**Information and Privacy Commissioner,
Ontario, Canada**

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

ORDER PO-2999

Appeal PA09-164

Ministry of Revenue

September 30, 2011

Summary: The appellant sought access to records related to the change in the definition of "tax benefit" in Ontario's General Anti-Avoidance Rule. The Ministry of Revenue denied access under sections 13(1), 15 and 18(1)(e). Later in the processing of the appeal the ministry took the position that certain records were not responsive to the request. It was not open to the ministry to unilaterally redefine the scope of the request in the way that it did. However, issues regarding access to those records are being addressed in another appeal. The ministry's decision to withhold the remaining records under section 15(a) is upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 15(a).

Orders and Investigation Reports Considered: P-880, Reconsideration Order R-970003

Cases Considered: *Ontario v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)

BACKGROUND:

[1] The Ministry of Revenue (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) which begins as follows:

> The purpose of this letter is to make a request to [the ministry] under [the *Act*] for the records related to the change in the definition of "tax benefit" in Ontario's General Anti-Avoidance Rule ("GAAR") provisions as a result of the replacement of *Corporations Tax Act* with the *Taxation Act , 2007*.

[2] The request identifies the change in the definition of "tax benefit" in some detail and then states:

> Accordingly, we formally request copies of the following records:
>
> 1. section 110 of the *Taxation Act, 2007*;
>
> 2. the definition of 'tax benefit' in section 110 of the *Taxation Act, 2007* and section 5 of the *Corporations Tax Act*;
>
> 3. the inclusion of the phrase "Act of a province of Canada that imposes a tax similar to a tax imposed under this Act" in the definition of 'tax benefit' in section 110 of the *Taxation Act, 2007*;
>
> 4. any harmonization, integration, coordination or comparisons of the GAAR provisions in section 110 of the *Taxation Act, 2007* and the GAAR provisions in all other Canadian Federal, provincial, and territorial taxation acts including
>
>   a. the Federal GAAR provision in section 245 of the *Income Tax Act* (Canada), and sections 68.2, 121.1 and 274 of the *Excise Tax Act* (Canada), and
>
>   b. the provincial and territorial GAAR provisions in the *British Columbia Income Tax Act* section 68.1, the *Alberta Corporate Tax Act* sections 72.1 and 72.11, the *Income Tax Act* (Saskatchewan) section 139, the *Tax Administration and Miscellaneous Taxes Act* (Manitoba) section 51, the *Taxation Act* (Quebec) sections 1079.9 to 1079.16, the *New Brunswick Income Tax Act* section 123, the *Income Tax Act* (Nova Scotia) section 80A and the *Revenue Act* (Nova Scotia) section 84, the *Income Tax Act* (Prince Edward Island) section 83, the *Income Tax Act* (Newfoundland and Labrador) section 88.1 and the *Income Tax Act* (Yukon Territory) section 61.

[3] Following the issuance of a fee estimate decision, the ministry processed the request and issued a decision waiving the balance of the fee, disclosing one record with severances made pursuant to section 13(1) (advice or recommendations), and withholding the rest of the responsive records, citing sections 13(1), 15(a) and (b) (relations with other governments) and 18(1)(e) (economic and other interests).

[4] The appellant appealed the ministry's decision.

[5] During mediation, the ministry agreed to share an index of the records at issue with the appellant. As no further mediation was possible, the file was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[6] The adjudicator previously assigned to this file began her inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the ministry. The ministry responded with representations in which it advised that it had reorganized the records in an attempt to clarify the appeal, and that it had prepared a revised index of records describing in detail the records at issue and the exemptions claimed. The ministry advised that it was now claiming that sections 15(a) and (b) apply to exempt all of the records at issue in the appeal, and also confirmed that it was claiming section 18(1)(e) for all records, except one identified agenda. In addition, the ministry advised that it had removed non-responsive records and parts of records, as well as any duplicates, from the scope of the appeal. Furthermore, the ministry made no mention of its former claim of the application of section 13(1) to some of the records and made no submissions on the possible application of that exemption.

[7] As a result of the ministry's representations, the adjudicator added the issue of the responsiveness of records to the scope of the appeal. With respect to the application of section 13(1), this exemption was previously claimed only for portions of three pages, and these three pages are contained in one of the records which the ministry considered non-responsive. Accordingly, the adjudicator did not remove section 13(1) as an issue in this appeal.

[8] The adjudicator then sent the revised Notice of Inquiry, along with a copy of the complete representations of the ministry, to the appellant. The appellant provided representations in response.

[9] Upon receipt of the appellant's representations, the adjudicator sent a copy of the complete representations of the appellant to the ministry, and invited the ministry to provide reply representations, which it did.

[10] This file was subsequently transferred to me to complete the inquiry.

PRELIMINARY ISSUE – SCOPE OF THE REQUEST

[11] As identified above, in its representations the ministry for the first time stated that certain records were not responsive to the request. These records had initially been identified as responsive records and were listed in the index referenced in both the Mediator's Report and Notice of Inquiry sent to the ministry. The ministry had been asked to provide representations on the application of the exemptions to these records. Instead, the ministry unilaterally decided that these records were no longer at issue, and chose not to provide representations on the application of the exemptions to them. These records were identified in the Notice of Inquiry as pages 1 to 24, 41, and 160 to 191.

[12] In its representations the ministry states:

> The request was for records relating to Ontario's change in the definition of "tax benefit" in the context of anti-avoidance law. The change added many Canadian jurisdictions which could be the location or source of the tax benefit. Ontario widened the definition of "tax benefit" in response to what it considers to be multijurisdictional schemes set up to avoid tax.
>
> The response to the request consists of records which really do not answer the underlying question, but which reveal interprovincial discussion of even more fundamental issues underlying the question and tax avoidance in general. The records are wider and deeper than the question, but never say that this is the reason Ontario made the change.
>
> As the nature of the change of the definition is to add jurisdictions from which the tax benefit may come, the Subcommittee discussions deal with multijurisdictional issues without specific reference to the definition. There was no explanatory note focusing on the question asked. No records were found which do exactly what was requested: explain Ontario's new definition with Ontario's reasons. A very strict view would be that no records are responsive to the request, but the ministry is taking a wide view of responsiveness to fulfill the spirit of open access provided in the *Act*. …

[13] The ministry describes the records which it identifies as responsive to the request, and then provides its position on why the other records, identified as responsive to the request at an earlier stage, are now considered to be non-responsive to the request. It states:

> Since many of the records and parts of the records addressed problems beyond the scope of the request, the ministry has removed non-

responsive records and parts of records as well as duplicates for the purpose of the appeal. The ministry relies on the Divisional Court in *Ontario v. Fineberg* (1994), 19 O.R. (3d) 197, which approved Adjudicator Anita Fineberg's statement that it is the unilateral responsibility of the ministry to judge the responsiveness of particular records:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. [Order P-1621 repeating Order P-880]

This view was also approved by Tom Mitchinson who in Order MO-1483 quotes former adjudicator Anita Fineberg who canvassed the issue of responsiveness of records in Order P-880:

> In my view the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries and circumscribes the records which will ultimately be identified as being responsive to the request.

Tom Mitchinson also states in the same Order that:

> … ideally records of this nature (non-responsive) should not be raised at the appeal stage; however, this is a role which should not be strictly applied.
>
> To require all portions of records, whether responsive or not, to undergo an exemption-based review in the context of responding to a particular request would, in my view, impose an unnecessary and unproductive burden on the statutory access scheme. [Order M-1483]

As these authorities rule, the ministry is not to explain the unresponsiveness of parts of the record in terms of exemptions. The question is whether or not the records were within the confines of the request for "documents relating to the decision making." The ministry has decided that some records on the original index were not requested by the requester.

[14] The appellant takes issue with the ministry's approach, and states:

> The appellant submits that pages 1 to 24, 41, and 160 to 191 (the "Disputed Pages") in the Original Index … are responsive to the request. Those pages:
>
> (a) contain emails sent and received by many of the same individuals that sent and received emails that the ministry has held to be responsive and the emails are on the same or similar responsive topics; and
>
> (b) in the case of page 41, are part of an agenda that the ministry has held to be responsive.

[15] The appellant's representations then state:

> Notwithstanding the appellant's submission that all of the records on the Original Index are responsive and not exempt from disclosure as described herein, …. the appellant [has] filed a new request for certain of the Disputed Pages.
>
> If the adjudicator rules that the Disputed Pages should be disclosed in this appeal, then the appellant will abandon its [new request] and any appeal that might arise therefrom.

[16] The ministry responds to the appellant's position in its reply representations. In those representations, the ministry takes the position that the appellant had revised the request in this appeal, and states that the revised request, dated after the original index was created, led to the revised list of records at issue. The ministry provides a copy of this "revised request," which was addressed to both the Ministry of Finance and Ministry of Revenue, and which reads as follows:

> We formally request copies of all records or parts of records … which consider the amendment of the definition of "tax benefit" in Ontario's General Anti-Avoidance Rule ("GAAR") as a result of the replacement of subsection 5(1) of the *Corporations Tax Act* with subsection 110(1) of the *Taxation Act, 2007* (the "Ontario GAAR Provisions") including all records which provide reasons, explanations, policy analysis, consideration, alternatives ("Reasons") for making the change.
>
> In particular, we are interested in: (i) why the words "Act of a province of Canada that imposes a tax similar to a tax imposed under this Act" was added to the definition of "tax benefit" in subsection 110(1) of the *Taxation Act, 2007* and (ii) records which discuss integration,

harmonization, co-ordination, or comparisons of the Ontario GAAR Provisions and the GAAR provisions in all other Canadian Federal, provincial, and territorial taxation legislation including and without limiting the generality of the foregoing:

(a) the following Federal GAAR provisions; section 245 of the *Income Tax Act* (Canada), sections 68.2, 121.1 and 274 of the *Excise Tax Act* (Canada), and

(b) the following provincial and territorial GAAR provisions: the *British Columbia Income Tax Act* section 68.1, the *Alberta Corporate Tax Act* sections 72.1 and 72.11, the *Income Tax Act* (Saskatchewan) section 139, the *Tax Administration and Miscellaneous Taxes Act* (Manitoba) section 51, the *Taxation Act* (Quebec) sections 1079.9 to 1079.16, the *New Brunswick Income Tax Act* section 123, the *Income Tax Act* (Nova Scotia) section 80A and the *Revenue Act* (Nova Scotia) section 84, the *Income Tax Act* (Prince Edward Island) section 83, the *Income Tax Act* (Newfoundland and Labrador) section 88.1 and the *Income Tax Act* (Yukon Territory) section 61.

To clarify, we are not requesting draft legislation or draft regulations. However, we are seeking explanatory notes, reports, agendas, minutes, memos and policy documents that may be in respect of the draft legislation or draft regulations.

Analysis and Findings

[17] To begin, I note that the request which gave rise to this appeal, and which is set out in the section entitled "Nature of the Appeal," above, was also made on the same date to the Ministry of Finance. The request to the Ministry of Finance also resulted in an appeal being opened by this office (PA09-304).

[18] The "revised request" referred to by the ministry clarified the request in the Ministry of Finance file, and frames the scope of that appeal. However, the "revised request" was not referred to in the course of the processing of the current appeal. Both the Mediator's Report sent to the parties at the conclusion of mediation, as well as the Notice of Inquiry sent to the ministry inviting representations, refer only to the initial request resulting in this appeal, and refer to the records at issue as those identified in the initial index. Neither of these documents refers to the "revised request."

[19] In its representations in response to the Notice of Inquiry, the ministry unilaterally chose to consider the "revised request" as the relevant request in this appeal, and then determined that certain records were no longer at issue in this appeal. It also did not make representations on the application of the exemptions claimed for those records.

[20] While it may have been permissible for the ministry to respond in this manner to a clarification received from a requester before the ministry issued its access decision, and most significantly, before the filing of an appeal, it was not open to the ministry to take such a step once the appeal before this office was underway. By doing so, the ministry has taken matters into his own hands that are, in fact, properly before this office in the context of an appeal.

[21] I reject the ministry's reliance on previous orders of this office to support its actions. The previous orders of this office referred to by the ministry clearly state that the institution's need to determine which documents are relevant to a request is a fundamental *first step* in responding to the request. These orders do not suggest that the ministry can unilaterally modify the scope of an appeal at any stage of the process. Although there may be instances where information in certain records may be found to be non-responsive as an appeal is processed, I find the suggested interpretation of these decisions by the ministry's counsel to support its actions in this appeal to be unreasonable.

[22] The proper approach would have been for the ministry to raise the issue of responsiveness in its representations, and to provide representations in the alternative on the exemptions it relied on for the records it claims to be non-responsive. Then the issue could have been adjudicated and a final order issued addressing all aspects of the appeal. The ministry's failure to provide representations on the exemptions previously cited for the records it now states are non-responsive means that, even if I decide to rule the records responsive, I would have to decide the issue of access to the records without benefit of the ministry's arguments.

[23] Fortunately, as identified above, when the appellant became aware that the responsiveness of certain records was at issue, he immediately submitted a new request to the ministry for those exact records. That request quickly resulted in an appeal to this office, and issues regarding access to those records are now before me in a separate appeal (PA10-57). I note that the exemptions claimed for some of those records also include the mandatory exemption in section 12 (cabinet records). Because issues regarding access to those records are being addressed in the new appeal, it would serve no useful purpose to consider these same issues in the current appeal.

RECORDS:

[24] There are 135 pages of records at issue in this appeal. These include Agendas and Minutes of identified subcommittee meetings, papers and slide presentations presented to the subcommittee meetings, and certain records internally circulated by Ontario participants in the meetings. Some of these records also include drafts.

[25] The ministry has categorized these 135 pages into 12 records (numbered I to XII). These are described in more detail below.

ADDITIONAL PRELIMINARY ISSUES

Late raising of section 15 to certain records at issue

[26] In its initial decision, the ministry claimed that section 15 applied to many of the records remaining at issue, but not to pages 35-39 or Record VI. However, as noted above, in its representations the ministry advised that it was now claiming that sections 15(a) and (b) apply to exempt all of the records remaining at issue in the appeal, including pages 35-39 and Record VI.

[27] The *Code of Procedure* for appeals under the *Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[28] In this appeal, I am not convinced that there is any prejudice to the appellant in allowing this additional claim, in the circumstances of this appeal. From the outset, the ministry applied section 15 (a) and (b) to the majority of records at issue in this appeal. Whether or not section 15 exempts records from disclosure is not a new issue in this appeal, only its application to several additional records.

[29] In conclusion, I will permit the ministry to raise the application of section 15 to the additional records.

Sharing of reply representations

[30] In this appeal, the appellant requested that he be entitled to receive and respond to the ministry's reply representations.

[31] The ministry did provide substantial reply representations, including additional information about the application of the exemption claims in sections 15 and 18, as well as other issues. However, because of my finding below that the records qualify for exemption under section 15(a), and because this finding is based on the ministry's initial representations, I determined that it was not necessary to seek surreply representations in this appeal.

ISSUES:

A. Does the discretionary exemption at section 15(a) and/or (b) apply to the information at issue?

B. Does the discretionary exemption at section 18(1)(e) apply to the information at issue?

DISCUSSION:

A. DOES THE DISCRETIONARY EXEMPTION AT SECTION 15(a) AND/OR (b) APPLY TO THE INFORMATION AT ISSUE?

General principles

[32] The ministry claims the application of the discretionary exemptions in sections 15(a) and (b) to all of the responsive records. These sections 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;

[33] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working

relationships. Similarly, the purpose of 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 PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

[34] 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.)].

[35] 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].

Section 15(a): prejudice to intergovernmental relations

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

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

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

The ministry's representations

[37] The ministry begins by summarizing the nature of the records as follows:

> All the records … concern the meetings of the Subcommittee on Interprovincial Tax Avoidance (the Subcommittee), a confidential subcommittee set up by Ontario to explore and negotiate common approaches to tax avoidance among the participating jurisdictions.
>
> The records … do not present any final decisions on the part of any government, but are both discussions and negotiating positions among the jurisdictions. There [sic] parties have informally adopted a co-

operative approach to negotiations, where disclosure to one is likely to be disclosure to all.

[38] The ministry then identifies three different categories of records at issue in this appeal, and takes the position that each of these categories qualifies for exemption under section 15(a). It identifies the three groups of records as follows:

Group I: Papers and Slides presented at the Subcommittee Meetings;
Group II: Agendas and Minutes of the Subcommittee Meetings; and
Group III: Minutes circulated only internally (these are in Group II as well).

[39] The ministry also provides the following background information about the relationship between Ontario and both the federal government and the other provinces regarding its position that section 15(a) applies to the records. The ministry states:

> ***i. Prejudice to Negotiations***
>
> *Between Canada and Ontario*
>
> The federal government now administers Ontario's corporations tax. This arrangement is largely fleshed out now that the Tax Collection Agreement was signed …, but details still to be worked out are the subject of the Memorandum of Agreement between Ontario and Canada, dated October 6, 2006, published by CCH. Some of these items are yet to be negotiated and in particular tax avoidance administration as mentioned by [an identified individual] in his [attached affidavit].
>
> As a result of impending tax avoidance litigation in the various provinces and as a result of ongoing negotiations on tax avoidance, there is a great need for confidentiality at the joint subcommittee level. Disclosure of the content of the Subcommittee's meetings will corrupt Ontario's relationships with other provinces and with the federal government which is in a position of power over Ontario as the sole administrator for the future. Other anti-avoidance negotiations among the provinces are still being conducted at the subcommittee level.
>
> The other jurisdictions have confirmed that disclosure of these matters would be harmful to the relationship and to the negotiations.

> *Between Governments*
>
> As a result of impending tax avoidance litigation with hundreds of millions of dollars at stake in the various provinces and as a result of ongoing negotiations on tax collection issues including tax avoidance, there is a great need for confidentiality at the joint subcommittee level. The harm to Ontario of jaundicing its relationships with other provinces and with the federal government which often plays a co-ordinating role to smooth provincial differences. Further negotiations are also afoot in regard to [other topics]. If relations or trust is prejudiced, other jurisdictions will be less willing to share in other contexts … . The list of agreements among the provinces mentioned [attached] shows the vibrant areas of mutual discussion and mutual interest quite apart from Corporations Tax. Any of these joint discussions could be prejudiced by a breach of trust.
>
> ***ii. Prejudice to Ongoing Relationships***
>
> Other provinces have similar statutes to levy tax on corporations, and since the business of many corporations spans a wider area than Ontario, these companies have to pay a similar tax in each province. When a company sets up another company in another province to reduce tax or create an overall tax benefit …, the interprovincial discussions become more important and more interesting for multiple jurisdictions, as what one province does may not be revenue neutral for the others. Although roles have not been decided, the Canada Revenue Agency (CRA) may be able to play a role in coordinating, especially for jurisdictions for which CRA collects provincial tax. The time may never come when there is nothing to negotiate among the jurisdictions on tax avoidance. Disclosure will always be an issue for such discussions ….

[40] The ministry reviews the two parts of the test for the application of section 15(a) as set out above, and then provides representations in support of its position that these tests have been met.

[41] With respect to whether the records relate to intergovernmental relations, the ministry states:

> Section 15 … recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The subject matter of [the records] is agendas, minutes and papers shared among the provinces and the federal government. Three records consist of an account of one of the intergovernmental meetings shared only internally within Ontario. The ministry relies on many Orders too

> numerous to mention to state that the records of intergovernmental committees of Canadian jurisdictions other than municipalities working on issues jointly are intergovernmental records. The committee which was formed to tackle the problem of tax avoidance has consisted of members of all the provinces and Finance Canada. If a member did not attend, they received the papers, minutes and agendas.
>
> The subject matter of the records at issue under subsection 15(a) is intergovernmental.
>
> [The records] consist of minutes of the subcommittee meetings (formal and handwritten), agendas and Next Steps or to do lists for the committee later posted as a topic on the agenda, slides presented at their meetings, papers presented in advance of their meetings and discussed at their meetings, responses to those papers which were discussed at other meetings, and all of these may be draft and/or final versions. These are clearly intergovernmental records.
>
> All discussions in the papers and responses to the papers which are mentioned in the agendas and minutes are about a matter that relates to an issue still to be determined ….
>
> The evidence at Tabs C-K with responses from every jurisdiction show just how intergovernmental these records are.

[42] Tabs C through K referred to in the ministry's submissions consist of material in the form of responses from the federal government and eight provinces relating to the disclosure of the records at issue. The ministry states:

> The ministry submitted a form to various Canadian jurisdictions inquiring whether they support Ontario's position for the purposes of evidence in [an appeal under the *Act*] on three criteria of section 15 in relation to each of the three categories of records as mentioned in the Index of Records. The hope was that all could respond quickly and speak with one resounding voice on the records and the material issues of section 15, without having to repeat the confidences within the records. Nonetheless, Canada graciously chose to respond in a more individual way.
>
> All jurisdictions responded, but Nova Scotia's participants explained that they had moved to other positions away from tax administration. Their successor of course would be unfamiliar with the records and the meetings, not having been invited.

> The Responding Jurisdictions then are from the east of Ontario: Quebec, New Brunswick, Newfoundland and Prince Edward Island and from the west of Ontario: British Columbia, Alberta, Saskatchewan and Manitoba, and federally from Finance Canada who looks after tax policy and the Canada Revenue Agency which looks after tax administration. The latter two spoke jointly at [Tab C].

[43] The ministry provides copies of these documents received from the other jurisdictions. These documents consist of a letter received from the federal government and eight forms signed by eight provinces involved in the subcommittee. In these documents, these jurisdictions identify their views on the disclosure of the records and the impact that disclosure may have. These documents are reviewed in more detail, below.

[44] The ministry then states:

> [An identified Audit Manager responsible for Tax Avoidance Audits at the Ontario Ministry of Revenue (the Audit Manger)] completes the picture with his affidavit addressing the same concerns and others in greater detail [Tab A]. [The Audit Manager's] evidence is that of an extremely knowledgeable and informed participant in the negotiations. As a former employee of the CRA in a similar capacity, he understands the federal response to the provinces. He attaches the Memorandum of Agreement with Canada [TAB B] which in part is an agreement to agree to further items.

[45] With respect to whether the disclosure would cause prejudice to intergovernmental relations, the ministry states:

> To satisfy the second element of subsection 15(a), there must be detailed and convincing evidence that the relations at issue are at risk. There are two ways in which disclosure can prejudice the conduct of intergovernmental relations: (i) to prejudice the ongoing work of an intergovernmental committee or body; and (ii) to undermine the conduct of intergovernmental relations in general so that governments will be less willing to share information in other contexts [See PO-2369-F]. The IPC has held that subsection 15(a) of [the *Act*] recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Often, it is when confidentiality plays a fundamental role in the functioning of the relationship that the records will fall under this exemption.

[46] The ministry then identifies how disclosure would be prejudicial to intergovernmental relations as follows:

> The serious consequences of disclosure of tax avoidance materials and federal provincial discussions include:
>
> > - Co-ordinating "inter provincial tax avoidance" has yet to be determined, and disclosure of the discussions that will lead to its fulfillment would be premature and prejudicial.
> >
> > - Discussions and resolutions that may have been possible could become impossible depending on the publicity and feedback that a disclosure would generate.
> >
> > - Disclosure would not be well received by other provinces and the disarray could bring about inter provincial tax disputes that are harmful to cooperative Canadian federalism.
> >
> > - If Ontario is forced into unilateral action on inter provincial tax avoidance because nobody wants to talk to the partner who cannot maintain confidentiality, there will be a strain on Ontario's participation in the Tax Collection Agreements under which the federal government collects income tax and corporations tax for the province.
> >
> > - Should inter provincial tax avoidance remain unaddressed, the taxpayers of Ontario will in the aggregate pay more tax than they otherwise should (now or later as money could be borrowed in the interim), had inter provincial tax avoidance been collaboratively addressed in the first instance. Therefore there is a significant interest in maintaining relationships with those who can assist with this problem.
> >
> > - At the very least, the shared expectation that the meetings are in camera which promotes frank discussion would be dashed and less candour could be expected.
> >
> > - Since the views in the papers and in the discussions are not official, any sharing of the information could misrepresent the jurisdiction who proposes these views unofficially.

> - Disclosure could set a precedent that will jeopardize the functioning of other multi jurisdictional working groups in the tax areas, such as those behind the [other identified agreements].

[47] In addition, the ministry submits that disclosure of the record would be prejudicial to government relations for the following reasons:

> The ministry submits that disclosure of the records would be prejudicial to government relations since there is a reasonable expectation of confidentiality between governments … when discussing the sensitive subject matter of tax avoidance and the General Anti-Avoidance Rule (GAAR). Disclosure of these discussions would prejudice the carefully cultivated relations between Ontario and the other taxing authorities who are continuing anti-avoidance negotiations.
>
> This harm to government relations is compounded by the hundreds of millions of tax dollars at stake for Ontario and other governments in tax avoidance, making the sensitive subject matter of these discussions all the more important to the different provincial and federal governments involved. The Minister submits in this overview that harm to further frank and open communication with other governments is prejudicial to governmental relations (Order PO-1927-1). Furthermore, Ontario could be prejudiced economically if the federal government decided to put Ontario at the bottom of its priority list for tackling any of the joint administration issues including allocation of revenue among the jurisdictions.

[48] The ministry also refers to a number of orders of this office which have examined the application of section 15(a) in other circumstances. These representations include references to the orders and brief summaries of the relevant portions of them, as well as a comment regarding the application of these principles to the circumstances of this appeal. Some of these references include the following:

> - Disclosure can prejudice the ongoing work of an intergovernmental committee; or body, and it can also undermine the conduct of intergovernmental relations such that governments will be less willing to share information in other contexts (PO-2369-F). These are important and ongoing discussions on tax avoidance and are very sensitive and important for the governments involved.

- Disclosure of matters relating to inter-provincial and territorial committees and meetings could prevent Ontario's ability to effectively participate in discussing issues requiring national cooperation and consultation (Order P-1137). Tax avoidance is an issue requiring national and federal cooperation and consultation.

- Intergovernmental Relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiation between various levels of government (Orders P-270 and PO-1927-1). There is ongoing formal and informal discussion and information exchange as the result of this tax avoidance joint project involving planning and negotiations between governments.

- Records of discussions among governments are exempt because the disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations (Order PO- 1927-1). These are the words of the statute invoked in this matter.

- Records relating to proposed amendments to hate crime, for example, if disclosed, could reasonably be expected to inhibit any further co-operative ventures among the federal, provincial and territorial governments with respect to these and other issues requiring national co-operation and consultation (Order PO-1891-1). In tax matters generally in Ontario, the statutes are opened for amendments every year. Every year's discussions may bear fruit in legislation that year or in later years. If one tactic does not work, another may be tried later. Discussions do include premature discussions about amending the statutes, and as such could be expected to inhibit co-operation.

- Agendas and content of the meetings were exempt where records documented working relationships between governments (in this case on the payment for medical services) (Order PO-2249). This applies to all of the records.

- Detailed information regarding the positions, views and policies of representatives in the intergovernmental committees are exempt except where the issue has been widely published (as in the case of the Canadian blood system) (PO-2369F). Nothing has been published in this group of records, and views of representatives are certainly the subject matter of the discussions.

- In one appeal, although Canada had not seen the records, they were found to relate to intergovernmental relations as their contents were sufficiently related to tripartite land claim negotiations (PO-2439). There are many jurisdictions involved, as even members not attending would have seen the formal agendas II and VII, papers VI and VIII, the slides III and IV and some responses to them, XII. Other records (I, V, X and XI) were not seen by all provinces or all members and it is not clear whether any but Ontario saw these made in Ontario versions, but they were seminal to other versions which were distributed or discussed at meetings.

- Letters sent by provincial regulators of many provinces to a national association of insurance regulators qualified for both the subsection 15(a) and (b) exemptions. Their disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations (Order PO-2061). The papers, agendas and slides (II, III, IV, VI, VII, VIII and XII) were created by other jurisdictions and these were sent into the interprovincial and federal subcommittee. They would qualify for section 15(a) and (b).

- Internally generated records qualify for exemption under subsection 15(a) (Order P-1137). Ontario generated records I, V, IX, X, and XI which are on the same subjects.

The materials provided by the federal government and the other provinces

[49] As identified above, the ministry also relies on the material provided by the federal government and the other provinces, as contained in Tabs C - K.

The provinces

[50] With respect to the provincial governments, as indicated above, the ministry invited the participating provinces to provide their views regarding the disclosure of identified records, and provided each province with a form in which it identified (in a summarized form) each of the three groups of records (as identified above) and, under each group of records, indicated Ontario's position regarding the harms that would flow from disclosure. The provinces were then invited to agree with Ontario's position regarding the harms that would flow from the disclosure of each of these groups.

[51] The relevant portions of the form read:

***Subject: RE: FIPPA request to Ontario for interprovincial tax avoidance records*.**

Disclosure of Record Group I

Records are:

1. Discussion Paper (and drafts thereof) on Inter provincial Income Tax Avoidance - for discussion purposes only and not for dissemination; and
2. Two Slide Presentations for the Subcommittee

If these records were disclosed, Ontario's position is:

X This record was received in confidence from another jurisdiction.
Y Our intergovernmental relationship would be prejudiced,
Z Ongoing negotiations among our jurisdictions would be harmed.

As an invited participant in the subcommittee with the interests of the wider group in mind, I AGREE WITH X, Y and Z.

Disclosure of Record Group II:

Records are: Agendas, Next Steps, Minutes whether typed or handwritten.

If these records were disclosed, the Ontario's position is:

X All but handwritten minutes were received in confidence from another jurisdiction, and the handwritten notes reflect what was rec'd from another jurisdiction.
Y Our intergovernmental relationship would be prejudiced
Z Ongoing negotiations among our jurisdictions would be harmed.

As an invited participant in the subcommittee with the interests of the wider group in mind, I AGREE WITH X, Y and Z.

Disclosure of Record Group III

> Records are: Ontario's internal discussions by e-mail of interprovincial matters including tax avoidance around the time of these meetings where other provinces interests are mentioned with our own.
>
> If these records were disclosed, Ontario's position is:
>
> X Our intergovernmental relationship would be prejudiced, and
> Y Ongoing negotiations among our jurisdictions would be harmed.
>
> As an invited participant in the subcommittee with the interests of the wider group in mind, I AGREE with Ontario.
>
> Please consider my keyed name to be my signature as I intend it to be.
>
> Keyed Name ....
> Jurisdiction ....

[52] Eight of the jurisdictions responded by signing the form. The ninth province indicated that the individuals invited to respond had moved on to different duties outside taxation, and they could not provide any response.

The Federal Government

[53] The form set out above was also provided to the federal government; however, the federal government provided a somewhat different response to the ministry's invitation to provide its views regarding disclosure of the records. The Federal Department of Finance provided a written response, addressed to the ministry, from the Director Intergovernmental Tax Policy, Evaluation and Research Division. This response was also copied to an individual at the Canada Revenue Agency. The federal government's response read as follows:

> I am replying on behalf of federal participants to the Subcommittee on Inter-provincial Tax Avoidance to your e-mail … regarding a request under the *Freedom of Information and Protection of Privacy Act* of Ontario for records.
>
> Senior federal officials who were involved with the project have carefully reviewed the document package provided by the government of Ontario. It is their view that the release of these documents, many of which were

> prepared by the federal government and provided to provincial governments on a confidential basis, would seriously prejudice intergovernmental relations by inhibiting the release of future documents to provincial governments. To have effective federal-provincial policy development and consultation, the federal government must be assured that confidential documents provided to provincial governments will not be publicly disclosed. Release of this information would seriously compromise the ongoing work of multi-jurisdictional committees examining tax issues. Furthermore, the release of these documents to the private sector could provide the recipients with a financial gain by allowing them to better assess the risks of entering into a provincial tax avoidance scheme, …
>
> As such, I strongly support the province of Ontario in its attempt to withhold this information from being released, and I am including my response for your referral.
>
> I would like to thank you for consulting with us, and I am confident that this letter will provide further clarifications on our position.

[54] The letter then attached a document entitled "Response to the Ontario Crown" which read:

> *Disclosure of Record Group I*
>
> Records are:
>
> - Discussion paper (and drafts thereof) on Interprovincial Income Tax Avoidances for discussion purposes only and not for dissemination;
> - Two slide presentations for the Subcommittee.
>
> If these records were disclosed, Ontario's position is:
>
> 1. This record was received in confidence from another jurisdiction;
> 2. Our intergovernmental relationship would be prejudiced;
> 3. Ongoing negotiations among our jurisdictions would be harmed.
>
> In my capacity as Director of the Intergovernmental Tax Policy, Evaluation and Research Division, a position that is involved in federal-provincial tax policy collaboration, and that chaired the Subcommittee on Inter-provincial Tax Avoidance; I convey that federal participants to the Subcommittee agree with Ontario's position (points 1-3).

> *Disclosure of Record Group 2*
>
> Records are: Agenda, next steps, minutes whether typed or handwritten. If these records were disclosed, Ontario's position is:
>
> 4. All but handwritten minutes were received in confidence from another jurisdiction, and the handwritten notes reflect what was received from another jurisdiction;
> 5. Our intergovernmental relationship would be prejudiced;
> 6. Ongoing negotiations among our jurisdictions would be harmed.
>
> In my capacity as Director of the Intergovernmental Tax Policy, Evaluation and Research Division, a position that is involved in federal-provincial tax policy collaboration, and that chaired the Subcommittee on Inter-provincial Tax Avoidance, I convey that federal participants to the Subcommittee agree with Ontario's position (points 4-6).

[55] This document does not address records in Group 3, and is signed by the Director of the Intergovernmental Tax Policy, Evaluation and Research Division.

The appellant's representations

[56] The appellant takes the position that the material provided by the ministry is not sufficient to establish the section 15(a) claim. With respect to the application of the claimed exemptions generally, the appellant begins by stating:

> The exemptions claimed in this Appeal are without merit. The ministry's refusal to disclose the Records (as defined herein) is based, *inter alia*, on its misguided notion that the *Act* permits it to refuse disclosure of the Records because the ministry is allegedly engaged in never-ending "negotiations" on all aspects of tax avoidance, without any linkage to the Records or any specific proposed agreement contemplated: "[t]he negotiations are being carried our currently and will continue in the future as long as there is tax avoidance." The ministry has a similarly overbroad view of section 15 in this Appeal.

[57] With respect to the application of section 15(a), the appellant states:

> … section 15(a) does not apply to the Records. The ministry's alleged evidence consists of a series of bald, self-serving, and speculative assertions. The ministry has submitted no evidence, let alone "detailed and convincing" evidence that any harm would flow from the disclosure of the Records …

[58] The appellant then states that the evidence provided by the ministry should be given no weight. The appellant states:

> The Appellant submits that the material found at Tabs C through N of the ministry's Book of Authorities and Evidence should be given no weight in this Appeal.
>
> Tabs C through N purport to contain the written statements of other governments that were allegedly involved in unspecified meetings ("Meetings") of the Subcommittee on Inter-provincial Tax Avoidance (the "Subcommittee"). However:
>
>> (a) there is no evidence that the individuals that responded to the emails were familiar with, had read, or had been provided with a copy of the Records, the Original Index or the Revised Index before sending their responses to the self-serving standard form document that Ontario sent to them; in fact, all of the responses pre-date the Revised Index where the three record groups are defined. This means that when record groups are referenced in the statements it is impossible to tell which Records, specifically, are being referenced, if any;
>>
>> (b) there is no evidence that the individuals that responded to the emails actually participated in the Meetings; they were "invited participants" but we know that at least some did not attend; and
>>
>> (c) consistent (a) and (b) above, the response at Tab L suggests that the ministry did not tell the other governments of "the time frame of the Anti-Avoidance Sub-Committee materials requested" when it sent them its standard form document. Accordingly, it is impossible to know what Record, if any, are referenced in the statements.
>
> In light of the above, the alleged statements contained in Tabs C through N should be given no weight in this Appeal.

[59] The appellant also challenges the affidavit provided by the ministry. The appellant states:

> Similarly, the Affidavit of [the Audit Manager] found at Tab A … should be given no weight. [The Audit Manager] refers to "attached exhibits" but

> attaches none. [The Audit Manager] does not specifically identify the Records or state that he is familiar with any of the Records.
>
> Nor does [the Audit Manager] state that he has reviewed any of the Records, the Original Index or the Revised Index. In fact, it would have been impossible for [the Audit Manager] to review the Revised Index because the Revised Index is dated [after the date of the affidavit]. This fact is significant because it highlights the lack of evidence of any connection between the Records and [the Audit Manager's] affidavit. [The Audit Manager's] comments ought to be disregarded since there is no way of determining what, specifically, he purports to speak about.
>
> In light of the above, there is no evidence that the subject matter in the Records is "intergovernmental."

[60] The appellant does not refer to the statement made by the federal government, but states that the ministry's "failure to provide any evidence, let alone detailed and convincing evidence that the subject matter in the Records is 'intergovernmental' means that its representations regarding alleged prejudice are irrelevant and need not be considered."

[61] The appellant then states that, in the alternative, there is no evidence of prejudice to intergovernmental relations. The appellant states:

> In its representations, the ministry makes a number of unsupported speculative statements about the harm that it alleges might occur if the Records were disclosed. The ministry suggests that disclosure will "corrupt" and "jaundice" relationships, and that discussions "could be prejudiced." At page nine of its representations, the ministry lists eight "serious consequences of disclosure of tax avoidance materials" (without suggesting that any such consequences would flow from disclosure of the Records). At page 11, the ministry suggests that:
>
>> Ontario could be prejudiced economically if the federal government decided to put Ontario at the bottom of its priority list for tackling any of the joint administration issues including allocation of revenue among the jurisdictions.
>
> The above statement is not only unsupported by any evidence but, without further explanation and context, is incomprehensible. Equally important is the fact that the ministry does not assert that the alleged prejudice in the passage above would flow from disclosure of the Records.

> The ministry's representations are comprised of imprecise, vague, and bald assertions in its representations are not supported by any evidence. The ministry's representations regarding prejudice, including those described above, do not cite the ministry's alleged evidence because none of the assertions contained in the representations are found in or supported by its alleged evidence.
>
> Turning to the alleged evidence submitted by the ministry, the appellant submits that [the individual's] affidavit does not contain any evidence, let alone "detailed and convincing evidence" to establish a "reasonable expectation of harm."

[62] The appellant also identifies in greater detail what he considers to be the deficiencies in the affidavit provided by the Audit Manager. In addition to the concerns identified above, the appellant argues that the Audit Manager's statements are general, vague and contradictory, and should not be relied on as they do not specify either the harms which may flow from the disclosure of records, or the specific evidence which would support the general statements made.

[63] The appellant then summarizes his position by stating that the ministry has provided no evidence, let alone clear and convincing evidence, to establish the elements of a claim under section 15(a), and that the disclosure of the records will not prejudice the conduct of relations between the Government of Ontario and any other government.

The ministry's reply representations

[64] In its reply representations the ministry correctly points out that the records themselves constitute evidence for the purpose of determining whether the section 15(a) exemption applies. The ministry also acknowledges that the provinces were not necessarily provided with the specific records at issue; rather, they were referred to certain types of records. Although the ministry has provided lengthy representations in responding to the appellant's representations, as I indicated above, it is not necessary for me to consider them as I have independently considered the matter based on the ministry's initial representations as set out above.

Analysis and findings

[65] As identified above, in order for a record to qualify for exemption under section 15(a), an institution must establish that:

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

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

General findings

[66] On my review of the records at issue and the representations of the parties, I am satisfied that they qualify for exemption under section 15(a) of the *Act*. I find that the evidence provided by the ministry in support of the application of the section 15(a) exemption to be sufficiently detailed and convincing to establish the application of the exemption for the records at issue.

[67] To begin, I am satisfied that the records relate to intergovernmental relations (relations between an institution and another government or its agencies). The ministry has identified that the records "concern the meetings of the Subcommittee on Interprovincial Tax Avoidance (the Subcommittee), a confidential subcommittee set up by Ontario to explore and negotiate common approaches to tax avoidance among the participating jurisdictions."

[68] The ministry has also identified that the federal government now administers Ontario's corporations tax, and that the subcommittee met with the federal governments and the provincial governments to discuss issues arising from the tax avoidance administration. Based on this information, I am satisfied that the subcommittee and, accordingly, the records at issue, relate to intergovernmental relations. This is further confirmed by the willingness with which the federal government and the participating provinces responded to the ministry's request to provide information on the disclosure of the records at issue. Although it is preferable from an evidentiary viewpoint that institutions provide objectively obtained views by other jurisdictions, it is difficult to imagine these responses being provided if the meetings and discussions of the subcommittee had not occurred or did not involve intergovernmental relations.

[69] Furthermore, I find that I have been provided with sufficient evidence to satisfy me that the disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[70] In the first place, the ministry has identified the confidentiality concerns surrounding the meetings, and arising as a result of impending tax avoidance litigation in the various provinces and the ongoing negotiations on tax avoidance. In addition, the ministry has identified its concern that disclosure of the content of the subcommittee's meetings will negatively impact Ontario's relationships with other provinces and with the federal government.

[71] Additionally, I find that the material provided by the federal government, and the statements made by it, are sufficiently compelling to support a finding that the prejudice will result. The federal government official who provided the material referred to above states that, prior to providing his response, he specifically requested copies of a number of the specific records at issue, and reviewed them. He then states that senior federal officials who were involved with the project have carefully reviewed the document package provided by the government of Ontario and:

> … It is their view that the release of these documents, many of which were prepared by the federal government and provided to provincial governments on a confidential basis, would seriously prejudice intergovernmental relations by inhibiting the release of future documents to provincial governments.

[72] He also provides specific reasons why this prejudice would occur, stating that, in order to have effective federal-provincial policy development and consultation, the federal government "must be assured that confidential documents provided to provincial governments will not be publicly disclosed." He also states that release of the information "would seriously compromise the ongoing work of multi-jurisdictional committees examining tax issues."

[73] Based on this information alone, I would have been satisfied that the records generally would qualify for exemption under section 15(a).

[74] However, the ministry has also provided additional specific information regarding the application of section 15(a) and evidence of consistent approaches taken in previous orders of this office. It also provided the sworn affidavit by the Audit Manager where this individual confirms that he participated in the subcommittee meetings of December 2, 2005, April 28, 2006 and September 5, 2008 and, accordingly, is very familiar with the records at issue. He also confirms the reasons why the subcommittee meetings were held, and the background information to these meetings.

[75] The appellant takes issue with the information provided in the Audit Manager's affidavit. Although I accept the appellant's position that some of the information contained in the affidavit is at times vague and seems to repeat the wording of the exemption, this sworn affidavit provides evidence, from a knowledgeable participant in the meetings, about the purpose and confidentiality of the meetings. Furthermore, I find that some of the appellant's concerns about the affidavit are unfounded. For example, the affiant refers to one attachment to the affidavit, which appears to have been provided to the appellant in its representations and is, in any event, a public document. Overall, I find the affidavit of the Audit Manager of assistance in explaining the background and reasons for the calling of the subcommittee meetings.

[76] In addition, although the ministry did not provide specific dates and references to records in seeking the views of the other provinces, I am satisfied that these provinces were involved in and were aware of the matters discussed at the subcommittee on inter-provincial tax avoidance.

[77] The appellant states that the revised index predates the forms provided by the provinces and the sworn affidavit. However, as identified above, all of the records remaining at issue have been identified from the start of this appeal, and section 15 was claimed for all of them except for pages 35-39 and Record VI. Even if the appellant's concerns were to be accepted, the forms and the affidavit would in any event apply to the records for which the section 15 exemption is claimed in the initial index (that is, all records except for pages 35-39 and Record VI, which I address specifically below).

[78] Furthermore, eight of the provinces provided information in support of the position that the harms in section 15(a) and (b) are made out for the records. Although I accept some of the appellant's concerns regarding this evidence and the weight that it should be afforded, I am satisfied that, given the description of the nature of the records identified in the form, this description is sufficient to establish that the eight provinces were aware of the nature of the information at issue.

[79] As a result, I find that the ministry has established that the section 15(a) harms could reasonably be expected to result from the disclosure of records that identify or would reveal the information and discussions in the three subcommittee meetings of December 2, 2005, April 28, 2006 and September 5, 2008. I will now review the specific records at issue in this appeal to determine whether and to what extent these records relate to or would reveal the information or discussions at those meetings.

Record I

[80] This record consists of 16 pages, comprised of a number of email messages (including attachments) relating to the December 2, 2005 subcommittee meeting.

[81] Pages 24-25, 27-28, 30-31 and 33-34 consist of drafts and a final document entitled "Next Steps" relating to the December 2, 2005 subcommittee meeting.

[82] The emails and emails chains on pages 26, 29, 32 refer to the draft and final "Next steps" documents, and either refer to an item in detail, or provide very brief succinct acknowledgements of the receipt of the material.

[83] On my review of pages 24-34, I am satisfied that its disclosure would reveal the information contained in the "Next steps" documents, which would in turn reveal the substance of the discussions at the subcommittee meeting of December 2, 2005. In addition, I find that although not all of the emails contain detailed information (for example, some include a very brief acknowledgement), to the extent that the portions of these emails or email chains do not refer to an item in any detail, I find that, if these emails or portions were severed, the disclosed portions would consist of meaningless snippets in the absence of the context of the comments.

[84] Pages 35-36 consist of an email chain referring to the attached notes from the December 2, 2005 meeting (pages 37-39). It is clear that the notes on pages 37-39 were typed from the handwritten notations taken at the December 2 meeting, and that disclosure of these notes would reveal the nature of the discussions at that subcommittee meeting. The emails on pages 35-36 that contain any substance refer to specific information either in the notes or discussed at the meeting. On my review of these records, I am satisfied that disclosure would reveal the substance of the discussion at the December 2, 2005 subcommittee meeting and, for the reasons set out above, that their disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations.

Records II and VII

[85] These two records consist of the agendas for the April 28, 2006 and the September 5, 2008 meetings respectively. They contain the topics for discussion at the identified subcommittee meetings. I am satisfied that disclosure would reveal the subject areas discussed at these meetings.

Records III and IV

[86] These two records consist of two slide presentations made to the subcommittee. These also include notations in the margins and/or underlining. As these were presented to the subcommittee and contain the details of the material presented to them, I am satisfied that disclosure would reveal the topics discussed at these meetings.

Records V and IX

[87] These two records consist of the handwritten minutes of two of the subcommittee meetings (the April 28, 2006 and September 5, 2008 meetings respectively). These minutes were taken by the Audit Manager, and contain detailed notes of the topics and discussions of the meetings. They also contain what appear to be very brief notes in the form of comments regarding the author's view of a particular topic or discussion.

[88] On my review of these two records, I am satisfied that disclosure would reveal the discussions or decisions made at the subcommittee meetings, and that their disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations. In addition, I find the brief notes in the form of comments made by the author would also either reveal the discussions or, if these comments were severed, would consist of meaningless snippets in the absence of the context of the comments.

Record VI (pages 74-98)

[89] This record consists of two copies of a paper prepared by Finance Canada's consultant (a draft and a final copy).

[90] I note that, except for pages 35-39, this is the only document for which the section 15(a) exemption claim was made later in the process. I also note that the response by the federal government does not directly address this record.

[91] However, on my review of the representations of the parties, and particularly on my review of the records, I am satisfied that this record qualifies for exemption under section 15(a).

[92] It is clear from both the April 28, 2006 meeting agenda and the handwritten minutes of the April 28, 2006 meeting, that the substance of this record, and the material in it, was presented to the subcommittee by the consultant who prepared the paper. Although I note that the draft copy of the paper is dated prior to April 28, 2006, and the final copy is dated after that date, based on my review of the agenda, the minutes and the draft and final paper, I am satisfied that disclosure of this record would reveal the nature of the material discussed and presented to the subcommittee meeting. On this basis, and on the basis of the representations confirming the nature of these meetings, I am satisfied that disclosure of this record could reasonably be expected to prejudice the conduct of intergovernmental relations, and that it qualifies for exemption under section 15(a).

Records VIII, X, XI and XII

[93] These records consist of a paper prepared by Finance Canada (Record VIII) and three papers which comment on that paper (Record X and XI, which contain Ontario's comments, and Record XII which contains Quebec's comments).

[94] I am satisfied that disclosure of Record VIII, prepared by Finance Canada and presented to the subcommittee meeting would reveal the substance of the discussions of the subcommittee, and that its disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations. Furthermore, on my review of the other three papers, I am satisfied that disclosure of these papers would also reveal the material contained in Finance Canada's paper, and that disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations.

Exercise of discretion

[95] As noted, section 15(a) is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

[96] 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

[97] In such a 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 43(2)].

[98] In its representations the ministry states that it exercised its discretion not to disclose the records for good reason. It refers to the fact that it consulted with other jurisdictions during ongoing negotiations on tax avoidance issues, and the other jurisdictions do not want these particular documents or others like them disclosed. It also refers to its position that disclosure of the records would affect present and future intergovernmental relations, particularly given the nature of the information at issue and the status of the discussions.

[99] The appellant's representations refer to its position that the ministry considered an improper factor, as it referred to generalized references to "ongoing negotiations" without any specific links to the records in issue. The appellant argues that these jurisdictions regularly discuss tax avoidance, and that by not referring to and considering the specific records, the ministry either refused to exercise its discretion, or took into account an irrelevant and improper consideration in the exercise of discretion. The appellant also states that the ministry failed to consider the right of access under the *Act*, including the notion that exemptions should be limited and specific.

[100] On my review of all of the circumstances surrounding this appeal, I am satisfied that the ministry has not erred in the exercise of its discretion to apply section 15(a) to the withheld information. I do not accept the appellant's position that the ministry did not consider the specific records at issue in this case, as the appeal clearly deals with specific records relating to the three identified meetings. In the circumstances, I am satisfied that the ministry properly exercised its discretion to apply the section 15(a) exemption, and I uphold its exercise of discretion.

Summary

[101] As a result of the above, I find that all of the records remaining at issue qualify for exemption under section 15(a). Having found that the records qualify for exemption under section 15(a), it is not necessary for me to review the possible application sections 15(b) or 18.

ORDER:

I uphold the ministry's claim that section 15(a) applies to the records at issue, and dismiss this appeal.

Original Signed by: September 30, 2011
Frank DeVries
Adjudicator