

# INTERPRETATION BULLETIN

## Cabinet Records

This interpretation bulletin outlines the factors for determining whether the mandatory exemption relating to Cabinet deliberations applies to a record. This is set out in **section 12(1)** of the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

### Section 12(1) of FIPPA states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be



brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

## Overview

Section 12(1) creates a mandatory exemption from disclosure in respect of any record that would reveal the substance of deliberations that have taken place or are intended to take place in the Executive Council or in any of its committees (Cabinet). Section 12(1) also exempts the records listed in subparagraphs (a) to (f) regardless of whether their disclosure would reveal the substance of any such deliberations.

The scope of the exemption encompasses a record prepared or placed before Cabinet for its consideration or to provide information for use in its deliberations, or a record that was created for another purpose but nonetheless reveals what has been proposed for consideration or what has transpired at the Cabinet level.

## Who has the burden of proving that the Cabinet records exemption applies?

Where an institution refuses to provide access to a record or part of a record on the grounds that it falls within the Cabinet records exemption, the burden of proving the applicability of the exemption lies with the institution, as required under section 53 of FIPPA.

## What are the underlying purposes for protecting Cabinet secrecy?

The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*<sup>1</sup> (*Mandate Letters Decision*) recognized three underlying purposes for protecting Cabinet secrecy: candour, solidarity and efficiency. It described these underlying purposes as follows:

... Collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny [...]. This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to by scholars as the “candour” and “solidarity” rationales for

<sup>1</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII).

Cabinet confidentiality [...]. At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity [...].

Scholars also refer to a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process [...]. Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government. ...<sup>2</sup>

## What is meant by Cabinet?

The Cabinet, which is also sometimes referred to as Executive Council, is a council of ministers of the Crown and is chaired by the Premier of Ontario.

## What is the Premier's role?

The Premier of Ontario is the head of Cabinet.

The Premier has a unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet.<sup>3</sup> Given this unique role, the deliberations of the Premier cannot be separated from the deliberations of Cabinet as a whole.<sup>4</sup>

The first minister, as head of Cabinet, enjoys extensive powers within Cabinet's deliberative process by convention. In many regards, the role and activities of the Premier are inseparable from Cabinet and its deliberations. First ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and its internal structure (e.g., the number, nature, and membership of Cabinet committees), set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided (Hogg and Wright, at §§ 9:5-9:6).<sup>5</sup>

The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes.<sup>6</sup> To the extent that records reflect consultations bearing on the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet.<sup>7</sup>

<sup>2</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII), at paras 29-30.

<sup>3</sup> Orders [PO-1725](#) and [PO-4099](#).

<sup>4</sup> Order [PO-1725](#).

<sup>5</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII), at para. 46.

<sup>6</sup> Orders [PO-1725](#) and [PO-4099](#).

<sup>7</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII), at para. 53 and Orders [PO-1725](#) and [PO-4099](#).

## What is meant by Cabinet committee?

For a body to be considered a “committee” for the purposes of s. 12(1), the group must be composed of ministers where some tradition of collective ministerial responsibility and Cabinet prerogative can be invoked to justify the application of the exemption.<sup>8</sup>

## Section 12(1): Opening words

To fall within the opening words of this provision, the information in the record must reveal the “substance of deliberations” of Cabinet or one of its committees.<sup>9</sup>

In interpreting the term “deliberations” in the opening words of section 12(1) of FIPPA, the Supreme Court in the *Mandate Letters Decision* called for a purposive and contextual approach:

... [T]he opening words of s. 12(1) ... mandate a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations, rather than categorically excluding certain types of information from protection. Thus, “deliberations” understood purposively can include outcomes or decisions of Cabinet’s deliberative process, topics of deliberation, and priorities identified by the Premier, even if they do not ultimately result in government action. And decision makers should always be attentive to what even generally phrased records could reveal about those deliberations to a sophisticated reader when placed in the broader context. The identification and discussion of policy priorities in communications *among Cabinet members* are more likely to reveal the substance of deliberations, especially when considered alongside other available information, including what Cabinet chooses to do.<sup>10</sup>

The use of the word “including” in the opening words means that 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>11</sup> Further, the types of records listed in paragraphs (a) to (f) are deemed to qualify for the exemption regardless of whether they meet the requirements in the introductory text of section 12(1).<sup>12</sup>

<sup>8</sup> Orders [P-604](#) and [PO-2857](#).

<sup>9</sup> Order [PO-2320](#).

<sup>10</sup> [Ontario \(Attorney General\) v. Ontario \(Information and Privacy Commissioner\)](#), 2024 SCC 4 (CanLII), para. 62.

<sup>11</sup> Orders [P-22](#), [P-1570](#), [PO-2320](#) and [PO-3977](#).

<sup>12</sup> Order [P-22](#). And see [Ontario \(Attorney General\) v. Ontario \(Information and Privacy Commissioner\)](#), 2024 SCC 4 (CanLII), at para. 14: “The paragraphs of the provision protect listed records, which need not meet the standard set out in s. 12(1)’s opening words to qualify for protection.”

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>13</sup> 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.<sup>14</sup>

The institution must provide sufficient evidence or representations to show a link between the content of the record and the actual substance of Cabinet deliberations.<sup>15</sup> However, the institution is not required to show that the deliberations in question took place or are intended to take place at a specific Cabinet meeting.<sup>16</sup>

## Section 12(1)(a): Agenda, minute or other record of deliberations

“Agenda,” in s. 12(1)(a), means a specific record created as an official document of Cabinet Office that identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. An entry in a different record that describes the subject matter of an item considered or to be considered by Cabinet is not usually considered to be an agenda.<sup>17</sup>

Similarly, the word “minute” refers to a specific record created as an official document of Cabinet Office which identifies the actual decision made or action taken by Cabinet or one of its committees on a specific topic at a particular meeting.<sup>18</sup>

## Section 12(1)(b): Policy options or recommendations

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.<sup>19</sup>

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13 Order [PO-2320](#).

14 Orders [P-361](#), [PO-2320](#), [PO-2554](#), [PO-2666](#), [PO-2707](#) and [PO-2725](#).

15 Order [PO-2320](#).

16 *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII), para. 49: “The dynamic and fluid nature of Cabinet’s deliberative process also means that not all stages of the process take place sitting around the Cabinet table behind a closed door.” See also, para 54: “Such a requirement is far too narrow and does not account for the realities of the deliberative process, including the Premier’s priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet’s deliberative process.”

17 Orders [PO-1725](#) and [PO-2857](#).

18 Order [PO-2053-F](#).

19 Orders [PO-2320](#), [PO-2554](#), [PO-2677](#) and [PO-2725](#).

Records that are peripherally related to a Cabinet submission that do not contain policy options or recommendations are not caught by the exemption under section 12(1)(b).<sup>20</sup>

## Section 12(1)(c): Background explanations or analyses of problems presented to Cabinet before it makes a decision

Section 12(1)(c) applies to background explanations or analyses of problems before Cabinet decisions are made and implemented but does not apply to such records after the fact.<sup>21</sup>

The test for s. 12(1)(c) requires the institution to establish that:

1. the record contains background explanations or analyses of problems to be considered;
2. the record itself was submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions;
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; and
4. the decision at issue either:
  - i. has not been made; or
  - ii. has been made but not implemented.<sup>22</sup>

Where consideration of a record containing background explanations or analyses has been delayed, it will nonetheless qualify for the exemption under section 12(1)(c) where it continues to be under pending consideration by Cabinet. A record may also qualify for exemption under section 12(1)(c) where it is substantially similar to a record presented in final form to Cabinet.<sup>23</sup>

## Section 12(1)(d): Consultation among ministers

To qualify for exemption under s. 12(1)(d), the record must either have been used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.<sup>24</sup>

The exemption does not apply if the record was merely used for consultations among civil servants employed in ministries.<sup>25</sup>

20 Order [PO-2467](#).

21 Orders [PO-2554](#) and [PO-2677](#).

22 Orders [P-1623](#), [PO-2186-F](#) and [PO-4063](#).

23 Order [PO-2002](#).

24 Orders [P-920](#) and [PO-4350](#).

25 Orders [P-920](#) and [PO-2554](#).

## Section 12(1)(e): Record prepared to brief a minister

Section 12(1)(e) applies to certain records prepared in advance of Cabinet meetings. It is prospective in nature and does not apply to records that have already been dealt with by Cabinet or its committees.<sup>26</sup>

The test for s. 12(1)(e) requires a showing that the record itself has been prepared to brief a minister in relation to matters that are either:

- Before or are proposed to be brought before Cabinet or its committees; or,
- The subject of consultations among ministers relating to government decisions or the formulation of government policy.<sup>27</sup>

## Section 12(1)(f): Draft legislation or regulations

To qualify for exemption under s. 12(1)(f), it must be found that the record is itself draft legislation or draft regulations or that its disclosure would reveal the content of the draft legislation or draft regulations.<sup>28</sup>

## Section 12(2): Exceptions to the exemption

Section 12(2) establishes circumstances under which the s. 12(1) exemption does not apply.

Section 12(2) reads:

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

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

## Section 12(2)(a): Record more than 20 years old

A record that is more than 20 years old must be disclosed, even if it would normally be covered by the exemption under s. 12(1) of FIPPA.

## Section 12(2)(b): Cabinet consent

The head of an institution is not required under s. 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>29</sup>

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

26 Orders [P-1182](#), [PO-2554](#), [PO-2677](#) and [PO-2725](#).

27 Orders [P-131](#) and [PO-2362](#).

28 Order [PO-4135](#).

29 Orders [P-771](#), [P-1146](#) and [PO-2554](#).

30 Order [PO-2422](#).

Where an institution makes the decision not to refer a matter to the Cabinet for possible consent under this section but did not consider relevant factors to bear on such a decision, the Office of the Information and Privacy Commissioner of Ontario will direct the institution to reconsider its decision in accordance with the relevant factors.<sup>31</sup>

Subsection 12(2)(b) provides no express guidance on relevant factors for a head to consider in deciding whether to seek Cabinet consent. Rather, it provides the institution, acting through its head, with discretion to seek Cabinet approval depending on the circumstances. This may include consideration of:

- The subject matter contained in the records.
- Whether or not the government policy contained in the records has been announced or implemented.
- Whether the record would reveal the nature of Cabinet discussion on the position of an institution.
- Whether the records have, in fact, been considered by the Cabinet.<sup>32</sup>
- Whether the public interest in transparency has reasonably been served through the disclosure of other records.
- Whether the records at issue continue to be relevant to the ongoing agenda setting of the Premier and decision-making of Cabinet.
- The potential harms that might flow from the disclosure of the records, including harm to stakeholders or government's relationship with stakeholders.<sup>33</sup>

This is not an exhaustive list of considerations for the heads of institutions.

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31 Orders [P-1390](#) and [PO-2227](#).

32 Orders [P-24](#) and [PO-2122](#).

33 Order [PO-4099](#).