



Information and Privacy  
Commissioner/Ontario

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

# ORDER PO-1824

Appeal PA-000002-2

Ministry of Northern Development and Mines



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## **NATURE OF THE APPEAL:**

The Ministry of Northern Developments and Mines (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

all correspondence, memoranda, briefing notes, analyses, e-mails and commentaries received by the [Ministry] regarding the development of the *Mining Act* Part VII Regulation and Mine Rehabilitation Code, between January, 1996 and the date of the receipt of this request from the following Ontario government agencies: the Ministry of the Environment (and Energy); the Ministry of Natural Resources; the Ministry of Labour; the Ministry of Finance.

The Ministry located 19 responsive records comprising 57 pages. These records consist of letters, memoranda, notes, e-mail messages and facsimile transmissions. The Ministry granted full access to ten records, partial access to one record, and denied access to the remaining eight records. The Ministry claimed section 13(1) (advice and recommendations) as the basis for exempting all remaining records or partial records, and section 17(1) (third party information) as an additional exemption claim for Records 29 and 57.

The requester (now the appellant) appealed the Ministry's decision, and also claimed that there is a compelling public interest in the disclosure of the records pursuant to section 23 of the *Act*.

During mediation, the appellant agreed not to pursue a number of issues, and narrowed the scope of his request to:

The statement of the Ministry of Finance of its position on the issue of financial assurances for mine closures.

Things that indicate that the Ministry of Finance has a problem with the way that [the Ministry] is approaching the question of financial assurances for mine closure. The appellant is seeking "clear expressions of concern" by the Ministry of Finance on this issue.

As a result, six records remain at issue in this appeal: Records 2, 6-7, 29, 30-31, 48 and 57. All of these records deal with information received by the Ministry from the Ministry of Finance (Finance).

I sent a Notice of Inquiry initially to the Ministry and three organizations mentioned in certain records, whose interests might be affected by the outcome of this appeal (the affected parties). Only the Ministry responded. I then sent the Notice to the appellant, along with the non-confidential portion of the Ministry's representations. The appellant submitted representations in response.

## **RECORDS:**

The remaining six records consist of memoranda, e-mail messages and a letter, all addressed to the Ministry from Finance.

## **DISCUSSION:**

### **Advice and Recommendations**

Section 13(1) reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Section 13(1) is subject to the exceptions listed in section 13(2).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)]. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act* (Order P-233).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

The Ministry explains that the records were produced in the context of recent changes to the *Mining Act* and the accompanying regulation dealing with financial assurances. These changes came into force on June 30, 2000. Under the regulation, mine operators must file a mine closure plan with the Ministry, accompanied by financial assurances with respect to rehabilitation of a mine site if an operator is unable to complete the mine closure plan. In developing this new regulation, the Ministry consulted with Finance, and the records at issue in this appeal all relate to Finance’s position on the issue of modified financial assurances for mine closures.

As far as Record 6-7 is concerned, the Ministry states that it is clearly marked as a “draft” memorandum from the Deputy Minister of Finance to the Deputy Minister of Northern Development and Mines. The fax cover page attached to this record, which has been disclosed to the appellant, makes it clear that the record is in draft form, which has not yet been approved by senior officials at Finance. The Ministry submits:

This record, in its entirety, very clearly constitutes a recommended reply to [the Ministry] that the ADM [Assistant Deputy Minister] and Deputy [Minister] of Finance can accept or reject as part of the deliberative process.

This Office has previously determined that “draft” documents do not inherently constitute advice and recommendations (see, for example, Order P-493). In Order P-324, I made the following statement on the question of draft documents:

In my view, it is possible for a draft document prepared by a public servant to qualify as "advice" under section 13(1), provided that the institution can establish that the draft contains a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process (Order 161).

I find Record 6-7 meets this requirement. It consists of a recommended course of action that may or may not be taken by Finance in providing its advice to the Ministry on the issue of financial assurances for mine closures. As such, this record qualifies for exemption under section 13(1) of the *Act*.

The Ministry claims that the other five records all contain specific advice or recommendations made by Finance to the Ministry concerning financial assurances for mine closures.

Specifically, the Ministry submits:

- Record 2 is a memorandum from a senior official at Finance to his counterpart at the Ministry, which provides “supportive commentary” on one possible approach to financial assurances, offers advice with respect to that option in certain circumstances, and then offers a recommended course of action.
- Record 29 is an e-mail message from this same senior official at Finance to the official at the Ministry responsible for developing the Regulation, reporting on discussions with certain bond rating agencies on approaches to financial assurances, and offering advice on an approach to monitoring financial indicators.
- Record 30-31, is a memorandum from an Assistant Deputy Minister of Finance to his counterpart at the Ministry, providing advice on different options for financial assurances.
- Record 48 is a memorandum from the Deputy Minister of Finance to the Deputy Minister of Northern Development and Mines, providing advice on one option for mining self-assurance.

- Record 57 is an e-mail message from officials at Finance to Ministry staff. It reports that an analysis of an earlier e-mail has been completed, identifies four areas of discussion which relate to financial assurance, and recommends a particular course of action.

I find that all of these records contain advice and/or recommendations, and qualify for exemption under section 13(1) of the *Act*. They were all prepared by public servants at Finance and outline proposed options and/or courses of action that could be accepted or rejected by the Ministry in the development of the regulation concerning financial assurances for mine closures. Records 2, 30-31, 48 and 57 specifically identify that Finance staff are commenting on proposals and outline the recommendations or suggestions being made to the Ministry. As far as Record 29 is concerned, the author makes it clear that he has canvassed the views of outsiders in developing his thinking on the issue, and incorporates these views into the advice being offered to the Ministry.

I further find that none of the records can be severed in a manner that would permit disclosure of information which is distinct from the portions which contain advice and recommendations, and that none of the exceptions listed under section 13(2) apply in the circumstances of this appeal.

### **Public Interest in Disclosure**

Section 23 of the *Act* 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.

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999)*, 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 13(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The purpose of section 13(1) is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure. (Order P-1398)

The appellant is an independent, not-for-profit, environmental law and policy research and education organization, which has a long history of research and publication on Ontario environmental law and policy.

In support of its position on section 23, the appellant provides a brief history of provincial legislation enacted over the past several years aimed at ensuring that adequate funds are available to carry out mine closure and remediation work at no cost to the taxpayer, in the event that a mine operator goes bankrupt or abandons a facility before completing a project. The appellant makes specific reference to the 1989 and 1996 amendments to the *Mining Act* in this regard. The appellant also describes past problems concerning mine closures experienced in both Ontario and other jurisdictions.

The appellant goes on to identify the proposed amendments to the regulation under consideration in 2000, and makes specific reference to the proposed new "corporate financial test". The appellant submits:

These provisions give rise to a number of compelling questions from a public interest perspective. Currently, there are over 6,000 known abandoned mine sites in the province, 40 percent of which belong to the Crown. Published estimates of the costs of remediating existing abandoned mines in Ontario range from \$300 million to \$3 billion. The use of a "corporate financial test" in lieu of hard security has the potential to increase the public's financial risk for the cleanup costs of additional abandoned mining sites in the future.

The appellant ends its representations on this issue with the following statements:

The records sought by the appellant specifically relate to the views and concerns of the Ontario Ministry of Finance regarding [the Ministry's] proposals with respect to the use of a "corporate financial test" in lieu of the realizable financial assurance requirements contained in the original [1989] amendments to the *Mining Act*. The Ministry of Finance is the agency charged with management of the province's finances. Evidence of concern on the part of the Ministry of Finance with respect to [the Ministry's] proposals, particularly in terms of the potential for large-scale public liabilities for the remediation of abandoned mines would be a matter of high public interest. Such liabilities may have the potential to be of such a scale that they may affect the province's overall fiscal situation, and draw resources away from other priority areas for public spending.

In particular, records of the view of the Ministry of Finance on this matter would assist members of the public in understanding the implications and potential consequences of the recent changes to Ontario's mine closure regime. This would strengthen the public's ability

to make effective use of the means of expressing public opinion and make informed political choices.

The Ministry's representations on section 23 include the following statements:

There has been a public consultation process related to the Regulation dealing with financial assurance because the draft regulation was posted on the Environmental Bill of Rights Registry from August 17, 1999 to October 16, 1999. Because there has been an opportunity for public input into the Regulation, we submit that the public interest has been accommodated and satisfied.

As a result of the Regulation being posted on the Environmental Bill of Rights Registry, the Ministry received only seven comments. It is our opinion that the small number of comments received indicates that there is not a public interest on the issue of financial assurances for mine closures, or if there is a public interest, it is not compelling.

The Ministry also notes the major concern of the appellant (i.e., they seek access to records which show a "**clear expression of concern**" by the Ministry of Finance on the issue of financial assurances for mine closures). As previously noted, the Ministry of Finance does not take issue with the approach of the Ministry on the issue of financial assurance. Consequently, there is no justification to invoke the public interest override because the records do not speak to the issue of concern to the Requester. [Ministry's emphasis]

The foregoing discussion on public interest demonstrates that there is little public interest in the issue of financial assurances for mine closures and that there has been an opportunity for the public to express any concerns. On the other hand, there would be a concern from a Ministry perspective if advice and recommendations were disclosed in the absence of a compelling public interest. The primary reason for this exemption is to preserve the process where public servants can provide open and frank advice to decision makers - advice that is not couched in terms that are publicly palatable because of a concern that the advice and recommendations may one day become public as a result of a freedom of information request.

I agree that the posting requirements for draft regulations under the *Environmental Bill of Rights, 1993* is intended to address public interest considerations for the content of the regulations themselves, but, in my view, this does not speak to the particular issue raised by the appellant. The appellant's concern relates to the possibility that advice was given by Finance officials and was not accepted by the Ministry in developing these regulatory changes, and that there is a compelling interest in making this advice known to the public.

The Ministry's representations on this issue refute the basis of the appellant's concern, by confirming that Finance did not object to the Ministry's approach to the financial assurance component of the new regulation. My independent review of the records substantiates this point.

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I have been provided with no evidence to suggest that there is any broadly-based public concern for the issue raised by the appellant. As the Ministry points out, only a very small number of comments were received in response to posting of the new draft regulation, and there is no indication that these comments dealt with the change in financial assurance requirements raised by the appellant. I am not persuaded that there is a public interest in disclosure of the records which reflect Finance's advice or recommendations to the Ministry in this regard, nor more particularly that any such public interest that may exist is compelling in the circumstances.

Therefore, I find that section 23 of the *Act* has no application in the circumstances of this appeal.

As a result of my findings, it is not necessary for me to consider the section 17(1) exemption claim.

**ORDER:**

I uphold the Ministry's decision to deny access to the records

Original signed by: \_\_\_\_\_

Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ October 17, 2000