



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

ORDER PO-2920

Appeal PA09-449

Ministry of Training, Colleges and Universities



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NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a detailed multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records concerning:

- the 2006 Ontario-Quebec Construction Labour Mobility Agreement regarding electricians; and,
- provisional certificates of qualification under the *Trades Qualification and Apprenticeship Act* (TQAA).

The Ministry located the responsive records and issued a decision providing partial access to them, citing sections 12 (Cabinet records), 13(1) (advice or recommendations), 15 (relations with other governments), 18 (economic and other interests) and 19 (solicitor-client privilege) of the *Act*. The Ministry advised that:

...the statistics regarding the issuance of provisional certificates is incomplete between 1999 to November 2006. Data is missing because many regional Field Offices disposed of their records after three years, in keeping with the Records Retention Schedule...

In the index which was provided to the appellant with the records, the Ministry noted that non-responsive information had been severed from three of the records.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant confirmed that he is appealing the severances made under sections 12, 13, 15, 18 and 19, the removal of non-responsive information and the search undertaken for records. The appellant removed from the scope of his request the severances made under section 18 on Records 33, 34 and 35. The Ministry confirmed that a sentence severed on Records 33 and 34 was in fact disclosed in Record 35; accordingly it advised that it is no longer relying on the exemption in section 15 for that information.

No other mediation was possible and the file was moved to adjudication where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry seeking its representations. I received representations from the Ministry, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. In its representations, the Ministry withdrew its reliance on section 19 for Record 14 and section 18 for Records 47 to 49. Therefore, sections 18 and 19 are no longer at issue. In response to the Notice of Inquiry, the appellant advised that he would not be providing representations but he continued to seek access to the records.

RECORDS:

The records at issue are described in the following chart:

Ministry Record Number	Description of Record	Released (?)	Exemption(s) Claimed
2	[undated] Provisional Certificates	Partial	s.13
15	2009-02-11 Email - Manager, Standards and Assessment to Senior Policy Adviser, Inter-Jurisdictional Relations Unit et al RE Update on Que-Ont	Partial	s.15(b)
24	2009-05-27 Email - Manager, Standards and Assessment to Manager, Standards and Assessment et al RE Electricians Matching and CCDA	Partial	s.12
25	2009-05-27 Email - Manager - Policy and Project Coordination Unit to Manager, Standards and Assessment et al RE Electricians Matching and CCDA	Partial	s.12, s.15(b)
26	2009-05-22 Email - Manager, Inter-Jurisdictional Relations Unit to Policy Analyst, Research and Planning Branch RE F-5 trades	Partial	s.15(a)
28	2008-12-18 Email - Director, Central Region, Employment and Training Division to Senior Policy Advisor, Research and Planning Branch et al RE Status update re ch text and work planning (with attachment)	Partial	s.15(b), Non-Responsive
29	2009-01-19 Email - Director, Central Region, Employment and Training Division to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al RE update on QC-ON agreement	Partial	s.13, s.15(b), Non-Responsive
30	2009-01-22 Email - Manager, Standards and Assessment to Director, Service Delivery Branch et al RE F5	Partial	s.15(a)
31	2009-01-22 Email - Director, Service Delivery Branch to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al RE F5	No	s.15(a)
32	2009-01-22 Email - Manager, Standards and Assessment to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al RE F5	Partial	s.15(a)
33	2009-01-22 Email - Manager, Standards and Assessment to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al RE F5 issue	Partial	s.15(a)

Ministry Record Number	Description of Record	Released (?)	Exemption(s) Claimed
34	2009-01-22 Email - Director, Research and Planning Branch to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al RE F5 issue	Partial	s.15(a)
35	2009-01-22 Email - Director, Service Delivery Branch to Director, Research and Planning Branch et al RE F5 Issue	Partial	s.15(a)
37	2009-01-22 Email - Manager, Standards and Assessment to Senior Policy Analyst, Inter-Jurisdictional Relations Unit et al Re: F5	Partial	s.15(a), Non-responsive
38	2009-02-09 Email - Manager, Standards and Assessment to Senior Policy Analyst, Inter-Jurisdictional Relations Unit (with attachment)	Partial	s.13
42	2009-02-11 Chapter Five – Labour Mobility	No	s.15(b)
43	2009-05-21 Labour Mobility and the Electrical Sector	Partial	s.13, s.15(a)
44	2009-05-20 Email - Senior Policy Adviser, Inter-Jurisdictional Relations Unit to Senior Policy Adviser, Corporate Policy Branch, Ministry of Labour RE Labour Mobility and Electrical Sector (with attachment)	Partial	s.13, s.15(a)
45	2009-05-14 Email - Director (Acting), Jobs Protection Office to Senior Policy Adviser, Standards and Assessment et al RE Labour Mobility and Electrical Sector Note Comments (with attachment)	Partial	s.15(a)
46	2009-05-12 Email - Senior Policy Adviser, Inter-Jurisdictional Relations Unit to Manager - Policy and Project Coordination Unit et al RE Labour Mobility and the Electrical Sector note revised (with attachment)	Partial	s.15(a)
47	2009-05-12 Email - Senior Policy Adviser, Inter-Jurisdictional Relations Unit to Manager - Policy and Project Coordination Unit et al RE Labour Mobility	Partial	s.15(a)
48	2009-06-29 Slide Deck Ontario-Quebec Construction Labour Mobility	Partial	s.13
49	2009-05-29 Slide Deck Ontario-Quebec Construction Labour Mobility	Partial	s.13

DISCUSSION:

RESPONSIVENESS OF RECORDS

I will first determine whether those portions of Records 28, 29 and 37 which the Ministry claims are non-responsive are, in fact, responsive to the request.

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:

The appellant clearly and specifically identified that he was interested in receiving records relating to the trade match for the trade of electrician, which is a trade regulated under the *Trades Qualification and Apprenticeship Act (TQAA)*, and relating to the issuance and enforcement of provisional certificates of qualification under the *TQAA*.

Record 28 is an email which deals with a number of discrete issues. The email contains a numbered list of points regarding a number of matches for trades other than the trade of electrician. Points 4, 5 and 6 of this record, which were severed and withheld from the appellant as "Non-Responsive", relate to matches for three specific trades that are not the trade of electrician and do not even remotely relate

to the trade of electrician. The withheld portions of this record do not address provisional certificates of qualification in any way.

Record 29 is also an email in which a number of discrete issues are discussed in a numbered list. Points 3, 4 and 5 on page two of the record were severed and withheld from the appellant as "Non-Responsive". Point 3 relates to matching a specific trade which is not the trade of electrician nor even remotely related to the trade of electrician. Point 4 relates to a list of professions which does not include any trades regulated under the *TQAA*. Point 5 relates to voluntary trades which does not include the trade of electrician. The withheld portions of this record do not address provisional certificates of qualification in any way.

Record 37 consists of an email chain in which five lines were severed and withheld from the appellant as "Non-Responsive". In the course of preparing these representations, the Ministry realized that the first two lines are responsive to the request and access will be granted to the appellant. The last three lines relate to trade matches for three specific trades, none of which are the trade of electrician and do not even remotely relate to the trade of electrician. The withheld portions of this record do not address provisional certificates of qualification in any way.

With the exception of the first two lines of the withheld portion of Record 37, the Ministry respectfully submits that the portions of Records 28, 29 and 37 that it withheld from the appellant do not bear any relationship to the request and its decision ought to be upheld.

Analysis/Findings

Based upon my review of the information at issue in Records 28, 29 and 37, I find that this information is not responsive to the appellant's request. The appellant's request provided sufficient detail to identify the records responsive to the request. The appellant's request related to electricians and provisional licences and certificates. The information that the Ministry has decided is non-responsive does not reasonably relate to the appellant's request as it relates to other information.

SEARCH FOR RESPONSIVE RECORDS

Where a requester 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 as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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].

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

The Ministry was asked to provide a written summary of all steps taken in response to the request. In particular it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Ministry submits that:

...the appellant was extremely clear and precise in the wording of the request which relates to interprovincial matching between Ontario and Quebec in respect of the trade of electrician, a trade regulated under the *TQAA*, and the policies related to the issuance and enforcement of provisional certificates of qualification under the *TQAA*.

The search for records responsive to the request was overseen by three managers within the Strategic Policy and Programs Division (SPPD) and by a director and a project manager in the Employment and Training Division (ETD), all of whom are experienced and knowledgeable about the *TQAA*, including the trade of electrician and the policies related to the issuance and enforcement of provisional certificates of qualification...

Of SPPD's four branches, three had responsibility for matters relevant to the subject matter of the request:

1. The Standards and Assessment Team of the Program Development Unit of the Programs Branch (formerly the Workplace Training Branch) establishes legislative and regulatory requirements under the *TQAA* and also develops and maintains guidelines, operating manuals and training materials to support the delivery of the *TQAA*...

The manager of the Standards and Assessment Team, along with two staff members who have primary responsibility for matters relating to trade matching and provisional certificates of qualification conducted a search of the paper and electronic records within their work unit.

2. The Inter-Jurisdictional Relations Unit of the Research and Planning Branch (now in the Strategic Policy and Initiatives Branch) serves as the Ministry's primary inter-jurisdictional liaison and centre of expertise on federal and interprovincial relations. Staff in this unit lead and contribute to federal/provincial and interprovincial negotiations.

The acting manager of the Inter-Jurisdictional Relations Unit, along with staff members who have primary responsibility for

interprovincial trade negotiations and agreements conducted a search of their paper and electronic records within their work unit.

3. A project team was assembled between October 2008 and December 2009 to implement the Agreement on Internal Trade (AIT). This team was part of the Research and Planning Branch. The issue of trade matching arose under the AIT, so the project manager and staff members conducted a search of their paper and electronic records within their work unit.

Of ETD's seven branches, two had responsibility for matters relevant to the subject matter of the request... A search of the paper and electronic records of both of these work units was also conducted.

Given that the request covers the period from 1994 to June 24, 2009, it is possible that records once existed that may have been responsive to the request. However, the records retention schedules for the relevant branches (and their predecessor branches) provided for in-Ministry retention for the current fiscal year plus a further two years and retention at the Records Centre for a further period of either 7 or 8 years. Therefore there may have been records from 1994-1999 that would have been disposed of in accordance with the records retention schedules.

Analysis/Findings

As stated above, when 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 as required by section 24 [Orders P-85, P-221 and PO-1954-I].

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]. Based upon my review of the Ministry's representations, I find that its searches were both extensive and comprehensive and that the Ministry has made a reasonable effort to locate responsive records.

Accordingly, based on the submissions of the Ministry respecting the nature and extent of its search, and in the absence of representations from the appellant, I find that the Ministry has provided sufficient evidence to establish that it has conducted a reasonable search for responsive records.

RELATIONS WITH OTHER GOVERNMENTS

I will now determine whether the discretionary exemption at section 15(a) applies to Records 26, 30 to 35, 37 and 43 to 48 and whether the discretionary exemption at section 15(b) applies to Records 15, 25, 28, 29 and 42.

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) 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].

A municipality is not a “government” for the purpose of section 15 [Orders P-69, PO-2715 and PO-2751].

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 submits that:

... the wording and scope of sections A, B and C of the appellant's access request fit[s] squarely within the ambit of intergovernmental relations...

It is clear on the face of all 19 records at issue under ss. 15(a) and (b) that the relations at issue are intergovernmental because issues and meetings to which they refer were intergovernmental and affect matters of mutual concern to the

Government of Ontario and the Government of Quebec. By requesting information which directly relates to a matter of mutual concern to the Government of Ontario and the Government of Quebec, the subject matter (the trade match of electrician between the governments) relates directly to intergovernmental relations...

...The records relate to both formal and informal discussions and exchanges of information regarding measures negotiated and agreed to between the Government of Ontario and the Government of Quebec in respect of a common issue of labour mobility and trade.

...Since 1993, the Government of Ontario and the Government of Quebec have entered into various bilateral and interprovincial agreements relating to labour mobility and trades...

Once signed, these agreements become publicly available. However, the negotiations leading up to the final agreements are conducted with the expectation that communications sent and received between governments will be held in confidence since, if disclosed, it could reasonably be expected to undermine the tenets of trust and honesty...

The Ministry submits that all information which was provided to it by the Government of Quebec as it relates to the match of the trade of electrician in the context of negotiating any of these agreements was sent and received with the expectation that such information would be held in confidence. In addition, given the ongoing nature of the negotiations between the two provinces on this issue (and on other issues of common interest), disclosure of such records would reasonably be expected to prejudice the conduct of future negotiations between the Government of Ontario and the Government of Quebec.

The records at issue in this appeal relate to the meetings of two intergovernmental committees charged with the negotiation of labour mobility and internal trade issues in the context of the negotiation of the 2009 Trade and Cooperation Agreement between Ontario and Quebec: the Bilateral Coordinating Committee (BCC) and the Canadian Council of Directors of Apprenticeship (CCDA). The CCDA's overall objective is to facilitate the interprovincial mobility of skilled trades people by establishing standard requirements and certification of different trades through the Interprovincial Standards Red Seal Program. The CCDA is comprised of representatives from provincial and federal governments...

Section 15(a): prejudice to intergovernmental relations

The Ministry submits that:

Record 26 is an email chain... The withheld sections of this record consist of two emails between the Ministry's representative on the BCC ...and the Inter-

jurisdictional Coordinator, Jobs Protection Office at the Ministry of Labour. ...The correspondence consists of very candid advice and the historical background of BCC negotiations from the Inter-jurisdictional Coordinator at the Ministry of Labour....

Should the withheld portions of Record 26 be disclosed, it is reasonable and likely to expect that the Government of Ontario would experience a number of negative harms. First, it is very likely that the negotiating position of Ontario would be used as leverage to exploit differences in Ontario and Quebec's positions in future labour mobility issues to the detriment of the Government of Ontario. Additionally, if the Ministry were to disclose the Government of Quebec's negotiating positions, it would undermine the relationship of trust that is critical to the ongoing trade negotiations between the two provinces. Furthermore, it is reasonable to expect that if the record were to be disclosed, the differences between the Government of Ontario and the Government of Quebec relating to labour mobility and the BCC negotiations, which are evident in the record, would upset the delicate balance of the very formal and polite environment of intergovernmental relations, not only with respect to labour mobility issues but on other issues of mutual concern to the two provinces...

Record 30 (and Record 32 and 37 which are duplicates of 30) is an email chain... The withheld portion of the email was written by the Director, Service Delivery Branch, to the following Ministry staff people: Senior Policy Analyst, Inter-Jurisdictional Relations Unit; Manager, Standards and Assessment; Manager, Delivery Support and Integration. The withheld portion of the email contains a proposed concession option for the Government of Ontario in its negotiations with the Government of Quebec, in the context of the BCC meetings.

If these records were disclosed ...it is possible that the Government of Quebec may be able to anticipate concessions the Government of Ontario may or may not make during intergovernmental negotiations in the future... The ability of the Government of Ontario to negotiate a competitive and fair agreement with the Government of Quebec as it relates to labour mobility will likely be undermined if this record were to be disclosed.

Record 31 (and Record 33 which is a duplicate of 31) ...consist of an email chain which centres on the content and issues related to labour mobility discussed during a teleconference with delegates from the Government of Ontario and the Government of Quebec. ... [T]he conference call attendees were from both the Government of Ontario and the Government of Quebec. The ...emails document the outstanding issues from the Government of Ontario's perspective, listing "disputed" items and outlining in detail where Ontario disagrees with Quebec.

Record 34 (and Record 35 which is a copy of 34) is a partially withheld email from the Director, Research and Planning Branch to the Senior Policy Analyst, Inter-Jurisdictional Relations Unit and the Director, Service Delivery Branch. In

this email, the Director, Research and Planning Branch provides frank and open comments about whether the Government of Ontario should consider taking a certain position in intergovernmental negotiations with the Government of Quebec...

Record 43 (and Record 44 to 47 which are duplicates) is an Issue Note which was partially withheld from the appellant. The ...information relates to certain matters conducted by the Government of Ontario which may be perceived negatively by the Government of Quebec ... [as well as] information about the intergovernmental relations between the Ontario Ministry of Labour and the Government of Quebec. This information, if released, would reveal a part of the Government of Ontario's strategy in how it deals with the Government of Quebec...

Analysis/Findings re: Section 15(a)

Based upon my review of the records, I agree with the Ministry that the information at issue is identical in:

- Records 30, 32 and 37
- Records 34 and 35

However, based upon my review of the records, I find that certain records do not contain identical information as set out in the Ministry's representations.

The information at issue in Record 33 is not identical to that in Record 31, though it is reproduced in its entirety in Records 34 and 35.

Record 31 contains the same information that is at issue in Records 30, 32 and 37, as well as some other information.

Furthermore, the information at issue in each of Records 43, 44 to 47 is not the same. Records 46 and 47 and part of Record 45 are duplicates. The information at issue in each of Records 43 and 44 is different from each other and from that in Records 45 to 47.

The discretionary exemption in section 15(a) 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 (Orders PO-1377 and PO-2897).

I agree with the Ministry that the discretionary exemption in section 15(a) applies to all of the information at issue in Records 26, 30 to 35 and 43 to 47 for which this exemption has been claimed. As set out in the Ministry's representations, this information reveals the negotiating positions of the Government of Ontario in its negotiation of an interprovincial agreement with

Quebec respecting labour mobility and internal trade. These records relate to intergovernmental relations and there is a reasonable expectation of prejudice to intergovernmental conduct as a result of disclosure. The Government of Ontario's ability to conduct intergovernmental relations with Quebec and other provincial governments will be undermined if this information is disclosed.

Therefore, subject to my review of the Ministry's exercise of discretion, I find that all of the information at issue in Records 26, 30 to 35 and 43 to 47 for which section 15(a) has been claimed is exempt.

Section 15(b): information received from another government

The Ministry submits that:

Record 15 is an email which contains the details of a conversation the Director, Research and Planning Branch, had with his counterpart in the Government of Quebec...

Disclosure of this information would undermine Ontario's position vis-à-vis the Government of Quebec as it could be reasonably be expected that Quebec would no longer be willing to share confidential and sensitive information - regardless of whether it is communicated by email, telephone, or letter - on matters of joint interest if Ontario cannot assure the confidentiality of the information.

Record 25 is an email chain which was partially withheld from the appellant... The withheld information was provided to the Government of Ontario by the Government of Canada's Human Resources and Social Development Canada (HRSDC), through their representative on CCDA, the intergovernmental body. Should this information be disclosed, it is reasonable to expect that other governments would hesitate to provide the Government of Ontario with information, whether directly or through intergovernmental organizations such as the CCDA. It is very likely that the disclosure of this information would create a "chilling effect" on intergovernmental relations involving Ontario, where it is clearly in Ontario's interests to ensure that it continues to receive information and be involved in discussions on major issues with other governments through intergovernmental organizations such as the CCDA.

Record 28 is a partially withheld email from the: Ministry's representative on the BCC to a number of key Ministry staff people involved in the formulation of the Government of Ontario's position in intergovernmental relations as it relates to labour mobility...

If this information was disclosed, it would reveal information which was provided in confidence to the Government of Ontario by Quebec. Additionally, the information would reveal one of the major fault lines of disagreement between the Government of Ontario and Quebec which, if disclosed, could upset the delicate

balance of the very formal and polite environment of intergovernmental relations between the two governments.

Record 29 is a partially withheld email chain in which the Government of Quebec provided the Ministry with a draft labour mobility chapter...

Record 42, which was withheld in its entirety, is a draft version of the labour mobility chapter which was provided to the Ministry by the Government of Quebec. Should these records be disclosed, a clear picture of the Government of Ontario's negotiating position and strategy will be revealed, while at the same time, the Government of Quebec's tentative position is also articulated. The ability of the Government of Ontario to negotiate a competitive and fair agreement with the Government of Quebec in the future as it relates to labour mobility will likely be undermined if this record were to be disclosed...

Analysis/Findings re: Section 15(b)

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

1. the records must reveal information received from another government or its agencies; and
2. the information must have been received by an institution; and
3. the information must have been received in confidence. [Order P-210].

I agree with the Ministry that the withheld portions of Records 15, 25, 28, 29 and 42 for which section 15(b) has been claimed contain information that qualifies for exemption under this section. Disclosure of this information could reasonably be expected to reveal information the institution received in confidence from the Government of Quebec [Orders MO-1896, PO-2569, PO-2647, PO-2666 and PO-2751].

I agree with the Ministry submission that:

...it is entirely reasonable to expect that the Government of Ontario's ability to conduct intergovernmental relations with Quebec and other provincial governments will be undermined if these records were to be disclosed. It is reasonable to expect that the Government of Quebec would hesitate to discuss with, and provide information to, Ontario on issues of mutual concern on the basis that this disclosure might place them in an unfavourable light with the public, private sector, interests groups or trade unions.

Therefore, subject to my review of the Ministry's exercise of discretion, I find that all of the information at issue in Records 15, 25, 28, 29 and 42 for which section 15(b) has been claimed is exempt.

ADVICE OR RECOMMENDATIONS

I will now determine whether the discretionary exemption at section 13(1) apply to Records 2, 29, 38, 43, 44, 48 and 49. This section reads:

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 records at issue in this appeal relate to the meetings of two intergovernmental committees charged with the negotiation of labour mobility and internal trade issues in the context of the negotiation of the 2009 Trade and Cooperation Agreement. This agreement is publicly available. The Ministry submits that disclosure of the withheld portions of the records for which section 13(1) has been claimed would permit one to accurately infer whether the advice or recommendations in the records had been accepted or rejected. It states:

Record 2 is a decision note prepared by Ministry staff regarding provisional certificates of qualification in the context of the repeal of the *Fairness is a Two Way Street Act* and the negotiation of the 2009 Trade and Cooperation Agreement between Ontario and Quebec...

The only portion of the record that was withheld is the recommended option, which is clearly labeled, including the steps recommended to be undertaken in implementing the recommended option.

Record 29 is an email chain, of which two lines were withheld under s. 13(1). The withheld portion was part of an email sent from the Ministry's representative on the BCC to the Senior Policy Analyst, Inter-Jurisdictional Relations Unit and consists solely of recommendations regarding the negotiating position on the issue of the match for the trade of electrician for the purposes of the negotiations on the 2009 Trade and Cooperation Agreement between Ontario and Quebec.

Record 38 is an e-mail with an attached issue note prepared by Ministry staff regarding the differences between Ontario and Quebec on the issue of the matching of construction trades. ...The only portion of the record that was withheld is the recommendation regarding the negotiating position on the issue of the match for the trade of electrician for the purposes of the negotiations on the 2009 Trade and Cooperation Agreement between Ontario and Quebec...

Records 43 and 44

Record 43 is an issue note on the various issues raised by stakeholder groups in the electrical sector relating to the matching of the electrical trades. Record 44 is a different version of Record 43, and deals with the same issues raised by the electrical sector relating to the matching of the electrical trades. The withheld portion of these records consist of series of recommendations for further development as well as two options that were not recommended.

Records 48 and 49 address the various issues raised by stakeholder groups in the electrical sector relating to issues of relevance to the negotiation of the 2009 Trade and Cooperation Agreement between Ontario and Quebec. The only portions withheld from these records are the Proposed Strategy to address each of the three issues raised by the stakeholder groups. The withheld portions consist of a recommended course of action for the consideration of senior management of both the Ministry and the Ministry of Labour.

Analysis/Findings

The information at issue in the records contains the advice or recommendations made by Ministry staff to other Ministry staff or to Ministry of Labour staff concerning the negotiation by the Ontario government of the 2009 Trade and Cooperation Agreement between Ontario and Quebec. In my view, this information meets the requirements for exemption under section 13(1) because the information at issue suggests a course of action that will ultimately be accepted or rejected by the person being advised. Further, I find that none of the exceptions in sections 13(2) and 13(3) to section 13(1) apply. Therefore, I find that disclosure of the information at issue in Records 2, 29, 38, 43, 44, 48 and 49 would reveal the advice or recommendations given and is, therefore, subject to my review of the Ministry's exercise of discretion, exempt under section 13(1).

CABINET RECORDS

I will now determine whether the mandatory exemption at section 12(1) applies to the information at issue in Records 24 and 25. The Ministry relies on the introductory wording of section 12(1) and on section 12(1)(e). These sections read:

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,

....

- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

....

The Ministry submits that:

The withheld portion is the same in both of these records. On its face, the withheld portion of the records relates to a discussion with senior staff of the Minister's Office in preparation for a meeting of Executive Council. If disclosed, this record would reveal the subject and substance of deliberations of the Executive Council and matters used to brief the Minister of Training, Colleges and Universities.

Analysis/Findings re: introductory wording of section 12(1)

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 subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-1570 and 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 and PO-2725].

In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations [Order PO-2320].

The information at issue is contained in one email in an email chain. This email is from the Manager, Standards and Assessment to other Ministry staff. Although a record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), based upon my review of the information at issue and the Ministry's representations, I find that it does not qualify for exemption under the introductory wording of section 12(1). I am unable to find that disclosure of the information at issue would reveal the substance of deliberations of Cabinet or its committees, or that disclosure would permit the drawing of accurate inferences with respect to these deliberations.

Based upon my review of the information at issue, I find that it does not qualify for exemption under the introductory wording of section 12(1). I have not been provided with evidence that links the specific contents of Records 24 and 25 with the actual substance of deliberations of Cabinet or its committees, nor is such a link apparent from a review of the information at issue in these records.

Analysis/Findings re: Section 12(1)(e) - record prepared to brief a minister

This section contemplates the exemption of records prepared in advance of the types of meetings referred to in the section. It has a prospective application. Section 12(1)(e) cannot apply to records that have been dealt with by the Cabinet or its committees, although such records may

still be exempt under the introductory wording of the exemption [Orders P-1182, PO-2554, PO-2677 and PO-2725].

Although the Ministry submits that the records refer to a discussion with senior staff of the Minister's Office in preparation for a meeting of Executive Council, the disclosed information in the email at issue refers to obtaining a letter for the Minister's Office. The disclosed information in Record 25 indicates that this letter may not be available.

Based upon my review of the information at issue in Records 24 and 25, I find that there is no evidence therein to indicate that this specific information was prepared to brief a minister as is required by section 12(1)(e). Therefore, I find that, section 12(1)(e) does not apply.

As neither the introductory wording of section 12(1) nor section 12(1)(e) apply, and no other exemptions have been claimed, I find that the information in Records 24 and 25 for which section 12(1) has been claimed is not exempt and I will order it disclosed.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under sections 13(1) and 15 in a proper manner.

The sections 13(1) and 15 exemptions are discretionary, and permit 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)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The Ministry submits that:

Section 13

In its original review of the records for which it has claimed an exemption under section 13, the Ministry has severed as much information as is reasonably possible without compromising the purpose of the exemption. Protecting the frank, deliberative process in this case by withholding only those portions of the records that would reveal the recommended course of action is consistent with both the principles of access and the limited and specific exemption under section 13.

Section 15

In its original review of the records for which it has claimed an exemption under section 15, the Ministry has severed as much information as is reasonably possible without compromising the purpose of the exemption. As noted earlier, the bilateral and interprovincial trade agreements that relate to the request are all publicly available once they have been finalized.

Protecting the ongoing working relationship between Ontario and Quebec, on interprovincial trade and mobility issues and on other issues of common interest, by withholding only those portions of the records that would, if disclosed, prejudice the conduct of these intergovernmental relations or that would reveal information provided in the course of confidential intergovernmental negotiations is consistent with both the principles of access and the limited and specific exemption under section 15.

Analysis/Findings

Based upon my review of the records and the Ministry's representations, I find that the Ministry took into account relevant factors, when exercising its discretion to claim the exemptions under section 13(1) and 15 and has exercised its discretion in good faith. Therefore, I uphold its exercise of discretion in respect of the undisclosed portions of the records for which the Ministry has claimed sections 13(1) and 15.

ORDER:

1. I order the Ministry to disclose to the appellant by **November 8, 2010** the information in Records 24 and 25 for which section 12(1) has been claimed.
2. I uphold the Ministry's decision to deny access to the remaining information in the records.
3. I uphold the reasonableness of the Ministry's search for responsive records
4. In order to verify compliance with this order, I reserve the right to require a copy of the records disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original Signed by: _____
Diane Smith
Adjudicator

October 18, 2010