reasonably

⁵ Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, Vol. 2 (Toronto: Queen’s Printer, 1980).

⁶ *Babcock v. Canada (Attorney General)*, [2002] 3 SCR 3.

⁷ The ministry cites Orders 22, P-1570, and PO-1917.

⁸ I have considered the contents of the agenda in coming to my decision in this appeal, but cannot refer to those contents, because the agenda meets the confidentiality criteria in *Practice Direction 7* and was not shared with the appellant.

⁹ Here, the ministry refers to *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* (1998), 111 BCAC 95 (BC CA) at paras 39-41.

possible.¹⁰ It also states that the information is intermingled to such an extent that it cannot be severed without disclosing the exempt information, and that to attempt to do so would result in the disclosure only of meaningless snippets of information.

The appellant's representations

[23] The appellant argues that there is no link between the content of the report and the actual substance of Cabinet deliberations. He says that the terms of reference for the advisors' review show that the document was prepared for the minister, not directly or exclusively for use during a Cabinet meeting.

[24] The appellant also argues that because the report was prepared before any Cabinet meeting about the review of municipalities, it could not reveal the substance of those discussions, and that if this record were to be protected, any record formulated by government could be hidden behind the Cabinet records exemption under the *Act*.

[25] The appellant argues, further, that the introductory words of section 12(1) do not protect the outcome of a deliberative process, only the communications within the deliberative process.

[26] Finally, the appellant submits that if section 12(1) applies, the report should be severable. He states that even wholesale disclosure of the report could not reveal the views, opinions, or concerns expressed by a member of Cabinet during a confidential meeting. He states that the report was funded by taxpayers, included citizen participation, and that releasing it is in the public interest, given the province's controversial decision to cut the size of Toronto's municipal council. He notes that the review was publicized by the government both when it was launched and when it was concluded.

The ministry's reply representations

[27] The ministry maintains that it has shown a link between the report and the substance of Cabinet deliberations. It submits that in Order PO-2417, the IPC held that a record does not have to be prepared solely for Cabinet's consideration for section 12(1) to exempt the record from disclosure.

[28] The ministry says that section 12(1) encompasses all aspects of the preparation of documents for Cabinet, including records that form the basis of Cabinet submissions presented by ministers. It again points to the November 1, 2019 letter from the minister to heads of council saying the decision to not take any action was based on the report "in consultation with my Cabinet colleagues", so, in the ministry's submission, the report was part of the deliberative process of Cabinet.

¹⁰ The ministry cites Orders PO-1663, PO-2922, and PO-3977, and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1997] OJ No 1465.

Analysis and findings

[29] As I noted above, a record never 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 would permit the drawing of accurate inferences about the deliberations. However, the institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.

[30] The ministry acknowledges that the report was not placed directly before Cabinet or any of its committees.

[31] The key terms "substance" and "deliberations" have been considered and defined in previous orders as follows:

- "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

[32] I have considered the parties' representations, the report itself, the Cabinet submission and the agenda. As explained in more detail below, I am satisfied that the disclosure of the report would either reveal the substance of the deliberations of the Priorities and Planning Committee of Cabinet or would permit the drawing of accurate inferences with respect to such deliberations.

[33] The ministry says that its submission was considered by the Priorities and Planning Committee on September 25, 2019. Based on my review of the submission and the agenda of the September 25, 2019 meeting, I accept that the Cabinet submission was considered by the Cabinet committee on that date. Having compared the report against the information set out in the Cabinet submission, it is clear that the report formed the substantive basis of the contents of the ministry's submission to Cabinet. I note that much of the key information in the report, including many of the options and suggestions in the report, was incorporated into the Cabinet submission.

[34] In Order P-266, the IPC found that reports that had not themselves gone before a Cabinet committee but which were instead incorporated into a submission to a Cabinet committee, were exempt from disclosure under the introductory wording of section 12(1). Similarly, in Order PO-3844, the adjudicator found that draft technical reports that formed the basis of a report provided to a Cabinet committee were exempt under section 12(1). Finally, in Order PO-2227, the adjudicator noted that even though a record may not have been put before Cabinet in its entirety, it may still qualify for exemption under the introductory wording of section 12(1) if the most essential

¹¹ Order M-184.

¹² Orders M-703 and MO-1344.

elements of the record were the subject of Cabinet's deliberations by way of inclusion in a Cabinet submission. I have considered these orders and found them useful in my analysis of the circumstances before me.

[35] Based on the evidence before me, I have no difficulty finding that the most essential elements of the report at issue were included in the submission to the Priorities and Planning committee of Cabinet. Further, based on my review of the relevant agenda and the minister's letter to heads of council, I am satisfied that Cabinet deliberated on the recommendations set out in the submission. As a result, I find that disclosure of the report would reveal, or permit the drawing of accurate inferences about, the substance of the deliberations of that Cabinet committee.

[36] To elaborate, in coming to my conclusions, I have considered the timing of the report in relation to the Cabinet meeting and the minister's announcement and his letter to heads of council. As I noted at the outset of this order, following the special advisors' consultation and review, the advisors submitted their report to the minister on September 20, 2019. A submission was then put forward to the Priorities and Planning Committee of Cabinet, which met on September 25, 2019. Then, on October 25, 2019, the minister announced that the ministry would not be pursuing a "top-down" approach, and would be providing municipalities with the resources to support local decision-making. On November 1, 2019, the minister sent a letter to heads of council, stating that:

After careful consideration of the feedback we heard through the course of the Regional Government Review that was launched in January 2019, and in consultation with my Cabinet colleagues, our government is committed to partnering with municipalities without pursuing a top-down approach. We will work collaboratively and in partnership, and we will not impose any changes on municipalities.

[37] From this sequence of events, it is evident to me that the substance of the report was deliberated on at the meeting of Cabinet's Priorities and Planning Committee and that either during that meeting or at some point between the meeting and October 25, 2019, a decision was made in relation to the recommendations discussed in the report.

[38] The appellant submits that the report was prepared for the ministry, not exclusively for Cabinet. However, the test for exemption under the opening words of section 12(1) is not whether the record was prepared exclusively for Cabinet, but whether its disclosure would permit accurate inferences to be drawn about the substance of the deliberations of Cabinet or one of its committees. As pointed out by the ministry, in Order PO-2417, the record at issue was prepared by a professional services firm for a ministry. Based on the evidence before him, former Commissioner Brian Beamish found that the record's disclosure would reveal the substance of deliberations of Management Board of Cabinet, a Cabinet committee. I agree with this reasoning, and similar reasoning applies here.

[39] The appellant also argues that the report cannot reflect the substance of deliberations of Cabinet because the report pre-dates the Cabinet meeting. I do not accept this argument. The test is whether disclosure of the report would reveal the substance of deliberations of the Cabinet committee meeting, or permit accurate inferences to be made about the substance of those deliberations. The evidence before me satisfies me that disclosing the report would, at a minimum, permit the drawing of accurate inferences about the substance of those deliberations. I also note that the IPC has long held that disclosure of materials prepared before a Cabinet meeting would reveal the substance of deliberations of Cabinet, provided the necessary link between the materials and the substance of Cabinet deliberations has been established.¹³

[40] Finally, the appellant notes that the opening words of section 12(1) are not intended to protect the “outcome” of a deliberative process, but rather the deliberations themselves. I note that former Commissioner Beamish said as much in Order PO-3973.¹⁴ However, in my view, the report, which was prepared before the Cabinet committee meeting, does not reflect any “outcomes” of Cabinet’s deliberations.

[41] For the above reasons, I am satisfied that the substance of the report was deliberated by the Priorities and Planning Committee and that disclosure of the report would reveal, or permit accurate inferences about, the substance of those deliberations.

[42] As a result, I find that the report is exempt from disclosure under the introductory wording of section 12(1).

[43] The appellant also submits that at least some of the report should be capable of being severed and disclosed pursuant to section 10(2). Having compared the information in the report with the Cabinet submission, I do not accept the appellant’s argument. From my review of the report and its recommendations, disclosure of any of the substantive information in the report would permit a reader to draw accurate inferences with respect to the content of the Cabinet submission and, in turn, Cabinet’s deliberations about the submission. Disclosure of any such portions would reveal options, suggestions and other information put to the ministry which were directly included in the ministry’s submission to Cabinet and deliberated on by Cabinet.

[44] I further find that to sever and disclose any non-exempt information in the report would result in the disclosure of worthless or meaningless snippets of information. An institution is not required to sever records for disclosure where to do so would reveal only such meaningless information.¹⁵ Consequently, I find that the report cannot

¹³ See, for example, Orders PO-2320 and PO-2989.

¹⁴ See Order PO-3973, paragraph 104. Order PO-3973 was upheld on judicial review by the Divisional Court and the Court of Appeal. The matter is currently scheduled to be heard by the Supreme Court of Canada. See *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 (Div Ct), upheld 2022 ONCA 74, leave to appeal granted 2022 CanLII 40784 (SCC).

¹⁵ See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1997] OJ No 1465 (Div. Ct.)

reasonably be severed within the meaning of section 10(2) of the *Act*.

[45] Finally, with respect to the appellant's argument that releasing the report is in the public interest, I note that the section 12 exemption is not subject to the public interest override found in section 23.¹⁶

ORDER:

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

Original Signed by: _____
Gillian Shaw
Adjudicator

_____ August 18, 2022

¹⁶ Section 23 of the *Act* states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 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.