



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

ORDER PO-2919

Appeal PA09-337

Ministry of Finance



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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information concerning the costs and revenue estimates related to the proposed harmonized sales tax (HST)¹ for the energy sector. The request was for:

- The estimated annual cost to the average household (or individual consumer) of higher sales taxes resulting from the full implementation of the [HST], excluding the impact of income tax reductions or lower prices potentially caused by business savings from the [HST].
- The estimated total increase in provincial revenue from higher sales taxes resulting from the full implementation of the [HST], excluding the change to revenue resulting from businesses not having to pay the [HST] on business inputs, the impact of personal and corporate income tax reductions, lower prices potentially caused by administrative savings from the [HST], transfers from the federal government. (In other words, I'd like this request to determine the mount of revenue raised from individual consumers).
- The estimated annual cost to the average household (or individual consumer) of higher sales taxes on energy (e.g. heating fuels, gasoline, etc.) resulting from the full implementation of the [HST], excluding the impact of income tax reductions or lower prices potentially caused by business savings from the [HST].
- The estimated total increase in provincial revenue from the higher sales taxes **on energy** (e.g. heating fuels, gasoline) resulting from the full implementation of the [HST], excluding the impact of income tax reduction, lower prices potentially caused by business savings from the [HST], and transfers from the federal government.

[emphasis in original]

The Ministry located responsive records and denied access to them in their entirety, in accordance with sections 12(1)(a), (b), (c), (d), (e) (Cabinet records), 13(1) (advice to government), 15(1), (b), (c) (relations with other governments) and 18(1)(a), (b), (c), (d), (e) (economic interests) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision. During mediation, the Ministry provided the appellant with an index of records. Further mediation was not possible and the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

¹ The Ministry submitted the following explanation of the HST: Under a single value-added sales tax system, Ontario's broad based RST [retail sales tax] was converted to a value-added tax structure and combine with the GST to create a federally administered single sales tax.

During my inquiry into the appeal, I sought and received representations from the Ministry and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

RECORDS:

Record Number and Description	Number of Pages	Exemptions Claimed
1 – “How Much?...” Place mat	1	Denied in part – 13, 15(a), (b), 18(1)(d),
2 – Summary of Fiscal Impacts (2i)	1	Denied in part – 12(b), (c), (d) and (e), 13, 15(a), (b), 18(1)(d), non-responsive information
3 – OVAT on Consumer Energy note	1	Denied in part – 12(b), (c), (d) and (e), 15(a), (b), 18(1)(d)
4 – Home Heating Estimates	1	Denied in full – 12(b), (c), (d) and (e), 15(a), (b), 18(1)(d)
5 – Sales Tax Reform – Sector Impacts (Utilities Sector, Including Energy)	3	Denied in full – 12(b), (c), (d) and (e), 15(a), (b), 18(1)(d),
8 – Transforming Ontario’s Tax System Slide Deck	74	Only 3 pages were identified by Ministry as responsive and denied in full – 12(b), (c), (d), (e), 13, 15(a), (b), 18(1)(d)
9 – Rationale for Sales Tax Reform and the Estimated Pass-through Cost Savings Slide Deck	19	Only 3 pages were identified by the Ministry as responsive and denied in full – 12(b), (c), (d), (e), 13, 15(a), (b), 18(1)(d)
10 – Excel Spreadsheet	4	Denied in full – 12(b), (c), (d), (e), 13, 15(a), (b), 18(1)(d)

In its representations, the Ministry submitted the following:

- Record 6 had been withdrawn from the appeal by the Ministry as being non-responsive;
- The responsive portions of Record 7, which had been withheld under section 13(1), were being disclosed to the appellant.

I asked the appellant to comment on whether Record 6 was responsive to his request in his representations. My discussion on this issue is set out below.

As the responsive portions of Record 7 were disclosed to the appellant, I have removed it from the scope of this appeal.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The Ministry submits on page 9 of its representations that Record 6 is non-responsive to the appellant's request. The Ministry submits that this record contains information relating to retail sales taxes only for the tax years reflected at the top of the table. This information, the Ministry submits, relates to taxation years that predate 2009, when the HST did not apply in Ontario.

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 appellant's representations on this issue do not directly address whether Record 6 is responsive to his request. Instead, the appellant argues that his request was for the estimates of the impact of the HST on consumers and provincial revenues, not the particular documents containing the estimates. The appellant explains:

It's unlikely that the requested estimates were *only* located in the documents contained in the Index of Records. Presumably, an analyst with the Ministry produced the estimates in a spreadsheet or computer program and transferred it to briefing material.

As the Appellant's search only requested these estimates and not necessarily the documents in which the estimates were contained, the Appellant would be satisfied with computer generated spreadsheets or data.

Finally, the appellant concludes by submitting that Order 50 of this office requires that the Ministry provide him with the responsive information, in this case the estimated amounts, in a spreadsheet.

In reply, the Ministry submits that based on its careful searches, it determined that the responsive information only exists in the responsive records and does not exist as "independent discrete data separate and apart from the responsive records." The Ministry goes on to distinguish the facts in the present appeal from those in Order 50. The Ministry states:

In the case of IPC Order 50, the information requested was available on the database however the specific report was not generated by the institution. That is, the information existed but the records did not. The IPC ordered that records be produced since the information existed on the database.

Accordingly, the Ministry concludes that it should not be required to produce a new record to provide information which does not exist independently on the database.

I will first address whether Record 6 is responsive to the appellant's request. As stated above, in order to be responsive information, the information must "reasonably relate" to the request. In the present appeal, the appellant's request, as set out above, relates to the estimated amounts of the impact of the HST on consumers and provincial revenue. I agree with the Ministry that the information on Record 6 contains information which predates the HST in Ontario and would not, therefore, provide information on its impact on consumers and provincial revenue. Accordingly, the information in Record 6 does not reasonably relate to the appellant's request and is not responsive. I will not consider Record 6 further in this appeal.

I will now address the appellant's argument that the Ministry should have provided the responsive information in another format which would be more accessible, rather than identifying records containing the responsive information.

I accept the Ministry's submission that the responsive information to the appellant's request is only available in the form of the requested records and do not exist as independent discrete data separate and apart from them. As stated in Order 50:

The *Act* requires the institution to provide the requester with access to all relevant records, however, in most cases, the *Act* does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the *Act* gives requesters a right (subject to the exemptions contained in the *Act*) to the "raw material" which would answer all or part of a request, but ... the institution is not required to organize this information into a particular format before disclosing it to the requester.

In summary, I uphold the Ministry's decision that Record 6 is not responsive to the appellant's request and I will not be addressing access to this record in the remainder of my decision.

CABINET RECORDS

The Ministry claims that the introductory wording of the mandatory exemption in section 12(1), and the specific provisions at 12(1)(b) through (d), apply to Records 2, 3, 4, 5, 8, 9 and 10. Section 12(1) reads, in part:

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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

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 an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various sub-paragraphs 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].

Section 12(1): Introductory wording

In support of its position that the introductory wording of section 12(1) applies, the Ministry provided a detailed description of the budget process by comparing and contrasting the "usual" Cabinet submission process with the budget process. The Cabinet submission process involves

the development of a Cabinet submission with recommendations for proposed policies that are submitted to various Cabinet committees for review. The Ministry explains how the budget process is different:

The Budget process proceeds on a separate track from the Cabinet process described above. Out of administrative and operational necessity including the requirement for Budget secrecy, steps 1 to 7 [of the Cabinet approval process] occur concurrently due to the nature of the Budget and the Budget process itself.

...

Pre-budget public consultations are not conducted until after November 15, after the Minister's presentation of the Economic Outlook and Fiscal Review to the Legislative Assembly as required under section 6 of the *FTAA*. Following the Minister's presentation, policy development at the Ministry of Finance (the "Ministry") for Budget matters will begin which usually occurs sometime in the late fall or early winter leading up to the next year's Budget. In recent years, the Budget has been introduced before the start of the government's fiscal year which begins on April 1st. *As a result of the reduced time frame, the Budget process proceeds on an accelerated basis without a formal process for document preparation and tracking.*

Given that the Budget is the major policy document outlining the government's plans for the upcoming fiscal year it will include proposals from throughout the government and not just those of the Ministry. The development, review and legislative drafting processes occur concurrently, as various proposals work their way through the Budget process. Before Budget day itself, the Minister will attend Cabinet to present the proposed Budget measures for deliberation; however, it is open to the Minister to discuss proposed measures with Cabinet colleagues outside of Cabinet.

Unlike the Cabinet process described above, Cabinet does not have formal advance notice of what may or may not be included in an upcoming Budget as Budget matters are not referred to a committee for review. *In addition, since there is no formal tracking process for Budget documentation development or review, whatever documents and information the Minister brings to Cabinet or discusses with Cabinet colleagues are determined by the Minister directly.* Eventually, the various processes merge when the Minister presents the Budget to Treasury Board and Management Board of Cabinet on the morning of the Budget for approval following which a Cabinet meeting is convened to approve the Budget. Once the Budget has been approved by Cabinet it is presented to the Caucus before being presented to the House.

[italics added]

The Ministry goes on to explain the role of Office of the Budget, Taxation and Pensions (“OBTP”) as the focal point for the planning and production processes relating to the Budget².

The Ministry submits that disclosure of the records would permit the drawing of accurate inferences regarding the substance of deliberations of Cabinet as the information set out in the records relating to the Budget formed the basis of Cabinet discussions concerning it. Further, the Ministry submits that:

Documentation developed for Budget proposals are prepared on the assumption that all the information will proceed to Cabinet for deliberation by necessity as the Minister only has statutory authority under s. 5(1) of *MTEA* [the *Ministry of Treasury and Economics Act*] to “recommend to the Executive Council finance, economic, accounting and taxation policy”. Final decisions regarding Budget proposals will be made by the Executive Council (i.e. Cabinet).

Until the proposal is considered by Cabinet, Ministry staff have no way of knowing which proposals will eventually be approved for inclusion in the Budget and which ones will not. In addition, the Minister decides for himself which material and documentation he will bring with him to Cabinet.

It is the Ministry’s position that Records 2, 3, 5, 8, 9 and 10 qualify for exemption under section 12(1). These records were all prepared for the purpose of briefing the Minister on the proposal to transition to the HST which was eventually brought to Cabinet for deliberation.

The Ministry provided further submissions on the application of the introductory wording of section 12(1), in appendices to its representations and reply representations. I did not disclose these appendices to the appellant as disclosure to him would have revealed information that would be subject to exemptions contained in the *Act*.

In response, the appellant argues that the Ministry has not established the necessary linkage between the contents of the records and the actual substance of Cabinet deliberations. The appellant submits:

Knowing how much the consumer might pay for energy, for example, cannot possibly help the requester (or the public) infer what was said at the Cabinet table. Cabinet has decided to implement the HST and having a better understanding of the fiscal implications would not allow the requester to infer the substance of those discussions.

In reply, the Ministry emphasizes that all documentation developed for budget proposals are prepared on the assumption that all the information will proceed to Cabinet for deliberation. In

² The Ministry provided an extensive description of the OBTP’s responsibilities however, what is note-worthy at this stage, is that the bulk of the information developed by the OBTP is financial and statistical information concerning the fiscal impact of a proposed measure.

addition, all proposed budget measures are submitted to Cabinet for deliberation for inclusion in the Budget.

To establish that the introductory wording of the section 12 exemption applies, the Ministry is required to provide sufficient evidence to satisfy me that disclosure of the records at issue would either reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences regarding the substance of any deliberations on the issue of the HST in the Budget. In my view, the Ministry has failed to provide me with such evidence.

The Ministry did not provide me with evidence that the records were actually placed before Cabinet or its committees. The Ministry has established that the Budget process, while analogous to the Cabinet process, is more fluid, with policy development, review, and approval occurring concurrently. I accept the Ministry's position that the records were prepared by staff of the OBTP under the belief that these records could possibly be put before Cabinet. I also accept the Ministry's submission that the Minister may discuss the Budget proposals with Cabinet colleagues before the Budget is presented to Cabinet for deliberation. Unfortunately, none of this information advances the Ministry's position that disclosure of the records would reveal the substance of deliberations of Cabinet or its committees.

As noted above, the Ministry provided confidential evidence to establish that the introductory wording of section 12(1) applied to exempt the records. Without providing the particulars, the evidence relates to the fact that:

- The Minister of Finance attended Cabinet before the Budget was presented to discuss the proposed Budget measures;
- There was a briefing of the Fiscal Prep Committee relating to the HST;
- There was a meeting of Treasury Board and Management Board of Cabinet for the purposes of reviewing and approving the Budget
- HST material was provided to Cabinet for the purpose of reviewing and approving the Budget.

The Ministry makes additional submissions on the fact that the Fiscal Prep Committee should be considered a Cabinet Committee for the purposes of section 12(1).

From my review of the evidence and the records at issue, I find that the Ministry has failed to establish a clear and direct linkage between the information at issue in the records and Cabinet deliberations. Despite all the evidence provided, the Ministry did not provide me with sufficiently detailed evidence that the records at issue were provided to Cabinet or its committees for its deliberations. The fact that records were prepared for a budget proposal that may end up with Cabinet or may have been included in the documentation provided to Cabinet is not enough. The evidence provided by the Ministry is too vague and fails to meet the evidentiary standard of proof required.

Further, the Ministry has not provided me with sufficient evidence to suggest that the information at issue, namely revenue and cost estimates, were deliberated upon by Cabinet or its committees. Even if I accept the Ministry's argument that the Fiscal Prep Committee is a

Cabinet committee for the purposes of section 12(1), I find that the Ministry has not provided me with sufficient evidence to suggest that the substance of this committee's deliberations would be revealed by disclosing the records at issue. The evidence provided by the Ministry suggests that HST was a topic of discussion and briefings; however, the subject matter or the matter being deliberated on is evident neither from the record nor the Ministry's evidence. Past orders of this office have held that the word "deliberations" means discussions with a view to making a decision [Order M-184]. It is not clear to me nor am I able to infer from the Ministry's representations or the records what decision was before Cabinet or its committees.

Accordingly, I find that the introductory wording of section 12(1) does not apply to exempt Records 2, 3, 5, 8, 9 and 10.

I will now proceed to consider whether the specific provisions in section 12(1) apply to exempt the records.

Section 12(1)(b): policy options or recommendations

The Ministry submits that section 12(1)(b) applies to Records 8 and 9 and states:

Record 8 is a slide deck that was prepared for the purpose of briefing the Minister on the various issues arising from discussions between Ontario and Canada with respect to the possible implementation of the HST in the Budget. The slide deck summarizes the various options and issues relevant to sales tax harmonization.

Record 9 is a slide deck that was prepared for the purpose of briefing the Minister. It sets out the rationale for implementing the transition to a single sales tax by setting out the economic impacts of harmonization and presents the distributional impacts.

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 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].

The appellant submits that section 12(1)(b) does not apply as the records were not prepared for Cabinet.

Based on my review of the records, I find that neither record contains policy options or recommendations. The responsive portions of Records 8 and 9 at issue contain information relating to the distributional impacts of the HST. Neither record contains policy options or recommendations. Accordingly, I find that Records 8 and 9 do not qualify for exemption under section 12(1)(b).

Section 12(1)(c): background explanations or analyses of problems

The Ministry submits that section 12(1)(c) applies to exempt Records 2, 3, 5 and 10. The Ministry states:

The exemption under clause 12(1)(c) may be claimed where the record contains background explanations or analyses submitted to Executive Council or its committees for their consideration in making decisions before those decisions are made and implemented.

Record 2 is an analysis of the fiscal impact of the proposed tax reform measures on provincial tax revenues up to the 2016-17 fiscal year.

Record 3 is an analysis of the breakdown in increased provincial revenues that would result from the imposition of HST on certain energy sources.

Record 5 is a briefing note prepared for the Minister regarding the impact of sales tax reform on the energy sector and provides narrative for Record 3.

Record 10 is comprised of charts and tables spread over 4 pages. These charts and tables provide background information used in briefing material for the Minister (e.g. Record 9).

The Ministry further argues that while the transition to the HST was announced in the 2009 Budget and legislation permitting the transition to the HST has now received Royal Assent, the HST is still in the process of being implemented.

Section 12(1)(c) is prospective in its application. It will apply to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact [Orders PO-2554 and PO-2677].

Based on my review of the Records 2, 3, 5 and 10, I find that section 12(1)(c) does not apply to exempt these records. Even if I accepted the Ministry's characterization of the information contained in these records, the fact is that this exemption is prospective in application. While the Ministry argues that the HST has not yet been fully implemented, it did not provide me with evidence that the measures addressed in the records have not yet been implemented.

Section 12(1)(d): consultation among ministers

The Ministry submits that section 12(1)(d) applies to exempt Records 2, 3, 5 and 10. The Ministry states:

The exemption under clause 12(1)(d) may be claimed where the record is used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

As discussed above, throughout the Budget process there are ongoing discussions between the Minister, the Secretary of Cabinet and staff of the Premier's Office and Cabinet members regarding proposed Budget measures. As the 2009 Budget introduced the most significant tax reform measures in a decade, the consensus of Cabinet would have been necessary in order to proceed with the proposed measures.

It is the Ministry's position that Records 2, 3, 5 and 10 qualify for exemption under section 12(1)(d) as, given the significance of the proposed reforms, the information in these Records would, presumably have been discussed between the Minister and his Cabinet colleagues.

The appellant submits that the Ministry has not provided sufficient evidence to warrant the use of section 12(1)(d). The appellant states, "[The Ministry] suggests that the seriousness of the budget decision would have "presumably" meant that the records would have been shared and discussed among ministers, but can't say for sure."

To qualify for exemption under section 12(1)(d), the record must either have been used for, or reflect, consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy [Order P-920].

Based on my review of the records and the representations of the parties, I find that section 12(1)(d) does not apply. I agree with the appellant's submission that the Ministry has not provided sufficient evidence to demonstrate that the records at issue were used or reflect consultation amongst the Minister and other members of the Cabinet relating to the budget. The Ministry's submission that the records would have presumably been discussed with the Minister and his Cabinet colleagues is imprecise and not sufficiently specific.

In summary, I find that neither the introductory wording of section 12(1) nor the exemptions listed in subsections (b) through (d) apply to exempt the records at issue from disclosure.

ADVICE TO GOVERNMENT

The Ministry submits that section 13(1) applies to exempt Records 1, 2, 3, 5, 8, 9 and 10.

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.)].

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 Order PO-1993, upheld on judicial review in *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)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

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)*, (cited above); 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)*, (cited above)].

The Ministry submits that the Office of the Budget, Taxation and Pensions' work product includes tables and charts, rather than narrative in a briefing note or memo. As such, the Ministry submits that:

It is vital that staff be in a position to advise the Minister freely with respect to the full fiscal impact of proposed tax measures as the decision will have an impact on the economy which could be damaging to the economy if a decision is made without full knowledge of the fiscal consequences of the proposed policy.

The Ministry provided detailed representations on the application of section 13(1) to each record, as follows:

Record 1 is a summary of estimates relating to the proposed tax measures.

The severed portion is exempt under section 13 as it contains advice to the Minister of the estimates of the impact on energy costs prior to the pass-through of business savings.

The figures presented in the record were prepared to brief the Minister on confidential tax policy proposals that were considered for the Budget. The record was used to provide the Minister with the *background material* on the budget proposals.

Record 2 is a table summarizing the estimated fiscal impact that a group of sales tax and income tax measures being proposed for the Budget would have on provincial tax revenues.

The record was used to brief the Minister on the projected fiscal impact of the proposed budget measures and assisted in decision-making and provided input into the fiscal plan for the 2009 Budget.

Record 3 is a table setting out an estimate of the increased provincial revenues that would result from the imposition of the HST on certain energy sources. This information was prepared to inform the Minister of the impact of the HST on consumer purchases of energy as part of the Budget process.

Record 5 is a briefing note prepared for the Minister regarding the impact of sales tax reform on the energy sector and provides additional narrative to Record 3...This record was prepared for the Minister to provide advice concerning the fiscal impact on energy sources arising from the transition to the HST.

Record 8 is a slide deck ..that was prepared for the purpose of briefing the Minister on the various issues arising from the discussions between Ontario and Canada with respect to the possible implementation of the HST in the Budget.

Only slides 57 and 59 of this record are responsive to the access request...Slides 57 and 59 were used to provide *background information* for the discussions between Ontario and Canada.

Record 9 is a slide deck ..that was prepared for the purpose of briefing the Minister on the economic and distributional impacts of sales tax harmonization...Only slides 10 and 12 of this record are responsive to the access request.

Record 10 is comprised of charts and tables spread over 4 pages.

Page 10-1 is comprised of 2 tables and 2 bar charts. One table summarizes the estimated aggregate impact of the HST based on income group before the pass-through of business savings, but after the savings provided through the income tax system, and as a result, that table and the corresponding bar chart are non-responsive.

Only the totals reflected in the other table and chart are responsive.

Page 10-3 is a set of tables with the aggregate impacts of the proposed tax measures on households based on income group before and after the pass-through of business savings.

Page 10-4 is a set of tables with the raw model output of the aggregate impacts of the various components of proposed tax measures on households based on income group before and after the pass-through of business savings.

An exemption under section 13 has been claimed for Record 10 as these charts and tables provide underlying *background information* that was used in briefing material prepared for the Minister on budget proposals.

The Ministry emphasizes that although the OBTP's advice and recommendation takes the form of tables and charts instead of briefing notes or memos, the substance and purpose of these records was to provide advice and recommendation to the Minister and, ultimately, Cabinet with respect to the budget measures

The appellant submits that the records contain factual or background information and do not suggest a course of action and as such can not be considered advice and recommendation for the purposes of section 13(1).

Based on my review of the records and the representations of the parties, I find that the records do not qualify for exemption under section 13(1). While I agree with the Ministry's argument that the substance and purpose of the record should prevail over its actual form, I find that in the present appeal, the substance of the information claimed exempt, does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. The information at issue consists of financial information about the impact of the HST and the estimates for the impact on provincial revenues. This is not "advice or recommendation" for the purpose of section 13(1). I find support for my finding in past orders of this office, and especially in

Order PO-2115, where former Assistant Commissioner Tom Mitchinson elaborated on the meaning of “advice”:

In my view, the key remaining contextual issue in this appeal is whether any or all of the remaining portions of records consist of “advice or recommendations”, as those terms are used in section 13(1).

I recently reviewed the meaning of the word “advice” for the purpose of section 13(1) in Order PO-2028. In that order, the Ministry of Northern Development and Mines took the position that “advice” should be broadly defined to include “information, notification, cautions, or views where these relate to a government decision-making process”. I did not agree, and stated:

... [the institution’s position] flies in the face of a long line of jurisprudence from this office defining the term “advice and recommendations” that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word “advice” in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

I accept the Assistant Commissioner’s approach and apply it here.

The Ministry has described the information withheld under section 13(1) as background material provided to brief the Minister. Neither the Ministry’s representations nor the records suggest a course of action that would be ultimately accepted or rejected by the Minister based on the information contained in the records. Accordingly, I find that the records do not contain advice or recommendations for the purposes of section 13(1).

RELATIONS WITH OTHER GOVERNMENTS

The Ministry takes the position that all of the records qualify for exemption under sections 15(a) and (b), which state:

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; or

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 [Orders PO-2247, PO-2369-F, PO-2715 and PO-2734]. Similarly, 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 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.); see also Order PO-2439].

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 states that it is entitled to access highly confidential federal data from Statistics Canada and Finance Canada and explains:

...OBTP is tasked with responsibility for developing budget proposals through research and analysis. Central to this role is the preparation of projections, particularly the fiscal and distributional impacts of a proposed measure. In developing projections that are accurate and meaningful, the Ministry relies on its access to comprehensive federal data. Access to this data is critical to the tax policy development process.

The Ministry argues that disclosure of the information at issue would undermine the Ministry’s relation with the federal government and would affect the future exchange of information between the two governments. The Ministry submits that disclosure may result in discontinued access to either Statistics Canada or Finance Canada data and thus negatively impact its ability to review the fiscal impact of future Budget proposals.

On the application of section 15 to the specific records, the Ministry submissions which I have summarized as follows:

- Record 1 contains figures based on confidential Statistics Canada data.

- Record 2 contains numbers which are based on figures provided in confidence by Finance Canada.
- Record 3 contains figures that are from confidential Statistics Canada data.
- Record 4 contains figures that are based on figures from Record 3 which in turn are from Statistics Canada data.
- Record 5 contains figures that are in Records 3 and 4 and are developed from Statistics Canada data.
- Record 8 contains information based on figures provided by Finance Canada and Statistics Canada data.
- Record 9 contains figures based on figures provided by Finance Canada.
- Record 10 contains figures that are based on figures provided by Finance Canada.

The Ministry explains that it obtains confidential data from Statistics Canada pursuant to an agreement dated December 16, 2002 and argues that it would suffer harm should disclosure occur. The Ministry states:

Without access to this detailed data [Statistics Canada data], estimates and projections developed for proposed tax measures and tax expenditure reporting would be of limited use in informing the public process and meeting the legislated tax expenditure reporting requirements.

Terms of the Agreement provide that the Ministry is not permitted to disclose any of the confidential information obtained other than to StatsCan employees. In addition, any use of the information other than for statistical, research or verification purposes requires the written consent of StatsCan.

To release these figures publicly without StatCan's consent would be interpreted as a breach of the StatsCan Agreement and presents the risk that StatsCan would stop supplying the Ministry with the confidential data.

The Ministry goes on to explain that it received confidential data from the Department of Finance (Finance Canada) during the negotiations on harmonizing Ontario's retail sales tax (RST) with the federal Goods and Services Tax (GST). The Ministry's access to this data was done through a secured computer connection and using password encrypted files. The Ministry explains the level of confidentiality for the data it received:

These files are considered Classified "Secret" information by the federal government. Classified information is reserved for information relating to national security and is designated as: "Top Secret", "Secret" or Confidential. A

“Secret” designation applies when compromise might reasonably cause serious injury to the national interest.

Finally, the Ministry submits that its relations with the federal government require a level of trust that would be harmed should the information received in confidence be disclosed. The Ministry states:

This loss of trust in Ontario’s ability to preserve confidentiality could impair future federal-provincial relations in areas beyond tax issues (e.g. pension policy). This would seriously harm Ontario’s fiscal and economic interests through the loss of confidential data and information from the federal government.

The appellant argues that the Ministry has not provided detailed and convincing evidence of a reasonable expectation of harm from the release of the records. The appellant submits that the Ministry’s representations on the harm are speculative and do not describe in detail the specific consequences of disclosure. The appellant states:

It’s unclear exactly what information is governed by the Ministry’s agreement with Statistics Canada or Finance Canada...

The sensitivities around releasing information provided by Statistics Canada or Finance Canada tend to be related to concerns around the release of “raw” data – micro-level data that could be used to identify detailed information about individuals (e.g. income tax paid) or companies (e.g. profits, cost structure). The Appellant’s request sought a calculation that may be based on this information, not the sensitive “raw” data itself.

Based on my review of the records, I find that section 15(b) applies to some of the information withheld in Records 3, 4, 5 and 8. I accept the Ministry’s submission that disclosure of the information in these records could reasonably be expected to reveal information that it received in confidence from either Statistics Canada or Finance Canada. Accordingly, I find that section 15(b) applies to exempt the following information:

- **Record 3:** The figures in the table just above the total. I accept that disclosure of these figures would reveal information received in confidence from Statistics Canada.
- **Record 4:** The figures listed in the last column of the table above the total. I accept that disclosure of these figures would reveal information received in confidence from Statistics Canada.
- **Record 5:** The two figures that are also found in Records 3 and 4. The first figure is not exempted under section 15. I accept that disclosure of these figures would reveal information received in confidence from Statistics Canada.

- **Record 8:** On page 59, the information in the second column of the table above the totals. I accept that disclosure of these figures would reveal information received in confidence from Finance Canada.

The rest of the information contained in these records are estimates which the Ministry describes as having been “developed” or “based on” information received from Statistics Canada. Based on my review of this information and the Ministry’s description, I conclude that these estimates are a result of calculations using information received in confidence. I am unable to find that disclosure of the “total” amounts or amounts that are “based on” information received in confidence could reasonably be expected to reveal information received in confidence from Statistics Canada. Further, I also do not find that disclosure of these numbers could reasonably be expected to prejudice the conduct of intergovernmental relations between the government of Ontario and the federal government. The Ministry has not provided the necessary detailed and convincing evidence that disclosure of this information could reasonably be expected to result in the harms set out in sections 15(a) and (b).

For similar reasons, I find that the information in Records 1, 2, 9 and 10 are also not exempt under sections 15(a) and (b). The Ministry describes the withheld information on these pages as being based on figures provided by either Statistics Canada or Finance Canada. As stated above, these figures that have been withheld by the Ministry appear to have been a result of calculations done by the Ministry and does not disclose the actual information received from Statistics Canada or Finance Canada. The Ministry has not provided detailed and convincing evidence that disclosure of these amounts could reasonably be expected to result in the harms set out in sections 15(a) and (b).

Accordingly, I find that only portions of Records 3, 4, 5 and 8 are exempt under section 15(b) subject to my finding on the Ministry’s exercise of discretion below.

I will consider the application of section 18(1)(d) to the information remaining at issue in Records 1, 2, 3, 4, 5, 8, 9 and 10.

ECONOMIC AND OTHER INTERESTS

The Ministry submits that section 18(1)(d) applies to exempt the information withheld in Records 1, 2, 3, 4, 5, 8, 9 and 10. Section 18(1)(d) states,

A head may refuse to disclose a record that contains,

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

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen’s Printer, 1980) (the Williams

Commission Report) explains the rationale for including a “valuable government information” exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(d) 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.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Section 18(1)(d): injury to financial interests

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the “ability of the Government of Ontario to manage the economy of Ontario”, section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

The Ministry submits that disclosure of the withheld information would result in the harm enunciated in section 18(1)(d) as:

..[it] would present an incomplete picture of the impact of the HST in Ontario. The information requested would provide an estimate of the amount of HST that Ontario individuals and households would pay in excess of the amount of retail sales tax that they currently pay. This estimate would significantly overstate the expected impact of the HST since it would not take into account the savings that businesses are reasonably expected to pass on to consumers by generally being allowed to claim a credit for the amount of HST paid on business inputs.

...

Presenting an incomplete picture of the impact of the HST could be injurious to the financial interests of Ontario and the ability of the Government to manage the economy. Especially during the time of economic uncertainty, an incomplete picture could have a negative effect on consumer confidence and lead to a decrease in consumer spending because of a general misapprehension of the impact of the HST. A decrease in consumer spending would in turn have an adverse effect on economic growth and job creation and add considerably to the challenges of the Government in managing the economy of the Province.

The Ministry provided record by record representations on the application of section 18(1)(d), however, the main point in its representations is that disclosure of the figures would present an incomplete picture of the impact of the HST.

The appellant submits that the Ministry's arguments are speculative and do not provide "detailed and convincing" evidence to support its claim that releasing the information could be "injurious to the government's ability to manage the economy". The appellant submits that the Ministry could have cited consumer confidence polls that "examine the way people perceive the HST" to establish a reasonable expectation of harm. Finally, the appellant submits that it could be argued that the Ministry's disclosure of information regarding the impact of HST has been one-sided thus far.

The Ministry, as stated above, was given an opportunity to respond to the appellant's representations. In its reply representations, the Ministry provided additional information and support of the overall impact of the HST.

From my review of the representations, I find the Ministry and the appellant's arguments about the "true" impact of the HST to be irrelevant. The Ministry was required to provide detailed and convincing evidence that disclosure of the information at issue could reasonably be expected to be injurious to the financial interests of the Government of Ontario. It has failed to do so. The Ministry's submissions are speculative at best and its generalized statements as to the anticipated harm do not provide the detailed and convincing evidence necessary for me to find that the exemption in section 18(1)(d) applies.

Accordingly, I find that section 18(1)(d) does not apply to exempt Records 1, 2, 9 and 10 and the portions of Records 3, 4, 5 and 8 I have found not exempt under section 15. As no further exemptions were claimed for these records, I will order these records disclosed to the appellant.

EXERCISE OF DISCRETION

As I have found that some of the information is exempt under section 15(b) of the *Act*, I must now consider the Ministry's exercise of discretion.

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 support of its exercise of discretion in applying section 15, the Ministry considered the need to preserve the confidentiality of information provided in confidence by the federal government and the necessity of respecting and preserving the longstanding working relationship with the federal government.

The appellant submits that the Ministry improperly exercised its discretion in withholding the information under section 15.

Based on my review of the records and the representations of the Ministry, I find that the Ministry's exercise of discretion relating to section 15 to be proper. The Ministry properly considered the wording of the exemption and the interests it seeks to protect as well as the nature of the information and the effect of disclosure on its relationship with the federal government.

Accordingly, I uphold the Ministry's exercise of discretion.

ORDER:

1. I order the Ministry to disclose Records 1, 2, 9 and 10 and the portions of Records 3, 4, 5 and 8, I have found not to be exempt to the appellant by **November 16, 2010**. I have provided the Ministry with a highlighted copy of Records 1, 3, 4, 5, and 8 with this order identifying the information to be withheld. To be clear, the information highlighted is **not** to be disclosed to the appellant.
2. I uphold the Ministry's decision to withhold portions of Records 1, 3, 4, 5 and 8.
3. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

original signed by: _____
Stephanie Haly
Adjudicator

October 14, 2010