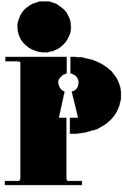

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2820

Appeal PA07-323

Ministry of Citizenship and Immigration

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NATURE OF THE APPEAL:

The Ministry of Citizenship and Immigration (the Ministry) received the following access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> According to several press reports … the [Ministry] recently arranged a grant of [dollar amount] to [identified organization]. Under the [*Act*] I would like to request copies in full of any and all documents, correspondence and internal and external communications, including electronic, relating to this action.

After the Ministry identified records responsive to the request, it quoted an estimated fee for access and extended the time to respond to the request under section 27(1)(b) of the *Act*. The Ministry then notified the identified organization with respect to certain records that the Ministry asserted may be subject to the section 17(1) (third part information) mandatory exemption claim. After receiving the identified organization's position on disclosure, the Ministry decided to grant partial access to the responsive records, upon payment of the required fee. As set out in an index that accompanied its decision letter, the Ministry relied on the discretionary exemptions at sections 13(1) (advice or recommendations) and 18(1) (valuable government information) and the mandatory exemptions at section 12 (Cabinet records), 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to deny access to the portion of the records it withheld. The Ministry also took the position that some pages of the records, in whole or in part, were not responsive to the request.

The requester (now the appellant) appealed the Ministry's decision to deny access to the portion of the records it withheld. In his appeal letter, the appellant asserts that there is a compelling public interest in disclosure of the requested records, thereby raising the potential application of section 23 (public interest override) of the *Act*.

At mediation, the appellant asserted that other responsive records should exist. As a result, the reasonableness of the Ministry's search for records was added as an issue in the appeal. Also during mediation the Ministry issued a supplementary decision letter providing the appellant with access to some of the records, in full or in part, that it had withheld. A revised index of records accompanied this supplementary decision letter. After receiving the supplementary decision letter, the appellant advised that:

- He is not seeking access to the personal information of individuals, information that relates to organizations other than the identified organization, or to the following: Records 1, 2, 4, 5 (page 1 - fourth severance), 6, 7, 11, 12, 13, 21 (pages 6 and 7), 25, 27 and 31 (bottom part);

- He is seeking access to the following information: Records 3 (top portion of page 1), 5 (page 1 - first three severances), 6 (page 5), 10, 20 (pages 1 and 5), 21 (pages 1, 2, 8, 9, 10), 22 (page 2) and 31 (page 1 - top half).

In response, the Ministry issued a further supplementary decision letter and provided a further revised index of records. In accordance with its further supplementary decision, the Ministry released portions of Records 3 (page 1 in full), 20 (further portions of pages 1 and 5) and 31 (page 1 in full). As a result of the Ministry's supplementary decisions and the appellant advising that he is not interested in obtaining access to personal information or information about other organizations, the number of records at issue was considerably reduced, and the application of the mandatory exemptions at sections 17(1) and 21(1) of the *Act* is no longer at issue in the appeal. Mediation did not resolve all the issues in the appeal, however, and the matter was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the adjudication by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry and the identified organization, initially. Upon reflection, and based on the nature of the information as well as the exemptions at issue, which at that stage no longer included section 17(1), I subsequently advised the identified organization that it was not necessary for it to provide representations at that time and none were provided. For the reasons set out below, I ultimately decided that it was not necessary to obtain representations from the identified organization on the facts and issues in the appeal.

The Ministry provided representations in response to the Notice. I then sent a Notice of Inquiry along with a complete copy of the Ministry's representations to the appellant. The appellant provided representations in response to the Notice. I determined that the appellant's representations raised issues to which the Ministry ought to be given an opportunity to respond. Accordingly, I sent a complete copy of the appellant's representations to the Ministry, along with a letter inviting reply representations. The Ministry advised that it had nothing further to add to its original submissions.

RECORDS

Remaining at issue in this appeal is the following:

Record	**Description (Portion at Issue)**	**Exemption(s) claimed/Responsiveness**
Record 5	Email (first three severances on page one/duplicated at the bottom of page three)	Section 13/Non-responsive
Record 6	Memorandum (page five)	Section 13/Non-responsive
Record 10	Emails (part of page one)	Non-responsive
Record 20	Email (part of pages one and five)	Sections 12, 13 and 18
Record 21	Emails and attachments (pages one, two, eight, nine and ten)	Section 12 (page one)/Non-responsive (pages two, eight, nine and ten)
Record 22	Email (page two)	Non-responsive

DISCUSSION:

RESPONSIVENESS OF RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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 and P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Ministry submits that there is no ambiguity in the appellant's request and relies on the appellant's position that he is not seeking access to information relating to other organizations that received year-end grants from the Ministry. Accordingly, the Ministry asserts that five of the six records remaining at issue, discussed in more detail below, contain information that is not responsive to the request.

In his representations, the appellant does not specifically address the Ministry's submissions on responsiveness other than to state that he is at a disadvantage in assessing these claims without access to the records.

Analysis and Findings

Record 5 (first three severances at the bottom of page one)

Record 5 is made up of intra-Ministry email exchanges along with a three-page attachment, comprising a list of year-end capital projects. The bottom portion of page one is duplicated in the bottom portion of page three. The Ministry submits that the three severances are not responsive to the request because they relate to possible year-end funding for projects and organizations other than the one identified in the request.

The request seeks copies of any and all documents, correspondence and internal and external communications, including electronic, relating to a grant to the identified organization, subject to the appellant's clarification that he is not seeking access to information that relates to organizations other than the one which he identified. Adopting a liberal interpretation of the request, I find that the first severance is responsive to the request because it touches generally upon the manner in which all the grants occurred, and the specific grant at issue is discussed in the attachment to the emails. In my view the balance of the severances are not responsive to the request because they clearly relate to organizations other than the one that is the subject of the request.

Record 6 (page five)

Record 6 consists of a series of emails with two memoranda (comprising pages three, four and five) attached. The Ministry submits that the memorandum at page five of Record 6 is not responsive to the request because it contains no mention of the identified organization and relates to other projects. I have reviewed page five and agree that the memorandum is not responsive to the request because it clearly relates to organizations other than the one that is the subject of the request.

Record 10 (page one)

Record 10 consists of a series of email exchanges between the Ministry of Finance and the Ministry with a series of draft year-end funding letters (including the one to the organization identified in the request) attached. The Ministry submits that the content of the emails at page one of Record 10 is not responsive because they generally refer to year-end funding and nothing in them specifically relates to the identified organization that is the subject of the request. I have reviewed the content of page one, and adopting a liberal interpretation of the request, I find that much of it is responsive to the request because, although somewhat peripherally, it relates to the manner in which the grant would be announced. In my view the second point in the email on top of page one is not responsive to the request because it clearly relates to organizations other than the one that is the subject of the request.

Record 21 (pages two, eight, nine and ten)

Pages one and two of Record 21 consists of intra-Ministry email exchanges. The withheld portion on page two refers to the attachment at pages eight to ten, being the Ministry's Budget and Issues Management Plan. The Ministry submits that this information relates to overall Ministry budgetary matters and is not specific to the identified organization. I have reviewed the withheld portion on page two and the attachment at pages eight to ten, and find that the withheld information is not responsive to the request because it deals with general budgetary matters only.

Record 22 (page two)

Record 22 consists of emails (pages one and two) with final versions of the year-end funding letters (including the one to the organization identified in the request) attached. The Ministry

submits that page two of Record 22 is not responsive to the request because it relates to year-end funding letters that were sent to recipients other than the identified organization. The Ministry points out that the year-end funding letter provided to the identified organization was disclosed to the appellant.

I have reviewed page two of Record 22 and adopting a liberal interpretation of the request, I find that it is, for the most part, responsive because it relates to the manner in which the grant occurred, and the specific grant at issue in this appeal is discussed in an attached year-end funding letter. There are, however, some portions that are not responsive to the request because they relate to organizations other than the one identified in the request. I have highlighted the responsive portions in the copy of page two sent to the Ministry along with this order.

As I have found portions of page one of Record 10 and page two of Record 22 to be responsive, I will order the Ministry to provide the appellant with a decision letter regarding access to this information.

ADEQUACY OF THE SEARCH FOR RECORDS

Section 24 of the *Act* also sets out the parameters of the adequacy of a search for responsive records. Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records within its custody or control. [Orders P-85, P-221, PO-1954-I]

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

The Ministry submits that there is no ambiguity in the appellant's request and, as set out in an affidavit the Ministry provided with its representations, it conducted a search for any information relating to the year-end grant that was provided to the identified organization. The deponent states that no specific date range for responsive records was used in its search.

To facilitate the mediation process the Ministry did disclose records that post-dated the date of the request, but it would appear that the Ministry considered the date of the appellant's request as a notional cut-off date. The affidavit included with the Ministry's representations describes in detail the multiple searches it conducted in an effort to locate records that were responsive to the request, including further searches that were conducted at the mediation stage as a result of information received from the appellant. No further responsive records were found. The appellant provides no representations on the adequacy of the Ministry's search for responsive records.

Analysis and Finding

In my opinion, the Ministry's searches were extensive and wide-ranging. The appellant's representations do not provide any basis to refute the Ministry's position that it has conducted a reasonable search for responsive records. As set out above, in order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control [Orders P-624 and PO-2559]. In my view, based on the multiple searches it conducted, the Ministry has made a reasonable effort to locate responsive records.

In all the circumstances, I find that the Ministry has provided sufficient evidence to establish that it has conducted a reasonable search for responsive records within its custody and control for the time period up to the date of the request.

I now turn to the exemptions that the Ministry claims for the responsive records remaining at issue in this appeal.

CABINET RECORDS

The Ministry takes the position that the withheld portions of pages one and five of Record 20 and page one of Record 21 qualify for exemption under section 12(1)(b) of the *Act*, which reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees.

The term "Executive Council" means Cabinet. Section 2 of the *Treasury Board Act* specifies that Treasury Board is a committee of the Executive Council.

The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-1570, PO-2320].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725].

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, ***and*** must have been either submitted to Cabinet or its committees or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made [Order PO-2320, PO-2554, PO-2677 and PO-2725].

Section 12(2) provides two exceptions to the application of the exemption in section 12(1). Section 12(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

The Ministry submits:

> The Ministry's year-end investments were required to be considered and approved by Treasury Board, a committee of Cabinet. Lists of recommended recipients were submitted by the Ministry to Treasury Board for its consideration and approval. The severed portions of these records contain clear references to recommended lists of recipients and the fact that those lists were submitted to Treasury Board.
>
> It is further submitted that the Cabinet record exemption applies to the severed portion of record 20 on page 5 because the severed portion relates to possible government announcements regarding the [identified organization]'s year-end investment. The [identified organization]'s year-end investment, like all year-end investments, required the review and approval of Treasury Board.

The appellant's representations do not specifically address the application of this, or any other, exemption claimed by the Ministry. Rather, they focus on the application of the "public interest override" at section 23 of the *Act*, dealt with in more detail below.

Analysis and Finding

Record 20 (severed portion of pages one and five)

Record 20 is an email string with an attachment. The portion withheld from the first page is the email that started the chain. The responsive portion withheld from page five relates to possible government announcements about the grant that is the subject of the request.

The Ministry submits that the grant that is at issue in this appeal, like all year-end investments, required the review and approval of Treasury Board and that lists of recommended recipients were submitted by the Ministry to Treasury Board for its consideration and approval. I note, however, that there is no mention in the records or in the Ministry's representations to indicate that the possible announcement of the grant was also subject to approval or deliberation by Cabinet or its committees, including Treasury Board.

I accept that a record containing a list of recommended recipients that was deliberated upon by Treasury Board would qualify for exemption under section 12(1)(b). Similarly, where disclosure of a record would reveal the substance of deliberations of Treasury Board about the list of recipients or where disclosure of such a record would permit the drawing of accurate inferences with respect to these deliberations, that record would also be exempt under the introductory wording to section 12(1).

The information sought to be withheld in this instance, however, does not do either. The withheld information on pages one and five, subject to the removal of non-responsive information, simply relate to possible government announcements and not the content of the list.

In my view, the Ministry has failed to establish that the responsive information withheld from pages one and five of Record 20 are found in a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Counsel or its Committees. In addition, I conclude that the withheld responsive information would not reveal the substance of the list of year-end investments deliberated upon by Treasury Board. I am, accordingly, not satisfied that this information falls within the scope of any part of section 12(1), including the introductory wording. Therefore, I conclude that the section 12(1) mandatory exemption does not apply to this information.

Record 21 (severed portion of page one)

Pages one and two of Record 21 also consist of intra-Ministry email exchanges. The severed portion of page one is the last two emails in the exchange. Both of these emails refer to an attachment found at pages six and seven, which is a final list of the year-end recipients. I have reviewed the withheld portion and I find that although there is no evidence that the emails were circulated outside the Ministry, disclosure of the emails would reveal the substance of deliberations of the Treasury Board. Accordingly, I find that the severed portions of page one of Record 21 qualify for exemption under the introductory wording of section 12(1) of the *Act*.

Regarding the possible application of the exception in section 12(2) the Ministry advised that during mediation it sought Cabinet's consent to disclose the severed portion of page one of Record 21, but that Cabinet did not provide it. I find that the Ministry has thereby satisfied any obligations that it may have under section 12(2) of the *Act*.

ADVICE OR RECOMMENDATIONS

The Ministry has also claimed that the first severance at the bottom of page one of Record 5 (duplicated in page 3), as well as the responsive information withheld from pages one and five of Record 20, is exempt under the discretionary exemption in section 13(1) of the *Act*.

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 [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.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"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].

With respect to the application of the section 13(1) discretionary exemption, the Ministry submits that the lists of potential recipient organizations constitute advice and recommendations because they suggest projects and recipients to be funded and the corresponding amounts of funding; all of which would have been accepted or rejected by Treasury Board.

The Ministry submits that:

> … the lists of potential recipient organizations constitute advice and recommendations in and of themselves because the lists suggest projects and recipients to be funded and the corresponding amounts of funding; all of which would have been accepted or rejected by Treasury Board. To illustrate, there is a clear reference in record 20 to Treasury Board and that some of the organizations were possibilities for funding. Furthermore, some of the projects referenced in record 6 did not eventually receive funding. The information in these records reflect the decision making process regarding which organizations should receive funding and in what amounts.
>
> Furthermore, the attachments in record 20 also relate to recommendations to government regarding possible public announcements of the year-end investments.
>
> As evidenced by the records in question, the recommended lists of potential recipients were authored by public servants (i.e. employees) of the Ministry.
>
> The Ministry submits that the use of the exemption in s. 13(1) in these circumstances is consistent with its purpose that persons employed in the public service are able to advise and make recommendations freely and frankly, without unfair pressure. Year-end investments by their very nature are discretionary expenditures of the government. As the Premier stated in his letter to the Auditor General of Ontario, contained in the Auditor General's report (dated July 26, 2007) regarding the review of the Ministry's year-end investments: "... governments respond to evolving revenue information by making year-end investment decisions to support public policy objectives ..."
>
> It is essential that public servants have the ability to provide frank and impartial advice and recommendations to decision-makers in government with respect to the selection of possible recipients and projects that meet the public policy objectives of the government. It is the Ministry's view that disclosure of the records in question would inhibit the free flow of advice and recommendations within the deliberative process of government decision-making regarding year-end investments.

The Ministry submits, therefore, that the withheld responsive information is exempt under section 13(1). The Ministry submits that none of the exceptions in sections 13(2) and (3) apply.

The appellant's representations do not address the possible application of section 13(1) to the record, nor do they discuss the section 13(2) and (3) exceptions.

Analysis and Findings

Record 5 (page one)

In my view, the withheld responsive portion of page one of Record 5 does not contain information which suggests a course of action that will ultimately be accepted or rejected by the person being advised. Accordingly, I find that the withheld responsive portion of page one of Record 5 does not qualify as "advice or recommendations" for the purpose of section 13(1) of the *Act*. As no other exemption was claimed for this information, and in my view none would apply, I will order that it be disclosed to the appellant.

Record 20 (pages one and five)

The only specific submissions that the Ministry makes with respect to Record 20 in relation to the application of the section 13(1) discretionary exemption is that "there is a clear reference in record 20 to Treasury Board and that some of the organizations were possibilities for funding" and that "the attachments in record 20 also relate to recommendations to government regarding possible public announcements of the year-end investments". Based on these representations and my review of the withheld portions at issue, I find that only the responsive information withheld from page five of Record 20 qualifies as advice and recommendations within the meaning of section 13(1) of the *Act* because, as submitted by the Ministry, it contains a recommendation to government regarding possible public announcements of the year-end investments and suggests a course of action that will ultimately be accepted or rejected by the person being advised.

I do not come to the same conclusion regarding the withheld responsive portion on page one of Record 20 that I have highlighted on a copy of the page provided to the Ministry with this order. I can find no reference to the Treasury Board in that severance and, in my view, what is sought to be withheld is in the nature of information, rather than a suggestion of a course of action that will ultimately be accepted or rejected by the person being advised. Based on the Ministry's representations and my review of the withheld portion of page five of Record 20, I find that this information does not qualify for exemption under section 13(1) of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Ministry has also claimed that the withheld responsive portion of pages one and five of Record 20 are also exempt under sections 18(1)(a) or (g) of the *Act*.

As I have found that the responsive portion of page five is exempt under section 13(1) of the *Act*, it is not necessary for me to also consider whether that information is exempt under sections 18(1)(a) or (g). I will then consider whether sections 18(1)(a) or (g) apply to the withheld responsive portion of page one of Record 20.

Sections 18(1)(a) and (g) of the *Act* read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

The Ministry submits that Record 20 contains financial information because the record relates to year-end investment money of the government and how it is to be used and distributed to possible recipients in the community. In particular, it submits:

> The attachments in record 20 contain proposed plans of the government for announcements about the year-end investments to various recipients (including the [identified organization]) which were not yet public, and in some cases there are references to possible public events where those announcements might occur. The Ministry viewed the disclosure of these portions of record 20 as premature because the Ministry could not confirm at the time, and still cannot confirm, whether the announcements actually took place.

Section 18(1)(a)

For section 18(1)(a) to apply, the Ministry must show that the information:

> 1. is a trade secret, or financial, commercial, scientific or technical information,
>
> 2. belongs to the Government of Ontario or an institution, and
>
> 3. has monetary value or potential monetary value.

I note that the Ministry's representations on this issue are directed towards the attachment rather than the responsive portion withheld from page one of Record 20, being an email exchange. In my view, the information withheld from page one of Record 20 does not satisfy

the criteria listed above and is not the type of information that qualifies for exemption under section 18(1)(a).

Section 18(1)(g)

In order for section 18(1)(g) to apply, the institution must show that:

> 1. the record contains information including proposed plans, policies or projects of an institution; and
>
> 2. disclosure of the record could reasonably be expected to result in:
>
>   (i) premature disclosure of a pending policy decision, or
>   (ii) undue financial benefit or loss to a person.
>
> [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.)]

The grants have been made. Any announcements related to the grants have already taken place. Disclosure of the withheld portion of page one of record 20 could not reasonably be expected to result in (i) premature disclosure of a pending policy decision, or (ii) undue financial benefit or loss to a person.

Accordingly, I find that sections 18(1)(a) and (g) do not apply to the responsive portion withheld from page one of Record 20.

As a result, I will order the Ministry to disclose to the appellant the responsive portion of page one of Record 20 that I have highlighted on a copy of the page provided to the Ministry with this order.

PUBLIC INTEREST

As I indicated above, the appellant takes the position that the public interest override at section 23 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the information which I have found to be exempt that clearly outweighs the purpose of the exemptions claimed by the Ministry.

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626 and PO-2614].

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613].

In this appeal, I only upheld the Ministry's application of the exemption at section 12(1) of the *Act* with respect to the withheld portion of page one of Record 21. Section 23 of the *Act* does not refer to section 12 as a provision which can be overridden. In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. The Court was silent regarding section 12. Accordingly, I find that the public interest override in section 23 of the *Act* does not apply to the withheld portion of page one of Record 21 in the circumstances of this appeal.

I now turn to the withheld responsive portion of page five of Record 20.

The Ministry's Representations

The Ministry submits that there has been a significant amount of information disclosed to the appellant which, coupled with the existence of a public process or forum to address public concerns, satisfies any public interest in the disclosure of the information at issue.

In particular, the Ministry submits that the Auditor General's review of the Ministry's year-end investments and its subsequent report satisfies any public interest in disclosure of the records at issue.

The Ministry explains:

> On May 10, 2007, the Premier of Ontario made a request under section 17 of the [*Auditor General Act*] for the Auditor General to review the year-end investment decision making process.
>
> …
>
> It is important to note that the issues reviewed by the Auditor General are precisely the same issues of concern that the appellant is interested in through his access request under the *Freedom of Information and Protection of Privacy Act*. Put another way, the subject matter of the Auditor General's

> review is the same as the subject matter of the records in question. These issues have already been thoroughly investigated and resolved by the Auditor General. The Auditor General's report is publicly available (see the Auditor General's introductory letter to the Premier at the front of the report). Any compelling public interest in the disclosure of the Ministry's records has been satisfied through the Auditor General's review and corresponding public report. The information in the report serves the purpose of informing the citizenry about the activities of their government and informing them for the purpose of expressing their opinions about the process by which year-end investments were made.

The Appellant's Representations

The appellant submits that "in this particular case the claims and exemptions lose their significance in the face of a powerful overriding 'compelling public interest' in the fullest possible disclosure".

He explains:

> The Ministry acknowledges that the matter to which the records pertain has been the subject of intense public concern, media coverage, and a formal inquiry by the Auditor General. The Ministry neglects to mention that the so-called "slush fund" scandal surrounding this matter ultimately forced the resignation of the Minister.
>
> The Ministry indicates that the [identified] grant was one of a number of questionable year-end grants that generated such controversy. The Ministry fails to note, however, that the [identified] grant dwarfed all others. … This particular grant has merited special attention because of its magnitude and the prominence of those involved in its arrangement.
>
> The Ministry maintains that the Report of the Auditor General was sufficient to satisfy the compelling public interest aroused by the scandal. This is hardly the case. The restricted terms of reference, limited scope, and overall inadequacy of the Report have been criticized vigorously by both opposition parties, which have together demanded a public inquiry and a criminal investigation.
>
> The full release of all records, especially those relating to the roles of [a named Minister] and his Cabinet colleagues, including the Premier, in arranging this largest grant, is essential to the public understanding of this controversial affair. Such disclosure would satisfy the compelling public interest and, thereby, the central purpose of the *Act*, namely, to shed light on the activities of elected officials in order to insure citizen confidence in the operations of government.

Accompanying the appellant's representations are newspaper articles covering the issue as well as joint statements of opposition party MPP's asserting the insufficiency of the Report of the Auditor General and demanding a public inquiry, as well as a criminal investigation.

Analysis and Finding

I have carefully considered the matter and in my view any compelling public interest in the disclosure of the responsive information withheld from page five of Record 20 has been satisfied by the significant amount of information that has been disclosed or ordered disclosed as well as the review of the year end grants by the Auditor General, which culminated in the report referenced above that addressed the issue of the year-end grant to the identified organization and others. In my view, releasing the information at page five of Record 20 withheld under section 13(1) of the *Act* would not advance or enhance the debate. In my view, therefore, the appellant has failed to establish that section 23 applies in the circumstances of this appeal.

FINAL MATTER

In light of my conclusion that the Ministry should disclose only certain information that it withheld under section 13(1), an issue upon which the Ministry made full submissions, and which information is of a most general nature, I ultimately determined that it was not necessary to obtain submissions from the identified organization in this appeal. That said, however, since the identified organization was notified of this process, I am providing it with a copy of this order as a courtesy.

ORDER:

1. I uphold the reasonableness of the Ministry's search for responsive records.

2. I order the Ministry to provide the appellant with an access decision, in accordance with the *Act*, on the responsive portions of page one of Record 10 and page two of Record 22 that I have highlighted on a copy of those pages provided to the Ministry with this order, using the date of this order as the date of the request.

3. I order the Ministry to disclose to the appellant the first severance at the bottom of page one of Record 5 (duplicated on page three) as well as the responsive portion of page one of Record 20 that I have highlighted on a copy of those pages provided to the Ministry with this order by providing them to the appellant by no later than **October 5, 2009** but not before **September 28, 2009**.

4. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of its access decision as well as a copy of the pages of the records that it discloses to the appellant.

Original Signed By: ______________________ August 27, 2009

Steven Faughnan
Adjudicator