



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2772

Appeals PA08-12, PA08-13 and PA08-21

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a seven part request under the *Freedom of Information and Protection of Privacy Act* (the Act).

The requester asked that the Ministry treat the seven part request as seven separate access requests.

This Order relates to three parts of the request, in which three appeal files were opened, described below. I have decided that appeals PA08-12, PA08-13 and PA08-21 should be dealt with together in view of the fact that the appellant and the institution are the same, and the subject matter of the records is similar.

The background of this request is the procurement by the Ontario government of a producer for a new generation of driver's licence and health cards. The appellant acts on behalf of one of the four vendors competing for the card production contract.

The Ministry provided the following background information:

The Ministry required that the proponents for producing the new cards consider the security recommendations put forward by the Canadian Council of Motor Transport Administrators and American Association of Motor Vehicle Administrators, which recommendations include the US *Real ID Act* and the Western Hemisphere Travel Initiative. The Ministry, in planning the production of a new driver licence card, was looking to make better use of new technologies to deter identity theft and ensure the integrity of Ontario's driver licence system.

The records at issue in these appeals relate to the testing that was conducted on the four vendors' cards.

PA08-12

The request to the Ministry that led to Appeal PA08-12 was for the following:

[a named individual's] reports of the results of the security and integrity testing performed on the other bidders' card submissions.

After notifying the named individual (the affected party) of the request, and inviting submissions regarding disclosure of the requested record, the Ministry issued a decision denying access to the responsive record in full. In its decision, the Ministry explained that the responsive record consists of portions of a document entitled "Card Security & Integrity Report, Proposed New Ontario Driver Licence and Health Card" dated November 1, 2006 (the report). It relied on sections 14(1)(c),(i),(l) (law enforcement/security), 18(1)(d) (economic and other interests), 15(a) (relations with other governments) and section 17(1)(a),(b),(c) (third party information) of the Act in denying access.

The requester (now the appellant) appealed the decision and this office opened appeal file number PA08-12.

During mediation, the Ministry clarified that pages 6 through 40 of the above referenced report are not responsive to the request. The appellant did not take issue with this position. In addition, the Ministry clarified that the balance of the report was responsive to the request.

No further mediation was possible and this file was moved to adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began my inquiry into this appeal by inviting the Ministry and the affected party to submit representations. I invited the Ministry to submit representations on all of the issues raised in this appeal. The affected party was invited to submit representations on the mandatory exemptions at sections 17(1)(a), (b) and (c) only. I received representations from both the Ministry of Transportation and the affected party. The affected party also provided representations on the exemptions at sections 14(1)(i) and (l).

On the same date that the Ministry submitted its representations, it also issued a new access decision in a related appeal, PA08-11. That appeal was related because the responsive record consists of portions of the same report that is at issue in this appeal. In its revised decision, the Ministry granted access in full to pages 1 through 9, 14 through 40, and parts of pages 41, 51, 61, 72, 84, 94 and 103. The appellant ultimately decided that all issues in relation to Appeal PA08-11 were resolved by this disclosure, and that appeal file was therefore closed.

I also decided to invite the Ministry of Health and Long-Term Care (MOHLTC) to submit representations, as it appeared to have an interest in the report. The MOHLTC advised that its position would be reflected in the Ministry's representations.

I then sent the non-confidential portions of the Ministry's and the affected party's representations to the appellant and invited its representations. The appellant provided representations. In its representations, the appellant narrowed its request in relation to Appeal PA08-12 to "those portions ... of the Report that address the important issue of whether Vendor C complied with the mandatory requirement that the drivers' license card ... and health card ... consist of the same substrate (the 'Mandatory Substrate Requirement').".

I then sent the appellant's representations to the Ministry and the affected party and invited them to provide reply representations, and both of them did so. In addition, after reviewing the appellant's representations, the Ministry issued a revised decision letter to the Appellant and disclosed portions of pages 68 and 78 of Record 1, described below. In addition, the Ministry advised that it is no longer relying on the exemptions set out in sections 14(1)(c) and section 15(a) of the *Act*, with respect to the record at issue.

The appellant provided representations to this office in response to the revised decision letter. In those representations, the appellant characterizes the issue before me in Appeal PA08-12 as "... whether the Ministry's revised decision is *complete* in respect of the MSR [Mandatory Substrate Requirement] Portions of the Report sought by the appellant." Put slightly differently, the appellant is asking that I review the report and determine whether any of the undisclosed

responsive portions address compliance by Vendor C with the MSR, as outlined in the appellant's narrowed request. My decision in that regard is outlined below.

PA08-13

The request to the Ministry that led to Appeal PA08-13 was for the following:

Any other records related to security and integrity testing performed on card samples submitted by any bidder (i.e., [the Appellant] or any other bidder) including records prepared by, provided by or in the custody of a third party. This request is limited to records created or received by the Ministry prior to March 9, 2007.

The Ministry identified three reports prepared by the Canadian Document Integrity Technical Working Group (the Working Group), whose members are employed by Passport Canada, the Canada Border Services Agency and the RCMP Forensic Laboratory Services, as responsive records. It issued a decision letter denying access in full to the three records pursuant to sections 14(1)(c),(i) and (l), 18(1)(d) and 15(a) and (b) of the *Act*.

The requester (now the appellant) appealed this decision. Mediation was not possible and this file was moved to the adjudication stage of the appeal process.

I began my inquiry into this appeal by issuing a Notice of Inquiry to the Ministry inviting it to submit representations. I also decided that the Canadian Document Integrity Technical Working Group (the Working Group), referred to above, may have an interest in the records at issue as an affected party, and I decided to invite them to submit representations regarding the discretionary exemptions at sections 14(1)(c), (i) and (l) and at sections 15(a) and (b).

As with Appeal PA08-12, I also decided to invite the MOHLTC to submit representations, as it appeared to have an interest in the reports. The MOHLTC advised that its position would be reflected in the Ministry's representations.

I received representations from both the Ministry and the Working Group. In its representations, the Working Group indicated that a number of portions of the reports, which it listed, could be disclosed. It also indicated that in its view, a number of portions of the reports, which it also listed, were "not relevant."

Following receipt of the representations of the Ministry and the Working Group, I sent the non-confidential portions to the appellant and invited representations. The appellant provided representations. In its representations, the appellant narrowed its request in relation to Appeal PA08-13 to the following:

- (a) those portions of the [Working Group] Reports that the Working Group indicates on page 4 of its submissions can be released in whole or in part and

those pages on page 5 of its submissions that the Working Group considered were not relevant; and

(b) those portions ... of the [Working Group] Reports that address the important issue of whether Vendor C complied with the mandatory requirement that the drivers' license card ... and health card ... consist of the same substrate (the [MSR]).

I then sent the appellant's representations to the Ministry and the Working Group and invited them to provide reply representations, and both of them did so. In addition, after reviewing the appellant's representations, the Ministry issued a new decision letter disclosing the portions of the reports that the Working Group indicated could be disclosed, but not the portions the Working Group said were not relevant. The Ministry stated that these portions were outside the scope of the appellant's request.

The appellant provided representations to this office in response to the revised decision letter. One of the issues in Appeal PA08-13 is whether the portions of the records described by the Working Group as "not relevant" are within the scope of the appellant's narrowed request. Based on my review of the records, the same issue arises with respect to *all* undisclosed portions. If any parts of the records are responsive, I must then determine whether any of the claimed exemptions apply. I will consider these issues below.

PA08-21

The request to the Ministry that led to Appeal PA08-21 was for the following:

...a copy of the email from [a named individual] mentioned in [another named individual's] 7:58 a.m., September 8, 2006 e-mail, and copies of all related e-mails. By "related" e-mails we mean (a) any previous or subsequent e-mails in the same e-mail string, (b) any other e-mails to, from or copied to [the named individual] and addressing the same topic and (c) any e-mails that are not from or to [the named individual] but that mention or discuss his position on this issue.

We also seek any other records that mention, address or relate to the e-mail from [the named individual] mentioned in [the other named individual's] 7:58 a.m., September 8, 2006 e-mail. Without limiting the generality of this request, it includes all correspondence, handwritten notes, e-mails, and digital and paper records that mention, address or relate to the position taken by [the named individual] on this issue. These include records involving [the named individual], e.g., a note sent to him or from him, as well as records that he did not create or receive, e.g., a communication in which one person explains to another person the position taken by [the named individual] or a handwritten note that somebody wrote after speaking to [the named individual]. (In the case of digital records, please include deleted, archived and backed up records.)

The Ministry issued a decision identifying a series of e-mails as the responsive records and disclosed portions of the e-mails to the requester. The Ministry denied access to other portions of the e-mails pursuant to sections 13(1) (advice or recommendations) or 15(a) (relations with other governments) of the *Act*. The requester (now the appellant) appealed this decision.

During mediation, the Ministry issued a supplementary decision advising the appellant that some of the information in the responsive records had been severed pursuant to section 21(1) of the *Act* (personal privacy). The appellant clarified that he is not seeking access to any information in the records severed pursuant to section 21(1). Accordingly, that information is non-responsive and section 21(1) is not at issue in this appeal.

No further mediation was possible and this file was moved to adjudication stage of the appeal process.

I began my inquiry into this appeal by issuing a Notice of Inquiry and inviting the Ministry to submit representations on the issues set out in the notice.

I received representations from the Ministry. At the same time, the Ministry issued a revised decision letter to the appellant in which it stated that it was no longer relying on section 15(a) in this appeal. It also decided to disclose the portions of the records that were withheld pursuant to section 15(a) to the appellant. Accordingly, section 15(a) is no longer at issue in this appeal.

I also decided to invite the MOHLTC to submit representations, as it appeared to have an interest in the reports. The MOHLTC advised that its position would be reflected in the Ministry's representations.

I then sent a modified Notice of Inquiry, along with the non-confidential portions of the Ministry's representations, to the appellant and invited its representations on the facts and issues set out in the Notice of Inquiry. The appellant responded, advising that it would not submit representations in this appeal and asking that I refer to its representations in Appeals PA08-12 and PA08-13 for background information regarding the broader context of Appeal PA08-21.

The sole issue in Appeal PA08-21 is whether the undisclosed portions of the records are exempt under section 13(1). I will address this issue below.

APPEALS PA08-12 and PA08-13

RESPONSIVENESS OF RECORDS

As noted above, the appellant describes the issue in Appeal PA08-12 as "... whether the Ministry's revised decision is *complete* in respect of the MSR Portions of the Report sought by the appellant." To determine this, I must review the report and determine whether any of the undisclosed responsive portions address compliance by Vendor C with the mandatory

requirement that the Driver's License and Health Card consist of the same substrate, as outlined in the appellant's narrowed request.

Similarly, as also referenced above, one of the issues in Appeal PA08-13 is whether the portions of the records described by the Working Group as "not relevant" are within the scope of the appellant's narrowed request. In other words, I must determine whether they are responsive to that request. As well, based on my review of the reports that are at issue in that appeal, the same issue arises with respect to all undisclosed portions.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Appeal PA08-12

As outlined above, the record initially identified by the Ministry as responsive to the request in Appeal PA08-12 consists of portions of a document entitled "Card Security & Integrity Report, Proposed New Ontario Driver Licence and Health Card" dated November 1, 2006. Substantial parts of this report were disclosed in Appeal PA08-11, and part has also been disclosed during Appeal PA08-12.

The appellant's revised request in this appeal was quite specific. As noted, the appellant now seeks access to "those portions ... of the Report that address the important issue of whether Vendor C complied with the mandatory requirement that the drivers' license card ... and health card ... consist of the same substrate (the 'Mandatory Substrate Requirement')." I will refer to this "Mandatory Substrate Requirement" as the "MSR."

The appellant also indicates in its representations that it "does not seek access to information about how to defeat or compromise the cards tested in the report."

In addition, the appellant's representations state that, "[b]ased on the Table of Contents of the Report, the MSR Portions are likely contained on pages 68-69 and 78-79 of the Report under the heading of Card Construction. However it is possible that the MSR Portions may be contained in other parts of the Report."

The information disclosed by the Ministry in its revised decision responding to the appellant's representations appears on pages 68 and 78 of the report. In its reply representations submitted at that same time, the Ministry submits that there are no other portions of the report that are responsive to the revised request, and that the appeal should be closed as all issues have been resolved.

As noted, however, in its representations in response to the Ministry's revised decision, the appellant asks that I review the report to determine whether other portions of it are responsive.

I have carefully reviewed the entire report. I find that the only portions referring to whether Vendor C complied with the MSR, requiring that both the drivers licence and the health card consist of the same substrate, have been disclosed. There are other references to card construction, but these do not address the MSR.

As there is no undisclosed responsive information in the record, Appeal PA08-12 is therefore dismissed.

Appeal PA08-13

As outlined above, the records originally identified by the Ministry as responsive to this request consist of three reports prepared by the Working Group. Although access to the reports was originally denied in full, parts of them were disclosed in response to the appellant's representations.

The information referred to as "not relevant" in the Working Group's representations does not form part of any of the three reports identified by the Ministry. Rather, it consists of correspondence and e-mails between the Ministry and the Working Group in relation to the appellant's access request and a general description of the Working Group.

As with Appeal PA08-12, the appellant's amended request in this appeal is quite specific. To reiterate, the amended request seeks access to the following information:

- (a) those portions of the [Working Group] Reports that the Working Group indicates on page 4 of its submissions can be released in whole or in part and those pages on page 5 of its submissions that the Working Group considered were not relevant; and
- (b) those portions ... of the [Working Group] Reports that address the important issue of whether Vendor C complied with the mandatory requirement that the drivers' license card ... and health card ... consist of the same substrate (the [MSR]).

I have carefully reviewed the three reports of the Working Group originally identified as responsive by the Ministry, as well as the additional records described as "not relevant" by the Working Group. The Working Group provided copies of the records with its representations, and these were identified by a page numbering system that is reflected in its representations concerning what could be disclosed, and what it considers "not relevant."

With respect to item (a) in the appellant's amended request, my review of the records indicates that the portions of the records identified by the Working Group as information that could be disclosed have in fact been disclosed in full. That leaves the question of the information described as "not responsive" by the Working Group.

In my view, the appellant's original request cannot be considered to encompass information about responding to its access request, or a generic description of the working group, even on the broadest possible reading. Appellants are not permitted to expand their requests during access appeals, and accordingly, I find that this information is non-responsive. If the appellant continues to seek access, it should file a new request for this information.

Turning to item (b) of the amended request, as part of my detailed review of the records, I looked for any information referring to whether Vendor C complied with the MSR, requiring that both the Driver's Licence and the Health Card consist of the same substrate, as mentioned in the narrowed request. With one exception, I find that there is no information of this nature in the records.

The exception appears on the final page of one of the reports identified by the Ministry. The report is entitled, "Ontario Drivers' Licence/Health Card 2007 Bidder "A" and "C" Comments and Suggestions from [the Working Group]." The information appears in a table, under the heading "Backing," and it is clear that it identifies the substrate material used in the Driver's Licenses and Health Cards whose images appear on that page. The Working Group has confirmed that lines 6 and 8 of the table relate to the prototype Driver's Licence and Health Card submitted by Bidder "C." As the information about "backing" in lines 6 and 8 of the table addresses the question of whether the same substrate is used by Bidder "C" in its prototype Driver's Licence and Health Card, I find that it is responsive to the appellant's amended request.

In determining that this information is responsive, I also considered the appellant's statement in the amended request that it "does not seek disclosure of information about how to defeat or compromise the cards tested..." As discussed in more detail below, I have carefully considered the representations that touch on that issue, and I have concluded that the information I have identified as responsive is not that type of information.

As this is the only responsive information in the undisclosed portions of the records, I will proceed to determine whether the claimed exemptions apply to this information only. I will not consider the unresponsive information further.

I note that, in Appeal PA08-12, the Ministry amended its decision and disclosed information describing the substrate of the Driver's Licence and Health Card proposed by Bidder "C". This is precisely the same category of information I have found to be responsive in Appeal PA08-13. In fact, the Ministry's revised decision in PA08-12 disclosed more information relating to the comparison of the two cards than the information I have identified as responsive in this appeal.

As noted above, the Ministry had initially denied access to the withheld information under the exemptions found at sections 14(1)(c),(i),(l) (law enforcement/security), 18(1)(d) (economic and other interests), 15(a) (relations with other governments) and section 17(1)(a),(b),(c). In this appeal, the Ministry relies on sections 14(1)(c),(i) and (l), 15(a) and (b) and 18(1)(d). The only exemption claimed here that was not relied on in Appeal PA08-12 is section 15(b).

IS THE RESPONSIVE INFORMATION IN APPEAL PA08-13 EXEMPT FROM DISCLOSURE?

The exemptions claimed by the Ministry in this appeal state as follows:

14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution;

18. (1) A head may refuse to disclose a record that contains,

(d) 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;

Law Enforcement

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Section 14(1)(c), (i) and (l) all focus on whether disclosure “could reasonably be expected to” result in a specified harm. Where section 14 uses the words “could reasonably be expected to”, the institution 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-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’*

Compensation Board) v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

The Ministry had an opportunity to respond to the appellant's amended request, and in fact did provide reply representations. As discussed in more detail below, the Ministry's reply representations refer only to the section 15(b) exemption.

In its initial representations, the Ministry submits, in relation to section 14(1)(c), that some of the comments in the records "implicitly reveal investigative techniques to detect counterfeit documents and forgery currently in use," and points to specific parts of the records. The information I have identified as responsive does not contain information of this nature, and is also not information specifically referred to by the Ministry in this part of its submission.

Concerning section 14(1)(i), the Ministry's initial representations focus on "comments on the characteristics of Vendor C's prototype" and state that this analysis should not be made public. The information I have identified as responsive could not accurately be described as "comments." The information merely identifies the backing material used in the two cards.

The Ministry's initial representations on section 14(1)(l) indicate that information about "the strengths and weaknesses of the cards" should not be disclosed. The Ministry goes on to identify particular portions of the records that, in the Ministry's view, could reasonably be expected to be of benefit to persons who intend to forge or falsify secure documentation. The information I have found to be responsive does not contain comments about strengths or weaknesses of the cards, nor does it contain any of the specific information identified by the Ministry in its representations on this section.

The Working Group has also made submissions about the potential harmful effects of disclosure of the records on law enforcement interests. Under section 14, its initial submissions focus on section 14(1)(c), and refer to portions that would reveal investigative techniques. The Working Group also comments that "the discussions and examinations were conducted within the strictest confidential conditions." However, portions of the records that reveal the nature of investigative techniques, discussions and examinations do not form part of the information I have identified as responsive.

The Working Group also refers to law enforcement interests protected under section 16 of Canada's federal *Access to Information Act*, and although that statute is not specifically before me in this appeal, I have considered the Working Group's comments on law enforcement interests in the context of section 14(1)(c), (i) and (l) of the *Act*. The Working Group's comments in that regard mirror the concerns addressed by the Ministry, as discussed above.

As with the Ministry, the Working Group was invited to comment on the amended request. The Working Group reiterated its view that the records, with the exception of information it said could be released, as discussed above, should be withheld, but did not elaborate on the effect of

the amended request or provide any explanation of why the much narrower category of responsive information should be withheld.

In my view, the representations provided by the Ministry and the Working Group do not provide sufficient evidence or argument for me to conclude that the harms outlined in sections 14(1)(c), (i) or (l) could reasonably be expected to result from disclosure of the small amount of information I have found to be responsive, which as noted above is distinct from the kinds of information specifically addressed in the representations of the Ministry and the Working Group.

In addition, I consider it to be highly significant that the Ministry decided to release precisely this same category of information in Appeal PA08-12, where these same section 14(1) exemptions were also initially claimed. But even without that disclosure, I would not be satisfied, on the evidence and argument provided to me, that the narrow category of information that is responsive to the appellant's amended request could reasonably be expected to result in the harms contemplated in these exemptions.

For all these reasons, I find that sections 14(1)(c), (i) and (l) do not apply.

Relations with Other Governments

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) and (c) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order 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.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

In its initial representations, the Ministry submits that the Working Group is an "agency" of another government for the purposes of section 15. In view of the conclusions I have reached regarding whether the harms mentioned in sections 15(a) and (b) could reasonably be expected to result from disclosure of the information I have found to be responsive to the amended request, it is not necessary for me to decide that issue.

In relation to section 15(a), the Ministry submits that the collaborative venture that resulted in the reports is “deserving of protection” and that disclosure “will prejudice” the possibility for future collaboration. The Ministry also comments that the Working Group and other law enforcement personnel have expressed concerns about disclosure of investigative techniques and the facilitation of crime if the records are found not to be exempt.

Under section 15(b), the Ministry’s initial representations argue that there was an expectation of confidentiality on the part of the Working Group in relation to the reports generally, and that the very nature of the reports supports that expectation.

The Ministry’s reply representations focus in particular on section 15(b), and refer to the Working Group’s confidentiality arguments concerning the discussions and examinations being conducted in the strictest confidence. I have already concluded, above, that those arguments refer to parts of the reports that are not responsive to the amended request.

Although invited to comment on sections 15(a) and (b) in the Notice of Inquiry, the Working Group’s representations do not refer to these exemptions. The Working Group’s reply representations do, however, mention that their law enforcement concerns relate to “intergovernmental issues”.

Both the Ministry and the Working Group had an opportunity to comment on the impact of the amended request on the potential application of sections 15(a) and (b), but neither of them did so. While it is possible that disclosure of other portions of the reports may have led to a reasonable expectation of the harms mentioned in sections 15(a) and (b), I am not satisfied that this is the case with respect to the information I have found to be responsive.

With respect to prejudice to intergovernmental relations under section 15(a), I again find it significant that, in Appeal PA08-12, where that exemption was also at issue, the Ministry chose to disclose precisely the same category of information as that which I have found to be responsive in this appeal. As well, the evidence provided to me is not sufficient to establish that disclosure of this information could reasonably be expected to prejudice the conduct of intergovernmental relations.

With respect to section 15(b), the exemption requires that the evidence establish a reasonable expectation that disclosure would reveal information that the Working Group “supplied in confidence” to the Ministry. The information I have found to be responsive simply identifies the substance used in the substrate of Bidder C’s prototype of the Driver’s Licence and Health Card. The Working Group’s representations identify the Ministry, and the MOHLTC, as having provided the prototypes to it. Accordingly, the source for this basic level of analysis was provided by the Ministry. As well, the Ministry has chosen to release precisely the same category of information in Appeal PA08-12. In my view, the evidence does not establish a reasonable expectation that disclosure of information about the substrate used in the cards would reveal information that was “supplied in confidence” by the Working Group to the Ministry.

Accordingly, I find that sections 15(a) and (b) do not apply.

Economic & Other Interests

Section 18(1)(d) is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

For section 18(1)(d) to apply, the institution must demonstrate that disclosure “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In its initial representations, the Ministry submits that disclosure of the Working Group reports raises concerns about the “potential for attacks on the integrity of the driver licence and health insurance system” based on the discussion of the physical characteristics of the cards in the report specifically addressing Vendor C, and the Working Group’s comments about both vendors’ prototypes. The report specifically addressing Vendor C does not contain responsive information and is not at issue. Nor does the information I have found to be responsive constitute a “comment”.

The Ministry also refers to the “comments and analysis relating to these characteristics,” arguing that disclosure of those parts of the reports would “risk facilitating the counterfeiting and falsifying of these cards, which in turn could lead to significant financial losses to the Province.” Again, mere identification of the material used in the substrate is not, in my view, “comments or analysis about the characteristics of the cards.” As well, I have taken into account the appellant’s statement that it does not seek access to information of this nature in determining that the information I have identified is responsive. Moreover, and significantly, the Ministry chose to disclose precisely this category of information in Appeal PA08-12. In my view, such a disclosure would not have taken place if there were a reasonable expectation that disclosure of this category of information could cause the problems identified in the Ministry’s representations.

As well, the Ministry had an opportunity to comment on the impact of the amended request on the application of this exemption in its reply to the appellant’s representations, and did not do so. In fact, the Ministry’s reply representations do not refer to this exemption at all.

I am not satisfied that the evidence and argument provided to me are sufficient to establish a reasonable expectation that disclosure could be injurious to the financial interests of the Government of Ontario not to its ability to manage the economy.

Accordingly, I find that section 18(1)(d) does not apply.

Conclusion

Having found that none of the exemptions claimed by the Ministry applies to the information I have found to be responsive, I will order it disclosed, and will provide a copy of the record page in question to the Ministry with this order, on which the information to be disclosed is highlighted.

APPEAL PA08-21

ADVICE TO GOVERNMENT

As outlined above, the records at issue in Appeal PA08-21 consist of the undisclosed portions of a group of e-mails. The Ministry relies on section 13(1) as the basis for denying access.

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 (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 e-mails that are at issue in this appeal were exchanged between the Ministry, the MOHLTC and the consultant retained by the Ministry to conduct card security and integrity testing of cards submitted by the vendors in the competition for the contract.

The Ministry submits that all of the information it has withheld contains advice or recommendations by the consultant retained by the Ministry. The Ministry argues that the exempt information:

... reflects the fact that the consultant was in the position of an advisor to a Ministry official who was in the position of being able to accept or reject the advice being offered. In the record, the consultant makes statements that either contain explicit advice or recommendations, or are such that advice or recommendations can be inferred from them.

In the confidential portions of the representations, the Ministry sets out the issues on which the consultant provided either explicit or implicit advice, and explains how several passages implicitly reveal the consultant's advice.

The Ministry submits that, because of the manner in which the consultant provided his advice, that is, either explicitly or implicitly, his views cannot be considered to be “mere information” or opinion.

The appellant chose not to submit representations on this issue, but asked me to consider the background information contained in the representations submitted in Appeals PA08-11 and 12. I have reviewed these representations. The appellant submits that both it and the public have a “compelling” need for disclosure of the information it seeks in those two appeals, which has to do with the MSR (the requirement that both the Driver’s Licence and Health Card have the same substrate material). While the appellant’s representations raise the possible application of the “public interest override” at section 23, this argument relates to information that has already been disclosed in Appeals PA08-11 and 12, and which I am ordering disclosed in Appeal PA08-13.

Absent specific argument concerning the application of section 23 to the information I find to be exempt under section 13(1) (as outlined below), and given that the appellant was a bidder for the card production contract, with an essentially private interest in the records, I am not satisfied that section 23 applies.

Having carefully considered the representations provided to me, and the contents of the e-mails, I conclude that the undisclosed information that is at issue in this appeal either consists of advice or recommendations of a consultant retained by the Ministry, or would permit accurate inferences to be drawn concerning the advice or recommendations. In this regard, I rely on the Ministry’s confidential representations concerning the drawing of accurate inferences, but I am not able to disclose those representations or provide a further explanation of this finding without disclosing confidential information, including the contents of these parts of the e-mails. I find this information exempt under section 13(1).

Sections 13(2) and (3): exceptions to the exemption

Introduction

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Sections 13(2) and (3) state, in part:

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

(a) factual material;

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

The word “report” appears in several parts of section 13(2). This office has defined “report” as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record [Order 24]. In my view, although some exempt portions of the record contain information that could be construed as factual, it is presented in an interpretive context that makes it integral to the advice or recommendation to which it relates. I therefore find that this exception does not apply.

The e-mails in question do not constitute a report, nor have they been publicly relied on as a basis for decision-making, and the exception at section 13(3) also does not apply.

EXERCISE OF DISCRETION

General principles

The section 13 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry submits that it exercised its discretion in invoking section 13(1). The information severed is limited to advice conveyed to the Ministry with an expectation of confidence on the part of the consultant. In addition, the Ministry submits that the advice relates to issues that are sensitive to the Ministry and that are linked to law enforcement concerns the Ministry has raised with respect to the remaining records at issue.

The Ministry submits that it is no longer relying on section 15(a) and has disclosed much of the e-mail exchange to the appellant. In addition, the Ministry states that it took into account the appellant's need for information and that, in fact, the appellant, as a competing bidder, was debriefed on the results of the proposal, including a verbal account of the performance of its cards during testing, including how one of the security features was easily defeated.

The Ministry states that disclosure of this information will achieve little or nothing in terms of promoting transparency in government decision making.

I am satisfied that, in the circumstances of this appeal, the Ministry considered relevant factors and not irrelevant ones in deciding to apply section 13(1), and its exercise of discretion was proper.

ORDER:

1. I uphold the Ministry's decision in Appeal PA08-12.
2. In appeal PA08-13, I order the Ministry to disclose the information from one page of the record entitled, "Ontario Drivers' Licence/Health Card 2007 Bidder "A" and "C" Comments and Suggestions from [the Working Group]" that is highlighted on a copy of that page which is being sent to the Ministry with this order. The Ministry is to disclose this information to the appellant by sending the appellant a copy no later than **May 8, 2009** but not before **May 4, 2009**. **Only the highlighted information is to be disclosed.**
3. I uphold the Ministry's decision in Appeal PA08-21.

Original Signed by: _____
John Higgins
Senior Adjudicator

_____ March 31, 2009