

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4400

Appeal PA20-00245

Treasury Board Secretariat

May 30, 2023

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Treasury Board Secretariat for records related to the New Toronto Courthouse project. The Treasury Board Secretariat located 17 responsive records and denied access to them in full on the basis of the mandatory exemption in section 12(1) of the *Act* (Cabinet records). In this order, the adjudicator upholds the Treasury Board Secretariat's decision that section 12(1) applies to the records 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).

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 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Treasury Board Secretariat for records related to all options considered before a decision was made to amalgamate the Ontario Court of Justice Criminal Courts into the building of the New Toronto Courthouse (the NTC) and to reconstitute the Toronto Region Bail Centre (the TRBC). The appellant clarified its

request to include any cost benefit analysis that related to those decisions.¹

[3] The Treasury Board Secretariat (the ministry²) issued a decision denying access to the responsive records it identified, in full, pursuant to the mandatory exemption at section 12(1) (Cabinet records) of the *Act*. The Ontario Crown Attorney's Association (now the appellant) appealed the ministry's access decision to this office (the IPC).

[4] During the course of mediation, the mediator spoke to and corresponded with both the appellant and the ministry. The ministry confirmed its access decision and the appellant took the position that there was a public interest in the records the ministry withheld. Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry pursuant to the *Act*.

[5] The sole issue in this inquiry is whether section 12(1) of the *Act* applies to the records at issue. The issue of whether the public interest override at section 23 of the *Act* applies to the records at issue was removed, as section 23 cannot apply to the mandatory exemption for Cabinet records at section 12(1).³

[6] I commenced an inquiry and sought representations from the parties and shared them in accordance with the Practice Direction Number 7 of the IPC's *Code of Procedure*. Some portions of the ministry's representations were not shared with the appellant as those portions met the confidentiality criteria in Practice Direction Number 7.

[7] In this decision, I find that section 12(1) of the *Act* applies to all of the records at issue. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[8] There are 17 records at issue in this appeal. They consist of plans, briefing notes, businesses cases, Treasury Board submissions, spreadsheets, and emails. They are described in further detail at Appendix II to this decision.

PRELIMINARY MATTERS:

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

² In its representations, the Treasury Board Secretariat refers to itself as "the ministry" and for consistency, I have used the same term.

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.

Production of records at issue

[9] In its initial representations the appellant asks that I order the ministry to produce the records at issue to me for examination so that I may make certain that no portions are 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 full, unsevered, copies of all of the records at issue at the beginning of this inquiry. I confirm that I have reviewed all of the records at issue 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 the records.

Information in the records at issue that is not responsive to the request

[11] The ministry says that records 1, 5, 7, 8, 10, 12, 14 and 17 contain information that covers other initiatives and projects led by the Ministry of the Attorney General and is not responsive to the appellant's request.⁴

[12] The ministry provided the IPC with a copy of the records with the information it says is not responsive severed, as well as a complete, unsevered copy. I have reviewed the records and considered each portion of information that the ministry says is not responsive to the appellant's request.

[13] I confirm that the portions the records at issue that the ministry severed relate to other initiatives, projects or issues that are not connected to the appellant's request and I uphold the ministry's decision in that regard. Going forward, when I refer to records 1, 5, 7, 8, 10, 12, 14 and 17, I am referring to the remaining information in those records that has not been redacted by the ministry as not responsive, and that is responsive to the appellant's request for information.

DISCUSSION:

[14] The sole issue in this appeal is whether the exemption in section 12(1) applies to the report. The ministry relies on the introductory wording of section 12(1), as well as sections 12(1)(a) and (b) to withhold the record. These sections state,

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,

⁴ I note that the ministry's representations stated that record 4 contained information that was not responsive to the request. However, the ministry did not sever any information in record 4. It did, however, sever information as "not responsive" in record 1. During the course of the inquiry, the ministry confirmed with the IPC that there was a typographical error in its representations and that it intended to specify that record 1 contained information that was not responsive to the request, rather than record 4.

(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;

[15] 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. 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).⁵

[16] As set out in the Notice of Inquiry provided to the parties at the beginning of this inquiry, 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.⁶

[17] Previous IPC orders are clear that the institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations for section 12(1) to apply.⁷

The ministry's representations

[18] The ministry says that the records at issue in this appeal relate to an initiative of the Ministry of the Attorney General (MAG) 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 known as the New Toronto Courthouse (the NTC). The ministry says that as part of the planning and development process for the NTC, MAG made a number of submissions to Treasury Board and/or the Management Board of Cabinet to seek approvals relating to operational and financial aspects of the NTC project.

[19] The ministry submits that Treasury Board (TB) is a Cabinet committee of the Executive Council responsible for providing oversight of government financial, expenditure and accounting policies and procedures.⁸ It says that the Management Board of Cabinet (MBC) is also a Cabinet committee of the Executive Council responsible for providing oversight of administrative policies and procedures to ensure the efficient and effective operation of the Ontario Public Service.⁹ The ministry states

⁵ Orders P-22, P-1570 and PO-2320.

⁶ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁷ Order PO-2320.

⁸ *Financial Administration Act*, RSO 1990 c F12, s 1.0.1.

⁹ *Management Board of Cabinet*, RSO 1990 c M12, s 3.

that TB and the MBC “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.”

[20] The ministry says that the records at issue consist of TB/MBC submissions, briefing notes and supporting documents. It asserts that all of the records at issue were either presented to TB and/or MBC, or relate directly to the development of records that were provided to TB and/or MBC.

[21] The ministry explained that while the records at issue relate to the NTC initiative led by MAG, it has custody of the records because they were submitted to the Capital Expenditure Management Division (CEMD) within the Office of the Treasury Board for submission to TB/MBC. The ministry says that the Office of the Treasury Board provides analysis, administrative and operational support to TB/MBC. According to the ministry, CEMD provides financial and policy analysis of submissions relating to capital projects or expenditures to TB/MBC. It says that one of CEMD’s responsibilities is to provide advice and recommendations to TB/MBC on ministries’ multi-year infrastructure plans. It further explains that when ministries wish to provide submissions to TB/MBC relating to projects, they must first provide their submissions to the Office of the Treasury Board who subsequently conducts analysis and develops recommendations to TB/MBC.

[22] The ministry submits that the introductory words of section 12(1) apply to exempt all responsive records at issue in this appeal. Additionally, it says that section 12(1)(a) applies to record 5 and section 12(1)(b) applies to records 3, 10, 12 and 17.

[23] The ministry submits that the responsive records were either put directly before TB/MBC, a committee of the Executive Council, to advise them of the key considerations and recommended courses of action, or were supporting documents to those submissions.

[24] The ministry made additional confidential representations about the nature of the records, the context in which they were created, and further details about the requests and recommendations they contain. The ministry says that the records are comprised of material information that was reviewed by Cabinet and deliberated upon to make decisions regarding the approvals sought by the ministry. It also made specific representations about the individual records, which I outline below.

The ministry’s representations regarding records 3, 4, 5, 7, 8, 10, 12, 14 and 17

[25] The ministry submits that each of these records was submitted to TB/MBC and Cabinet by the MAG. It asserts that MAG gave the records to the Office of the Treasury Board and specifically, CEMD, for the purposes of facilitating submissions to TB/MBC. While I cannot reveal the specifics of the content of the records referred to in the ministry’s confidential representations, in general, the ministry says that the records provide detailed information about the matters under consideration.

[26] The ministry made the following specific representations:

- records 3, 7, 8, 12, 14 and 17 were all specifically prepared for the purpose of seeking approval from TB/MBC on matters addressed in the records.
- record 4 is a submission to TB/MBC seeking approval for a particular action that contains detailed specifics about the implementation of that action.
- record 5 is comprised of “minutes” of TB/MBC meetings and contains a detailed overview of decisions that have been approved by the TB/MBC with respect to each initiative that was submitted for approval to TB/MBC.
- records 10 and 12 are multi-year planning submissions that provide a summary of the key decisions already made by TB/MBC, provide policy options and recommended courses of action for TB/MBC and seek additional approvals.
- records 7, 10 and 17 are clearly marked “Confidential Advice to Cabinet” at the bottom of each page.

[27] I note that for each of the bullet points above, the ministry made additional confidential representations providing details about the nature of the records supporting its assertion that section 12(1) applies. I cannot reveal these details without revealing the content of the information at issue but I have considered the confidential representations when making my decision.

[28] The ministry reiterates that each of records 3, 4, 5, 7, 8, 10, 12, 14 and 17 was submitted to and considered by TB/MBC and Cabinet and are therefore captured by the section 12(1) exemption.

The ministry’s representations regarding records 1, 2, 6, 9, 11, 13, 15 and 16

[29] The ministry submits that records 1, 2, 6, 9, 11, 13, 15 and 16 are supporting documents to the eight records set out above that it says were submitted to TB/MBC and to Cabinet. The ministry says that these records also qualify for exemption from disclosure pursuant to the introductory wording of section 12(1).

[30] The ministry says that although these records were not formally submitted to TB/MBC, the Office of the Treasury Board has custody of these documents because they were used to develop materials that inform and support the submissions made to TB/MBC. Specifically, the ministry says that they are underlying records that were used to inform the briefings and discussions of TB, that they relate directly to the options and recommendations considered by Treasury Board, and that they are substantially similar to those records submitted for TB/MBC approval. As a result, the ministry says that disclosure of the supporting documents would allow inferences to be drawn about what was considered by TB/MBC and Cabinet.

[31] The ministry made the following specific representations:

- record 1 contains planning and strategies related to submissions to TB/MBC and significantly overlaps with the submissions in record 4.
- record 2 provides background information and analysis relating to the NTC project.
- record 6 is a capital activities list and contains data that informed record 3, which was submitted to TB/MBC.
- record 9 is a supporting document that provides background and analysis also found in record 3, which was submitted to TB/MBC.
- record 13 is comprised of background information and analysis for record 12, which requested decisions with respect to various initiatives led by the MAG from TB/MBC arising from particular circumstances.

[32] The ministry submits that the above records all contain similar or identical analyses, findings and recommendations with respect to the development of the NTC as those records that were submitted to TB/MBC. As a result, the ministry says that disclosing any part of these records would reveal the information that was provided for review and deliberation by TB/MBC and Cabinet. The ministry asserts that as a result, these records fall within the scope of the introductory wording of section 12(1).

[33] With regard to record 11, the ministry says that this record is a multi-year plan that contains detailed information that would reveal decisions made by TB/MBC.

[34] Finally, the ministry says that records 15 and 16 are email correspondence between staff members from the Ministry of Attorney General and CEMD regarding the scheduling of the items tracking to TB/MBC, including a brief summary of those items. The ministry asserts that the records discuss the deliberations of TB/MBC about these items and the expected timeframe in which those deliberations would take place.

The appellant's representations

[35] The appellant submits that the importance accorded to the deliberative candour of Cabinet has been somewhat exaggerated and that "the protection of this interest ought in every instance be weighed against the public's interest in open and transparent governance." A significant portion of the appellant's representations focus on the public interest in the NTC project and issues regarding the general interpretation of the *Act*. I note that the appellant made nearly identical representations in Appeal PA20-00241. That appeal resulted from a similar request the appellant made to the Ministry of the Attorney General. I addressed the issues raised and arguments made regarding the interpretation of section 12(1) and the public interest override in Order

PO-4399 and as a result, I will not consider those arguments again here.¹⁰

[36] With regard to the records at issue in this appeal, the appellant submits that it has no means of verifying the ministry's claims and asks that I examine the records to ensure that no portions have been withheld in violation of its right of access under the *Act*.

[37] It also argues that records 1, 2, 6, 9, 11, 13, 15, and 16 do not fall within the limited and specific scope of the section 12(1) exemption because they were not placed before Cabinet. The appellant says that these documents were only used to inform TB discussions, as distinct from Cabinet deliberations. Given this, the appellant asserts that these records ought to be disclosed. It argues that to do otherwise would be "inconsistent with the purposes of the *Act* and the need to 'strike a balance' that recognizes the importance of open government to effective, responsive, and accountable governance."

[38] The appellant did not address whether sections 12(1)(a) or (b) apply.

The ministry's reply

[39] The ministry responded to the appellant's assertion that records 1, 2, 6, 9, 11, 13, 15 and 16 are not captured by the section 12(1) exemption because they were not placed before Cabinet. It says that records which have never been placed before an Executive Council (Cabinet), or its committees, may still qualify for exemption under the introductory wording of section 12(1), provided an institution establishes that disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or permit the drawing of inaccurate inferences with respect to the substance of deliberations of an Executive Council or its committees.¹¹

[40] In response to the appellant's assertion that records used to inform TB are distinct from Cabinet deliberations, the ministry reiterates that TB is a Cabinet committee of the Executive Council that is responsible for providing oversight of government financial, expenditure and accounting policies and procedures.¹² It submits that any record that would disclose the substance of the discussions and briefings at TB is protected by section 12(1) because TB is one of the committees of Executive Council. The ministry says that any person who may be privy to those meetings and discussions is required to maintain the information in confidence, which is consistent with Cabinet confidentiality and with each public servant's oath of office and confidentiality.

[41] The ministry asserts that its confidential representations specifically identified the essential elements of the records listed above that were connected to and/or overlapped with the records that were actually submitted to TB/MBC. Therefore, the

¹⁰ See paragraphs 21 to 38 of Order PO-4399.

¹¹ Order P-361, PO-2466, PO-2227.

¹² *Financial Administration Act*, RSO 1990 c F12, s 1.0.1; PO-2820; PO-3934.

ministry says that the disclosure of records 1, 2, 6, 9, 11, 13, 15 and 16 would reveal key considerations relating to the development of the NTC that have been deliberated by TB/MBC.

[42] I note that the appellant's sur-reply did not directly address the issues raised by the ministry in its reply.

Findings and analysis

[43] Based on my review of the records and the ministry's representations, I find that the ministry has provided sufficient evidence to demonstrate that the introductory wording of section 12(1) applies to exempt each of the records at issue from disclosure. Specifically, I find that the ministry has provided sufficient evidence to demonstrate that the disclosure of the records would reveal the substance of deliberations of TB/MBC.

[44] To begin, I note that all of the records remaining at issue relate to requests for approvals and/or recommendations made to TB/MBC and/or Cabinet about the NTC. Some of the records are marked in various ways to indicate that they were prepared for the purpose of giving confidential advice to Cabinet.¹³ However, as noted by previous IPC orders such evidence is not determinative, on its own, in assessing whether disclosing the contents of these records would reveal the substance of deliberations of Cabinet or its committees.¹⁴ Instead, the ministry must provide sufficient evidence to establish a link between the contents of each record and the actual substance of deliberations of Cabinet or its committees. For the reasons that follow, I find that the ministry has established that link in each case.

Records 3, 4, 5, 7, 8, 10, 12, 14, and 17

[45] The ministry says that these records were submitted to, and considered by, TB/MBC. The evidence before me supports the ministry's assertions that MAG made various submissions to TB/MBC seeking approvals relating to operational and financial aspects of the NTC project. I note that the records themselves are particularly useful in understanding both the context of the requests made to TB/MBC and the information that would have been considered by TB/MBC when making decisions related to those requests.

[46] While I cannot reveal the content of any of the records, the specific requests to TB/MBC are set out in records 3 ("MAG Note") and 4 ("Business Case"). There is significant overlap in the content of these records. Record 5 ("Minuted Decision") identifies the dates when record 4 (and the related supporting information) was considered by TB/MBC, sets out TB/MBC's decisions regarding MAG's requests, and identifies issues that MAG was instructed to report back to TB/MBC about. Based on my review of these three records, it is clear to me that the information in records 3 and 4

¹³ Specifically, records 7, 10 and 17.

¹⁴ See, for example, Order PO-4201.

was deliberated on by TB/MBC and summarized in record 5. I find that revealing any of records 3, 4, or 5 would reveal the substance of TB/MBC's deliberations.

[47] Next, I note that records 7 ("MAG Treasury Board Submission"), 10 ("Multi-Year Planning") and 17 ("Assessment Note") are clearly identified at the beginning of each record as "Treasury Board Submissions." Each page of these records is also marked as "confidential advice to Cabinet." As with record 5, these records set out detailed requests with supporting information and summaries of the main points. It is clear to me from the ministry's representations and my review of the records themselves that these records were submitted to, and deliberated on, by TB. I also note that record 8 ("Treasury Board Briefing Note") is directly related to record 7. While I cannot reveal the contents, I am satisfied that disclosing records 7, 8, 10 and 17 would reveal information TB deliberated on, and made decisions about.

[48] Having reviewed record 12 ("TB/MBC Multi-Year Planning"), I agree with the ministry's description in its representations. This record relates to planning that sets out previous TB/MBC decisions and provides analysis and recommendations regarding future approvals to be sought. The ministry says, and I accept, that this record was submitted to TB/MBC. However, even if it were not submitted, I find that revealing the contents would reveal the substance of TB/MBC deliberations, based on the content of the record alone.

[49] Finally, I also accept that record 14 ("Program Note") was submitted to, and deliberated on, by TB/MBC. I confirm that there is specific evidence in record 14 that suggests it was submitted to TB/MBC for consideration. It details specific requests to TB/MBC and sets out contextual information and analysis relevant to those requests. I accept that the information and analysis in record 14 was considered by TB/MBC when making a decision regarding the requests.

[50] In summary, I find that the introductory wording of section 12(1) applies to exempt each of the records 3, 4, 5, 7, 8, 10, 12, 14, and 17 from disclosure.

Records 1, 2, 6, 9, 11, 13, 15, and 16

[51] The ministry says that although the above-noted records were not submitted to TB/MBC, they directly relate to the options and recommendations considered by TB and are substantially similar to those records submitted for TB/MBC approval.

[52] The appellant says that section 12(1) exemption does not apply to these records because they were not placed before Cabinet and were only used to inform TB discussions, as distinct from Cabinet. However, as noted in the Notice of Inquiry provided to the appellant at the beginning of this inquiry, and reproduced above, 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.¹⁵

[53] As stated by the ministry, TB and MBC are Cabinet committees of the Executive Council and as such, any records that would disclose the substance of TB/MBC discussions and briefings are protected by section 12(1) of the *Act*.¹⁶

[54] I have reviewed the remaining records and compared them to records I determined were submitted to, and deliberated on, by TB/MBC above and I am satisfied that the ministry has proven that all of these records, including those records identified as background or supporting materials, fall within the opening wording of section 12(1) because they would either: (1) reveal the substance of deliberations of Cabinet or its committees relating to decisions made regarding the NTC; or (2) permit the drawing of accurate inferences with respect to those deliberations.

[55] The ministry submits, and I agree, that the responsive portions of record 1 ("MAG Plan") overlap significantly with record 4, which I concluded section 12(1) applies to above. Based on my review, I also find that the content of record 1 also overlaps with portions of the other various records above that I concluded section 12(1) applied to. To be clear, I find that many of the same concepts, examples, issues, plans and requests are set out in record 1 as those records identified above. It is not possible to reveal the contents of record 1 without revealing information that is subject to section 12(1).

[56] Next, I find that records 2 ("Asset Summary Data") and 6 ("Capital Activities List") contain data that is used in record 3, 5 and 14 (all of which I concluded are subject to section 12(1) of the *Act*). Based on my review of all of the information I am satisfied that records 2 and 6 cannot be disclosed without revealing information that was the subject of TB/MBC deliberations and relevant to its decision-making processes.

[57] I find that record 9 ("TBMBC Submission Template") is also subject to the introductory language of section 12(1). The ministry says, and I agree, that record 9 provides background information and analysis that is also located in record 3. Furthermore, I note that this is a templated document that was completed and submitted to CEMD. As noted in the ministry's representations, CEMD provides advice and recommendations to TB/MBC on infrastructure plans. I find that the content of record 9 supports that assertion. Furthermore, I find that there is specific information in record 9 that indicates this record would be used to inform TB/MBC's deliberations.¹⁷ As a result, I am satisfied that section 12(1) applies to record 9.

[58] I also accept the ministry's assertion that record 13 ("TB/MBC Multi-Year Planning") is comprised of background information and analysis for record 12, which I determined was subject to the section 12(1) exemption. I base this finding on my

¹⁵ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

¹⁶ See also, Orders PO-3395-I, PO-3359 at para. 28, and PO-3934 at paras. 26 to 27.

¹⁷ For example, page 7.

review and comparison of records 12 and 13, which I find are clearly meant to be read together. I accept that disclosing record 13 would reveal information subject to section 12(1) of the *Act*.

[59] Record 11 ("MAG Multi-Year Planning") is also related to records 12 and 13. Based on my review, I accept the ministry's submission that it is a multi-year plan that would reveal decisions made by TB/MBC related to project approvals, costs and construction planning, all of which were the substance of TB/MBC deliberations.

[60] Finally, records 15 and 16 are emails, as described by the ministry. The emails contain information about matters before TB/MBC. In my view, disclosing these two emails would reveal specific issues that were being considered and deliberated on by TB/MBC in response to requests made by MAG. I cannot be more specific about the content of the emails without revealing information that is subject to section 12(1) of the *Act*.

[61] In summary, I am satisfied that in the context of these records, and based on the issues discussed in them, requests were made to TB/MBC and it made decisions about those requests. I accept that disclosing the records at issue would reveal the substance of the information TB/MBC deliberated on in making those decisions. In my view, the ministry has provided sufficient evidence to establish a link between the contents of each record and the actual substance of deliberations of Cabinet or its committees.

[62] As the introductory wording in section 12(1) applies to exempt the records in full, it is not necessary for me to consider whether they are also exempt under sections 12(1)(a) or (b). Furthermore, while the appellant has raised public interest concerns, the public interest override in section 23 cannot apply to override section 12(1). As such, it is not necessary to consider the application of section 23 to the records.¹⁸

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

[63] 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.

[64] 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

¹⁸ Orders PO-3359 at paras. 27 to 30, PO-4048, PO-4221, and PO-4291.

release the record. However, the head must at least turn their mind to it.¹⁹

[65] The ministry says that it considered whether it would be appropriate to approach the TB/MBC and Cabinet, to seek consent under the circumstances.

[66] The ministry submits that it took into consideration that the records at issue relate to potential future Cabinet consideration. The ministry says that because the NTC project is still an ongoing initiative and TB/MBC and Cabinet continue to make decisions relating to this initiative, the ministry determined that there was no reasonable basis upon which consent to access to the records would be given. The ministry says that it ultimately decided it would be inappropriate to seek consent from Cabinet to release the records at issue.

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

[68] 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.

[69] 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 it considered and why the head decided not to seek consent. I accept the ministry's reasons and find that the exception to section 12(2)(b) does not apply and the records are exempt under the mandatory section 12(1) exemption, by reason of the introductory wording to section 12(1).

ORDER:

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

Original Signed by: _____

Meganne Cameron
Adjudicator

_____ May 30, 2023

¹⁹ Orders P-771, P-1146 and PO-2554.

²⁰ Order PO-2114-F.

APPENDIX I

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).

APPENDIX II

Record Number	Ministry's non-confidential description of record
1	MAG Plan
2	Appendix B Asset Summary data
3	MAG Note
4	Business Case
5	Minuted Decision
6	Capital Activities List
7	MAG Treasury Board Submission
8	2014-2015 Treasury Board Order Briefing Note
9	TB MBC Submission Template
10	TB/MBC Multi-Year Planning (Note)

11	TB/MBC Multi-Year Planning (List)
12	TB/MBC Multi-Year Planning (Decision Template)
13	TB/MBC Multi-Year Planning (Overview)
14	Program Note MAG
15	Email containing docket numbers and dates items related to NTC went to TBMBC
16	Email containing feedback/requests for changes related to TBMBC submissions being prepared for submission related to NTC
17	Assessment Note