



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2032

Appeal PA-020021-1

Ministry of Northern Development and Mines



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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to view "all minutes of the Northern Ontario Heritage Fund Corporation Board of Directors meetings, from June 26, 1995 until and including July 18, 2001."

The Ministry initially gave the requester a fee estimate of \$113.00 to process the request, and he paid a deposit of \$56.50. The Ministry then issued a final decision identifying 50 records responsive to the request. The Ministry granted full access to 44 records and partial access to 6 records. In refusing access to portions of the six records, the Ministry relied on the exemptions in sections 13(1) (advice to government - one record) and 18(1)(g) (economic or other interests - five records). The Ministry also advised the requester that two sets of minutes would be reviewed for release once approved by the Board of Directors of the Northern Ontario Heritage Fund Corporation (the NOHFC). Finally, the Ministry reduced its original fee estimate to \$100.60 and advised the requester that he would receive the records upon paying the outstanding balance of \$44.10.

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

During mediation, the Ministry indicated that it had decided to grant full access to the two sets of minutes that were initially withheld pending approval by the NOHFC Board of Directors.

Also during mediation, the Ministry advised the appellant that it was no longer relying on section 18(1)(g) to deny access to portions of five records, and issued a revised decision granting access to these records in their entirety. Therefore, these five records and the application of section 18(1)(g) are no longer at issue in this appeal.

The Ministry continued to deny access to a 5-page attachment to the minutes of the March 25, 1999 meeting of the NOHFC Board, pursuant to section 13(1) of the *Act*.

The unresolved issues relating to the one remaining record were transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry initially, and received representations in response. I then sent the Notice to the appellant, together with a copy of the non-confidential portions of the Ministry's representations. The appellant did not submit representations.

RECORDS:

The record is a 5-page attachment to the minutes of the March 25, 1999 meeting of the Board of Directors of the NOHFC, entitled "Toward a Northern Ontario Tourism Action Plan: Proposed NOHFC Initiative". The minutes themselves have already been disclosed to the appellant.

DISCUSSION:

Section 13(1) of the *Act* reads:

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.

I recently issued Order PO-2028, which involved the same parties as the current appeal (Order PO-2028 is subject to an application for judicial review). In that order I stated:

In previous orders, this office has found that the words “advice” and “recommendations” have similar meanings, and that in order to qualify as “advice or recommendations” in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993]. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given [see Orders P-1037 and P-1631].

Ministry’s submissions

The Ministry identifies that the record is a “Proposed Initiative” (PI) prepared by the Ministry’s Regional Economic Development Branch (REDB) and presented by the Director of that branch to the NOHFC. The Ministry explains that employees in the REDB are divided into a series of teams who serve as the Ministry’s focal point for economic development in Northern Ontario. Two of the responsibilities of these teams, as identified by the Ministry, are to “facilitate consultation with northerners on policy ideas and initiative” and to “support [the NOHFC] by promoting programs, assessing proposals and monitoring projects”.

In this regard, the Ministry submits:

... the extensive consultation with tourism industry stakeholders in the north and the development of tourism initiatives presented in the portion of the record at issue and the resulting advice and recommendations provided to the Board are clear elements of the mandate of the REDB and its area teams.

As far as the record itself is concerned, the Ministry submits:

... the [PI] contains a recommendation that the initiatives described in the document be considered by the NOHFC Board. Although the word proposal is used, it is clear in the context that the initiatives are being recommended for

approval by the NOHFC Board as part of its tourism program. Apart from this overall recommendation, the document describes each of the recommended initiatives and implicitly recommends specific components and criteria described for each initiative. The description of the initiatives therefore contains its own recommendations within the larger suggested course of action - to fund the initiatives as part of the existing tourism program. It cannot be disclosed without revealing the advice that relates to these specific recommendations or the overall suggested course of action.

The Ministry points out that the NOHFC Board has the authority to consider the various recommended initiatives, and to either accept all of them, only some of them, or to reject the recommendations and fund none of them.

The Ministry submits:

The recommendation for these tourism initiatives was clearly prepared for the purpose of advising the Board, which would make the ultimate decision after consideration of that advice.

In its representations, the Ministry changed its position with respect to page 1 of the record. The Ministry continued to maintain that this introductory background section:

... qualifies as advice, in that it serves to place the recommended initiatives into context and is essential to understanding the basis of what is being recommended. However, the ministry notes that this section is also more factual, would not reveal the substance of the advice or recommendation and may be released to the appellant.

In support of its position that pages 2-5 should not be disclosed, the Ministry points to Orders 94 and PO-1823, which deal with the purpose underlying the section 13(1) exemption. In Order 94, former Commissioner Sidney B. Linden stated:

In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

In Order PO-1823, Adjudicator Donald Hale stated:

Put another way, the purpose of the exemption 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 P-1690].

In this regard, the Ministry submits:

... It remains crucial to the integrity of this program, and all other programs of the NOHFC that initiatives presented to the Board for consideration as elements of the tourism program be evaluated fairly. In order to ensure fairness of NOHFC decisions the free flow of advice, from [Ministry] staff to the NOHGC board within the decision-making process must be protected. Information gathered during stakeholder consultations, issues raised and options considered and presented must be kept confidential so as to not influence the process, or to advantage or disadvantage future applications.

Findings

As the Ministry acknowledges, the record does not include any explicit “recommendations”. However, that does not dispose of the issue. I must also assess whether disclosure of the record or any portion of the record would permit one to accurately infer recommendations (or advice) made by the REDB.

The Ministry explains the various roles played by REDB staff and the NOHFC Board. As I understand it, one of the REDB’s roles, in the context of the administration of the tourism program, is to make funding recommendations based on policies adopted by the NOHFC. Page 1 of the PI, which the Ministry has agreed to disclose, indicates that a number of “potential actions” were identified by the REDB to address concerns raised by stakeholders about the tourism program. Page 1 of the record also indicates that these “proposed actions” were discussed with a committee of the NOHFC, and the minutes themselves, which have already been disclosed to the appellant, indicate that the PI would be discussed at the April 1999 Board meeting.

The record at issue in this appeal is quite different from the one I dealt with in Order PO-2028. The record in the previous appeal included a series of options presented by the Ministry to the NOHFC. The decision facing the NOHFC in that case was to choose one of the three presented options. I found that the options in that case did not include any explicit advice or recommendations; and also, based on the particular circumstances of that appeal, that disclosure of the information in the records would not permit one to accurately infer any advice or recommendations. In contrast, the record at issue in this appeal does not contain options; rather, it consists of a series of proposed initiatives that, as the Ministry points out, can be accepted in whole or in part, or rejected in their entirety.

I will now apply the same test and approach outlined in Order PO-2028 to determine: (1) if the information contained in the PI itself consists of advice or recommendations; and, if not (2) whether the information, if disclosed, would permit one to accurately infer any advice or recommendations given.

Assessing the contents of the PI from this context, I accept that any specific funding proposals presented to the NOHFC that actually set out a suggested course of action are accurately

characterized as recommendations, even though the record may not use that term. Pages 2-5 of the PI consist of 3 such funding proposals. The essential format includes: an introduction of a proposed initiative that links back to a specific “proposed action” listed on page 1; a brief description of the initiative, including examples of projects that might be approved for funding; a list of the kinds of entities that should be considered for funding under the initiative; an analysis of funding priorities; a proposed total budget for the initiative; and suggested approval criteria for those applying for funding. Subject to my consideration of the exception in section 13(2)(a) of the *Act*, I find disclosure of pages 2-5 of the PI would reveal a suggested course of action that will ultimately be accepted or rejected by the NOHFC during the deliberative process of policy-making and decision-making within its mandate; specifically, whether to accept or reject the funding proposals presented to it by the REBD and how to implement each initiative the NOHFC decides to proceed with. Accordingly, subject to the possible application of section 13(2)(a), I find that pages 2-5 of the PI meet the requirements of section 13(1).

Section 13(2)(a) provides:

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

factual material

In its representations, the Ministry acknowledges that page 1 of the PI contains factual information, and that disclosing this information would not reveal the substance of any advice or recommendation in the rest of the record.

As noted earlier, one portion of page 1 identifies a series of “potential actions” identified by the Ministry for consideration by the NOHFC. The proposals that follow on pages 2-5 build on three of these listed “potential actions”. The introductory portion of each proposal provides a general contextual background which is then described in detail under the other headings. The Ministry acknowledges that the introductory portion of each proposal may appear to be factual, but submits that it places the proposal in context and assists the NOHFC in understanding it. The Ministry also argues that disclosing the contents of the introductory section would reveal the advice or recommendations included in the description section that follows.

I do not accept the Ministry’s position. I agree that the introductory sections consist of contextual information but, in my view, they simply provide additional facts that elaborate on the title of each proposed category that appears on page 1, and which the Ministry has agreed to disclose. Having carefully reviewed the contents of the three introductory sections, I am also not persuaded that they contain any advice or recommendations, nor that disclosing them would reveal any advice or recommendations contained in the other parts of the proposals. No specific initiatives are described; no eligible applicants are identified; no funding details are included; and no approval criteria can be ascertained from the contents of the introduction sections. Therefore, I find that the introductory portion of each of the three proposals contains factual information that falls within the scope of section 13(2)(a), and should be severed from the rest of pages 2-5 and disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose page 1 of the record in its entirety; the top portion of page 2 up to but not including the heading "Description"; the portion of page 3 beginning with the underlined title in the middle of the page and continuing to the end of the paragraph under the heading "Introduction"; and the bottom portion of page 4, beginning with the underlined title and continuing to the end of the page. This disclosure is to be made by the Ministry to the appellant by **August 29, 2002**.
2. I uphold the Ministry's decision to deny access to page 5 of the record in its entirety, and the portions of pages 2-4 not covered by Provision 1.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record disclosed to the appellant in accordance with Provision 1, only upon request.

Original signed by:
Tom Mitchinson
Assistant Commissioner

August 8, 2002