



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2231

Appeal PA-020066-1

Ministry of Finance



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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), a requester asked the Ministry of Finance (the Ministry) for access to the final reports of the named consulting companies retained by Ontario SuperBuild Corporation (OSBC) to review the Ministry of Natural Resources' (MNR) air services.

The Ministry identified two records responsive to the request

- a report dated January 31, 2001 and called a Baseline Summary (Record 1)
- a report dated June 14, 2001 (Record 2)

The Ministry denied access to these two records based on these sections of the *Act*

- 12(1)(b), (c) and (e) (cabinet records)
- 13(1) (advice or recommendations)
- 18(1)(a), (d) and (g) (economic and other interests of the province)

The requester (now the appellant) appealed the decision. The appeal proceeded to adjudication when mediation was unsuccessful.

I sought initial representations from the Ministry.

The Ministry asked that some of their representations be kept confidential, a request that I obliged. The Ministry also amended the exemptions on which it relied to deny access to the records:

- It added section 65(6) as a basis for excluding application of the *Act* to pages 17 and 49-52 of Record 1.
- With respect to the section 12(1) exemption, it claimed that the introductory words applied without reliance on the section's enumerated types of records.
- With respect to section 18(1), the Ministry dropped paragraphs (a) and (g) and only claimed the application of section 18(1)(d) for a portion of the records at issue.

Then, the appellant provided representations that I shared with the Ministry and to which the Ministry submitted a reply.

Because at the time of writing, the provincial government, hence Cabinet, had changed, I asked the Ministry to update its representations regarding the application of the claimed section 12 exemptions. The Ministry indicated that **it was** now withdrawing **its** reliance on the section 12(1)(b), (c) and (e) exemptions.

The only exemptions left for my consideration, therefore, are sections 65(6), 13(1) and 18.

I have carefully considered all of the representations before me.

RECORDS:

Record 1 is a 79-page document dated January 31, 2001, and is described as a Baseline Summary. Record 2 is a 33-page report dated June 14, 2001.

CONCLUSION:

Pages 17 and 49-52 of Record 1 are not excluded from the scope of the *Act* by virtue of section 65(6)3. No portions of Record 1 qualify for exemption and therefore the Ministry must disclose it to the appellant in its entirety. While pages 20-22 qualify for exemption under section 13, the Ministry must disclose the remaining portions to the appellant since they are not exempt.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry claims that the *Act* does not apply to pages 17 and 49-52 of Record 1 on the basis of section 65(6)3.

General Principles

Section 65(6) states:

Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, the Ministry must establish these three requirements:

1. the records were collected, prepared, maintained or used by the Ministry or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

The Ministry submits:

...Page 17 is a chart showing MNR's organizational structure by full time equivalent position. As such, the chart is a communication about an employment-related matter - - employment positions within MNR - - in which MNR has an interest, as the employer. Furthermore, MNR's interest was present when the chart was prepared and used in the report. Similarly, pages 49-52 relate to MNR's organizational structure; it lists numbers of full time equivalent positions, salary costs, employee locations and employment-related matters in which MNR has an interest as employer.

The appellant says:

Even if MOF were somehow considered to be the institution referred to in 65(6)(3) it has not identified any meetings, consultations, discussions or communications **about labour relations or employment matters** in which the institution has an interest. In this context it is ludicrous of the MOF to argue that the existence of labour related information within the requested reports is, in and or itself, a "communication" as referred to in subsection 65(6)(3) of the *Act*.

Finally the reports although prepared for MOF were not intended to be used in the context of the context of labour relations but rather as background information for the overall evaluation of the efficiency and efficacy of the MNR Air Services.

In reply, the Ministry asserts:

1. The records were collected and prepared for use by Super Build pursuant to its statutory mandate which satisfies the 1st requirement. The fact that the records were originally prepared, maintained and used by MNR does not defeat the application of section 65(6)3 (Order P-1560, PO-2106).

2. The records are intended to be used in the preparation of a presentation to Cabinet for deliberation regarding MNR's air services activities.
3. The records at issue (as previously noted) are employment related matters. It conveys information with respect to MNR's organizational structure and staffing requirements by full time equivalent positions which is employment related information.

Findings

I find that the **Act** does apply to the portions of Record 1 identified by the Ministry because the test for the application of section 65(6)3 has not been met.

There are two significant points to bear in mind for the application of section 65(6)3.

First, generally, the record at issue, must have been collected, prepared, maintained or used *in relation to* meetings, consultations, discussions or communications about labour relations or employment-related matters. The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In other words, Record 1 must have a **substantial** connection to a labour relations or employment related matter.

Second, as found in Order PO-1905 (followed in PO-2132), Requirement 3 of the test may apply where the records were collected, maintained and/or used in relation to the stated activity "*regardless of the purpose for which they were originally created or prepared*" (emphasis added). So, as stated in Order MO-1654-I, where (as is the case here) the records stemmed from a consultant's review,

The question of whether any of the[se] records ... are "substantially connected to" an employment-related matter turns on the question of how the records were maintained or used by the City outside the primary purpose of assessing the effective and efficient operation of the EMS. In my view, if the City were able to establish that records were maintained or used in relation to a labour relations or employment-related matter, that would satisfy the "substantially connected to" component of the test, regardless of whether they were created or prepared by the consultant for this purpose.

While the specific information the Ministry seeks to exclude may be labour relations or employment-related information, the Ministry has failed to establish that the record **itself** has been used or maintained in relation to a labour relations or employment-related matter. The Ministry's submission on this point is that the record is "intended to be used in the preparation of a presentation to Cabinet for deliberation regarding MNR's air services activities". As has been determined in earlier orders (see for example M-941 as well as MO-1654-I), reviews of program delivery **normally** are **considered** an evaluation of an entire operation rather than related to labour relations or employment. The Ministry has provided no evidence that Record 1 was maintained or used in any labour relations or employment-related context.

Therefore, the *Act* does apply to pages 17 and 49-52 of Record 1.

ADVICE TO GOVERNMENT

The Ministry claims that section 13(1) applies to pages 8 (in part), 9 and 13-33 of Record 2.

General principles

Section 13(1) states:

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Minister of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)* (January 19, 2004), Toronto Docs. 433/02, 25/03 (Ont. Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Minister of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)* (January 19, 2004), Toronto Docs. 433/02, 25/03 (Ont. Div. Ct.)]

Ministry Representations

... pages 8, 9, and 13 to 33 of the record (2) are also exempt under s. 13(1). On their face, these pages contain a detailed description of several options, a conclusion about the relative merits of the options, and a recommendation based

on an analysis of the options. In particular, pages 8-9 set out the consultant's conclusion from which one can infer its advice and recommendation; pages 13-19 set out options and a conclusion about their relative merits, pages 20-22 outline the recommendation, and pages 23-33 provide a more detailed description of the options set out at pages 13-19.

Given the fact that the records were prepared for presentation to Cabinet, it is clear that the purpose of the recommendation is specifically to provide a suggested course of action that can ultimately be accepted or rejected by Cabinet.

....

Since the options described in the Record are in fact accompanied by a conclusion that discusses their relative merits, and a recommendation that analyzes a particular option, the options are also exempt under s. 13(1). This is consistent with previous Orders where the IPC distinguishes between records containing only options and those containing a recommendation as well. In the latter case, the options have also been exempted (see Order PO-2028). It is also consistent with Order PO-1742-I, where information regarding various options to be considered in dealing with the Ministry's review of a particular issue were exempt because they provided a "recommended course of action" which could be accepted or rejected by its recipient. As such, "their disclosure would reveal the advice or recommendations" of a public servant or a consultant retained by the Minister, and qualified for exemption.

The Ministry takes the position that the Records do not fall within the mandatory exemptions in section 13(2) of FIPPA. Specifically, the Ministry does not believe that the Records contain a coherent body of facts separate and distinct from the advice and recommendations (13(2)(a) of FIPPA).

Appellant Representations

The main report and the sub-consultation report may serve as inspiration to OSBC in the development of its recommendations and/or opinions to Cabinet. However it is clear that the consultation mandate did not include the formulation of policy options or recommendations to *OSBC let alone* Cabinet.

Assuming the reports do not therefore contain recommendations and/or policy advice for OSBC, let alone Cabinet, it would be up to MOF to prove the contrary.

Although MOF goes on at great length about jurisprudence in regard to section 13 it does not offer any substantive proof that these reports actually contain advice or recommendation for Cabinet.

The fact is that these reports contain information only. As such they are accessible under the Act.

Findings

I agree with the Ministry only in part.

In my analysis, I too rely on Assistant Commissioner Mitchinson's Order PO-2028, **recently upheld on judicial review (see above)**. The facts and issues in that appeal closely parallel those found here. I find, though, that the principles enunciated in that order, and confirmed by the Court, support disclosure of most of the information the Ministry seeks to withhold.

First, I find that pages 20, 21 and 22 of Record 2 do reveal advice or recommendations. Therefore, these pages are exempt on the basis of section 13(1) of the *Act*. These pages, in fact, comprise one section of the record entitled "Recommendation". It is within these pages only that one finds actual advice: a clear general recommendation followed by a series of specific recommended steps to be pursued. The decision maker has the option of accepting or rejecting the recommendations.

Pages 8 and 9 reveal no advice. These pages contain some general conclusions that the consultant reached, presumably through the process of research and evaluation of the facts and other information.

Pages 13-19 and 23-33 also do not reveal advice. Pages 13-19 contain basic descriptions of the various options (called "extensions") that the consultant explored for the purpose of ultimately making a recommendation. In pages 23-29 (called Appendix A), the consultant provides greater detail about each extension. In none of these descriptions can one find advice to the decision maker on **a course of action** nor can one accurately infer any advice given. Finally, pages 30-33 (called Appendix B) contain analyses of the extensions on three different bases. These three would be similar in nature to a "pros and cons" comparison. Again, here, as in Order PO-2028, this portion of the record does not contain any explicit advice and there is **no** statement recommending that a particular extension be preferred. Furthermore, even upon careful examination, this portion does not permit inferences to be drawn about the nature of the advice or recommended course of action.

In conclusion, section 13(1) does apply to exempt pages 20-22 of Record 2 from disclosure. Section 13(1) does not apply to pages 8, 9, 13-19 and 23-33 of Record 2.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that section 18(1)(d) applies to the following either in whole or in part

- Record 1 – pages 10-16, 19-26, 31-33, 37, 41, 46, 54, 56-59, 61, 63, 65, 67, 71, and 74-79
- Record 2 – pages 10-12

General principles

Section 18(1)(d) reads:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario

For this exemption to apply, the Ministry must provide “detailed and convincing” evidence to establish a ‘reasonable expectation of harm’. Evidence amounting to speculation of possible harm is not sufficient [Order PO-1993, upheld on judicial review in *Ontario (Minister of Transportation) v. Ontario (Information and Privacy Commissioner)* (January 20, 2004), Toronto Docs. 193/02, 224/02 (Ont. Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Ministry Representations

The Ministry submits:

Portions of Record #1 and #2 are exempt under s. 18(1)(d).

Previous Orders have established that this provision does not contemplate prejudice to any and all economic interests of an institution in its relations with its employees; rather, it deals with records that if disclosed could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy or adversely affect the government’s ability to protect its legitimate economic interests. (Order # P-441).

MOF submits that the portions of Record #1 and Record #2 that describe the costs, revenues, debts and assets of MNR’s aviation operations, or contain information about the Ontario Aviation Industry’s aviation rates fall within the ambit of s. 18(1)(d).

And,

The IPC has, in past orders, held that the disclosure of appraised market value reports regarding government properties not yet sold could seriously undermine the ORC’s position with any potential purchaser of the properties, and would allow possible purchasers to make use of the information to the detriment of the Government when negotiating a price with the ORC. As such, disclosure could reasonably be expected to prejudice ORC’s economic interests and be injurious to

the Government's financial interests, under 18(1)(d). (PO-1901 and PO-1894). MOF submits that the same reasoning applies to the identified portions of the records in this appeal.

Consequently, MOF submits that information in the two records that describe the costs, revenues, debts or assets of MNR's aviation operations...are exempt under s. 18(1)(d).

The Ministry also makes other, confidential, representations regarding this issue, which I am not at liberty to disclose.

Appellant representations

These reports contain no proprietary information as foreseen by the exemption under section 18 of the *Act*. They are simply a collation of information freely accessible from other sources.

All the financial information about the MNR Air Services itself come from publicly accessible sources.

All the information with regard to Ontario aviation industry rates comes from tariffs published by each operator and which must be publicly available under the provisions of the National Transportation Act.

Furthermore MOF has offered no substantive support for its contention that any of the financial information could reasonably be expected to be injurious to the Government's financial interests.

Findings

I am not satisfied that disclosure of the information contained in the records **could reasonably be expected to be** injurious to the financial interests of the Government of Ontario.

First, while the Ministry has described what it believes the injury to the financial interests of the government might be, it has failed to provide detailed and convincing evidence sufficient to establish a *reasonable expectation* of harm.

As indicated, the records here are reports of a consultant hired to review the delivery of the MNR's air services program. The reports were to have been considered by Cabinet. At the time the reports were prepared, then, Cabinet had not even considered let alone made decisions about the air services program. Therefore, I fail to see how the records here are comparable to those at issue in the cases cited by the Ministry (i.e., **Orders** PO-1901 and PO-1894) in support of its argument. In **Order** PO-1901, the records were appraisal reports relating to cottage lots and recreational campsites presumably on the verge of being sold, hence the existence of an appraisal in the first place. The issue there was **whether** the institution could obtain a fair return for the

sale of the properties in question. The facts were similar in PO-1894 in so far as a sale of the property to which the records related appeared imminent, pending a decision of the Ontario Municipal Board. Here, there is no evidence of an existing deal or sale that might be jeopardised.

Furthermore, the Ministry has failed entirely to address the appellant's arguments that the reports contain no proprietary information and that, in fact, the information itself, though perhaps not collated as it is in the reports, is freely accessible from other sources.

Consequently, I am not satisfied that disclosure of information related simply to the costs, revenues, debts or assets of the MNR's aviation operations, especially in these circumstances, could reasonably be expected to be injurious to the financial interests of the government.

Therefore, I find that pages 10-16, 19-26, 31-33, 37, 41, 46, 54, 56-59, 61, 63, 65, 67, 71, and 74-79 of Record 1 and pages 10-12 of Record 2 are not exempt from disclosure on the basis of section 18(1)(d).

ORDER:

1. I order the Ministry to disclose all of Record 1, and pages 1-19 and 23-33 of Record 2, to the appellant no later than **February 17, 2004**.
2. I uphold the Ministry's decision to deny access to pages 20-22 of Record 2.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to **Provision 1**.

Original Signed By: _____
Rosemary Muzzi
Adjudicator

January 27, 2004 _____