

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4500

Appeal PA23-00170

Cabinet Office

March 27, 2024

**Summary:** A reporter requested records under the *Act* from Cabinet Office related to the Ontario Government's consideration of changes to the Greenbelt. Cabinet Office denied access to the responsive slide deck, under the mandatory exemption at section 12(1) (Cabinet records) of the *Act*. The adjudicator upholds Cabinet Office's decision and dismisses the appeal.

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

### OVERVIEW:

[1] Cabinet Office received a request from a reporter under the *Freedom of Information and Protection of Privacy Act* (the *Act*) that was clarified as follows:

Please provide all documents and records (memos, briefing notes, reports, correspondence, emails, texts, meeting minutes, etc.) relating to the government's consideration of changes to the Greenbelt from the Premier Office. The scope of the request should include the Premier, Chief of Staff, Deputy Chief of Staff for Policy, Principal Secretary and the Policy Lead on the subject. Please exclude any records related to media monitoring.

Time frame: April 1, 2022 – November 4, 2022.

[2] In response to the request, Cabinet Office issued a decision denying access, in full,

to the responsive records, a slide deck and a mandate letter. Cabinet Office claimed the mandatory exemption at section 12(1) (Cabinet records) and several discretionary exemptions to withhold these records.<sup>1</sup>

[3] The requester, now the appellant, appealed the Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] I conducted a written inquiry under the *Act* by sending a Notice of Inquiry setting out the facts and issues on appeal to Cabinet Office.

[5] During the inquiry, I removed the mandate letter from the scope of the appeal without objection from the parties and Cabinet Office issued a revised access decision about an email chain that it found in a further search. Cabinet Office withheld portions of the email chain from disclosure. The appellant does not seek access to the withheld portions of the email chain.

[6] For the reasons that follow, I uphold Cabinet Office's decision to withhold the slide deck under section 12(1) and dismiss the appeal.

## **RECORD:**

[7] The remaining record at issue is a slide deck.

## **DISCUSSION:**

### **Does the mandatory exemption at section 12(1) relating to Cabinet records apply to the slide deck?**

[8] Section 12(1) protects certain records relating to meetings of Cabinet or its committees.

[9] The rationale for the section 12(1) exemption is maintaining Cabinet confidentiality. This rationale was identified in the Williams Commission Report<sup>2</sup> (which formed the basis for the development of the *Act*), as follows:

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<sup>1</sup> More specifically, it claimed the discretionary exemptions at sections 13(1) (advice or recommendations), 18(1) (economic and other interests), and 19 (solicitor-client privilege) of the *Act*. On appeal, Cabinet Office clarified that it is withholding the slide deck under sections 12(1) and 13(1), and the mandate letter under sections 12(1), 13(1), 18(1), and 19; it later withdrew its section 18(1) claim. Since I have removed the mandate letter from the scope of the appeal, I do not discuss any of the exemptions claimed over it in this order.

<sup>2</sup> Entitled *Public Government for Private People: The Report of the Cabinet Office Commission on Freedom of Information and Individual Privacy 1980*, vol 2 (Toronto: Queen's Printer, 1980).

If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold ministers responsible for government policy would be diminished.<sup>3</sup>

[10] I note that in its recent decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*,<sup>4</sup> the Supreme Court of Canada articulated a third rationale of Cabinet confidentiality: "it promotes the efficiency of the collective decision-making process . . . all in aid of effective government." The Supreme Court agreed with the Cabinet Office that, "along with ensuring ministerial candour and solidarity, Cabinet secrecy also helps to ensure the deliberative process runs efficiently by preserving the confidentiality of deliberations until a final decision has been made and announced." The Court explained:

The prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process. ... Publicizing Cabinet's decision-making process before the formulation and announcement of a final decision "would increase the public pressure that stakeholders put on ministers and give rise to partisan criticism from their political opponents"; this scrutiny "would ultimately paralyze the collective decision-making process."

[11] I mention the Supreme Court's discussion of the efficiency rationale here for the sake of completeness only. For the reasons outlined in my analysis and findings below, the evidence and submissions provided by Cabinet Office establish that the substance of Cabinet's deliberations within the meaning of section 12(1) would be revealed by the disclosure of the slide deck and maintaining its confidentiality is justified under the candour and solidarity rationales alone.

[12] Order 131 and later IPC orders have used the following definitions<sup>5</sup> of the terms "substance" and "deliberations," which I agree with, and adopt in this appeal:

The term *substance* is defined as "essence; the material or essential part of a thing, as distinguished from form," or "essential nature; essence or most important part of anything."

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<sup>3</sup> *Ibid*, page 85.

<sup>4</sup> 2024 SCC 4.

<sup>5</sup> Black's Law Dictionary (5th edition) and the Oxford Dictionary.

The term *deliberation* is defined as “the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means.”

[13] In Order PO-1725, the IPC discussed the special role of the Premier of Ontario in connection with setting the agenda of Cabinet and its deliberations, the indivisibility of the Premier’s deliberations from the deliberations of Cabinet as a whole, and the important role that the Premier’s “senior staff” have as the Premier’s “eyes and ears.” Order PO-1725 recognized that information presented to senior staff of the Premier *may* qualify as exempt under section 12(1) of the *Act*.

***Section 12(1): introductory wording***

[14] The introductory wording of the exemption at section 12(1) is: “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 . . .”

[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.

[16] 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).<sup>6</sup>

[17] Evidence of a document actually having been placed before Cabinet provides “strong but not necessarily determinative evidence that disclosing its content could reveal the substance of deliberations.”<sup>7</sup> To meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence and argument to establish a linkage between the content of the record and the substance of Cabinet deliberations.<sup>8</sup>

*Cabinet Office’s representations*

[18] Cabinet Office submits that the introductory wording of subsection 12(1) applies to exempt the slide deck in its entirety.<sup>9</sup>

[19] Cabinet Office explains that the slide deck is a briefing deck that was directly put

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<sup>6</sup> Orders P-22, P-1570 and PO-2320. Note that 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 (see Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725).

<sup>7</sup> Order PO-2320.

<sup>8</sup> Order PO-2320.

<sup>9</sup> Before addressing the slide deck itself, Cabinet Office set out many of the basic points that I made above regarding the exemption in general, so I will not repeat them.

before Cabinet on November 2, 2022.

[20] It explains that the slide deck was prepared by the program area in the Ministry of Municipal Affairs and Housing. Cabinet Office further explains that the slide deck was developed by staff with relevant subject matter expertise, and was used to brief Cabinet and seek direction, in the form of a Cabinet approval, on the issues and options set out in the slide deck. Furthermore, Cabinet Office states that the slide deck was approved by Cabinet, as indicated by the signature of the Minister of Municipal Affairs and Housing. In this regard, Cabinet Office submits that the slide deck clearly and, on its face, contains information that would reveal the substance of the deliberations of Cabinet as it outlines the issue, key considerations, proposed roll-out of the plan, and the decision sought from Cabinet.

*The appellant's representations*

[21] The appellant submits that Cabinet Office has not provided sufficient evidence to show a link between the Cabinet contents of the record and the actual substance of Cabinet deliberations. She highlights that in stating this, she is in the disadvantaged position of having to argue why disclosure should be made, without having had an opportunity to review the record.

[22] The appellant also notes that the reports issued by the Auditor General<sup>10</sup> and Integrity Commissioner<sup>11</sup> contain detailed information from Cabinet documents provided by the government, despite the exemptions in the *Act*. She argues that the inclusion of this information in these public reports further supports her submissions in favour of releasing the record.<sup>12</sup>

*Analysis/findings*

[23] Based on my review of the slide deck and the parties' representations, I find that the slide deck is exempt from disclosure under the mandatory exemption at section 12(1) of the *Act*.

[24] I appreciate that the appellant, like any requester disputing a decision to withhold information in a record, is being asked to comment on a record she has not seen. However, I have had the benefit of doing so. A record is an important piece of evidence, and in some cases, can be the most important evidence in an appeal to the IPC.

[25] On my review of the slide deck and Cabinet Office's representations, I uphold

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<sup>10</sup> Special Report on Changes to the Greenbelt, Office of the Auditor General of Ontario, August 9, 2023 (updated on October 6, 2023).

<sup>11</sup> Report Re: The Honourable Steve Clark, Minister of Municipal Affairs and Housing and Member of Provincial Parliament for Leeds–Grenville–Thousand Islands and Rideau Lakes, Office of the Integrity Commissioner of Ontario, August 30, 2023.

<sup>12</sup> The appellant made this submission in relation to both records that were at issue in this appeal, the slide deck and the mandate letter, before I removed the mandate letter from the scope of the appeal.

Cabinet Office's decision. The evidence establishes that the slide deck was developed by staff with relevant subject matter expertise, was placed before Cabinet, and was used to brief Cabinet and seek direction. Having reviewed the record, I agree with Cabinet Office's characterization of the slide deck, that it outlines the issue, key considerations, proposed roll-out of the plan, and the decision sought from Cabinet. In the circumstances, I accept and find that disclosure of the slide deck would reveal the substance of Cabinet deliberations.

[26] The fact that Cabinet Office or others have provided detailed records or information to the Auditor General and the Integrity Commissioner for their respective investigations does not mean that the slide deck at issue was provided and made available to the public.

[27] Therefore, I uphold Cabinet Office's decision to withhold the slide deck under section 12(1) of the *Act*.

***Section 12(2)(b): consent as an exception to the exemption***

[28] Section 12(2)(b) establishes that the head of an institution shall not refuse to disclose a cabinet record "where, the Executive Council for which, or in respect of which, the record has been prepared consents to access being given."

[29] 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.<sup>13</sup>

[30] Only the Cabinet in respect of which the record was prepared can consent to the disclosure of the record.<sup>14</sup>

*The ministry's representations*

[31] The ministry notes that section 12(2)(b) is discretionary and refers to the IPC's consistent approach that an institution must at least turn its mind to the question of whether to seek Cabinet consent.<sup>15</sup>

[32] The ministry states that the question of whether to seek the approval of Cabinet to release the information has been given careful consideration by officials in Cabinet Office. In this respect, Cabinet Office says that it considered a number of relevant factors, including:

- the public policy purpose of the Cabinet records exemption,

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<sup>13</sup> Orders P-771, P-1146 and PO-2554.

<sup>14</sup> Order PO-2422.

<sup>15</sup> The ministry cites Orders P-771, P-1146 and PO-2554.

- the nature of the records and the information they contain,
- the potential harms to the Cabinet confidentiality of the Cabinet deliberative process that may arise from disclosure,
- the fact that the government has disclosed or announced certain policy initiatives after full consideration by Cabinet.

[33] Cabinet Office states that after carefully considering all relevant factors, it determined that on balance, it would not request the Cabinet consent to release the slide deck. In this respect, Cabinet Office is of the view that the Premier and Cabinet are in the best position to determine, in accordance with Cabinet's deliberative process, when and how the government will announce its policy initiatives, or if they would like to reveal the specific considerations that factored into arriving at a particular decision.

*The appellant's representations*

[34] The appellant notes that since the time that she filed her request, "the Premier, speaking on behalf of his Cabinet and caucus members," has announced the reversal of his government's decision to open parts of the Greenbelt for development and issued an apology. She submits that, nevertheless, Cabinet Office declined to request consent to release the records at issue.

*Analysis/findings*

[35] Having reviewed Cabinet Office's representations, I am satisfied that it turned its mind to the question of whether to seek Cabinet consent to disclose the slide deck and I accept that it considered relevant factors in doing so. This is not changed or undermined by the fact that the Premier announced a reversal of the government's Greenbelt plans.

[36] Given my finding that the mandatory exemption at section 12(1) relating to Cabinet records applies to the slide deck, I will not consider Cabinet Office's alternative claim that the slide deck is also exempt under the discretionary exemption at section 13(1) of the *Act* as advice or recommendations of a public servant.

**ORDER:**

I uphold Cabinet Office's decision to withhold the slide deck under section 12(1) of the *Act* and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ March 27, 2024