

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3128

Appeal PA11-62-2

Ministry of Finance

October 31, 2012

Summary: The appellant sought access to records relating to the Ontario government's implementation of temporary input tax restrictions during the conversion of the Ontario Retail Sales Tax to a Harmonized Sales Tax. The ministry granted partial access to responsive records, relying on the exemptions in sections 12 (Cabinet records), 13 (advice or recommendations), 15 (relations with other governments) and 17 (third party information). The appellant appealed. During both the mediation and adjudication stages of the appeal, the ministry clarified that it was relying on the introductory wording in section 12(1), as well as subparagraph (b), section 13(1), section 15(b) and sections 17(1) and (2). The adjudicator upheld the ministry's application of section 12(1) to those records to which it had claimed the exemption. The ministry's application of sections 13(1) and 15(b) was upheld in part. The application of the exemptions in sections 17(1) and (2) was not upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1), 13(1), 15(b), 17(1), 17(2).

OVERVIEW:

[1] This appeal concerns a request submitted to the Ministry of Finance (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- All briefing notes related to temporary input tax credit restrictions (also known as the temporary recapture of input tax credits); and
- The estimated revenue raised annually by the temporary restriction of input tax credits on meals and entertainment.

[2] The ministry issued a decision letter, granting partial access to records responsive to the request. The ministry denied access to the withheld portions of the records pursuant to sections 12 (Cabinet records), 13 (advice or recommendations), 15 (relations with other governments), and 17 (third party information) of the *Act*. In its decision, the ministry advised that it did not locate any records responsive to the second part of the request.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the mediation stage of the appeal process, the ministry agreed to provide the appellant with an index of records. The ministry also advised that some of the information contained within the records had been withheld because it was viewed as being non-responsive to the appellant's request.

[5] The appellant confirmed during mediation that he wished to pursue access to all of the withheld information, including those portions marked non-responsive. The appellant also confirmed that he did not take issue with the ministry's response to the second part of the request.

[6] Near the conclusion of mediation, the ministry provided the appellant with a copy of an index of records (the index), which described the records at issue and the exemptions that it wished to apply to each. In the index, the ministry confirmed that it is relying upon the exemptions in sections 12(1)(b), (c), (d) and (e), section 13(1), section 15, and sections 17(1) (third party information) and 17(2) (tax information) to deny access to various portions of the records at issue.

[7] The parties were unable to resolve the appeal during the mediation stage of the appeal process and the file was moved to the adjudication stage for an inquiry. In an inquiry, the parties are invited to provide written representations to an adjudicator on the issues, following which the adjudicator issues a written decision.

[8] The file was transferred to me to conduct the inquiry. I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the ministry. The ministry provided representations in response. In its representations, the ministry clarified that with regard to section 12, it was relying on both the introductory wording in section 12(1) and subparagraph (b), and that with respect to section 15, it was relying on subsection 15(1)(b). With regard to section 12(1), the ministry did not make representations on the application of subparagraphs (b), (c), (d) and (e).

[9] I then shared the ministry's non-confidential representations with the appellant, in accordance with *Practice Direction 7* and section 7 of the *IPC Code of Procedure*, and sought representations. The appellant declined to provide representations during the course of this inquiry.

Preliminary matters

[10] The appellant has expressed an interest in obtaining access to information marked non-responsive by the ministry. I have carefully reviewed those portions of the relevant records (parts of records 2 and 3) and find that this information relates to issues beyond the scope of the appellant's request. Accordingly, I am satisfied that this information is non-responsive to the appellant's request and I will not address this issue further in this order.

[11] I note as well that the ministry has claimed the application of the exemptions in sections 17(1) and 17(2) to some of the information at issue in records 1, 3, 4, 7, 12 and 13.

[12] In the case of record 4, the ministry states in its representations that it no longer relies on section 17(1) to portions of that record because the information pertaining to certain named entities is well known. Accordingly, section 17(1) is no longer at issue with regard to record 4 and I will not address the application of that exemption to it any further in this inquiry.

[13] With regard to records 1, 3, 7, 12 and 13, the ministry states in its representations that it notified several affected parties whose identities and views are set out in these records. Seven of these affected parties consented to the disclosure of their information and the ministry has agreed to disclose this information to the appellant. In light of the consents received and the ministry's decision to disclose, I will not address the application of section 17(1) to this information further in this order. Of the remaining affected parties, three denied consent and three did not respond. During the course of my inquiry I did not seek representations from the six affected parties that did not consent to the disclosure of their information in these five records. I also did not seek representations from a consultant and two senior ministry officials identified in record 3.

[14] I do not believe that section 17(1) or 17(2) would apply to this identifying information or that any of this information qualifies as "personal information" within the meaning of that term in section 2(1), due to the application of the "business identity information" exclusion in section 2(3). However, having not sought representations from these non-consenting affected parties, I have decided to sever their identifying information from records 1, 3, 7, 12 and 13. However, I am still required to review the application of section 17(1) and/or 17(2) to the remaining information at issue in these

records. My analysis of the application of the section 17(1) and 17(2) exemptions to this remaining information is discussed below.

[15] In the discussion that follows, I reach the following conclusions:

- The mandatory exemption in section 12(1) applies to records 5, 6, 7, 8, 8, 9, 10 and 11, in their entirety.
- The discretionary exemption in section 13(1) applies to record 13 in its entirety (with the exception of all identifiers, which I have severed on other grounds) and to records 3, 4, in part.
- The discretionary exemption in section 15(b) applies to record 4, in part.
- The mandatory exemptions in sections 17(1) and 17(2) do not apply to any of the records at issue.

RECORDS:

[16] There are 12 records at issue. The records at issue and the exemptions claimed are listed in the table reproduced as Schedule A to this order, set out below.

ISSUES:

- A. Does the mandatory exemption at section 12(1) apply to records 5, 6, 7, 8, 9 10 and 11?
- B. Does the discretionary exemption at section 13(1) apply to records 3, 4, 5, 6, 8, 9, 10 and 13?
- C. Does the discretionary exemption at sub-section 15(b) apply to records 4, 5, 6 and 11?
- D. Does the mandatory exemption at section 17(1) apply to records 1, 3, 5, 7, 12 and 13?
- E. Does the mandatory exemption at section 17(2) apply to records 4, 5, 6 and 13?
- F. Did the ministry exercise its discretion under sections 13(1) and 15(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the mandatory exemption at section 12(1) apply to records 5, 6, 7, 8, 9 10 and 11?

Section 12(1): Cabinet records

[17] In its representations, the ministry has addressed the application of the introductory wording in section 12(1) as well as subparagraph (b) of that section to records 5, 6, 7, 8, 9, 10 and 11. The relevant portions of section 12(1) 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,

...

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

Section 12(1): introductory wording

[18] 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).¹

[19] 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.²

[20] 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.³

¹ Orders P-22, P-1570, PO-2320.

² Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725.

³ Order PO-2320.

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

[21] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.⁴

Section 12(2): exceptions to the exemption

[22] Section 12(2) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[23] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.⁵

Representations

[24] By way of introduction, the ministry states that “temporary restricted input tax credits” (or RITCs) were announced in the 2009 Ontario Budget as an element of the tax reform measures that included the conversion of the Ontario Retail Sales Tax (RST) to a Harmonized Sales Tax (HST), with the HST generally replacing the RST on July 10, 2010. The ministry notes that the HST is imposed under the federal *Excise Tax Act* in respect of taxable supplies of goods and services. It applies to the same goods and services as the Goods and Services Tax (GST) and includes a federal portion at the rate of 5% and a provincial portion at the rate of 8%. The ministry notes that the HST is also a form of “value-added taxation”, which has as an essential feature a mechanism whereby the tax paid by a business on the supplies that it acquires for use in commercial activities is generally reimbursed to the business through input tax credits. The ministry states that the 2009 Budget announced that as part of the transition to the HST, Input Tax Credit (ITC) claims by large businesses would be temporarily restricted.

[25] The ministry states in its representations that the records at issue, which are subject to section 12, were contained in one of two binders put before Cabinet for

⁴ Order PO-2320, PO-2554, PO-2677 and PO-2725.

⁵ Orders P-771, P-1146 and PO-2554.

consideration at two "in camera" meetings. The ministry provides a table that sets out each record number, the date of the Cabinet meeting at which the record was considered and the location of the record in the relevant binder that was put before Cabinet. The ministry has requested that the dates of the Cabinet meetings be withheld from the appellant due to confidentiality concerns. As a result, I chose to not share these dates with the appellant at the inquiry stage of the appeal due to confidentiality concerns.

[26] The ministry's representations are supplemented by an affidavit sworn by the Manager, Treasury Board Co-ordination Office, Office of the Budget and Treasury Board of the Ministry of Finance (the Manager), who the ministry submits managed the team that compiled the binders prepared for and presented at the two Cabinet meetings. The ministry asked that I not share the contents of the Manager's affidavit with the appellant. I respected the ministry's wishes at the inquiry stage of the appeal. However, to fairly and transparently review the application of the section 12 exemption in this order, I find it necessary to provide some contextual information regarding the responsibilities of the Manager's office and the process the Manager followed to confirm the whereabouts of the records at issue in the relevant binders prepared for the Cabinet meetings. In doing so, I have been careful not to reveal the contents of the records at issue or any other information that may be viewed as confidential.

[27] The Manager states in her affidavit that her office is responsible for coordinating the assembly of material that is submitted to meetings of Treasury Board/Management Board of Cabinet for review. The Manager states that this includes the preparation of the Budget and Fall Economic Statement briefing binders that are submitted to Treasury Board/Management Board of Cabinet and, for the purposes of this appeal, the briefing binders for the 2010 Ontario Budget and the 2010 Fall Economic Statement. In her affidavit, the Manager accounts for where the records at issue appeared in the binders prepared for Treasury Board/Management Board of Cabinet meetings at which the 2010 Ontario Budget and the 2010 Fall Economic Statement were discussed. The Manager states that she has examined records 5, 6, 7 and 9 and confirms that they are the same documents that were placed in the 2010 Ontario Budget Briefing binders that were submitted to the Treasury Board/Management Board of Cabinet meeting on a specified date. She further states that she has examined records 8, 10 and 11 and confirms that they are identical to those placed in the 2010 Fall Economic Statement binders that were submitted to the Treasury Board/Management Board of Cabinet meeting on a specified date.

[28] The ministry submits that all of the records at issue contain policy options and recommendations. The ministry states that the Cabinet reviewed and discussed the contents of these records at two Cabinet meetings.

[29] Regarding the possible application of the exception in section 12(2)(b), relating to the ministry asking for Cabinet's consent to disclose the records, it submits that while

it turned its mind to seeking Cabinet's consent, it chose not to do so to avoid creating confusion regarding the "multiplicity of iterations or alternatives" and in order to protect its "confidential relationship with other jurisdictions and stakeholders" that were consulted during the deliberative process.

Analysis and findings

[30] Having carefully reviewed the ministry's representations and the contents of the records at issue, I am satisfied that these records qualify for exemption, in their entirety, under the introductory wording of section 12(1).

[31] In my view, the ministry has provided sufficient evidence to establish a linkage between the contents of the records and the actual substance of Cabinet deliberations (see Order PO-2320). Accordingly, I find the records qualify for exemption pursuant to the introductory wording in section 12(1).

[32] I reach this conclusion based on two factors: the evidence provided by the Manager in her sworn affidavit and the contents of the records themselves. With regard to the Manager's sworn evidence, I am satisfied that she has demonstrated that she and her team assembled the records at issue for inclusion in the binders that were presented to Cabinet for deliberation at the two specified meetings that took place in 2010. As well, I am satisfied on the face of the records themselves that they were presented to Cabinet for deliberation. I note that records 10 and 11 are marked "Confidential Advice to Cabinet" and, in my view, it is clear that these records were presented to Cabinet for deliberation and that Cabinet did, in fact, consider their contents at the two Cabinet meetings in question. I acknowledge that records 5, 6, 7 and 8 do not contain the same qualifier, instead stating in various forms that the records are "confidential". However, comparing the subject matter and the contents of records 10 and 11 with that in records 5, 6, 7 and 8, I am satisfied that the latter records address the same issues, that is, the province's transition to the HST and the temporary restriction of ITCs for certain businesses through the transition period. Accordingly, I also find that records 5, 6, 7, and 8 were presented to Cabinet as part of its deliberative process.

[33] Having found these records exempt under the introductory wording in section 12(1), I am not required to consider the application of section 12(1)(b) to the contents of these records. However, I note that all of these records present "policy options" and/or "advice" or "recommendations" that were "prepared for submission" to Cabinet within the meaning of section 12(1)(b). Accordingly, I am satisfied that the substantive content of these records would also qualify for exemption under section 12(1)(b).

[34] Dealing briefly with the application of the exceptions in section 12(2), it is clear that section 12(2)(a) does not apply, owing to the age of the records, and I am

satisfied that Cabinet has not consented to the disclosure of the records pursuant to section 12(2)(b).

[35] I note that other exemptions have been claimed in respect of records 5, 6, 7, 8, 9, 10 and 11. However, having found these records exempt under section 12(1), I need not consider the application of the other exemptions to these records.

B. Does the discretionary exemption at section 13(1) apply to records 3, 4 and 13?

Section 13(1): advice or recommendations

[36] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[37] 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.⁶

[38] 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].

[39] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.⁷

[40] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

⁶ 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.).

⁷ 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.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations⁸

[41] It is implicit in the various meanings of “advice” or “recommendations” considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.⁹

[42] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.¹⁰

[43] 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
- a supervisor’s direction to staff on how to conduct an investigation¹¹

Representations

[44] The ministry submits that it is

clear from the “context in which the records at issue were created and communicated” that they contain “information that could be said to ‘advise’ the Minister in making the decision on RITCs, or that would “allow one to accurately infer any advice given.”

⁸ 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).

⁹ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

¹⁰ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

¹¹ 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).

[45] The ministry adds that the records "do not consist of mere information."

[46] The ministry states that records 3, 4 and 13 make "express recommendations." The ministry also asserts, in the alternative, that all of these records contain information that would "permit the drawing of accurate inferences with respect to a suggested course of action" even if one or more does not "itself...make a specific recommendation."

[47] The ministry makes the following representations regarding the application of section 13(1) to each of records 3, 4 and 13:

- *Record 3* – The information in chart form contained on page 1 is non-responsive to the appellant's request as it is about the tax treatment of books, not restrictions on ITCs. The ministry also states that the first part of this page, which identifies a consultant by name is exempt pursuant to section 13(1); however, the ministry does not provide any reasons for taking this position regarding this information. With respect to page 2 of the record, the ministry states the first paragraph "establishes the context and factual basis" for the advice that follows. The ministry then describes the remaining information on this page as "words of recommendation" and advice with supporting reasons for the advice and recommendations given. The ministry has bolstered its views with an affidavit submitted by the consultant identified in the record, which it has asked that I not share due to confidentiality concerns.
- *Record 4* – The ministry submits that record 4 consists of a slide deck containing "confidential advice" provided to the Minister of Finance in a slide presentation delivered on March 10, 2010 on the subject of restricted ITCs and Municipal Electricity Utilities. The ministry states that this record was prepared by an identified senior ministry employee. The ministry submits that the record contains the author's "express recommendations" towards a particular course of action and that the slide deck was presented to "assist the Minister in deciding among the three named options mentioned on pages 7 and 8 [of the record], with Option 1 being clearly recommended." The ministry states that the slide deck begins with a statement of the issue, then the background of what each taxpayer in the group currently pays (which it claims to be confidential taxpayer information) and analysis. The ministry submits that "the Minister could not make the decision without the background, considerations, the analysis or the alternatives." The ministry adds that all is "necessary advice to the Minister who must decide whether to take the express recommendations or the alternatives." The ministry also provides an affidavit sworn by the author of the slide deck. However, the author's affidavit does not specifically address the application of section 13(1) to

the information at issue in record 4; rather, it addresses the application of other exemptions to various records at issue, including record 4.

- *Record 13* – The ministry describes this record as a chart prepared by a named individual that provides recommendations from two sources on various issues relating to RITCs and the manufacturing sector. The ministry states that the “entire document consists of explicit recommendations.”

Analysis and findings

[48] Having reviewed the ministry’s representations and the contents of records at issue, I find portions of records 3 and 4 and all of record 13 exempt from disclosure pursuant to the discretionary exemption in section 13(1). I reach these conclusions for the following reasons:

Record 3

[49] This record is a “background note” prepared by a ministry employee for a senior ministry official for his review in advance of his participation in discussions with the Southern Ontario Commodity Tax Study Group regarding issues relating to the GST/HST harmonization.

[50] Page 1 of this background note contains two sections, a statement of the “Issue” followed by part 1 of the author’s “Analysis.” Under the “Issue” section, the name of a consultant is provided along with the first name of the ministry official for whom the background note was prepared. As stated above, in the background section to this order, I have decided to sever the personal identifiers for both the consultant and ministry official. Accordingly, this information is not at issue. However, with regard to the remaining information in this part of the record, I find that it consists of contextual information regarding the nature of the issues raised by the consultant and the purpose of the background note. In my view, all of this information qualifies as factual or background information, as contemplated by the exception to the section 13(1) exemption set out in section 13(2)(a). I find that this portion of record 3 does not include the advice or recommendations of the author or the consultant. Nowhere in this portion of the record is a preferred course of action suggested. Nor does the information at issue permit the drawing of inferences with respect to a suggested course of action. Accordingly, I conclude that the information contained in the “Issue” portion of this record is not exempt under section 13(1) and I will order it disclosed subject to my discussion regarding the application of the mandatory exemption in section 17(1) to it, below.

[51] With regard to part 1 of the “Analysis” section of this record, I have determined above in the background section of this order, that this information is non-responsive to

the appellant's request. Accordingly, I will not address the application of section 13(1) to it.

[52] Page 2 contains a second part of the "Analysis" section of this record. It is comprised of a bolded statement regarding the topic followed by four paragraphs containing discussion.

[53] The bolded statement sets out the issue to be determined. In my view, it represents contextual information. It does not preview or reveal a preferred course of action in the paragraphs to follow, nor does it permit the drawing of accurate inferences with respect to a suggested course of action. I find that this information is not exempt under section 13(1) and I will order it disclosed subject to the possible application of the mandatory exemption in section 17(1) to it.

[54] Paragraph one of page 2 provides a statement of fact attributed to the consultant regarding the tax treatment of a particular industry sector in one province as compared to another province. In my view, this information is strictly factual in nature. It does not suggest a preferred course of action nor does the information at issue permit the drawing of inferences with respect to a preferred course of action. Accordingly, I find that the information contained in this paragraph is not exempt under section 13(1) and I will order it disclosed subject to the application of the mandatory exemption in section 17(1) to it.

[55] Paragraph two of page 2 clearly sets out a preferred course of action based on certain prevailing circumstances regarding the nature of restrictions on ITCs. I find this information qualifies for exemption pursuant to section 13(1).

[56] Paragraph three of page 3 expands on the proposed course of action discussed in paragraph two, providing insight into how the preferred course of action could be orchestrated and the pros and cons of using a particular approach. While the wording of this paragraph does not expressly set out a preferred course of action, it does permit the drawing of inferences with respect to a suggested course of action. Accordingly, I find this information exempt pursuant to section 13(1).

[57] Paragraph four of page 3 provides an "option" to address concerns expressed in previous paragraphs two and three. While not expressly stated as a preferred course of action, it once again permits the drawing of accurate inferences regarding a suggested course of action. I also find this information exempt under section 13(1).

Record 4

[58] Record 4 is comprised of a cover page followed by seven pages of discussion.

[59] Portions of the cover page, specifically the title of the document, were disclosed by the ministry in its index. The remaining information on this page helps to identify the nature of the document and the date it was created. In my view, none of this information reveals a preferred course of action or permits the drawing of inferences with respect to a suggested course of action. I find that that the information on this page is not protected by section 13(1).

[60] Page 2 is titled "Issue and Decision Sought" followed by two bullet points. The first bullet point provides factual and background information regarding the issue to be determined in the document. The statement of the issue to be determined and the decision sought, as well as the first bullet point, do not reveal a preferred course of action or permit the drawing of inferences with respect to a suggested course of action. Accordingly, I find this information is not exempt under section 13(1) and I will order it disclosed subject to my discussion of the application of section 17(2) to a discrete portion of the first bullet point. However, the second bullet point alludes to a suggested course of action and then provides two options for addressing the issue to be determined in the document. This information clearly permits the drawing of inferences with respect to a suggested course of action and I find it exempt under section 13(1).

[61] Page 3 is titled "Background – RITCs." This page provides background contextual information regarding eligibility to claim ITCs for Ontario businesses. This information does not reveal a preferred course of action or permit the drawing of inferences with respect to a suggested course of action. Accordingly, I do not find it exempt under section 13(1) and I will order it disclosed.

[62] Page 4 is titled "Background – Electricity Distribution/Retail in Ontario." Again, like the information on page three, I find the information on this page to be background contextual information, in this case about the number of licensed electricity distributors and retailers in Ontario. This information does not reveal a preferred course of action or permit the drawing of inferences with respect to a suggested course of action. Accordingly, I do not find it exempt under section 13(1) and I will order it disclosed.

[63] Page 4 is titled "Background – Electricity Distribution/Retail in Ontario." The information on this provides background information about the status of electricity distributors in Ontario. Several entities are identified by name. I have previously stated that I will sever out all identifiers for these affected parties. What remains is purely factual information that is not connected to any advice or recommendations given. I find then that this information is not exempt under section 13(1) and I will order it disclosed.

[64] Page 5 is titled "Analysis", which then follows on pages 5 through 7. The first part of page 5 makes mention of a document titled "Ontario's Tax Plan for Jobs and Growth" followed by what was announced through that document regarding the application of RITCs to certain sectors and organizations. There are then two bullet points that provide some background contextual information regarding the announcement. The document titled "Ontario's Tax Plan for Jobs and Growth" is readily available on the ministry's website.¹² Further, the contextual information provided neither reveals a preferred course of action nor permits the drawing of inferences with respect to a suggested course of action. In my view, it is clearly not exempt under section 13(1) and I will order it disclosed. The second part of page 5 provides additional background contextual information regarding concerns about the tax status of Municipal Electricity Utilities. In my view, the information contained in this portion of the record does not reveal a preferred course of action or permit the drawing of inferences with respect to a suggested course of action. I will order this information disclosed, subject to my determination respecting the application of section 17(2) to it.

[65] Page 6 provides further analysis. There are two bullet points. The first bullet point provides further factual and background information regarding the tax status of Municipal Electricity Utilities. In my view, the information contained in this portion of page 6 does not reveal a preferred course of action or permit the drawing of inferences with respect to a suggested course of action. I will order it disclosed subject to the possible application of section 17(2) and section 15(1)(b) to this information. However, I find that the second bullet point is connected to advice given at a later point in this record. While this information does not expressly set out a preferred course of action, it does permit the drawing of inferences with respect to a suggested course of action. Accordingly, I find this information exempt pursuant to section 13(1).

[66] Page 7 is titled "Options", which then follow on pages 7 and 8. At the top of page 7 three options are listed. Each option is then discussed in detail. Option 1 is marked as the preferred option. I am satisfied that the discussion of option 1 qualifies as a "recommendation" within the meaning of that term under section 13(1), as it clearly sets out a preferred course of action. However, I am also satisfied that the remaining information – including the listing of options 2 and 3 and the discussion of those options on page 8– is also exempt under section 13(1). This information taken as a whole constitutes advice provided by a senior ministry staff person to the Minister of Finance for consideration within the deliberative process of government decision-making and policy-making regarding issues surrounding the application of RITCs in the electricity sector. While this information may not represent the preferred course of action, it does permit the drawing of inferences with respect to a suggested course of action. To summarize, I find all of the information at issue on pages 7 and 8 exempt pursuant to section 13(1).

¹² <http://www.fin.gov.on.ca/en/publications/2009/fbbb.html>.

Record 13

[67] I concur with the ministry that all of the information contained in record 13 is exempt from disclosure under section 13(1). The record is a table comprised of three columns. The first column describes the topic or issue to be addressed relating to RITCs and the manufacturing sector. Columns two and three provide recommendations from two sources on the various topics or issues listed in column one. I am satisfied that viewed as a whole, the information in this record either presents a series of preferred courses of action or permits the drawing of inferences with respect to suggested courses of action. Accordingly, I find the information in this record exempt from disclosure in its entirety under section 13(1).

C. Does the discretionary exemption at sub-section 15(b) apply to portions of the information remaining at issue in record 4?

[68] As stated above, the ministry raised the application of section 15(b) in regard to several records at issue, specifically records 4, 5, 6 and 11. I have found records 5, 6 and 11 exempt in their entirety pursuant to section 12. Accordingly, I need not consider the application of section 15(b) to these records. I have found portions of record 4 exempt under section 13(1). However, the ministry relies on section 15(b) to deny access to another portion of record 4. I will now examine the application of that exemption to this information.

Section 15(b): information received from another government

[69] Section 15(b) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (b) reveal information received in confidence from another government or its agencies by an institution;
- or

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

[70] 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.¹³ The purpose of sections 15(b) is to allow the Ontario government to receive information in confidence from intergovernmental contacts, thereby building the

¹³ Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

trust required to conduct affairs of mutual concern.¹⁴

[71] 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.¹⁵

[72] 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.¹⁶

The test under section 15(b)

[73] 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;
2. the information must have been received by an institution; and
3. the information must have been received in confidence.¹⁷

Representations

[74] The ministry states that the province of Ontario was invited by the federal government to participate in intergovernmental discussions in relation to issues surrounding the transition from the GST to the HST. The ministry states that the federal government was seeking policy input from the provinces to assess the policy challenges that may have arisen by importing rules already in place in Quebec into the federal *Excise Tax Act*.

[75] The ministry implies that the information at issue in record 4 was received in confidence from Finance Canada to inform the provincial Minister of Finance regarding the tax status of municipal electricity utilities. The ministry notes that it was the intention of the author of record 4 that the information contained in it remains

¹⁴ 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.

¹⁵ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439.

¹⁶ Order P-1552.

¹⁷ Order P-210.

confidential. Each page of the record is marked "CONFIDENTIAL FEDERAL/PROVINCIAL RELATIONS – CONFIDENTIAL ADVICE TO MINISTER."

Analysis and findings

[76] Having carefully examined the portions of record 4 remaining at issue and the ministry's representations, I am satisfied that this information qualifies for exemption under section 15(b). This information, very clearly on its face, was received by the ministry from Finance Canada with an expectation that it will be treated in confidence. Accordingly, I find that the three part test under section 15(b) has been satisfied and that this information is exempt under that section.

D. Does the mandatory exemption at section 17(1) apply to records 1, 3 and 12?

[77] As stated above, the ministry raised the application of the section 17(1) mandatory exemption to records 1, 3, 5, 7, 12 and 13. Part of record 3 and all of record 13 were found exempt pursuant to section 13(1). Records 5 and 7 were found exempt in their entirety under section 12(1). Accordingly, I do not need to examine the application of section 17(1) to these records. As well, as discussed in the background section of this order, I have removed from the scope of this appeal the identifying information for all affected parties mentioned in records 1, 3 and 12. Accordingly, I do not need to examine the application of section 17(1) to the identifying information in records 1, 3 and 12. I am now left to examine the application of section 17(1) to the limited information remaining at issue in records 1, 3 and 12.

Section 17(1): the exemption

[78] Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[79] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹⁸

[80] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[81] The ministry states in its representations that the information for which it seeks the application of section 17(1) is “technical”, “commercial” and “financial” and information.

[82] These types of information have been discussed in prior orders:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information

¹⁸ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706.

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.¹⁹

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.²⁰ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²¹

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.²²

[83] On part 1 of the test, the ministry states:

[T]he information is all of a kind, financial information and technical (tax) information since it consists of the position favoured by each party consulted by Ontario on restrictions on input tax credit and the financial impact this would have on the industry. In these consultations the technical and financial input of companies, consultants and associations representing particular industries should be protected, assuming the other criteria are met.

Analysis and findings

[84] Having carefully reviewed the information remaining at issue in records 1, 3 and 12, I find that it does not meet the test of "technical", "commercial" or "financial" information within the meaning of those terms under part 1 of the test under section 17(1). In my view, the information at issue is not related to the treatment of the enterprise or the business interests of the affected parties' identified in the records, which is critical to meeting the part 1 test under section 17(1). Rather, it is generic advice offered by various interested stakeholders that have been consulted by the ministry for their views regarding the proposed treatment of a class of taxpayers during the transition to the HST.

[85] Further, even if this information did meet the part 1 test, which I have found is not the case, I am satisfied that the disclosure of the information remaining at issue would not be prejudicial to the affected parties since I have removed all identifying information.

¹⁹ Order PO-2010.

²⁰ Order PO-2010.

²¹ Order P-1621.

²² Order PO-2010.

[86] To conclude, having determined that the information at issue in records 1, 3 and 12 does not meet part 1 of the test under section 17(1), I find that this information does not qualify for exemption under that exemption and I will order it disclosed.

E. Does the mandatory exemption at section 17(2) apply to information at issue in record 4?

[87] Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[88] The ministry states that the information at issue under section 17(2) is "identifiable or identified taxpayer information..." that "came from a federally-created HST federal tax return or information developed from federal tax returns about certain groups whose members can be identified directly or indirectly."

[89] The ministry adds that it is not asserting a section 17(2) claim "in respect of facts which speak of the entire group unless those facts say something about each identifiable member of the group."

[90] Turning to my analysis and findings, record 4 is a draft slide deck prepared for the purpose of providing advice to the Minister of Finance. The information remaining at issue in this record under section 17(2) is restricted to a small portion of page 2. I have found all other information to which the ministry claimed the application of section 17(2) exempt under one of the other exemptions claimed.

[91] In my view, the information remaining at issue does not qualify for exemption under section 17(2). It is generic information about the proposed application of restrictions on ITCs to a particular class of taxpayers.

[92] Neither the record itself nor the representations provided by the ministry establish that the information at issue was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. I note that an affected party is identified by name in the portion of the information at issue, as an example of an entity that falls into the class of taxpayers discussed in the record. However, my decision to remove all identifying information about affected parties merely bolsters my conclusion that the information at issue is generic information about a class of taxpayers.

[93] I note that the ministry, in its representations, shares the view that section 17(2) would not apply to information in which individual members of a group are not identified. Accordingly, even if I were to find that the information at issue was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a

tax, which I find not to be the case, any possibility that section 17(2) might apply is negated by my decision to sever the identity of the named affected party.

**F. Did the ministry exercise its discretion under sections 13(1) and 15(b)?
If so, should this office uphold the exercise of discretion?**

General principles

[94] The section 13(1) and 15(b) 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.

[95] 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.

[96] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²³ This office may not, however, substitute its own discretion for that of the institution.²⁴

Relevant considerations

[97] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant²⁵:

- 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

²³ Order MO-1573.

²⁴ Section 54(2).

²⁵ Orders P-344, MO-1573.

- 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.

Analysis and findings

[98] The ministry's representations on this issue are brief. However, having had the benefit of carefully reviewing all of the records at issue under the section 13(1) and 15(b) exemptions, and considering the totality of the ministry's representations on the application of these exemptions to those records, I am satisfied that the ministry has properly exercised its discretion in this case. In my view, the ministry has exercised its discretion in good faith and has taken into account relevant considerations and no irrelevant ones.

[99] Accordingly, I uphold the ministry's exercise of discretion in applying the exemptions in sections 13(1) and 15(b) to portions of the information at issue.

ORDER:

1. I uphold the ministry's application of the exemption in section 12(1) to records 5, 6, 7, 8, 9, 10 and 11 in their entirety.
2. I uphold the ministry's application of the discretionary exemption in section 13(1) to section 13.

3. I order the ministry to disclose records 1, 3, 4 and 12, in part, to the appellant in accordance with the highlighted versions of these records provided to the ministry with its copy of this order, by **December 10, 2012** but not before **December 3, 2012**. To be clear, the ministry is not to disclose to the appellant the portions of these records that have been highlighted in yellow.
4. I order the ministry to provide me with copies of the severed versions of records 1, 3, 4 and 12 that it discloses to the appellant.
5. I remain seized of this matter in order to verify compliance with order provisions 2, 3 and 4.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ October 31, 2012

SCHEDULE A

Record #	Description	Severed or Withheld in Full	Exemptions Claimed or Reason for Non-disclosure
1	Stakeholder Asks re RITCs (2 pages)	Withheld in full	17(1)
3	Southern Ontario Commodity Tax Study Group – Background Note (2 pages)	Withheld in full	13(1) 17(1)
4	Slide Deck – Restricted ITCs and Municipal Electricity Utilities (8 pages)	Withheld in full	13(1) 15(b) 17(1), (2)
5	Slide Deck – Decision Matrix: Restricted ITCs (Staff Recommendations) (5 pages)	Withheld in full	12(1)(b) 13(1) 15(b) 17(1)(2)
6	Note – Restricted ITCs and the MUSH Sector (4 pages)	Withheld in full	12(1)(b) 13(1) 15(b) 17(2)
7	Information Notice – Temporary Recapture of ITCs Requirement – Summary Chart (6 pages)	Withheld in full	12(1)(b) 17(1)
8	Table – Restricted ITC on Energy Inputs: Policy Options for Contract and/or Own Use Manufacturers (4 pages)	Withheld in full	12(1)(b) 13(1)
9	Executive Summary: Release of Information Notice – Input Tax Credit Restrictions for Large Businesses (2 pages)	Withheld in full	12(1)(b) 13(1)
10	Re-Release of Information Notice #5 – ITC Restrictions/Recapture (2 pages)	Withheld in full	12(1)(b) 13(1)
11	Note – Restricted ITCs, Contract Manufacturing and Manufacturing for Own Use (2 pages)	Withheld in full	12(1)(b) 15(b)
12	Table – Restricted ITC: Recommendations (7 pages)	Withheld in full	17(1)
13	Table – Restricted ITC: Manufacturers (2 pages)	Withheld in full	13(1) 17(1)