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

ORDER PO-2897

Appeal PA09-306

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All documentation (including, but not limited to, correspondence, memoranda, minutes, reports, briefing notes or material, drafts, positions, papers, etc.) pertaining to a meeting on contraband tobacco held on February 25, 2008, that was attended by representatives from Health Canada, the Royal Canadian Mounted Police, the Ontario Provincial Police, the Ontario Ministry of Revenue, the Ontario Ministry of Finance, the Ontario Ministry of Transportation and the [named First Nations group]. Please include all documents prepared in advance of the meetings, all documents tabled and/or discussed at the meetings, and all documents prepared as a result of the meetings. Please exclude emails from the search.

The Ministry consulted with the parties that attended the meeting referred to in the request and subsequently issued a decision to the requester. The Ministry identified two responsive records; a presentation entitled "An Overview of Tobacco Legislation and Enforcement in Ontario" and minutes of the meeting that took place. The Ministry denied access to both records in full, relying on the exemptions set out in sections 15(a) and 15(b) (relations with other governments) of the *Act*.

The requester (now the appellant) appealed this decision. During the mediation stage of this appeal, the appellant advised the mediator that they believe there is a public interest in the requested records. As a result, section 23 of the *Act* has been added as an issue in this appeal.

No further mediation was possible and this appeal was moved to adjudication where it was assigned to me to conduct an inquiry. I initially sent a Notice of Inquiry to the Ministry and to two affected parties, outlining the facts and the issues, in order to seek representations. I received representations from the Ministry, but not from the two affected parties. I then had a staff member from this office contact the two affected parties. One affected party did not respond and the other stated verbally that they objected to the release of the records, but did not provide reasons or written representations.

I then sent the Ministry's representations in their entirety to the appellant with a Notice of Inquiry, in order to seek representations. The appellant responded and advised that they have no additional factors which are relevant to this appeal.

RECORDS:

Two records are at issue in this appeal. The first record is a presentation entitled "An Overview of Tobacco Legislation and Enforcement in Ontario". The second record is comprised of minutes of the meeting that took place on February 25, 2008.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

The Ministry is relying on section 15(a) and section 15(b) to deny access to the records.

The Ministry advises that the meeting's attendees were representatives of the provincial government, the federal government, and a First Nations group. The Ministry submits that the representatives from the First Nations group are another "government" for the purposes of section 15 of the *Act* and that, having been notified of the request by the Ministry, they objected to the release of the records.

Section 15 states, in part:

> 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;
>
> …
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments.

Section 15(a): prejudice to intergovernmental relations

Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships [Orders PO-2247, PO-2369-F, PO-2715 and PO-2734].

In order for a record to qualify for exemption under section 15(a), an institution must establish that:

1. the record relates to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the record could reasonably be expected to prejudice the conduct of intergovernmental relations. [Reconsideration Order R-970003]

Part one: records relate to intergovernmental relations

The Ministry submits that the First Nations group is another government for the purpose of section 15 of the *Act*. The Ministry relies on Order P-1406, in which then Inquiry Officer Donald Hale found that "tripartite" relations between Ontario, Canada and "aboriginal governments" in the context of land claims settlements are "intergovernmental" for the purpose of section 15. The Ministry states that the records at issue relate to a meeting involving a similar configuration of parties, concerning an issue related to jurisdiction and governance. Therefore, the Ministry concludes, the records are part of "tripartite relations" and are, accordingly exempt from disclosure. [Note P-1406 was reconsidered in R-970003 but not on this point.]

The appellant and the two affected parties did not provide representations on this issue.

After a careful review of the records, I am satisfied that both records at issue relate to "intergovernmental relations" under the first part of the section 15(a) requirement. Past orders of this office have held that relations between Ontario and Canada which are reflected in records relating to First Nations land claim settlements are intergovernmental in nature for the purposes of section 15(a). [Orders 210, P-630, P-730, P-908, P-949, R-970003 and PO-2439]. While these records do not relate to land claims settlements, the relevant question under requirement one is whether the records "relate to" intergovernmental relations.

It is clear from reviewing the records that representatives from Ontario, Canada and a First Nations group were present at and participated in the meeting. The slide deck presentation served as background material to the meeting. The minutes of the meeting describe the perspectives of all the parties present at the meeting concerning jurisdiction and governance. In my view, similar to the circumstances that were present in the orders cited above, this type of meeting relates to intergovernmental relations, as do the records at issue.

In coming to that conclusion, I did not need to determine whether or not a First Nations group is a "government" for the purposes of section 15(a). My finding that the meeting relates to intergovernmental relations is based on the participation of the government of Canada.

However, I do note that the Federal Court of Appeal was faced with this issue in the context of a request for information made under the federal *Access to Information Act*. In the *Chippewas of Nawash First Nation*, [1999] F.C.J. No. 1822 Rothstein J.A. (as he was then), writing for the Federal Court of Appeal stated:

> …[T]here is limited evidence of significant probative value on the question of whether an Indian band is a government of the same nature as those referred to in section 13 of the *Access to Information Act*. We do not say that the question of Aboriginal self-government is not a well known issue that is currently subject to public debate. However, our decision must be based on evidence and on a matter of this significance and complexity, much more evidence would have to have been adduced…

In my view, the Ministry has failed to provide sufficient evidence to support its position, having merely stated its belief that the First Nations group is another government for the purpose of section 15. I agree with the position taken by Justice Rothstein that making a finding that a First Nations group is a government for the purposes of freedom of information legislation would require an analysis of significant and relevant evidence. I have not been presented with that type of evidence in this appeal.

Furthermore, I note that the federal *Access to Information Act* was amended following the Court's decision in the *Chippewas* appeal to expressly include "an aboriginal government" at section 13(1) of that *Act*. In addition, section 16 of the British Columbia *Freedom of Information and Protection of Privacy Act* expressly includes "an aboriginal government," which is defined in definitions at Schedule 1 of that statute to mean "an aboriginal organization exercising governmental functions." While in no way determinative of the question of whether a First Nations group is a "government" for purposes of section 15 of Ontario's *Act*, the apparent need for express provisions in the federal and British Columbia statutes combined with its absence in Ontario's *Act* reinforces my conclusion that there is not sufficient evidence to support the Ministry's conclusion.

Nevertheless, having concluded that the records relate to intergovernmental relations, I move to consider part two of the requirements of section 15(a) of the *Act*.

Part two: reasonable expectation of prejudice to intergovernmental conduct as a result of disclosure

This discretionary exemption was included in the *Act* in order to protect the interests of the government of Ontario in the conduct of intergovernmental relations. This exemption does not exist for the benefit of any other party, including other levels of government with which the province or the institution, as the case may be, is conducting intergovernmental relations.

The Ministry submits that releasing the records would prejudice the conduct of intergovernmental relations, particularly given that the representatives of the First Nations group oppose the release. The meeting during which the minutes were taken was closed to the public and relates to sensitive, ongoing discussions. The Ministry states:

> …there is ample reason to believe that relations between Ontario and the [named First Nations group] would be harmed were the [r]ecords to be disclosed.

The first record is a slide deck from a presentation entitled "An Overview of Tobacco Legislation and Enforcement in Ontario." The type of information contained in this record is publicly available on the Internet, such as Ontario's e-laws and, in many cases, provincial websites. For example, Ontario's Ministry of Revenue has tax bulletins available on its website, including information relating to the *Tobacco Tax Act* as it relates to First Nations (http://www.rev.gov.on.ca/en/bulletins/tt/tob2_2005.html). In Orders PO-1891-I and PO-2666, Senior Adjudicator David Goodis and Adjudicator Frank DeVries, respectively, held that disclosure of records that are publicly available do not fall within the scope of section 15(a), and

could not be reasonably expected to result in the harms set out in section 15(a). I agree with their approach.

The appellant has identified the subject matter of the meeting attended by the various participants as relating to contraband tobacco, and the Ministry itself has identified the content of the first record by its title as comprising "An Overview of Tobacco Legislation and Enforcement in Ontario." The governing legislation and the enforcement regime in Ontario relating to contraband tobacco are readily available to the public on various public websites. Consistent with the approach taken in Orders PO-1891-I and PO-2666, I am not satisfied that disclosure of this first record, which essentially refers to matters of general public knowledge, could reasonably be expected to result in the harms set out in section 15(a).

The second record consists of the minutes of the meeting at which representatives from Ontario, Canada and a First Nations group were present. Based on my review of this record, I conclude that the minutes reflect the perspectives of the various parties provided in confidence, and their release could discourage future frank discussions, if it became known that records from discussions of this type are subject to being released. I am satisfied that the character of the information in the minutes and the evident expectation of confidentiality attached to the discussions are sufficient to support the chilling effect suggested by the Ministry, and that section 15(a) therefore applies to that record.

Consequently, I find that there would be a reasonable expectation of prejudice to intergovernmental conduct as a result of disclosure of the minutes of the meeting involving representatives of Ontario, Canada and a First Nations group. Therefore, I find that this record is exempt under section 15(a) of the *Act*.

Section 15(b): information received from another government

Having found that the first record is not exempt under section 15(a), I will now consider the application of section 15(b) of the *Act* to that record.

The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [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.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666].

For a record to qualify for exemption under subsection 15(b), the institution must establish that:

1. the records reveal information received from another government or its agencies; and

2. the information has been received by an institution; and

3. the information has been received in confidence. [Order P-210].

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].

The Ministry submits that releasing the records would reveal information received in confidence from another government. In particular, the minutes capture in detail the perspective of the different parties present at the meeting and reveal the information that was provided by the parties. In addition, the record consisting of the presentation would, in effect, reveal the substance of the discussions that took place.

The Ministry states that the sharing of confidential information between governments is a key component of governmental operations and that releasing this type of information would lead other governments to stop sharing information with Ontario.

The first record, as previously described, is the slide deck from the presentation. I find that this record fails to meet the first part of the section 15(b) requirement. The slide deck was not received by the Ministry from another government or government agency. In fact, the record was prepared by the Ontario Provincial Police, which is an agency of the Ontario government itself. I also do not accept the Ministry's argument that disclosure of this record would reveal the substance of the discussions that took place at the meeting. The slide deck simply sets out the legislative scheme in Ontario pertaining to tobacco regulation and enforcement. As I previously indicated, much of this information is factual information that is publicly available. Disclosure of this factual information would not reveal information received in confidence. While this record may reveal the subject matter of the meeting, it certainly does not capture the substance of the discussions that ensued, nor the information that was shared by the participants at the meeting.

Consequently, as neither section 15(a) nor section 15(b) apply to this record, I will order its release.

Conversely, with respect to the minutes of the meeting, I have found that this record is exempt under section 15(a) of the *Act*.

EXERCISE OF DISCRETION

I must determine whether the Ministry properly exercised its discretion in denying access to the minutes of the meeting. The section 15 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)].

In its representations, the Ministry states:

> The Ministry has exercised its discretion in deciding not to release the [r]ecords. The Ministry is justifiably concerned that if it started releasing information that could be withheld under section 15, it would stop receiving information from other levels of government. The sharing of confidential information between governments is a key component of governmental operations.

The appellant and the affected parties made no representations on this issue.

I am satisfied that the Ministry properly exercised its discretion, taking into consideration relevant factors and not taking into consideration irrelevant factors. I am also satisfied that the Ministry did not exercise its discretion in bad faith or for an improper purpose. Therefore, I uphold the Ministry's exercise of discretion in denying access to the minutes of the meeting.

PUBLIC INTEREST OVERRIDE

I will now determine whether the public interest override at section 23 of the *Act* is applicable to the minutes of the meeting.

Section 23 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.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The appellant raised the public interest override as an issue in this appeal during the mediation stage. However, in response to the Notice of Inquiry, the appellant did not provide any representations in relation to section 23.

The Ministry submits that there is no compelling public interest in the records that would "clearly outweigh the purpose of the" section 15 exemption, such that section 23 would apply. The Ministry is of the view that, should the records be released, the effectiveness of the exemption at section 15 would be questioned by other levels of government. In addition, the

Ministry states that section 15 should not be lightly overridden and, if it is, this may cause other governments to stop sharing information with the Ministry.

While the regulation and enforcement of tobacco in Ontario may be of public interest, I have not been presented with any evidence from the appellant as to why this interest clearly outweighs the purpose of the exemption at section 15, nor is the basis for such a conclusion evident from the record I have found exempt, or from any other material before me. Consequently, I find that section 23 is not applicable in this appeal.

ORDER:

1. I order the Ministry to disclose the slide deck presentation in its entirety to the appellant and to do so by **July 29, 2010** but not before **July 23, 2010**.

2. I uphold the Ministry's decision to deny access to the minutes of the meeting.

Original Signed by: June 23, 2010
Brian Beamish
Assistant Commissioner