



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2110-F

Appeal PA-010372-1

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

This order represents my final order in respect of the outstanding issues from Interim Order PO-2087-I.

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Finance (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

Any and all information, background material and records relating to the drafting and/or enactment of Sections 1 and 2 of Schedule D to the *Tax Credits To Create Jobs Act, 1997*, including, without limiting the generality of the foregoing, any notes, briefs, summaries, minutes, drafts, memoranda, correspondence, policy statements and submissions which relate to said drafting and/or enactment.

The Ministry located 37 responsive records and granted access to eight of them in their entirety. The Ministry denied access to the remaining 29 records on the basis of the application of sections 12 (cabinet records), 13 (advice or recommendations) and/or 19 (solicitor-client privilege) of the *Act* as set out on an index of records that it attached to the decision letter.

The appellant appealed the Ministry's decision to deny access to the records.

Mediation could not be effected and this appeal was forwarded to adjudication. At inquiry, I sought and received representations from both parties. After reviewing them, I issued Interim Order PO-2087-I. In that order, I found that a number of the records and parts of records at issue qualified for exemption under the discretionary exemption in section 19 and/or the mandatory exemptions in sections 12 and 21(1) of the *Act*. I also concluded that the appellant did not necessarily dispute the application of section 19 generally, but was essentially seeking my confirmation that this exemption claim, in fact, applied. Having determined that the section 12, 19 and 21(1) exemptions applied to certain records, I concluded that they should not be disclosed to the appellant.

I also determined that portions of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 qualify for exemption under section 13(1), but found that the Ministry had failed to exercise its discretion under this section.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed (Order MO-1277-I).

I included a provision in Interim Order PO-2087-I requiring the Ministry to exercise discretion under section 13(1) with respect to the above-noted records and to provide me with representations as to the factors considered in doing so. The Ministry submitted representations

in compliance with this provision, which I subsequently shared with the appellant and sought his comments in return. The appellant also submitted representations on this issue.

DISCUSSION:

Exercise of Discretion

In explaining why it exercised its discretion in refusing to disclose the information in the above-noted records to the appellant, the Ministry states:

In deciding to invoke section 13 ... the Ministry has considered a number of factors, including the reasonableness of its decision, the effect of the disclosure of the records and fairness.

It should be underlined that the information in those Records relates to proposed amendments to the Regulations to the RST Act to clarify the application of the tax to goods and services provided below cost by a promotional distributor. The documents contain proposals on how to change the legislation dealing with promotional distributions and comments by various public servants on the proposals. Changes to tax policy and legislation are a sensitive matter as they affect government revenues.

In determining whether to disclose the Records the Ministry balanced the Requestor's interest in disclosure and the effect disclosure would have on the internal decision-making processes in government and the deliberative process of government policy and decision-making. The Ministry concluded that releasing these Records would inhibit the free exchange of information and advice as the information, advice, recommendations, and analysis contained in those Records was prepared by public servants with an expectation that it would be maintained in confidence for a specific audience and for a specific purpose.

The Ministry also considered what impact disclosing these Records on future work undertaken by public servants in developing policy proposals and preparing legislative amendments. The Ministry feels that disclosing these Records would have a chilling effect on that work and would be detrimental to the candid exchange of views by public servants on policy and legislative proposals. In light of the importance of obtaining critical analysis of policy and legislative proposals in order to develop the best possible policies and legislation, the Ministry is of the view that it would not be in the best interests of good government to release these Records.

The Ministry also considered whether refusing disclosure of these Records would affect the Requestor's ability to a fair determination of his rights vis-à-vis his tax liability. The Ministry is of the view that there are other avenues available to the

Requestor to obtain the information necessary to a fair determination of his rights under the established processes for such tax collection matters ...

In responding to these submissions, the appellant takes the position, generally, that the Ministry:

has missed the point in that it has failed to consider the fundamental purposes of the legislation: (1) to ensure that information should be available *to the public* and (2) that necessary exemptions from the right of access should be limited and specific. [emphasis in the original]

The appellant submits that the Ministry has neglected to consider the overriding interest of the public in disclosure as contemplated by the *Act*. He argues that “the Ministry’s blanket submission to the effect that any work related to the formulation of Government policy and decision-making ... should be immune from disclosure runs contrary to the spirit of the [*Act*]”.

The appellant rejects the Ministry’s argument that disclosure of internal discussions would have a “chilling effect”, as being without foundation and irrelevant in this context. He refers to the diminished privacy expectations of public servants with respect to the disclosure of salary information in support of his position.

The appellant also appears to take the position that section 13(1) is designed to protect only certain types of communications within government and that “the refused documents do not constitute such documents...”.

Contrary to the appellant’s last two points, in Interim Order PO-2087-I, I found that the records at issue in this discussion qualify for exemption under section 13(1). With respect to the exercise of discretion, an institution’s exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Order 58).

In reviewing the Ministry’s exercise of discretion, my determination is not necessarily based on how I would exercise my discretion in the circumstances, but rather, as I indicated above, on whether the Ministry has taken into account appropriate considerations, including the overall purposes of the *Act*.

Having reviewed the reasons and rationale provided by the Ministry for exercising discretion under section 13(1) of the *Act*, I find nothing improper. I am satisfied that the Ministry has considered the purpose of the exemption in section 13(1) within the overall context of the *Act*. I am also satisfied that the Ministry has considered the appellant’s needs with respect to the information at issue and any fairness issues that might impact on its decision to withhold the records from disclosure. Consequently, I find that the Ministry’s exercise of discretion should not be disturbed and portions of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 are, accordingly, exempt from disclosure under section 13(1) of the *Act*.

Along with the copy of Interim Order PO-2087-I that I sent to the Ministry, I included copies of the records at issue on which I had highlighted the portions that were exempt (severances under sections 12, 19 and 21(1) of the *Act* were highlighted in pink and green) and/or qualified for exemption under section 13(1) (highlighted in yellow). In Provision 2 of Interim Order PO-2087-I, I ordered the Ministry to disclose the portions of the records that were not exempt or which did not qualify for exemption. Accordingly, assuming that the Ministry has complied with Order Provision 2, there remains nothing further for the Ministry to do in responding to this access request.

ORDER:

I uphold the Ministry's decision to withhold the portions of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 that I have highlighted in yellow on the copies of these records that were sent to the Ministry's Freedom of Information and Privacy Co-ordinator with Interim Order PO-2087-I.

Original signed by: _____

Laurel Cropley
Adjudicator

February 10, 2003 _____