



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2687**

## **Appeal PA06-323**

### **Ministry of Agriculture, Food and Rural Affairs**



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## **NATURE OF THE APPEAL:**

A request was submitted to the Ministry of Agriculture, Food and Rural Affairs (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

...a copy of an Audit [Report (the Report)] completed by the Provincial Auditor, on [named company], and their related Company. This [Report] was completed sometime this spring. I am requesting the summary and the detailed [Report].

By way of background, the Ministry states that the Report was prepared by public servants in the Ontario Internal Audit Division (the Audit Division) of the Treasury Board Office, Ministry of Finance. The Ministry goes on to state that the Audit Division provides professional advice to agencies and ministries of the Ontario Public Service, including to the Ministry. Quoting from the Audit Division's intranet site, the Ministry states that the role of the Audit Division is to

...enhance the ability of our public service clients to manage resources prudently to achieve their intended purpose. We do this by providing professional advice, assurance and expertise to promote: value for money, managed risk and sound business practices.

Paragraph 4.0 of the Report, titled "Audit Scope", which was subsequently disclosed to the requester, describes the scope of the audit process and ensuing Report as primarily an evaluation of the overall compliance of the Agricultural Commodity Corporation (ACC) in delivering the agricultural Commodity Loan Guarantee Program (CLGP), as well as an assessment of the value for money of the CLGP.

Following third party notification, the Ministry denied access to the Report pursuant to sections 13(1) (advice or recommendations) and 17(1) (third party information) of the Act.

The requester (now the appellant) appealed the Ministry's decision and appeal PA06-323 was opened.

During the mediation stage of the appeal process, the Ministry issued a revised decision granting access to the Report, including paragraph 4.0. It denied access to the withheld portions, continuing to rely on sections 13(1) and 17(1).

An affected third party (the third party) appealed the Ministry's decision to disclose part of the responsive record and appeal file PA07-92 was opened. In light of the parties' positions at mediation in regard to file PA06-323, mediation was not attempted in this case.

Both files were then referred to the adjudication stage of the appeal process for an inquiry.

As the appellant's appeal (PA06-323) and the third party's appeal (PA07-92) are related, I decided to address both files together at adjudication.

I commenced my inquiry by issuing a Notice of Inquiry seeking representations from the Ministry, on the application of sections 13(1) and 17(1), and from the third party, on the

application of section 17(1) only. The Ministry submitted representations and agreed to share the non-confidential portions with the appellant. The affected party wrote to advise that it was withdrawing its appeal. As a result of the affected party's withdrawal, the Ministry disclosed those portions of the Report to which it had claimed the application of section 17(1). Accordingly, this information and the application of section 17(1) to it are no longer at issue.

I then issued a second Notice of Inquiry and sought representations from the appellant on the application of section 13(1) to the information remaining at issue. I enclosed a copy of the Ministry's non-confidential representations with the Notice of Inquiry.

The appellant submitted representations in response, which were shared in their entirety with the Ministry. The Ministry responded with a letter in which it clarified its position regarding the nature and author of the audit, but chose not to submit further representations on the application of section 13(1) to the information at issue.

## **RECORD:**

There is one record at issue in this appeal, consisting of the undisclosed portions of the 30-page Report, dated March 2006.

## **DISCUSSION:**

### **ADVICE OR RECOMMENDATIONS**

The Ministry submits that the discretionary exemption in section 13(1) applies to portions of the record. This section 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 (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario*

*(Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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 (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

The Ministry has identified four sections of the Report that it submits clearly constitute advice or recommendations. These sections are characterized by a heading titled "Recommendations" (at pages 10, 14, 20 and 21), which the Ministry states provide for a "suggested course of action that can be accepted or rejected by the decision-maker", followed by a heading titled "Management Response" (at pages 10, 14, 20-21 and 22), which the Ministry states refer to the respective recommendations and whether they have been accepted or rejected.

The Ministry has also severed other portions of the Report (at pages 6, 9, 14 and 19-20) on the basis that disclosure of this information would allow the appellant to infer the recommendations contained at pages 10, 20 and 21.

While the appellant's representations touch on the application of section 13(1), stating that the "recommendations" set out in the Report were not made during the deliberative process of government decision-making and policy-making, the focus of the appellant's submissions is on the application of the mandatory exception in section 13(2)(f) of the *Act*. This section states:

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

a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

With regard to the application of the exception at section 13(2)(f), the appellant relies on the decision of Adjudicator Holly Big Canoe in Order P-603, asserting that the Report at issue considers the "effectiveness, efficiency and economy" and "performance" of the CLGP and, as a result, qualifies for disclosure pursuant to the mandatory exception in section 13(2)(f). It is the appellant's view that the audit in question was a "value-for-money audit", which he submits is defined on the Office of the Auditor General of Canada's website as

[an] assessment of whether or not money was spent with due regard for economy and efficiency and whether appropriate procedures were in place to measure and report on the effectiveness of government programs.

The appellant also cites several other orders (including PO-1884, P-1190, upheld on judicial review in *Ontario Hydro v. Mitchinson Assistant Information and Privacy Commissioner of Ontario et al*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), and Order P-726) to support his position that even if the Report does contain advice or recommendations, the entire record must be disclosed since the record reports on institutional performance and, accordingly, falls into the exception in section 13(2)(f).

In reply, the Ministry states that the appellant has mischaracterized the audit as purely a value-for-money audit, arguing that this was a "routine ministry audit with only one component being value for money."

With regard to the application of the exception in section 13(2)(f), the Ministry submits that the portions of the Report that have been withheld refer "primarily to the performance or efficiency of ACC rather than to the [Ministry], and thus do not fall within the exception under section 13(2)(f)." The Ministry states that since the ACC is neither an institution under the *Act* nor a part of the Ministry, the exception in section 13(2)(f) cannot apply to it. The Ministry also submits that the severed information "relates primarily to specific recommendations made to [the

Ministry] regarding the ACC's processes and operations, as well as its compliance with its mandate."

## **Analysis and findings**

### ***Section 13(1)***

I accept the Ministry's position that the four severed portions of the Report marked "Recommendations", at pages 10, 14, 20 and 21, contain advice or recommendations from the Audit Division to the Ministry regarding the overall compliance of the ACC in delivering the CLGP. These are clearly, on their face, recommendations that "suggest a course of action" that was ultimately accepted by senior management of the Ministry (as confirmed by the corresponding sections titled "Management Response", discussed below), with respect to key financial and administrative elements of the CLGP. Accordingly, I find that the severed sections of the Report marked "Recommendations" qualify for exemption under section 13(1), subject to my discussion of the application of the exception in section 13(2)(f) below.

Similarly, I find that the disclosure of the following remaining severed portions of the Report qualify for exemption under section 13(1), subject to the application of the exception in section 13(2)(f), since disclosure of this information would permit one to accurately infer the nature of the advice or recommendations contained in the "Recommendations" sections of the record:

- the two bullet points in the "Results" section of the "Conclusions and Summary" portion of the "Executive Summary" at page 6,
- the four sections preceding each of four corresponding sets of recommendations at pages 9, 14, 19-20 and 21, and
- the four sections marked "Management Response" following each of the four sets of recommendations at pages 10, 14, 20-21 and 22.

### ***Exception in section 13(2)(f)***

For the reasons that follow, I concur with the appellant's views regarding the application of the mandatory exception in section 13(2)(f) to the severed information in the Report.

The Ministry suggests that I take a narrow view of the application of the section 13(2)(f) exception to the Report, arguing that the withheld portions of it refer primarily to the performance or efficiency of the ACC rather than to the Ministry. In my view, the Ministry has taken an unreasonably narrow interpretation of this exception and its application in this case that is inconsistent with the principle of providing a general right of access to government-held information.

As referenced above, the stated scope of the audit was primarily to evaluate the overall compliance of the ACC in delivering the CLGP, and to assess the value for money of the program. While the Report may by implication address the ACC's performance in delivering the

CLGP, it clearly concerns a program for which the Ministry is responsible and accountable. This finding is supported by the fact that the recommendations contained in the Report are, on their face, addressed to the Ministry, which in turn has responded to those recommendations and committed to following through on their implementation. Accordingly, in my view, it is irrelevant whether or not the ACC is an institution under the *Act* or a formal part of the Ministry.

In Order P-603, Adjudicator Big Canoe found that the section 13(2)(f) exception applied to records relating to a value-for-money and performance review audit addressing the activities of the former Workers' Compensation Board. In finding that section 13(2)(f) applied in that case, Adjudicator Big Canoe states that "a report which considers effectiveness, efficiency and economy is one which considers the "performance" and "efficiency" of an institution." In making her finding, Adjudicator Big Canoe found that an operational review is similar to a value-for-money audit, to the extent that it "examines the process set up to achieve an established objective and the resulting report would recommend 'how to improve the effectiveness of the process'."

I concur with Adjudicator Big Canoe's reasoning and apply it in the circumstances of this case. While the scope of the audit in this case may not have been focused exclusively on the value-for-money objective, it was one of three stated objectives addressed in the Report, with "compliance" and "future governance" being the other two. In my view, all three objectives are aimed at assessing and analyzing the CLGP with a view to increasing program efficiency, effectiveness and performance.

To conclude, I am satisfied that the section 13(2)(f) exception applies to the severed portions of the Report and the Ministry must, therefore, disclose the entire document to the appellant [see Order P-726].

## **ORDER:**

I order the Ministry to disclose the Report in its entirety to the appellant by **July 28, 2008**.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ June 27, 2008