



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1919

Appeal PA-010100-1

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of Agriculture, Food and Rural Affairs (OMAFRA) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for training manuals entitled "Utilization of Biosolids on Agricultural Lands", which had been referred to at a specified recent conference attended by the requester. OMAFRA forwarded the request to the Ministry of the Environment (the Ministry), pursuant to section 25 of the *Act*, as the institution having custody and control of the requested records.

The Ministry denied access to the two responsive manuals on the basis of the exemption contained in section 13(1) of the *Act* (advice and recommendations). The Ministry also advised the requester that it planned to publish the final version of these manuals in the future.

The requester (now the appellant) appealed the Ministry's decision.

During the course of mediation, the Mediator identified that one of the manuals contained a draft regulation, and added section 12(1)(f) of the *Act* (draft legislation or regulations) as a possible additional mandatory exemption claim.

The appeal was not resolved through mediation, so it proceeded to the inquiry stage. I sent a Notice of Inquiry to the Ministry, and received representations in response. I decided it was not necessary to seek representations from the appellant before issuing this order.

In its representations, the Ministry clarified that the draft regulation identified by the Mediator was ultimately rejected by the Minister of the Environment and, as a result, it was never sent to Cabinet or any of its Committees for deliberation. Accordingly, the Ministry made no submissions in its representations on the application of section 12(1)(f), and I find that this exemption claim, which was not raised by the Ministry, has no application in the context of this appeal.

RECORDS:

The two records at issue in this appeal are:

- A 85-page record entitled "Utilization of Biosolids on Agricultural Land - Participant's Manual" (the Participant's Manual). This record includes a document dated November, 1997 entitled "Proposed Standardized Approval Regulations - Ontario Regulation 347 (Waste Management)".
- A 120-page record entitled "Utilization of Biosolids on Agricultural Land - Leader's Manual" (the Leader's Manual).

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 13(1) provides:

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.

To qualify as "advice" or "recommendations", the information contained a record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118). As well, 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) (Orders 94, P-233, M-847 and P-1709).

The Ministry acknowledges that neither of the manuals contains specific advice or recommendations, but submits that disclosure of the records would reveal advice or recommendations with respect to the implementation of the draft regulation included in the Participant's Manual. The Ministry states:

The proposed implementation of the Standardized Approval Regulation qualifies as "advice" or "recommendations" for the purpose of section 13(1), as information about this proposed regulation relates to a suggested course of action which was ultimately rejected by its recipient, the Minister of the Environment, during the deliberative process.

The Ministry also submits that the records cannot be severed so as to separate any advice or recommendations associated with the draft regulation from the rest of the information contained in the two manuals.

The Ministry summarizes its position as follows:

... it is the Ministry's position that the records at issue reveal advice to government by virtue of the assumptions on which they were based and the resulting references throughout the draft text to a proposed regulation which was ultimately rejected. Therefore, the ministry respectfully requests that the Commissioner uphold its use of the discretionary exemption provided by section 13 of the Act with respect to these records, as their release would implicitly reveal advice to government which would normally be withheld under section 13(1).

The Ministry also identifies that the two manuals are being revised to reflect current Ministry rules, and states: "It is expected that the two [manuals] will be ready for public release towards the end of June. The ministry would be pleased to provide copies of the revised drafts to the appellant at that time."

Having reviewed the two manuals, I find that only very limited portions contain any reference to the draft regulation. Specifically, with the exception of the actual regulation itself which is reproduced at pages 2.17 through 2.39 of the Participant's Manual, the only other reference to it is contained in a one-line reference on page 2.2 of this record. As far as the Leader's Manual is concerned, only 11 of the 120 pages refer to the draft regulation, and in some cases only in the very broadest of terms. Consequently, I do not accept the Ministry's position regarding the difficulty of severing the two records. However, in light of my decision on the application of

section 13(1) set out below, it is not necessary for me to identify precisely which portions of the records might refer to or reveal information contained in the draft regulation.

The appellant points out that the two manuals were used at a recent agricultural conference which he attended, and were available for viewing at that time. In the Notice of Inquiry, I asked the Ministry to provide its position on the impact of this apparent prior disclosure, but the Ministry chose not to address this issue in its representations.

It is the Ministry's position that the content of the draft regulation itself constitutes the "advice or recommendations" provided to the Minister, and that disclosure of the records, which include the actual text and other references to the draft regulation, would thereby reveal the actual advice or recommendations.

The copy of the proposed regulation contained in the Participant's Manual is stamped "DRAFT", and each page of the regulation contains the words "**Draft for Public Consultation**". Page 2.18 of this manual refers to the draft regulation by title, and lists a number of ways for individuals to obtain copies, including from the Ministry's Public Information Centres, through the Environmental Bill of Rights Web site, from a Ministry Internet e-mail address, and by contacting any one of seven Ministry offices listed by phone number. Page 2.18 also specifically asks for public comments on the content of the draft regulation, and identifies how to forward comments to the appropriate Ministry office locations and individual Ministry employees.

Clearly, the draft regulation that forms the basis for the Ministry's section 13(1) exemption claim was a publicly available document during 1997 when the process for regulating biosolids on agricultural lands was under consideration by the Ministry. The fact that records were disclosed in the past does not necessarily mean that they are now automatically available to requesters for that reason (Orders P-1070 and MO-1431), nor does it necessarily follow that previously disclosed information cannot constitute advice or recommendations for the purpose of section 13(1). The specific facts and circumstances of each request and appeal must be considered individually. That being said, in my view, the fact that this draft regulation was accessible to the public on an ongoing basis, and was in fact made widely available to the public by the Ministry for the purpose of obtaining public comment has a significant bearing on the application of the section 13(1) exemption claim in the circumstances of this appeal.

The "advice or recommendations" exemption in section 13 purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making (Orders 94 and M-847). Put another way, its purpose 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 (Orders 24, P-1363 and PO-1690).

I agree with this analysis of the purpose behind the exemption, which is an important public policy consideration. This purpose was also referenced in Order P-1398 (upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)), and in Order P-1413.

The specific portion of the Participant's Manual identified by the Ministry as containing "advice or recommendations", and relied on by the Ministry to deny access to both manuals in their entirety, is the draft regulation, which the Ministry made widely accessible to the public for the purpose of receiving comment and input. In my view, to now deny access to this previously available information, on the basis of what would appear to be a technical application of past interpretations of section 13(1), would be inconsistent with the purpose of this exemption, and cannot be supported. There is no ambiguity as to why the draft regulation was disclosed in 1997; it was for the express purpose of seeking input from the public to assist in the formulation of public policy. I do not accept, based on the circumstances of this appeal and the representations provided by the Ministry, that disclosure of this same information now could reasonably be expected to impair either the Minister's ability to take actions and make decisions without unfair pressure, or to affect the ability of the persons employed in the public service to advise and make recommendations freely and frankly.

Accordingly, I find that the section 13 exemption does not apply, and the two manuals should be disclosed to the appellant.

Although not directly comparable, it is interesting to note that under section 6(2) of the *Municipal Freedom of Information and Protection of Privacy Act*, a draft by-law or draft private bill, which might otherwise qualify for exemption under section 6(1) of that statute, cannot qualify if the draft document has been considered in a meeting open to the public.

ORDER:

1. I order the Ministry to disclose the records to the appellant by **July 25, 2001**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by:
Tom Mitchinson
Assistant Commissioner

July 4, 2001