

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4399

Appeal PA20-00241

Ministry of the Attorney General

May 30, 2023

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act (the Act)* to the Ministry of the Attorney General (the ministry) for records related to the New Toronto Courthouse project. The ministry located a responsive record and denied access to it on the basis of the mandatory exemption in section 12(1) of the Act (Cabinet records). In this order, the adjudicator upholds the ministry's decision that section 12(1) applies to the record at issue and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 12(1), 12(2), and 23.

Orders Considered: Order PO-3973.

OVERVIEW:

[1] The appellant in this matter is the Ontario Crown Attorneys' Association, a professional association that represents Crown prosecutors employed by the Criminal Law Division of the Ontario Ministry of the Attorney General, including over 200 Crown prosecutors who conduct criminal prosecutions at the six courthouses located in the Greater Toronto Area.

[2] The appellant made a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act (the Act)* for various records relating to all other options considered before the decision was made to amalgamate the Ontario Court of Justice Criminal Courts into the building of the New Toronto Courthouse (NTC), as well as any records relating to the costs and safety issues associated with conducting all criminal trials for the entire city at the

NTC site.¹

[3] The ministry found one responsive record, a project note, and issued a decision denying access to it pursuant to the mandatory exemption in sections 12 (Cabinet records), and the discretionary exemptions at sections 13(1) (advice or recommendations) and 18(1)(d) (economic and other interests) of the *Act*. It also stated that it did not locate any responsive records for some portions of the request.

[4] The requester (now the appellant) appealed the ministry's decision to this office. During the course of mediation, the mediator communicated with both the appellant and the ministry. The appellant also had questions about whether additional responsive records might exist. The ministry provided a response and the appellant advised the mediator that it did not wish to pursue the issue of whether the ministry conducted a reasonable search for responsive records.

[5] The appellant asked that the matter proceed to adjudication. The appellant also took the position that there was a public interest in the record the ministry withheld. Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry pursuant to the *Act*.

[6] I commenced this inquiry by seeking representations from the ministry on the issues set out in a Notice of Inquiry. The ministry's representations were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. In its representations, the ministry withdrew its reliance on the discretionary exemptions in sections 13(1) and 18(1)(d) of the *Act*. As a result, those issues were removed from the scope of this appeal. The issue of the application of the public interest override at section 23 of the *Act* was also removed, as it cannot apply to the mandatory exemption for Cabinet records at section 12(1).² The appellant was then invited to submit representations in response to the ministry's submission and to the issues set out in a Notice of Inquiry. Both parties were also permitted the opportunity to submit representations in sur-reply.

[7] There is one record at issue in this appeal. It is a 25-page "Project Note" that the ministry withheld pursuant to the mandatory exemption for Cabinet records at section 12(1) of the *Act*.

[8] In this decision, I uphold the ministry's decision to withhold the record at issue on the basis of the section 12(1) exemption for Cabinet records and I dismiss the appeal.

DISCUSSION:

¹ The entire text of the request is reproduced at Appendix I to this decision.

² 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.

Preliminary Matter

[9] In its initial representations the appellant asks that I order the production of the Project Note to me for examination so that I may make certain that no part of it is unnecessarily withheld in violation of the appellant's right of access. The appellant reiterates this request in its sur-reply.

[10] As noted in the ministry's reply representations, the ministry provided the IPC with a copy of the Project Note at the beginning of this inquiry. I confirm that I have reviewed the entire Project Note as part of my decision-making process during this inquiry. As a result, it is not necessary for me to order the ministry to produce it.

Background and overview of parties' positions

[11] The ministry says that the Project Note relates to its initiative to amalgamate all of Toronto's Ontario Court of Justice criminal court operations, which are currently dispersed across the Toronto Region, into a centralized court location. It explains that it is leading the development of the amalgamation in a downtown Toronto location, known as the New Toronto Courthouse (the NTC).

[12] The ministry submits that as part of the planning and development of the NTC, it made submissions to Treasury Board and the Management Board of Cabinet to seek approvals relating to operational and financial aspects for the NTC project. It asserts that the Project Note was submitted to Treasury Board and the Management Board of Cabinet to provide specifics about the development of the NTC, including background information, financial calculations and other related information. The ministry claims that as a result, the Project Note is exempt from disclosure pursuant to the introductory wording of section 12(1) of the *Act* and/or section 12(1)(b).

[13] The appellant submits that concerns about the NTC project have been raised by professional associates, city councillors, advocacy organizations, unions and other civil society groups about the potential detrimental impacts the amalgamation could have on access to justice for victims and accused by making it more difficult and costlier for low income, racialized or other marginalized populations to attend court.

[14] The appellant also raises concerns about the negative impact the NTC project may have on the small business communities depending on foot traffic from courthouses and the potential for workplace violence and other health and safety hazards for court workers if the amalgamation were to happen. The appellant included references to secondary materials in support of these assertions, such as letters to the Premier of Ontario and news articles.

[15] Finally, the appellant submits that it has no means of verifying the ministry's claim that section 12(1) applies to the Project Note. It asserts that the ministry's claim that section 12(1) applies should be weighed against the public interest concerns it raised, as well as the public interest in open and transparent governance.

The section 12(1) exemption for Cabinet records

[16] As set out in the Notice of Inquiry provided to the parties at the beginning of this inquiry, section 12(1) of the *Act* protects certain records relating to meetings of Cabinet or its committees. It 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;

[17] 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.

[18] 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).

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

[20] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records remain exempt after Cabinet makes a decision.³

The parties' representations regarding the interpretation of section 12(1)

[21] The appellant submits that the *Act* is based on the principle that the right of access to government information ensures that the public has the information it needs to participate meaningfully in the democratic process and that politicians remain accountable to the citizenry. It says that the Supreme Court of Canada has affirmed that these are the overarching purposes of access to information legislation, which are intended to facilitate democracy by making government more effective, responsive, and accountable.

[22] The appellant says that the *Act's* remedial purpose is to facilitate democracy by granting access to government information so that the public can participate in the democratic exercise, make government more effective and responsive, and to keep it accountable to that public. It argues that where statutory exemptions are relied upon, the exemptions must be interpreted in the context of this purpose and that where the words of an exemption suggest alternative interpretations, the one that favours disclosure must be chosen.

[23] Specifically with regard to the exemption for Cabinet records at section 12(1)

³ Orders PO-2320, PO-2554, PO-2677 and PO-2725.

of the *Act*, the appellant submits that the protections afforded to cabinet confidences under federal and provincial evidence acts are neither unlimited nor absolute. It refers me to *Carey v. Ontario*, where the Supreme Court of Canada emphasized that the “idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion.”⁴ In that case, the Court instructed that the government’s interest in maintaining cabinet confidences must be balanced against other important competing interests.

[24] The appellant concedes that the *Carey* decision did not concern freedom of information legislation, but maintains that the decision is instructive to the extent that it suggests that the scope of cabinet immunity must be considered in light of other important public interests. Following *Carey*, the appellant says that both the IPC and the courts have recognized the importance of striking a balance between the Cabinet interests and the public interest in access to information in respect of freedom of information legislation.

[25] Next, the appellant refers me to *O’Connor v. Nova Scotia*, a decision of the Nova Scotia Court of Appeal dealing with that province’s equivalent of the section 12(1) exemption.⁵ In *O’Connor*, the appellant says the court emphasized that any document sought to be exempted from disclosure on the basis of Cabinet confidences ought to first be examined:

There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations.⁶

[26] Finally, the appellant also relies on former Commissioner Beamish’s Order PO-3973 and says that it stands for the principle that an institution applying section 12(1) must provide sufficient evidence establishing a link between the content of a record and the substance of Cabinet deliberations. That order was the subject of judicial review proceedings, with the matter currently being on reserve before the Supreme Court of Canada.

[27] The appellant submits while the deliberative candour of Cabinet has traditionally been viewed as important, that importance has been “somewhat exaggerated” and thus the protection of the interest must be weighed against the public’s right to open and transparent governance in every instance.

[28] In reply, the ministry submits that the public interest is not a criterion that is considered when determining the application of the section 12(1) exemption. It notes that *Carey* dealt with “public interest immunity,” which is a common law privilege that recognizes a right of the government to object to the production or admissibility of otherwise relevant information on the grounds of public interest. The

⁴ [1986] 2 SCR 637, (*Carey*).

⁵ *O’Connor v. Nova Scotia*, 2001 NSCA 132 (*O’Connor*); See also: *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, section 13(1).

⁶ *O’Connor* at para. 94.

ministry denies that *Carey* establishes the test for determining whether a Cabinet records exemption in access to information legislation should apply. Rather, the ministry says that *Carey* establishes the test for when records that are relevant to litigation involving the Crown should be withheld in accordance with the public interest.

[29] The ministry submits that the *Act* respects and protects the confidentiality of Cabinet records through the mandatory exemption covering records revealing the substance of deliberations of Cabinet and its committees under section 12(1). The ministry notes that section 12 is a mandatory exemption, as opposed to discretionary, and it is not subject to the public interest override. The ministry argues that these features indicate that the legislature recognized that an exemption for Cabinet records was necessary and in the public interest to protect Cabinet confidentiality and, more specifically, the efficacy and candour of Cabinet deliberations.

[30] The ministry also notes that the public interest override provision of the Nova Scotia legislation considered in *O'Connor* permits a head of a public body to disclose information notwithstanding any other provision of FIPPA where it is "clearly in the public interest,"⁷ whereas Ontario's cabinet records exemption is not listed in its public interest override provision.⁸ The ministry submits that the Legislature's deliberate choice to exclude section 12(1) from the public interest override in section 23 is a clear rejection of a balancing approach to Ontario's Cabinet records exemption.

[31] In sur-reply, the appellant reiterates its position that the section 12(1) analysis requires a consideration of the public purpose of the *Act* and "the public rights and interests that are being balanced in the statutory scheme." The appellant submits that the case law it has raised is relevant and appropriate. It asserts that its arguments regarding the public interest in the information at issue should be considered and would not be "tantamount to injecting a balancing test into the s 12(1) analysis."

[32] The appellant notes that the Ontario Court of Appeal found that the IPC's reference in Order PO-3973 to section 12(1) itself striking a balance was not an error.⁹ (As I noted above, Order PO-3973 is currently the subject of judicial review proceedings, with the Supreme Court of Canada's decision on the matter pending).

[33] Based on the foregoing, the appellant argues that the Commissioner can, and ought, to consider the public interest in its section 12(1) analysis and decision-making with respect to whether the records at issue reveal the substance of Cabinet deliberations.

[34] Finally, the appellant reiterated its concern about safety issues with the NTC.

⁷ *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, section 31. This section deals with the disclosures in the public interest.

⁸ See footnote 2.

⁹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74.

It specifies that the concerns informed its access request and enclosed a Toronto Police Services ("TPS") report which set out policing and security concerns with the NTC project.

Analysis and findings regarding the interpretation of section 12(1)

[35] I do not agree with the appellant that the authorities referred to in its representations stand for the principle that I can (or should) weigh the public interest when considering whether section 12(1) applies to the information at issue.

[36] As noted by the ministry in its reply representations, section 12(1) is a mandatory exemption that is not subject to the public interest override at section 23 of the *Act*. I agree with the ministry's statement that the omission of the section 12(1) from section 23 is a clear indication that the Legislature did not intend for the public interest to be a consideration in the application of section 12(1). This analysis is in line with numerous IPC orders that addressed this issue.¹⁰

[37] I also agree with the ministry that the *Carey* decision is of limited application to the current case as it deals with a common law privilege that is not directly relevant to the interpretation of section 12(1) of the *Act*.

[38] Finally, having reviewed both Order PO-3973, and the related Court of Appeal decision, I do not agree that the competing interests referred to by former Commissioner Beamish and the Court of Appeal include the public interest in the manner contemplated by the appellant, even if the Supreme Court upholds those decisions. Commissioner Beamish was clear that the competing interests at stake are "a citizen's right to know *what government is doing* and government's right to consider *what it might do* behind closed doors."¹¹ The Court of Appeal said that this was not a new balancing test for section 12(1), but rather a recognition that there is a competing interest in the *Act* between the public's ability to access information and Cabinet's ability to deliberate in private, and that to achieve this balance, the section 12(1) analysis must focus on the link between the information at issue and the substance of Cabinet's deliberations. In my view, the public interest arguments raised by the appellant are not relevant to this determination and as a result, I will not consider its evidence in that regard further.¹²

The parties' representations about the application of section 12(1)

[39] The ministry submits that the Project Note is exempt from disclosure pursuant to the introductory wording of section 12(1) and section 12(1)(b) of the *Act*.

[40] As noted above, the ministry submits that the Project Note was submitted to the Treasury Board/Management Board of Cabinet and that it provides specifics

¹⁰ See, for example, Order PO-3359 at paras. 27 to 30, Order PO-4048, Order PO-4221, and Order PO-4291.

¹¹ Order PO-3973 at para. 97, citing *O'Connor*.

¹² As noted above, I confirm that I reviewed all the evidence provided by the appellant in its representations, including the various secondary materials prior to making any decision about the application of section 12(1) to the Project Note.

about the development of the NTC, including background information, financial calculations and other related information. The ministry provided additional descriptive information about the Project Note in the confidential portions of its representations; however, I cannot reveal additional details about those submissions without revealing the content of the information at issue.¹³

[41] The ministry submits that Treasury Board is a Cabinet committee responsible for providing oversight of government financial, expenditure and accounting policies and procedures.¹⁴ It says that Management Board of Cabinet is also a Cabinet committee that is responsible for providing oversight of administrative policies and procedures to ensure the Ontario Public Service is efficient and effective.¹⁵ The ministry asserts that Treasury Board and Management Board of Cabinet sit together as one committee to “ensure strong financial and human resource management and provides strategic leadership in driving the government’s transformation and expenditure management strategy.”

[42] The ministry’s position is that because the Project Note was submitted to, and considered by, Treasury Board and the Management Board of Cabinet, as well as Cabinet, it is captured by the exemption under section 12(1) through the introductory language and through section 12(1)(b) specifically.

[43] The ministry states that it submitted the Project Note to Treasury Board, the Management Board of Cabinet, and Cabinet for consideration and approval to proceed with alternative financing and a procurement project. It says the primary purpose of the Project Note was to assist Treasury Board and the Management Board of Cabinet and advise them of the key considerations and recommended courses of action regarding the NTC.

[44] The ministry submits that the Project Note contains material information and recommendations that were reviewed by Cabinet and deliberated upon to make decisions relating to the NTC project. The ministry provided additional specific details and explanations in its confidential representations about the information about the Project Note and describes how the Treasury Board and the Management Board of Cabinet considered the information in determining whether to approve the ministry’s request.

[45] The appellant’s representations in response to whether the Project Note was submitted to Cabinet and/or its committees for deliberation are brief.¹⁶ The appellant states only that it has no means of verifying the ministry’s claim that the Project Note was put before Cabinet for deliberation. The appellant questions the ministry’s credibility on the basis that it only located one responsive record to the appellant’s request, even though the Treasury Board Secretariat identified nine records it states

¹³ I confirm that the ministry provided an unredacted copy of the record to the IPC for the purposes of this inquiry.

¹⁴ The ministry refers me to the *Financial Administration Act*, RSO 1990 c. F12, section 1.0.1.

¹⁵ The ministry cites the *Management Board of Cabinet*, RSO 1990 c. M12, section 3.

¹⁶ The appellant addresses various issues and concerns about the NTC project in its representations. I have reviewed all of the appellant’s representations but will outline only and review those matters most relevant this aspect of my decision here.

were submitted to it by the ministry in response to a similar request the appellant made.¹⁷

Analysis and findings regarding the application of section 12(1)

[46] Based on my review of the Project Note and the parties' representations, I am satisfied that the Project Note is exempt under the introductory wording of section 12(1). The evidence before me indicates that the Project Note was submitted to Treasury Board and the Management Board of Cabinet for consideration and approval. I accept that both Treasury Board and the Management Board of Cabinet are committees of Executive Council, as contemplated by section 12(1) of the *Act*.

[47] I find that the content of the Project Note aligns with the description provided by the ministry in its representations and it is clear to me from reading the record that it was prepared to provide detailed background information, financial details and estimates, and policy considerations and recommendations in relation to the NTC. Furthermore, it is clear from the content of Project Note that the ministry was seeking approval to proceed with alternative financing and procurement, as stated in its representations.

[48] I accept the ministry's representations that Treasury Board and/or the Management Board of Cabinet would have reviewed and considered the record in their discussions about the NTC project and decision-making process about whether to approve the ministry's request.

[49] I have considered the credibility issue raised by the appellant. I am not persuaded by the appellant's assertion that the difference in the number of records identified by the different ministries suggests the ministry's credibility is in question in this appeal.¹⁸ In any event, my independent review of the record at issue is not dependent on any party's credibility.

[50] In conclusion, based on my review of the Project Note and the ministry's representations, both confidential and non-confidential, I find that there is a clear link between the record at issue and the substance of Treasury Board and/or the Management Board of Cabinet's deliberations regarding the approvals sought by the ministry. As such, I find that the information contained in the Project Note would reveal the substance of Cabinet deliberations and/or those of its committees, or information that would permit the drawing of accurate inferences with respect to these deliberations.

[51] In the alternative, I also find that the information at issue is exempt pursuant to section 12(1)(b). The Project Note expressly sets out a recommended course of action, as well as the pros and cons and the financial implications of the recommended course of action, as contemplated by section 12(1)(b). I accept the ministry's confidential and non-confidential representations that the Project Note was

¹⁷ This request is the subject of Appeal PA20-00245, which is addressed by Order PO-4400.

¹⁸ This discrepancy may have been relevant had the appellant continued with its appeal of the issue of whether the ministry conducted a reasonable search for responsive records, but it did not.

submitted to the Treasury Board and/or the Management Board of Cabinet for consideration and approval. As a result, I find that the ministry has established that the criteria under section 12(1)(b) are also satisfied.

Does the exception for Cabinet consent at section 12(2) apply?

[52] Section 12(2) establishes two exceptions to the section 12(1) exemption, only one of which is relevant to the present appeal:

(2) 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.

[53] As set out in the Notice of Inquiry provided to the parties, the head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record. However, the head must at least turn their mind to it.¹⁹

[54] The ministry says that it considered whether it would be appropriate to approach the Treasury Board and Management Board of Cabinet, and Cabinet, to seek consent under the circumstances.

[55] The ministry submits that it took into consideration that the matters dealt with in the Project Note are ongoing and relate to potential future Cabinet consideration. The ministry says that because the NTC project is still an ongoing initiative and Treasury Board/Management Board of Cabinet and Cabinet continue to make decisions relating to this initiative, the ministry determined that there was no reasonable basis upon which Treasury Board and/or the Management Board of Cabinet would consent to access being given to this record.

[56] After weighing these considerations, the ministry says that it ultimately decided it would be inappropriate to seek consent from Cabinet to release the Project Note.

[57] The appellant did not address section 12(2) in its representations.

[58] The consideration by a head of whether or not to seek consent under section 12(2)(b) is different from an examination of whether a head ought to exercise their discretion to disclose a record that is otherwise exempt under a discretionary exemption.²⁰ In the context of the mandatory section 12(1) exemption, the head cannot decide to disclose the records without Cabinet consent.

[59] As a result, all that I must decide is whether the head considered whether to seek consent. In this case, I am satisfied that the ministry considered whether it should seek consent. It provided sufficiently detailed reasons explaining what factors

¹⁹ Orders P-771, P-1146 and PO-2554.

²⁰ Order PO-2114-F.

it considered and why the head decided not to seek consent. I accept the ministry reasons and therefore find the exception in section 12(2)(b) of the *Act* does not apply in the circumstances.

[60] As discussed earlier in this decision, because the public interest override at section 23 of the *Act* cannot apply to the section 12(1) exemption, I am not able to consider the application of section 23 to the Project Note and I uphold the ministry's decision to withhold it from the appellant.

ORDER:

I uphold the decision of the ministry that the record at issue qualifies for exemption under section 12(1) of the *Act*, and dismiss this appeal.

Original Signed by: _____
Meganne Cameron
Adjudicator

_____ May 30, 2023

APPENDIX I

APPENDIX A - COST BENEFIT ANALYSIS

Any internal or external: reports; memoranda; opinions; communications; correspondence, including letters, text messages on both Ontario government and personal devices, emails and archived emails (on both Ontario government and personal accounts) - including drafts of said documents, communications and correspondence relating to all options considered prior to deciding to amalgamate all Ontario Court of Justice Criminal Courts into the building of the New Toronto Courthouse (NTC) at Armoury/Chestnut/Centre streets and the reconstitution of the Toronto Region Bail Centre (TRBC), formerly referred to as the Bail Centre of Excellence (BCE), at 2201 Finch Avenue West. For greater certainty, this would include any cost benefit analyses done, but not limited to the following: the cost of moving Toronto West, Toronto North and Toronto East to the NTC location downtown as compared to the cost of building the NTC as a new location for the downtown courts while maintaining the other "suburban" courts in their present locations. In particular, any document or communication concluding that there is no cost saving by bringing the suburban courts into the NTC (in essence, the cost of either option is cost neutral).

Any internal or external: reports; memoranda; opinions; communications; correspondence, including letters, text messages on both Ontario government and personal devices, emails and archived emails (on both Ontario government and personal accounts) - including drafts of said documents, communications and correspondence relating to the costs and ancillary safety issues caused by compromised response times in the "suburbs" associated with conducting all criminal trials for the entire city at the NTC site, including but not limited to the cost of sending Toronto Police Service officers and Ontario Provincial Police officers to the city core for any aspect of court proceedings.

Any internal or external: reports; memoranda; opinions; communications; correspondence, including letters, text messages on both Ontario government and personal devices, emails and archived emails (on both Ontario government and personal accounts) - including drafts of said documents, communications and correspondence relating to the effect on local economies, particularly the business communities in the "suburbs" and the downtown core by moving all criminal court matters in Toronto to the NTC and TRBC/BCE.