

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3130-I

Appeals PA07-409 and PA08-127

Ministry of Finance

November 5, 2012

Summary: The requester sought access to records related to reassessments under the *Corporations Tax Act*. The ministry granted partial access to the responsive records, some of which were withheld, in whole or in part, pursuant to sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 15 (relations with other governments), 17(2) (tax information), 18(1) (economic and other interests), and 19 (solicitor-client privilege) of the *Act*. Following the issuance of Interim Order PO-3006-I and Reconsideration Order PO-3107-R, the ministry was instructed to exercise its discretion with respect to records found subject to discretionary exemptions. This order requires the ministry to disclose all or part of three records, to exercise its discretion with respect to two records. This order also upholds the ministry's exercise of discretion with respect to the remaining records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 19.

Orders and Investigation Reports Considered: PO-3006-I, PO-3107-R, PO-2490, P-58.

Cases Considered: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23.

OVERVIEW:

[1] The Ministry of Finance (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

1. All records from/to [named individual] (Senior Tax Avoidance Auditor, Ministry of Finance) including indexes, file lists, file plans, letters, memoranda, working papers, worksheets and emails in respect of the audit and proposed reassessment under the *Corporations Tax Act (CTA)* of the Taxpayer [the requester] for fiscal years ended December 28, 2002, January 3, 2004 and January 1, 2005. These records include, but are not limited to:

a) all drafts (annotated or not) of a document titled "Summary Position Paper Finco - Tax Compliance and Regional Operations Branch Tax Avoidance Audit";

b) the final and complete version (i.e. not summary) of a document from which the document titled "Summary Position Paper Finco – Tax Compliance and Regional Operations Branch Tax Avoidance Audit" was extracted or summarized; and

c) the records containing the findings of the Taxpayer's audit and recommendations to reassess the Taxpayer.

2. All records from/to [named individual] (Manager, Tax Avoidance Audit, Ministry of Finance) including indexes, file lists, file plans, letters, memoranda, working papers, worksheets and emails in respect of the audit and proposed reassessment under the *CTA* of the Taxpayer for fiscal years ended December 28, 2002, January 3, 2004 and January 1, 2005.

3. All records from/to [named individual] (Director, Western Region, Taxpayer Compliance & Regional Operations Branch, Ministry of Finance) including indexes, file lists, file plans, letters, memoranda, working papers, worksheets and emails in respect of the audit and proposed reassessment under the *CTA* of the Taxpayer for fiscal years ended December 28, 2002, January 3, 2004 and January 1, 2005.

4. All records from any other official of the Ministry of Finance including indexes, file lists, file plans, letters, memoranda, working papers, worksheets and emails in respect of the audit and proposed reassessment

under the *CTA* of the Taxpayer for fiscal years ended December 28, 2002, January 3, 2004 and January 1, 2005.

5. All records between the Ministry of Finance (Ontario) and any other federal or provincial taxing authority (including the Canada Revenue Agency and the Ministry of Finance for Alberta).

6. All records including preparatory drafts, submissions and any internal memoranda in respect of the amendment made to subsection 2(2) of the *CTA* by 2005, c.28, Sch. D, s.2(1)...

[2] The Ministry of Finance had split into two ministries on February 21, 2007, just before the request was made. These two ministries consisted of the Ministry of Revenue (MOR) and the Ministry of Finance (MOF or the ministry). In 2011, the Ministry of Revenue was absorbed back into the Ministry of Finance.

[3] The MOR located responsive records and granted partial access to them. Some of the records were withheld, in whole or in part, pursuant to sections 13(1) (advice or recommendations), 15 (relations with other governments), 17(2) (tax information), 18(1) (economic and other interests), and 19 (solicitor-client privilege) of the *Act*.

[4] The requester (now the appellant) appealed MOR's decision to this office, which then opened appeal file PA07-409.

[5] During the mediation of appeal PA07-409, additional responsive records were also located within the ministry and a decision letter was issued. The ministry granted partial access to the responsive records and denied access to others pursuant to sections 12(1)(e) and (f) (Cabinet records), 13(1) (advice or recommendations), 15(a) (prejudice to intergovernmental relations), 17(2) (tax information), 18(1)(d) (injury to financial interests), and 19 (solicitor-client privilege) of the *Act*. This decision was also appealed by the requester (the appellant in file PA07-409), which resulted in appeal file PA08-127 being opened by this office.

[6] The appellant advised that it wished to pursue access to all of the records that were withheld, in full or in part, except for the information that was deemed to be non-responsive to the request and that which was withheld pursuant to the personal privacy exemption in section 21(1) of the *Act*.

[7] As mediation did not resolve the issues in these files, they were transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry and the appellant. The parties' representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. In 2011, the Ministry of Revenue was absorbed back into the Ministry of Finance.

[8] On October 27, 2011, I issued Interim Order PO-3006-I. In that order, I found certain records or portions of records exempt by reason of the mandatory exemptions in sections 12(1)(f) and 17(2) and subject to the discretionary exemptions in sections 13(1), 15(a) and/or (b), 18(1)(d) and 19. I ordered the ministry to re-exercise its discretion with respect to the following records that I found subject to discretionary exemptions:

- Records O13, O76 to O80, G22B; the concluding statements on pages 41 and 42 of Record P9A; pages 1 and 2 of Record P8U; the identified excerpts on pages 45, 56, 116-117, and 129 of Record P9B; the severed information in Record O74.¹
- Records O46, P7D, P7E, P7I, P8C, P8F, P8H, P8J, P8M, P8N, P8Q, P8P, P8R, P8S, P8V, G9A, G18A, G19, G22E; the severances on pages 2 and 3 of Record P7G; the non-highlighted portions of Records P8B, P8E, P8I, P8L, P8O, P8T; the agenda in Record P8L; pages 1 to 3 and part of one email on page 4 and the attachment to Record P8A; the emails in Record P8D; pre-meeting notes and draft agenda in Record P8G; parts of two emails on page 1 of Record G8.²
- Records P7J, P9B, Y7, G22A and G22C and the non-highlighted information in Record O50.³
- Pages 1, 6, 10, 13, 14, 19, 23, 27, 31, 34, 37, 43, 49, 57, 65 and 76 of Record Y4; Page 1 of Record O11; Page 1 of Record P5F; Record Y8C.⁴

[9] In Interim Order PO-3006-I, I found certain records or portions of records not exempt and ordered the ministry to disclose them. I ordered the following information disclosed:

- Records P7C, P7H, P8K;
- meeting notes in Record P8G;
- the highlighted information in Records P8A, P8B, P8E, P8I, P8L, P8O, P8T, O10, and O50;
- the severances on page 1 of Record P7G;
- Record P7K (except for the names of corporations in Record P7K); and
- the attachments to Records P8D and P8U.

[10] The ministry disclosed the information at issue in Records O10, O50, and P7K and filed a reconsideration request for the remaining information that I ordered

¹ These records are subject to section 13(1).

² These records are subject to sections 15(a) and/or (b).

³ These records are subject to section 18(1)(d).

⁴ These records are subject to section 19.

disclosed. The ministry and the appellant provided representations with respect to the ministry's reconsideration request. In response to Interim Order PO-3006-I, both parties also provided representations with respect to the ministry's exercise of discretion. All of these representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] I then issued Reconsideration Order PO-3107-R, in which I found additional records subject to the discretionary exemption in sections 15(a) and/or (b). In that order, I ordered the ministry to exercise its discretion concerning the disclosure of the information at issue, which consists of:

- the pre and post meeting notes in Record P7C;
- page 1 of Record P7H;
- certain portions of the emails on page 7 of Record P8A;
- page 1 of Record P8B;
- the meeting notes in Record P8G;
- certain portions of the email on pages 4 and 5 Record P8I; and
- the attachment to Record P8U.

[12] In response to Reconsideration Order PO-3107-R, both parties provided representations with respect to the ministry's exercise of discretion. These representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. In its representations, the ministry exercised its discretion to withdraw its section 18(1)(d) claim to Records G22A, G22C, P7J, P9B and Y7. Therefore, only portions of Record O50 remain subject to section 18(1)(d).

[13] As no other exemptions have been claimed for all of Records G22A and G22C, I will order these records disclosed. I will also order the disclosure of the information in Records P7J to which the ministry claimed the application of section 18(1)(d).⁵

[14] In Interim Order PO-3006-I, I found both Records P9B and Y7 exempt by reason of section 18(1)(d). As a result, I did not consider in that order whether the discretionary solicitor-client privilege exemption in section 19 also applied to these two records. I will consider in this order the application of section 19 to these two records below.

⁵ As per Interim Order PO-3006-I, the mandatory exemption in section 17(2) exempts the names of corporate taxpayers in Records P7J, as well section 13(1) has been applied to identified excerpts on pages 45, 56, 116-117 and 129 of Record P9B.

[15] In this order, I order the ministry to disclose all or part of three records, to exercise its discretion with respect to two records, and I uphold the ministry's exercise of discretion with respect to the remaining records.

PRELIMINARY ISSUE:

Does the solicitor-client privilege exemption in section 19 apply to Records P9B and Y7?

[16] As stated above, because the ministry has withdrawn its application of the section 18(1)(d) exemption to Records P9B and Y7, I will consider whether each of these records is exempt by reason of section 19. These records can be more particularly described in the following chart:

Record No.	Description
P9B	Title: Position Paper: Captiveco ⁶ Passive Interest Income (135 pages)
Y7	March 9, 2006 (3 pages) String of emails between 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (Ministry of Finance [FIN]) and Counsel, Legal Services Branch (Ministry of Finance, Legal Services Branch) among others.

[17] Section 19 reads:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[18] Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

⁶ Described by the ministry as a subsidiary in a tax haven. See paragraph 15 of Interim Order PO-3006-I.

Branch 1: common law privilege

[19] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.⁷

Solicitor-client communication privilege

[20] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁸

[21] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁹

[22] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.¹⁰

[23] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹¹

[24] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹²

Litigation privilege

[25] Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation.¹³

⁷ Order PO-2538-R; *Blank v. Canada* (Minister of Justice) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Order P-1551.

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹¹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

¹³ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above).

[26] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

[27] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[28] Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

[29] Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Record P9B

[30] P9B is a 135 page paper entitled, "Position Paper, Captiveco: Passive Interest Income TCROB Tax Avoidance Audit – Draft - For discussion at the Ontario GAAR

[General Anti-Avoidance Rule] Committee." Section 13(1) has been applied to the identified excerpts on pages 45, 56, 116-117 and 129 of Record P9B.

[31] The ministry describes the record as:

...a discussion paper for the Anti-Avoidance Committee of the ministry discussing all of the various approaches that the ministry could take in making the assessments and the strengths and weaknesses of each approach. It was meant to inform the ministry's internal and confidential discussions and is not an official, authoritative final version of the ministry's internal deliberations on those issues.

[32] The ministry has applied section 19(a) to the entire record on the basis of litigation privilege. It states that this record was written by its Senior Tax Avoidance Specialist, acting without legal representation, in reasonable contemplation of litigation. The ministry states that the author's intention was to create "legal dissertations" in full contemplation of litigation.

[33] The ministry relies on the test for litigation privilege, as provided in MO-1337, as follows:

1. The record must have been created with existing or contemplated litigation in mind;
2. The record must have been created for the dominant purpose of existing or contemplated litigation; and
3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension.

[34] The ministry states that as a GAAR record, this record was created with contemplated litigation in mind and for the dominant purpose of the contemplated litigation. According to the ministry, this is because GAAR is applied to transactions that otherwise follow the letter of the law, but not its object and spirit. It states that a GAAR case is prepared with an eye to eventual litigation. It states that this is especially so where so millions of dollars are at stake, and where the law is not clear. It states that:

The only remedy for this tax avoidance scheme is successful litigation, since the ministry chose not to close the alleged loophole for the retroactive years in which the scheme was executed. Indeed, the fact that the ministry invited taxpayers to "settle" the tax issue indicates that litigation was contemplated... Also, the record is a legal position developed

in light of the use of GAAR and the almost inevitable litigation that would follow...

[35] The ministry quotes from a memo sent by its Manager, Tax Avoidance Unit, Ottawa Tax Office, which describes this record as a paper that was developed in 2006 for presentation at the GAAR Committee to pursue the corporate income tax avoided by using technical arguments and applying the GAAR. This paper formed the basis and was the model for proposals taken by the ministry to certain corporate taxpayers.

[36] The ministry makes reference to an email which confirms that by January 2009 the appellant had obtained legal counsel in response to the ministry's proposed reassessment, which according to the ministry, evidenced an intention to legally dispute the application of GAAR in court.

[37] The ministry also refers to an email written by the ministry's Senior Tax Avoidance Specialist in response to the appellant's appeals from the ministry's access decisions. A direct quote from the relevant portion of this email reads as follows:

Although not hired to perform legal work, per se, nor engaged to reassess necessarily, the latter of which was a determination based objectively on the facts examined, there is no doubt that reassessment and litigation, which is unavoidable in most tax situations, was fully contemplated.

[38] The appellant provided general submissions concerning all of the records for which the ministry claimed the application of section 19. It submits that:

To the extent that you are satisfied upon examining [identified records, including Record P9B] that they are privileged within the scope of prior jurisprudence records outlined above, we would agree that they are to be exempt from disclosure. However, these records have lost their privilege or were never privileged, and it is our position that such records are to be disclosed forthwith...

Analysis/Findings re: Record P9B

[39] This record discusses tax avoidance scenarios and assesses the strengths and weaknesses of various anti-avoidance techniques.¹⁴ In its representations in support of section 18(1)(d), the record is described by the ministry as disclosing potential grounds that taxpayers could utilize in appeals of their tax assessments for attacking the minister's assessment decisions.

¹⁴ Paragraph 328 of Interim Order PO-3006-I.

[40] Based on my review of this record, I find it was created for the dominant purpose of reasonably contemplated litigation. The record is an analysis of the statutory and case law as it applies to reassessments of taxes and subsequent appeals and makes reference to discussions with the ministry's Legal Services Branch. As such, it is subject to litigation privilege under branch 1 of section 19. Section 19(a) applies to this record.

[41] Although the ministry provided the appellant with a summary of this record,¹⁵ the information in this record is much more comprehensive and includes a discussion of the strengths and weaknesses of various approaches the ministry could undertake in the reassessments and tax appeals. Furthermore, I have no evidence that the litigation has been terminated or the privilege has been waived.

[42] As the ministry has not provided specific representations on the exercise of discretion concerning section 19 and this record, I will order the ministry to exercise its discretion with respect to this record.

Record Y7

[43] This record is dated March 2006 and is a three page string of emails between the ministry's Manager, Tax Avoidance Unit, Ottawa Tax Office and counsel from the ministry's Legal Services Branch and others.

[44] The ministry states that this record is part of a continuum of communications for legal advice in respect of the reassessment of captiveecos, revival of dissolved captiveecos, and collection of reassessed amounts.

[45] The appellant did not provide specific representations on this record.

Analysis/Findings re: Record Y7

[46] I agree with the ministry that this email chain represents part of a continuum of communications between ministry staff and lawyers in the ministry's Legal Services Branch for the purpose of obtaining or giving professional legal advice. The emails in the email chain form a continuum of communication between a solicitor and client. As such, this record is subject to solicitor-client communication privilege under branch 1 of section 19. Section 19(a) applies to this record. This privilege has not been waived.

[47] I will order the ministry to its exercise of discretion with respect to this record, as well.

¹⁵ Summary Position Paper, Record P9C.

RECORDS:

[48] In this order, the information at issue consists of the records found subject to discretionary exemptions in Interim Order PO-3006-I¹⁶ and in Reconsideration Order PO-3107-R, specifically:

Tax Advisory

Record No.	General Description or Categories	Subject to Sections
G8	March 3, 2005 Parts of two emails on page 1 Email from: Ministry of Finance employee To: Senior Tax Advisory Specialist Corporations Tax Branch - Finance group Re: named company & Provincial Tax Avoidance Scheme	s. 15(a) s. 15(b)
G9A	March 1, 2005 (2 pages) Email From: CRA [Canada Revenue Agency] employee To: a Ministry of Finance employee Re: named company & Provincial Tax Avoidance Scheme	s. 15(a) s. 15(b)
G18A	July 14, 2005 (18 pages) Email Re: GAAR Referrals - provincial tax avoidance From: Sr. Group Manager, Field Audit, Oshawa (FIN) [Ministry of Finance] To: Manager, Interpretations and Legislative Training Corporations Tax Branch (FIN) & (Finance people) Forwarded from: Chief, Provincial Legislative Amendments, Legislative Policy Directorate (CRA) Attachments: Memorandum to GAAR Committee chairperson from the Tax Avoidance and Special Audits Division Re: Generic Provincial Tax Avoidance - Case 1 & 2	s. 15(a) s. 15(b)
G19	Jan 26 & 27, 2007 (17 pages) Presentation: Captiveco Interest Income (Meeting with Alberta Treasury)	s. 15(a)
G22B	Jan 21, 2005	s. 13(1)

¹⁶ Other than Records O-10, O-50, and P7K.

Record No.	General Description or Categories	Subject to Sections
	(1 page) Email Re: Captiveco From named Ministry of Revenue employee To: Sr. Manager, Tax Advisory Corporations Tax Branch, Manager, Interpretations and Legislative Training Corporations Tax Branch, Sr. Tax Advisory Specialist Tax Advisory Corporations Tax Branch	
G22E	January 25, 2007 (1 page) Email from 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office, to Manager, Interpretations and Legislative Training Corporations Tax Branch and Sr. Tax Advisory Specialist Corporations Tax Branch	s. 15(b)

Tax Design

Record No.	General Description or Categories	Subject to Sections
O11	May 4, 2005 Page 1 draft legislation and covering email RE: CTA draft #9	s. 19
O13	April 14, 2005 Cover page email from Director, Corporate and Commodity Taxation Branch, Office of the Budget and Taxation to 2005 Assistant Deputy Minister, Office of Budget and Taxation. 2006 Special Budget Advisor, Deputy Minister's Office. with Attachment "Tax Haven Corporations, Redistributing Revenue to Other Provinces" prepared by 2005 Corporate Tax Design 2006 Sr. Leg. Design Specialist, Corporate Tax Administration Redesign, Corporate and Commodity Taxation Branch, Office of Budget and Taxation	s. 13(1)
O46	Undated (3 pages) referred to by the Ministries as Draft Option Paper: Tax Haven Corporations- Timing of Implementation	s. 15(a)
O50	Undated	s. 18(1)(d)

Record No.	General Description or Categories	Subject to Sections
	(3 pages) the non-highlighted information Tax Haven Corporations, Background Information	
074	Feb 28, 2005 the severed information in the one page note by 2005 Corporate Tax Design 2006 Sr. Leg. Design Specialist, Corporate Tax Administration Redesign, Corporate and Commodity Taxation Branch, Office of Budget and Taxation dated Feb 28, 2005 (main text prepared by 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office)	s. 13(1)
076	Feb 23, 2005 (12 pages) Slide package: Addressing Threats to the Tax Base	s. 13(1)
077	Feb 18, 2005 (12 pages) Draft Slide package: Addressing Threats to the Tax Base	s. 13(1)
078	Feb 17, 2005 (12 pages) Draft Slide package: Addressing Threats to the Tax Base	s. 13(1)
079	Feb 17, 2005(14 pages) Draft Slide package: Addressing Threats to the Tax Base	s. 13(1)
080	Feb 16, 2005 (13 pages) Draft Slide package: Addressing Threats to the Tax Base	s. 13(1)

Tax Compliance and Revenue Operations

Record No.	General Description or Categories	Subject to Sections
P5F	March 3, 2005 Page 1 of String of Email To: Sr. Manager, Tax Advisory Corporations Tax Branch From: 2005 Corporate Tax Design 2006 Sr. Leg. Design Specialist, Corporate Tax Administration Redesign, Corporate and Commodity Taxation Branch, Office of Budget and Taxation	s. 19

Record No.	General Description or Categories	Subject to Sections
	<p>Re Captiveco draft Legislation With Attachment Another version of P5E draft legislation which went to counsel, Counsel, Legal Services Branch</p>	
P7C	<p>July 21, 2006 Pre Meeting Handwritten Notes and Post Mortem</p>	s. 15(a)
P7D	<p>March 7, 2007 (1 page) Meeting Notes CRA/MRQ/AB/ON [Canada/Quebec/Alberta/Ontario]</p>	s. 15(a)
P7E	<p>July 11- 18, 2006 (4 pages) String of Emails To: Director, London Regional Tax Office and Mississauga, Sr. Manager, Tax Advisory Corporations Tax Branch, Director, Corporations Tax Branch From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: Meeting July 14, 2006 - Tax Avoidance Arrangement Exploiting Ontario Tax Provisions</p>	s. 15(a) s. 15(b)
P7G	<p>July 10, 2006 (3 pages) the severances on pages 2 and 3 String of Emails To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office From: Director, London Regional Tax Office and Mississauga RE: Provincial Tax Avoidance utilizing provisions within the Ontario Corporation Act</p>	s. 15(a) s. 15(b)
P7H	<p>July 4, 2005 Page 1 of 3 String of Emails To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office, Ministry of Finance employee, Manager, Interpretations and Legislative Training Corporations Tax Branch Group Manager, Field Audit, Sr. Manager, Tax Advisory Corporations Tax Branch, Sr. Tax Advisory Specialist Tax Advisory Corporations Tax Branch, Finance employee From: named Ministry of Finance employee</p>	s. 15(a) s. 15(b)

Record No.	General Description or Categories	Subject to Sections
P7I	<p>Re: Captiveco's request for change in year-end</p> <p>April 12, 2006 (20 pages)</p> <p>Page 1 is Emails and attachment</p> <p>To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office</p> <p>From: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division</p> <p>Re: Provincial Tax Avoidance utilizing provisions within the Ontario Corporation Tax Act</p> <p>Pages 2-19: Draft Federal Generic Position Paper</p>	<p>s. 15(a)</p> <p>s. 15(b)</p>
P8A	<p>March 14, 2007</p> <p>pages 1 to 3 and part of one email on page 4 and the attachment certain portions of the emails on page 7</p> <p>String of emails and draft doc</p> <p>To: named Quebec employee, Director, Audit, Tax and Revenue Administration (AB) [Alberta], CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division</p> <p>CC: Sr. Manager, Tax Advisory Corporations Tax Branch (FIN), Director, Tax Avoidance and Special Audits Division (CRA), 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN), Director, London Regional Tax Office and Mississauga (FIN), named Alberta employee, Manager, Corporate Tax Audit (AB), From: Director General, Director General's Office, (CRA)</p> <p>Re: Meeting July 14, 2006 Tax Avoidance Arrangement Exploiting Ontario Tax Provisions.</p> <p>Draft Letter to National Director, Tax (named accounting firm) From Director General, Director General's Office Email To: Alberta employee, CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division, Director, London Regional Tax Office and Mississauga</p> <p>From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office</p>	<p>s. 15(a)</p> <p>s. 15(b)</p>
P8B	<p>October 13, 2006</p> <p>The non-highlighted portions and page 1</p>	<p>s. 15(a)</p> <p>s. 15(b)</p>

Record No.	General Description or Categories	Subject to Sections
	<p>String of Emails To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office From CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division, Director, Audit, Tax and Revenue Administration (AB) and others Re: Ontario Financing Arrangement - Statute Barred Status 152(4)</p>	
P8C	<p>October 16, 2006 (1 page) Email To: Director, Audit, Tax and Revenue Administration (AB), Director, London Regional Tax Office and Mississauga (FIN), Sr. Manager, Tax Advisory Corporations Tax Branch (FIN), named Quebec employee, 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) From: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division Re: Ontario Financing Arrangement - Oct. 3 meeting</p>	<p>s. 15(a) s. 15(b)</p>
P8D	<p>Nov 20, 2006 emails in String of Email To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office, named Quebec employee, Director, Audit, Tax and Revenue Administration (AB), Director, London Regional Tax Office and Mississauga, Sr. Manager, Tax Advisory Corporations Tax Branch, From: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division Re: Ontario Financing Arrangement – Oct. 3 meeting</p>	<p>s. 15(a) s. 15(b)</p>
P8E	<p>Nov 24, 2006 (6 pages) non-highlighted portions String of Emails To: Manager, Tax Audit (AB), and others. From: 2006 Manager, Tax Avoidance Unit, Ottawa</p>	<p>s. 15(a) s. 15(b)</p>

Record No.	General Description or Categories	Subject to Sections
	Tax Office Re: Fincos [foreign affiliates] ¹⁷ and Extra-Provincial Limited Liability Companies (EP LLCs)	
P8F	Feb 28, 2007 (4 pages) String of Emails To/From: Alberta employee, CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division, Director, London Regional Tax Office and Mississauga (FIN) To/From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office	s. 15(a) s. 15(b)
P8G	Oct. 3, 2006 (3 pages) pre-meeting, meeting notes and draft agenda Meeting Notes Notes and Agenda of CRA/ Provincial Tax Authorities Meeting with Tax Advisers	s. 15(a) s. 15(b)
P8H	Sept 27, 2006 (4 pages) String of Emails To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office From: named Ministry of Finance employee and CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division Re: Ontario Finco Case Alberta taxpayer	s. 15(a) s. 15(b)
P8I	Sept 15, 2006 (5 pages) non-highlighted portions and certain portions of the email on pages 4 and 5 String of Emails To: Director, London Regional Tax Office and Mississauga, Director, Audit, Tax and Revenue Administration (AB), CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division, named Quebec employee From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: Request for meeting re: July 24 th letter	s. 15(a) s. 15(b)

¹⁷ See paragraph 15 of Interim Order PO-3006-I.

Record No.	General Description or Categories	Subject to Sections
P8J	<p>Aug 28, 2006 (3 pages) String of Emails To: Director, Audit, Tax and Revenue Administration (AB) From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) Re: Application of subsection 152(4) of the Federal Income Tax Act</p>	<p>s. 15(a) s. 15(b)</p>
P8L	<p>April 19, 2006 (6 pages) non-highlighted portions and agenda in Email and Attachment Forwarded To: Director, London Regional Tax Office and Mississauga, Sr. Manager, Tax Advisory Corporations Tax Branch, Sr. Tax Advisory Specialist Tax Advisory Corporations Tax Branch From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: Federal Provincial Meeting Attn: List of participants Avoidance Arrangements</p>	<p>s. 15(a) s. 15(b)</p>
P8M	<p>April 12, 2006 (7 pages) String of Emails Between: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division and 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) Re: Provincial Tax Avoidance</p>	<p>s. 15(a) s. 15(b)</p>
P8N	<p>March 24, 2006 (8 pages) String of Email Between: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division and 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) Re: Provincial Tax Avoidance</p>	<p>s. 15(a) s. 15(b)</p>
P8O	<p>March 21, 2006 (2 pages) non-highlighted portions String of Email Between: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) and others, CRA employee</p>	<p>s. 15(a) s. 15(b)</p>

Record No.	General Description or Categories	Subject to Sections
	Re: Federal Provincial Meeting	
P8P	March 17, 2006 (1 page) Email To: Director, London Regional Tax Office and Mississauga, Director, Corporations Tax Branch (now ADM) From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: Possible Tri-party Meeting on Captiveco	s. 15(a) s. 15(b)
P8Q	March 1, 2006 (6 pages) Sting of Email To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office From CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division Re: Provincial Tax Avoidance	s. 15(a) s. 15(b)
P8R	March 1, 2006 (2 pages) String of Email To: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division From: CRA/ARC (Avoidance Review Committee) Re: Documents attached	s. 15(a) s. 15(b)
P8S	Feb 6, 2006 (2 pages) String of Email To: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office From: CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division Re: Provincial Tax Avoidance	s. 15(a) s. 15(b)
P8T	Jan 17, 2006 (5 pages) non-highlighted portions String of Emails To: Manager, Field Audit, Corporate Tax Audit Division of Alberta Finance (AB) From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office	s. 15(a) s. 15(b)

Record No.	General Description or Categories	Subject to Sections
	Re: List of companies using Ontario to Avoid Alberta Provincial Taxes	
P8U	Undated (5 pages) pages 1 and 2 and the attachment to Document Note & Draft Letter Re: Collaboration on Inter Provincial Tax Avoidance Draft Letter to National Director, Tax (named accounting firm) From Director General, Director General's Office Re: meeting of July 14, 2006	s. 13(1) for pages 1 and 2 s. 15(a) and/or s. 15(b) for attachment
P8V	June 4, 2007 (11 pages) Chart - Document Re: Ontario Shuffle Audits	s. 15(a) s. 15(b)
P9A	June 19, 2007 the concluding statements on pages 41 and 42 Title: Summary Position Paper Finco, Captiveco Passive Interest Income	s. 13(1)
P9B	Title: Position Paper: Captiveco Passive Interest Income (135 pages)	s. 13(1) to identified excerpts on pages 45, 56, 116-117 and 129.

Legal Services

Record No.	General Description or Categories	Subject to Sections
Y4	pages 1, 6, 10, 13, 14, 19, 23, 27, 31, 34, 37, 43, 49, 57, 65 and 76 Various drafts, instructions to counsel, comments on drafts re: 2005 amendments to s. 2(2) of the <i>Corporations Tax Act</i>	s. 19
Y8C	January 5, 2006 (1 page) Email between Counsel, Legal Services Branch and 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office RE: Quick CMT [corporate minimum tax] Assessments and Captiveco Specialty Debt	s. 19

DISCUSSION:

Did the ministry exercise its discretion? If so, should this office uphold the exercise of discretion?

[49] The sections 13(1), 15(a), 15(b), and 19 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.

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

[52] In its representations, the ministry addressed the following factors concerning its exercise of discretion with respect to each of the records subject to sections 13(1), 18(1)(d) and 19:

- 1) Should the information be available to the public?
- 2) Is disclosure required by law under a tax statute?
- 3) Is there a public interest in the records?
- 4) Will disclosure increase public confidence in the records?
- 5) Is some of the information publicly available or available on records disclosed?
- 6) Does the passage of time since the request was made change anything?
- 7) Does the appellant have a compelling need to receive the information?
- 8) Should the exemptions be more limited and specific than as claimed?

[53] The ministry also provided one set of representations for all of the records subject to section 15(a) and/or (b). In those representations, the ministry stated that it

¹⁸ Order MO-1573.

¹⁹ Section 54(2).

was not discussing each individual record as "...there really is no discretion to exercise when Cabinet has not consented to disclosure."

[54] In response, the appellant submits that the ministry has taken into account irrelevant factors and, as such, has not exercised its discretion in a proper manner. In its representations, the appellant reviews the ministry's representations in support of its decision to not exercise its discretion to disclose any of the records that I have found subject to discretionary exemptions in Interim Order PO-3006-I and Reconsideration Order PO-3107-R.

[55] The appellant disputes the ministry's suggestion that certain records ought not to be disclosed because they concern tax policies that have not been adopted and, therefore, have no legal or practical relevance to the appellant's ongoing Superior Court litigation. The appellant states that these records can be relevant to the interpretation of tax statutes, which is a key issue in the appellant's tax appeals. As such, the appellant submits that the ministry's reliance on this rule is reliance on an irrelevant consideration. The appellant states that:

...Administrative documents, even those concerning policies that are yet to be adopted, may assist the appellant to understand the ministry's interpretation of the *Tax Act* and the reason why the ministry drafted certain disputed provisions in a particular manner...

Information about the options the ministry considered, and what its staff believed they were doing, in responding to the appellant's tax structure may help to clarify this issue and show the ministry's intentions at the time the disputed reassessments were made.

[56] The appellant states that, as the ministry is the respondent in the appellant's tax appeals, there is a clear conflict of interest between the ministry's discretion to disclose information under the *Act* and its interest in limiting the appellant's access to information that may weaken the ministry's position in its parallel tax proceedings. The appellant submits that even if certain requested documents are unlikely to be admissible under formal evidentiary rules, the appellant may still have a compelling interest in those documents since they may assist it in developing its trial strategy or since they may lead to a train of inquiry which will be relevant to its tax appeals.

[57] The appellant states that the ministry considered an irrelevant factor in taking into account that disclosure to the appellant may give it an advantage over other taxpayers to whom the same documents have not been disclosed. The appellant states that:

If a document is otherwise subject to disclosure under the freedom of information scheme, the fact that one taxpayer has requested access to it and another has not is irrelevant to determining whether the first should

receive access. Any person has the right to seek disclosure of such documents for its own purposes. What would be inequitable would be punishing one taxpayer with nondisclosure because others have not sought access to the same documents.

[58] The appellant also states that the ministry's position that the records may cause public confusion is an irrelevant consideration. It states that the fact that some taxpayers may not understand the proper role of certain policy documents in the tax system should not deter those who can appreciate those documents from having access to them.

[59] Concerning the ministry's position that it does not have discretion to disclose documents falling within section 15 of the *Act* since disclosure would ultimately require Cabinet's approval, the appellant states that this is contrary to the *Act*, which requires the ministry to properly consider and decide whether to refuse to disclose a particular record in the first instance. Although disclosure is ultimately subject to Cabinet approval, the ministry cannot refuse to exercise its discretion at the first stage of the section 15 analysis because it is of the view that Cabinet would refuse disclosure at the second stage.

[60] The appellant submits that the ministry has incorrectly interpreted factor (d) from paragraph 387 of the Interim Order PO-3006-I.²⁰ It states that the ministry refers to whether "disclosure will increase public confidence in the records". As such, the appellant states that the ministry did not adequately consider a relevant factor concerning the implications that non-disclosure would have on public confidence in the ministry's broader operations and on the freedom of information regime generally.

[61] As well, the appellant states that contrary to the principle that exemptions from disclosure should be "limited and specific",²¹ the ministry has not specifically considered whether any portion of the outstanding records should be released. According to the appellant, this suggests an unreasonable exercise of ministerial discretion.

[62] The appellant submits that the success of the freedom of information system should not be measured by the number of records disclosed by an institution. It states that:

The fact that the ministry has disclosed a large number of documents is no substitute to ensuring that it has disclosed all documents to which the appellant is entitled under the statutory scheme.

²⁰ In paragraph 387 of Interim Order PO-3006-I, I listed factors that may be relevant for the ministry to consider in the exercise of its discretion. Factor (d) was whether disclosure of the records will increase public confidence in the operation of the ministry.

²¹ As described by factor (h) of paragraph 387 of the Interim Order PO-3006-I.

[63] In reply, the ministry states that in regard to section 18(1)(d), relevance to the tax case is part of the legal test. The ministry states that:

Since the ministry may withhold records which would harm the economy of Ontario under that section, and given that hundreds of millions [of dollars] are at stake in these tax cases of which one tax case could end up having such precedential value as to render the rest unnecessary, and given that the number of millions at stake in all the cases is sufficient to harm the economy of Ontario, the disclosure of what is relevant to the tax cases is harmful to the ministry's tax case where section 18(1)(d) is claimed leading to losses harmful to the economy. This is part of the legal test of harm to the economy rather than the discretionary test. But what is relevant changes as a case becomes more focused and narrow. This explains the further disclosures that have taken place since 2007 the year of the original Request when the case was seen as anticipated.

[64] The ministry also submits that unadopted policies are not relevant to any matter at issue in the tax case. The ministry states that any conflict of interest is between two laws (*FIPPA* and the law of discovery in the court proceedings). The ministry states that its appellant's use of *FIPPA* as an alternate and wider route to discovery is a fishing expedition for records are irrelevant to the case, which is not ordained by the discovery rules. It also states that:

A second conflict between the regimes is that what leads to disclosure under discovery (relevance) leads to non-disclosure under section 18(1)(d) if a relevant document is harmful to the ministry's case. (Records P7J, P9B, Y7, G22A and G22C). I expect these to be disclosed under the discovery regime, but not under *FIPPA*...

[S]ince the tax case has more precisely narrowed its focus, the greater part of the ministry's original claims of s. 18(1)(d) have been dropped, for the very reason that documents first considered relevant and harmful have since been recognized as irrelevant and not harmful to the cases and therefore to the \$millions at stake in those cases impacting the economy. Indeed at the time the request was made in 2007, the issues of the case were not sufficiently defined to be sure about questions of relevance and materiality, and a litigator had not been assigned. As a result many disclosures have been made by the ministry after the date of first response by the ministry...

The adjudicator decided on all records at issue for the discretion review that the exemptions applied using the rule of law. Now she may be asking for a new exercise of discretion to disclose despite the legal application of an exemption on the records won by the ministry. In any case, the

ministry has not changed its exercise of discretion after winning the records...

The ministry submits that the appellant will have another avenue through the discovery process to obtain all records which are relevant to the case, and that determination will be made elsewhere. In this forum, that is not the rule. The ministry has not used relevance as a factor favouring disclosure where it conflicts with section 18(1)(d).

[65] In its exercise of discretion, the ministry states that it is the public interest to not prematurely disclose money making tax policy ideas wherever possible as premature policy disclosures to a sole or small group of beneficiaries can be viewed by others as corrupt.

[66] The ministry also confirms that all taxpayer specific records requested have been disclosed to the appellant.

[67] Concerning section 15, the ministry states that consent to disclose intergovernmental confidences by Cabinet is necessarily limited to the situation in which the ministry might ask Cabinet through a Cabinet Submission for permission to disclose intergovernmental confidences. The ministry states that the seeking of permission from Cabinet has never happened.²² There is discretion for the ministry to consult Cabinet or not. When the ministry determines that a record would harm intergovernmental relations and fits within section 15, it exercises its discretion at the same time not to ask permission from Cabinet to disclose it. It states that:

This is not a Part Two ultimate decision of Cabinet, but one which is within the control of the Minister choosing to consult. If there is to be no consultation, there will be no Cabinet consent, and the record is then mandatorily exempt. Since the ministry knows that Cabinet will not be consulted, it knows from the beginning that Cabinet will not consent, and the exemption is clearly mandatory from the very beginning. There is nothing discretionary anyone has ever considered sufficient to overcome a desire not to disclose once it is decided that records were provided in confidence from another jurisdiction or that relations would be prejudiced. This point may add to the mandatory or non-discretionary wording of the second part of section 15.

[68] Concerning the factor of public confidence in the records, the ministry states that there is no possible increase in public confidence in the ministry resulting from the disclosure of policy or other records which are unapproved, tentative, premature and unadopted.

²² To the knowledge of ministry's counsel.

[69] The ministry further states that it is never barred in an appeal from changing the exercise of its discretion towards disclosure as more becomes known about what is harmful under section 18. The ministry states that it has limited the exemptions claimed as much as possible in respect for the overall disclosure obligation in the *Act*.

[70] In sur-reply, the appellant states that it maintains its earlier position as set out in its prior representations, with one exception; it disputes the ministry's test for legal relevance. With respect to the substantive question of the records relevance, the appellant relies on its prior explanation as to why the records may be legally relevant or otherwise significant to its parallel tax appeals.

[71] In its representations on discretion in response to Reconsideration Order PO-3107-I, the ministry states that, concerning sections 15(a) and (b), the ministry is not aware of a decision rendered in which approval has been sought by any head to override the exemption. It states that:

... Ontario has promised the other jurisdictions by emails to defend the confidentiality of these records.²³ Nothing has changed in the area of cooperative spirit since those letters were written. Indeed there has been further co-operation.

The ministry, nonetheless, has considered whether it would be wise to ask for this override and to seek to disrespect the confidences of these jurisdictions after promising to defend their confidentiality. The ministry has no desire to prejudice these relationships or disrespect these confidences and therefore the ministry continues to exercise its discretion in favour of non-disclosure of these records rather than asking Cabinet to approve the head prejudicing these relationships or betraying these confidences knowingly. While it is not clear that the ministry would have access to the Cabinet for this purpose, it would not even wish to influence Cabinet to approve these disclosures in any case. There would be no reason to ask.

The ongoing sensitive discussions about tax avoidance matters among tax policy ministries and tax administration authorities continue to be extremely important to Ontario. Joint confidential discussions save each jurisdiction from having to study each scheme separately, thereby wasting time, money and human resources. Joint decisions may also help prevent similar problems from moving to an uninformed jurisdiction. These discussions have the compelling flavour of multi-jurisdictional tax law enforcement. The Order has combed out and eliminated pieces of records which are not confidential such as the mere travel arrangements of

²³ As referenced in Reconsideration Order PO-3107-R, correspondence from other governments at tab 10 of the ministry's initial representations .

participants. This leaves undisclosed only the confidential co-operative emails, ideas and thoughts of individuals of each jurisdiction in meetings, agendas and next steps expressed in meetings and emails, in order to preserve the relationship of co-operation all of which truly belong within s. 15(a) or (b). Ontario needs to be able to assure other jurisdictions that it is able and prepared to receive information in confidence to join forces to uphold the tax law and to co-operate in other areas of mutual benefit.

Since the discretionary window of prior Cabinet approval is an extremely narrow and even difficult one to climb through in section 15, the ministry explains its exercise of discretion by saying that it has no urge to prejudice relations with the provinces or the federal government, or to betray their confidences, but wishes to continue with co-operative meetings and activities. For this reason it would not ask the Cabinet to approve disclosure of these records.

Without the consent of the Executive Council, Ontario may not disclose these records. It has no discretion to do so.

The ministry has exercised its discretion as described above despite its recognition and consideration of the purpose of the access part of the *Act* to permit government openness and transparency subject to specific limited exemptions. The ministry has considered the appellant's need for this information in the tax appeal, and does not consider the information to be relevant or the appellant's need to be compelling or sympathetic. The ministry has considered whether public confidence would be improved with disclosure and has determined that public confidence would be improved by non-disclosure. Favouring confidential cooperation with other tax authorities is necessary to prevent mutual treasury drain or tax slippage. The ministry has considered the nature of the information and confirmed its sensitivity among the participating and sharing jurisdictions. This information has not been otherwise disclosed outside the participating tax authorities.

[72] In response to the ministry's representations on Reconsideration Order PO-3107-R, the appellant relies on its earlier representations on the ministry's exercise of discretion

[73] Concerning the appellant's particular interest in the records, the appellant submits that the ministry is caught in an obvious conflict of interest in this case. It states that:

The fact that the ministry "does not consider the (requested) information to be relevant or the appellant's need to be compelling or sympathetic"

must be viewed alongside the fact that the ministry is also the respondent in the underlying Superior Court tax appeals. As a result, the ministry's practical interest will be to limit access to any information that may reflect errors or weaknesses in the legal or factual arguments it is advancing in those appeals. Furthermore, while it might be reasonable for the ministry to exercise its discretion not to disclose the most sensitive intergovernmental documents, it may similarly be unreasonable for it to decide not to disclose those documents that have a greater bearing on the underlying tax appeals. By way of example, such documents may speak to the reason the ministry decided against making the 2005 amending legislation retroactive to an earlier tax year.

Analysis/Findings

[74] In Interim Order PO-3006-I, I listed some factors that may have been relevant for the ministry to consider in the exercise of its discretion as follows:

- a. that information should be available to the public;
- b. whether disclosure of similar information is required by law, such as by the provisions of the *Corporations Tax Act*, *Taxation Act, 2007* (Ontario), the *Income Tax Act*, or any other statute;
- c. the public interest in the records;
- d. whether disclosure will increase public confidence in the operation of the ministries;
- e. that some of the withheld information may be otherwise publicly available or available in records that have been disclosed;
- f. the passage of time since the records were created and since the request was made in May 2007;
- g. whether the appellant has a compelling need to receive the information; and
- h. that any necessary exemptions from the right of access should be limited and specific.²⁴

²⁴ See paragraph 387 of Interim Order PO-3006-i. Additional unlisted considerations may be relevant [Orders P-344, MO-1573].

[75] Based on what the ministry has stated in its representations, I find that the ministry has taken into account a consideration that varies from the relevant considerations listed in Interim Order PO-3006-I. Instead of addressing (d) listed above, the ministry has misinterpreted this consideration and has taken into account:

“Will disclosure increase public confidence in the records?”

[76] As pointed out by the appellant, and as set out in the Notice of Inquiry, this office has asked for submissions on the following relevant consideration:

“Whether disclosure will increase public confidence in the operation of the institution.”

[77] However, I note that the ministry, when discussing this point in its initial representations does indicate that disclosure of the records would not provide a coherent policy promoting public confidence. In general, it appears that the ministry has taken into account whether disclosure will increase public confidence in the operation of the ministry, despite not clearly stating so in a coherent way.

[78] The appellant has also indicated that the ministry has not properly exercised its discretion as it has misconstrued whether the records are relevant to the appellant’s tax litigation with the ministry. However, one factor listed in Interim Order PO-3006-I, speaks to the compelling need of the appellant to receive the information in the records. This is different from the appellant’s concern about whether the records are relevant to the litigation.

[79] Furthermore, the appellant has received all records that specifically refer to it. The records at issue generally consist of communications by the ministry with other governments, or between its staff and counsel, or draft policy documents. The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[80] In Order PO-2490, former Senior Adjudicator John Higgins in considering section 64(1) determined that:

The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has

commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

The application of section 64(1) ... was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect.

...

...

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act. ... In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not

purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[81] Adopting this analysis, I find that the fact that a record may be useful in a court case in and of itself does not result in a finding an institution did not exercise its discretion properly in not disclosing this record. Nor does the usefulness of the information in the records in a potential court case in and of itself result in a finding that the information is exempt under the *Act*.²⁵

[82] Many factors are relevant in determining whether an institution has exercised its discretion in a proper manner. Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant.²⁶

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

²⁵ Reconsideration Order PO-2899-R.

²⁶ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[83] The authority of the Commissioner to return matters to an institution for further consideration is referred to in the *Ontario (Public Safety and Security) v. Criminal Lawyers' Association (CLA)*.²⁷ In *CLA*, the Supreme Court of Canada cited with approval comments made by the Commissioner, as follows:

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

[84] Based on my review of the records at issue and the parties' representations, I find that the ministry's exercise of discretion was made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. I find that the ministry has exercised its discretion in a proper manner concerning the records remaining at issue in this order.

[85] The ministry has undertaken a thorough review of the large number of records that it located in response to the appellant's request and has decided to disclose a substantial number to it, while exercising its discretion to withhold some records or portions of records that are subject to sections 13(1), 15(a) and (b), 18(1)(d) and 19. The ministry has also disclosed all appellant specific records to it. Therefore, I will uphold the ministry's exercise of discretion.

²⁷ [2010] S.C.J. No. 23.

ORDER:

1. I order the ministry to disclose to the appellant Records G22A and G22C and the information in Record P7J to which the ministry claimed the application of section 18(1)(d) by **November 27, 2012**.
2. I order the ministry to exercise its discretion with respect to Records P9B and Y7 and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the ministry continues to withhold all or part of these records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The ministry is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than **November 27, 2012**. If the appellant wishes to respond to the ministry's exercise of discretion and/or its explanation for exercising its discretion to withhold information, it must do so within 21 days of the date of the ministry's correspondence by providing me with written representations.
3. I uphold the ministry's exercise of discretion with respect to the remaining records at issue in this order.
4. In order to verify compliance with order provision 1, I reserve the right to require a copy of the records disclosed by the ministry to be provided to me.
5. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Diane Smith
Adjudicator

November 5, 2012