

Guide to Responding to Information Requests from the Financial Accountability Officer of Ontario

Purpose of this Document

This guide has been developed to aid ministries and public entities in preparing responses to information requests from the Financial Accountability Officer of Ontario (FAO). This guide is not a substitute for the *Financial Accountability Officer Act, 2013* (FAO Act) and the Cabinet records order-in-council (OC 1412/2016). The FAO Act and the order-in-council should be reviewed before responding to requests from the FAO.

Questions and Answers

1. Under what authority is the FAO making this information request?

Under subsection 12(1) of the FAO Act, ministries and public entities have the duty to provide the FAO with information in their custody or under their control that the FAO believes to be necessary to perform his duties.

2. What information needs to be provided?

You must provide any financial, economic or other information that is in your ministry's or public entity's custody or control that the FAO believes to be necessary to perform his duties (subject to limited exceptions, see Question 3) and enter it into the template provided by the FAO.

Cabinet has consented for ministries and public entities to provide the FAO with certain information contained in Cabinet records (OC 1412/2016). The order-in-council has the effect of narrowing the application of the Cabinet records exception in subsection 12(2) of the FAO Act. As a result, you must provide information contained in Cabinet records that is necessary for the performance of the FAO's duties provided that:

- The FAO has requested the information;
- The information is not available from other sources (please indicate the other source where possible);
- The decision to which the information relates has been made by Cabinet or one of its committees and publicly announced, even if Cabinet or one of its

committees could engage in further deliberation about the decision; and,

- The information was prepared for the current Cabinet (whose term began February 11, 2013, when the current Premier was sworn in); information contained in Cabinet records prepared for a previous Cabinet remains protected, unless it is more than 20 years old.

Please review the information request carefully to determine what information is responsive. In responding to the information request please complete the cover spreadsheet provided, listing all the responsive information with a description of the information.

3. When can/must information be withheld from the FAO?

There are only three limited circumstances in which a ministry or public entity cannot provide information to the FAO:

- 1) The information is contained in a Cabinet record which Cabinet has not consented to provide to the FAO (subsection 12(2) of the FAO Act, section 12 of the *Freedom of Information and Protection of Privacy Act* and OC 1412/2016);
- 2) It is personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* (see subsection 12(3) of the FAO Act); or
- 3) It is personal health information within the meaning of the *Personal Health Information Protection Act, 2004* (see subsection 12(3) of the FAO Act).

Subsection 12(4) of the FAO Act requires that ministries and public entities take reasonable steps to redact personal information and personal health information from their responses to FAO requests in order to maximize the information they can provide.

With respect to OC 1412/2016, the order-in-council prohibits ministries and public entities from providing the FAO with certain information contained in Cabinet records, including:

- An agenda of Cabinet or one of its committees;
- A minute of Cabinet or one of its committees, unless the minute is the only source of the information requested by the FAO;
- Policy or costing options or recommendations, unless the option or recommendation was selected by Cabinet or one of its committees;
- The substance of deliberations of Cabinet or one of its committees concerning those options and recommendations, other than deliberations related to the option or recommendation selected by Cabinet or one of its committees that

would be apparent from its disclosure;

- Information concerning the individual opinions of Cabinet ministers;
- A communications plan, stakeholder management plan, key messages or other communications materials;
- Draft legislation or regulations, unless approved by Cabinet or one of its committees.

Should one of these circumstances affect information that is responsive to an FAO information request, please identify which of the circumstances applies in your response and explain why you believe it applies.

4. Can I withhold from the FAO commercially sensitive information?

No. Commercial sensitivity is not a valid justification for withholding information from the FAO. The only valid justifications for refusing to provide information to the FAO are the Cabinet records, personal information and personal health information exceptions set out in subsections 12(2) and (3) of the FAO Act; the Cabinet records exception was narrowed by the order-in-council adopted in October 2016 (see Question 3 for more details).

However, please note that while ministries and public entities must provide the FAO with commercially sensitive information, paragraphs 2 or 3 of section 13 of the FAO Act may prevent the FAO from disclosing the information (see Question 14 for more detail).

5. Do I have to provide to the FAO information that has not been publicly released?

Yes. Not having been released publicly is not a valid justification for withholding information from the FAO. The only valid justifications for refusing to provide information to the FAO are the Cabinet records, personal information and personal health information exceptions set out in subsections 12(2) and (3) of the FAO Act; the Cabinet records exception was narrowed by the order-in-council adopted in October 2016 (see Question 3 for more details).

6. Do I have to provide information subject to solicitor-client privilege, litigation privilege and/or settlement privilege to the FAO?

Yes. The only valid justifications for refusing to provide information to the FAO are the Cabinet records, personal information and personal health information exceptions set out in subsections 12(2) and (3) of the FAO Act; the Cabinet records exception was narrowed by the order-in-council adopted in October 2016 (see Question 3 for more details).

However, please note that the disclosure of information subject to solicitor-client

privilege, litigation privilege and/or settlement privilege does not constitute a waiver of those privileges by virtue of subsection 12(6) of the FAO Act and may prevent the FAO from disclosing the information by virtue of paragraph 4 of subsection 13 of the FAO Act (see Question 14 for more details).

7. What if the information being requested does not exist or is not within the custody or control of my ministry or public entity?

In the event that the information the FAO requests does not exist or is not within the custody or control of your ministry or public entity, please indicate in your response that:

- No information exists that would respond to the request;
- That the requested information is not in the custody or control of the ministry or public entity; or
- That the requested information is not in the custody or control of the ministry or public entity but is or may be available through another ministry or public entity.

If possible, please provide information on which ministry or public entity has custody or control of, or might have custody or control of the responsive information.

8. What is the deadline?

Under subsection 12(1) of the FAO Act, ministries/public entities have a duty to disclose information to the FAO in a timely manner.

All information requests have a deadline included in the cover letter and on the attached information request itself.

Depending on the nature of the information request, you may wish to organize initial scoping meeting between your ministry/public entity and the FAO contact to discuss the scope of an information request, the availability of information and the timeline for responding to the request. The FAO will not unreasonably withhold extensions.

9. What if our ministry or public entity cannot meet the deadline?

Depending on the nature of the information request, you may wish to organize initial scoping meeting between your ministry/public entity and the FAO contact to discuss the scope of an information request, the availability of information and the timeline for responding to the request (see Question 8).

However, if your ministry or public entity cannot meet the deadline set out in the request or negotiated with the FAO, please notify the FAO contact identified in the information request and request an extension. The FAO will not unreasonably withhold extensions.

10. How should the information be transmitted to the FAO?

Non-confidential information may be transmitted to the FAO by e-mail. The FAO contact identified in the information request should be copied.

Confidential information should be transmitted securely. Please speak to the FAO contact to arrange for secure delivery.

11. In what format should I provide information to the FAO?

To the extent possible, information should be provided in machine-readable format such as Microsoft Word or Excel or files readable with this software. PDF is acceptable when machine readable formats are not available.

12. What if I do not understand what is being requested?

If you do not understand what information is being requested or require any clarification, please speak to the FAO contact identified in the information request. The FAO contact would be happy to provide clarification and explanation.

Depending on the nature of the information request, you may wish to organize initial scoping meeting between your ministry/public entity and the FAO contact to discuss the scope of an information request, the availability of information and the timeline for responding to the request (see Question 8).

13. What if the information requested requires my ministry or public entity to incur costs?

Under subsection 12(1) of the FAO Act, all information must be provided free of charge.

14. Will the FAO disclose the information that our ministry/public entity provides?

The FAO does not generally disclose information in raw form. Instead, the FAO provides the Legislative Assembly of Ontario with economic and financial analysis based on that information.

Furthermore, the FAO cannot disclose information unless the disclosure is essential for the performance of the FAO's mandate and four conditions under paragraphs 2, 3 and 4 of section 13 of the FAO Act are fulfilled:

- The information is not third party information (section 17 of the *Freedom of Information and Protection of Privacy Act*);
- The information does not involve relations with other governments (section 15 of the *Freedom of Information and Protection of Privacy Act*);
- The information would not affect the economic and other interests of Ontario (subsection 18(1) of the *Freedom of Information and Protection of Privacy Act*); and
- The information is not subject to solicitor-client privilege, litigation privilege or settlement privilege.

Moreover, the FAO cannot disclose information obtained solely from a Cabinet record (OC 1412/2016).

Should one of these circumstances affect information that is responsive to an information request, please clearly identify the information in the cover spreadsheet provided and identify which restriction applies, citing the specific provision in the *Freedom of Information and Protection of Privacy Act* or OC 1412/2016.

15. What happens if our ministry or public entity fails to comply with a request?

If your ministry or public entity fails to comply with an FAO information request, all efforts should be made to remedy the situation at the staff level. Your ministry or public entity's staff should work with FAO staff to resolve the dispute informally and cooperatively.

If the dispute cannot be resolved at the staff level, the FAO will notify the deputy minister or head of the public entity in writing, providing details of the non-compliance to attempt to resolve the dispute.

If the matter is not resolved in a timely manner at the senior level, the FAO may notify the minister responsible and the head of the public entity (if applicable).

Finally, the FAO may notify the Speaker of the Legislative Assembly and the Chair of the Standing Committee on Finance and Economic Affairs that he is of the opinion that the ministry or public entity has failed to comply with the information request under subsection 12(5) of the FAO Act.

16. What happens if our ministry or public entity is not able to provide requested information because some or all of this information falls under the Cabinet records, personal information or personal health information exceptions?

The FAO will assess the explanation you provide about why the exception applies to the requested information. If the FAO is satisfied with the explanation, you will not be required to do anything more. If, however, the FAO is not satisfied with the explanation, he may seek further clarification and if he determines that your ministry or public entity has failed to comply with the information request, he will initiate the dispute resolution process described in Question 15.

Additional Questions

If you have any additional questions or require clarification, please contact the FAO contact identified in the information request.