Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3107-R

Appeals PA07-409 and PA08-127

Ministry of Finance

August 29, 2012

Summary: The requester sought access to records in respect of audits and proposed reassessments under the *Corporations Tax Act* for the fiscal years ending December 28, 2002, January 3, 2004 and January 1, 2005. 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*. This order determines that some of the portions of the records ordered disclosed in Interim Order PO-3006-I are subject to the discretionary exemptions in sections 15(a) and/or (b) and orders the ministry to re-exercise its discretion with respect to this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 15(a) and (b), 18(1)(d) and 19(b).

Orders and Investigation Reports Considered: Orders PO-3006-I, PO-2872, PO-2899-R, PO-3066-R, PO-3072-R.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII).

OVERVIEW:

[1] The Ministry of Finance 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). The MOR located responsive records and granted partial access to the responsive records, some of which 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*.

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

[4] During the mediation of appeal PA07-409, responsive records were also located within the ministry and a decision letter was issued by it also. 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.

[5] 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*.

[6] As mediation did not resolve the issues in these files, the files were transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry conduct an inquiry. 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.

[7] 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 records I found subject to these discretionary exemptions. My decision on the ministry's re-exercise of discretion will be reflected in a subsequent order.

[8] 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);
- the attachments to Records P8D and P8U.

[9] 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 disclosed. Both the ministry and the appellant provided representations with respect to the ministry's reconsideration request. These representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[10] In this order, I find that some of the records at issue are subject to the discretionary exemptions in sections 15(a) and/or (b) and I order the ministry to re-exercise its discretion with respect to these records.

RECORDS:

[11] In this reconsideration order, the information at issue consists of the records ordered disclosed in Interim Order PO-3006-I,[1] specifically:

- Records P7C, P7H, P8K;
- meeting notes in Record P8G;
- the highlighted information in Records P8A, P8B, P8E, P8I, P8L, P8O, and P8T;
- the severances on page 1 of Record P7G; and
- the attachments to Records P8D and P8U.

[1] Other than Records O-10, O-50, and P7K.

[12] These records are described in the following chart:

Record	Description	Exemptions Applied
P7C **Fully at issue**	July 21, 2006 (2 pages) Pre Meeting Handwritten Notes and Post Mortem	s. 15(a) s. 18(1)(d)
P7G **The severances on page 1 are at issue**	July 10, 2006 (3 pages) 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	s. 15(a) s. 15(b) s. 18(1)(d)
P7H **Partly at issue**	July 4, 2005 (3 pages) 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 Re: Captiveco's request for change in year-end	s. 15(a) s. 15(b) s. 18(1)(d)
P8A **Partly at issue**	March 14, 2007 (10 pages) String of Emails and Draft doc To: named Quebec employee, Director, Audit, Tax and Revenue Administration (AB), CRA (Canada Revenue Agency) Manager, GAAR (General Anti-Avoidance Rule) and Technical Support Section of the Tax Avoidance and Special Audits Division 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,	s. 15(a) s. 15(b)

Record	Description	Exemptions Applied
	Manager, Corporate Tax Audit (AB), From: Director General, Director General's Office, (CRA) Re: Meeting July 14, 2006 Tax Avoidance Arrangement Exploiting Ontario Tax Provisions. 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 From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office	
P8B **Partly at issue**	October 13, 2006 (13 pages) 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)	s. 15(a) s. 15(b) s. 18(1)(d) s. 19
P8D **Attachment at issue**	Nov 20, 2006 (8 pages) 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	s. 15(a) s. 15(b) s. 18(1)(d) s. 19
P8E **Partly at**	Nov 24, 2006 (6 pages) String of Emails	s. 15(a) s. 15(b) s. 19

Record	Description	Exemptions Applied
issue	To: Manager, Tax Audit (AB), and others. From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: Fincos and Extra-Provincial Limited Liability Companies (EP LLCs)	
P8G **Meeting Notes at issue**	Oct. 3, 2006 (3 pages) Meeting Notes Notes and Agenda of CRA/ Provincial Tax Authorities Meeting with Tax Advisers	s. 15(a) s. 15(b)
P8I **Partly at issue**	Sept 15, 2006 (5 pages) 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 24th letter	s. 15(a) s. 15(b) s. 19
P8K **Fully at issue**	July 24, 2006 (4 pages) Letter To: named accounting firm and named law firm From: Director General, Director General's Office (CRA) Re: Meeting of July 21 - reassessments	s. 15(a) s. 15(b)
P8L **Partly at Issue**	April 19, 2006 (6 pages) 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 Att: List of participants Avoidance Arrangements	s. 15(a) s. 15(b) s. 18(1)(d)

Record	Description	Exemptions Applied
P8O **Partly at issue**	March 21, 2006 (2 pages) String of Email Between: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office (FIN) and others, CRA employee Re: Federal Provincial Meeting	s. 15(a) s. 15(b)
P8T **Partly at issue**	Jan 17, 2006 (5 pages) String of Emails To: Manager, Field Audit, Corporate Tax Audit Division of Alberta Finance (AB) From: 2006 Manager, Tax Avoidance Unit, Ottawa Tax Office Re: List of companies using Ontario to Avoid Alberta Provincial Taxes	s. 15(a) s. 15(b) S. 17(2) s. 19
P8U **Attachment at issue**	Undated (5 pages) 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) s. 15(a) s. 15(b) s. 17(2) s. 18(1)(d) s. 19

DISCUSSION:

[13] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. The ministry rely on paragraphs (a) to (c) of section 18.01 of the *Code of Procedure* which state as follows:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

[14] Section 18.02 of the IPC's *Code of Procedure* states:

> The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[15] The ministry submits that there are four reasons in support of the reconsideration request:

> A. Failure to consider exemption claims;
>
> B. Inconsistent application of exemptions;
>
> C. Failure to apply settlement privilege; and
>
> D. Failure to consider all the evidence.

[16] I will consider the claims of the ministry to each record at issue.

Failure to consider exemption claims - Record P7H

[17] Sections 15(a) and (b) were claimed for the information at issue on page 1 of this record. These sections read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

[18] In Interim Order PO-3006-I, I determined that sections 15(a) and (b) did not apply to the email on page 1 of this record as:

> …This email refers to information about a phone call from the CRA; however, this is only general information. No specific taxpayers are named or even mentioned. I find that disclosure could not reasonably be expected to either prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution nor, under section 15 (b), reveal information received in confidence from another government or its agencies.

[19] I also determined that the severances on pages 2 and 3 of this record were not subject to section 18(1)(d). This section reads:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[20] With respect to the application of section 18(1)(d) to the information at issue on pages 2 and 3 of Record P7H, I stated that:

> The information at issue in this record is from June 2005 and concerns a general discussion of requests for year-end changes before the effective date of the amendment to the *CTA* in 2005. I do not agree with the Ministry that disclosure of this information could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. The *CTA* was amended in 2005. The discussion in this record of potential year-end changes of corporate taxpayers was not specific to any particular taxpayer nor is there any reference in this information to any settlement information.

[21] The ministry asks that I reconsider my findings, stating that:

> Reasons irrelevant to the claimed exemptions. Harm to the economy 18(1)(d) is not taxpayer harm 17(2). Whether changing tax years is a new tax avoidance issue is beyond the expertise of adjudicator. Naming taxpayers relates to s. 17(2) not exemptions claimed. Settlement discussion irrelevant to s.15 + s.18.

[22] The appellant submits that I generally discussed the claimed exemptions at paragraphs 188-200 and 299-306, and specifically considered their application to record P7H at paragraphs 240-241 and 316-318 of the Interim Order. The appellant states:

> Contrary to the Ministry's assertions, paragraphs 317 and 318 of the Interim Order suggest that you referred to settlement issues and changes in particular year-end dates solely because these issues were raised in the Ministry's representations. You were not required to determine whether requests to change year-end dates were a new tax avoidance issue; rather, you determined that the disclosure of the general information contained in this record would not be injurious to the respondent's

> financial or economic interests. This is precisely what you were required to do under the claimed exemption.

[23] In reply, the ministry state that under my discussion of section 18(1)(d), no reasons related to the economy of Ontario are given. The ministry states:

> The reasons given at [318] were that there were no settlement discussions [appropriate for exemption of s. 19(b) which includes settlement privilege] and that the information did not single out one taxpayer by name [appropriate for exemption of s. 17(2) which is about harm to taxpayers when a named taxpayer's information is released].
>
> What would he harmful to the economy of Ontario in a multimillion dollar tax case is best decided by the Ministry of Finance, and therefore additional due deference to the Ministry may be needed particularly in the application of this subsection and even more particularly in this case. It is not appropriate to argue the tax case in the *FIPPA* forum to show the harm of a particular record to the tax case and therefore to the economy. The government tax litigator is given the responsibility and privilege of presenting the Ministry's best case before the judge in the tax case. Any tax arguments made in this forum would fetter the tax lawyer's discretion to do so, and such arguments, had they been made, would have been inappropriately addressed to a *FIPPA* adjudicator for decision on relevance to a tax case the adjudicator has no jurisdiction to decide.
>
> This shows the inappropriateness of *FIPPA* appeals being used as an early discovery vehicle. If *FIPPA* can be used in these circumstances, the deference accorded to the Minister by the Adjudicator should be recognized as a temporary measure. The Ministry is still subject to and does not resist discovery at the appropriate time and made by the appropriate litigator. The Ministry does not intend to use *FIPPA* decisions to overpower the rules of civil procedure, or vice versa, as a different test is used under discovery rules at a different time, namely relevance. When *FIPPA* is used for early discovery by similarly situated taxpayers, a multiplicity of overlapping proceedings ensue (of which this appeal is only one), to the detriment and vexation of the Ministry and perhaps the IPC. It is not likely that this was the intended purpose of *FIPPA*.

[24] In sur-reply, the appellant relies on its representations made in response to the reconsideration request.

Analysis/Findings re: Record P7H

[25] The ministry states that I failed to consider the section 15(a) and (b) exemption claims for the information at issue on page 1 of Record P7H. As set out in the analysis of the sections 15(a) and (b) exemption in Interim Order PO-3006-I, the ministry stated in its initial representations that:

> Section 15(a)
>
> This is an Ontario report of a conversation with CRA representative [name], with respect to a new issue and a planned exchange of information on that issue…
>
> It would prejudice intergovernmental relations to disclose discussions about confidential positions re: particular tax avoidance situations (Order PO-1927-I)… Also the positions, views and policies of representatives in the intergovernmental committees are exempt according to Order PO-2369.
>
> Section 15(b)
>
> …The information was received by the CRA… The phone call described [in this record] was received by Ontario… [The record] if disclosed, would prejudice relations among the government. Individuals should be able to share freely without intrusion.

[26] 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.[2]

[27] I agree with the ministry that in reviewing the information at issue on page 1 of Record P7H, I did not consider fully the section 15(b) exemption to the information at issue. Based on my further review of this information, disclosure would permit the drawing of accurate inferences with respect to information received by Ontario from the federal government. Therefore, disclosure may be said to "reveal" the information received.[3]

---

[2] Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439.
[3] Order P-1552.

[28] In particular, for a record to qualify for exemption under subsection 15(b), the institution must establish that:

1. the records must reveal information received from another government or its agencies; and

2. the information must have been received by an institution; and

3. the information must have been received in confidence.[4]

[29] All three parts of the test under section 15(b) have been satisfied with respect to the information at issue on page 1 of Record P7H.

[30] I rely on the findings of Adjudicator Stephanie Haly in Order PO-3066-R, where she considered the reconsideration of an order concerning records claimed to be exempt under section 14(1)(e) of the *Freedom of Information and Protection of Privacy Act*. In that order, Adjudicator Haly stated that:

> The ministry submits that there was a fundamental defect in the adjudication process and that it has established the necessary ground for reconsideration set out in paragraph (a) of section 18.01. I summarize the ministry's representations as follows:
>
> - My finding that the information on page 86 of the record is either "generalized administrative information" or "generalized or administrative information" is unclear and incomprehensible, thus rendering the Order fundamentally defective.
>
> - The ministry's incontrovertible evidence points to a reasonable expectation of harm from disclosure of the record.
>
> - This office's jurisprudence indicates that OPP training manual information is the type of information that can be withheld under section 14(1)(e).
>
> The ministry also provided an affidavit from a Superintendent of the OPP with its reconsideration request supporting its position that the information on page 86 is exempt from disclosure under section 14(1)(e).

[4] Order P-210.

> I have reviewed the ministry's representations and my findings in Order PO-3010 on the application of the exemptions at sections 14(1)(e), (i) and (l) with respect to the information at issue on page 86. I find that my use of the terms "generalized administrative information" or "generalized or administrative information" without further elucidation rendered my reasoning unclear. By necessity, in order not to disclose the contents of the record, I used these terms to convey the type of information at issue on page 86. However, in using these terms and phrases without providing additional explanation, I agree with the ministry that the reasoning in Order PO-3010 with respect to the application of the section 14(1) exemptions is unclear. As a result, I agree that there was a fundamental defect in the adjudication process and the ministry has established sufficient grounds for a reconsideration of Order PO-3010.

[31] Similarly, in Order PO-3072-R, Assistant Commissioner Brian Beamish reconsidered an order on the basis that a fundamental defect in the adjudication process occurred when he failed to fully consider the exemption at issue in that appeal. He stated that:

> After reviewing the affected party's reconsideration request, the representations of the appellant and Infrastructure Ontario concerning the reconsideration request, the representations of all parties made during the inquiry, and my findings in Order PO-3011, I find that I erred in failing to fully consider the inferred disclosure exception to the second part of the section 17(1) test. I find that this error constitutes a fundamental defect in the adjudication process, thereby meeting the ground for reconsideration outlined in section 18.01(a) of the IPC's Code of Procedure. Accordingly, I will reconsider my decision in Order PO-3011 on this basis and will now proceed to reconsider whether the inferred disclosure exception to the "supplied" part of the section 17(1) test applies to the records that I ordered disclosed.

[32] I find that I failed to fully consider all three parts of the test under section 15(b) in Interim Order PO-3006-I for page 1 of Record P7H.

[33] As a result, I agree that there was a fundamental defect in the adjudication process for the information at issue on page 1 of Record P7H and find that the ministry has established sufficient grounds for a reconsideration of my order concerning that information. This information is subject to the discretionary exemption in section 15(b). I have not received representations from the ministry on its exercise of discretion concerning this record. Accordingly, I will order the ministry to exercise its discretion with respect to this record.

[34] The ministry also states that I failed to consider the section 18(1)(d) exemption claim for the information at issue in pages 2 and 3 of Record P7H. The section reads:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[35] As set out in Interim Order PO-3006-I, concerning section 18(1)(d), the ministry stated in part in their initial representations that:

> This record consists of [internal ministry] emails …regarding "Captiveco's request for change in year-end." ...
> The ministries submit that this record contains strategies for assessment and negotiating settlement with tax avoiders, along with the MOF's initial position in relation to the taxpayers request to change their year ending dates before the amendment to the legislation becomes effective.

[36] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[5]

[37] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[6] I find that I failed to consider the ministry's overall representations concerning the application of section 18(1)(d) to the information at issue. In its initial representations, the ministry stated that there are two basic types of harms to the province and to the ministry which justify exemption from disclosure, which can be summarized as follows:

> i. Taxpayers will take advantage of any information disclosed to further their tax avoidance activities. Tax avoidance costs the Ministry millions of dollars in tax revenue through a decrease in the integrity of the tax system. The Affidavit of Marc Bourbeau, (at Tab 3 in the Book of Evidence) provides evidence of the current estimate of Ministry's stake in this appeal. The Ministry must be able to discuss anti-avoidance approaches and assess the strengths and weaknesses of those approaches in confidence to determine the best method for counteracting tax avoidance. Releasing unofficial or incomplete information weakens the

[5] Orders MO-1947 and MO-2363.
[6] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

> Ministry's official anti-avoidance position, is confusing and potentially misleading, and is contrary to the Ministry's service standards.
>
> ii. It discloses potential grounds for attacking the Minister's assessment decisions which would result in significant losses of tax revenue if the case were lost. Taxpayers would take advantage of this information to further their tax avoidance activities, which cost the Ministry millions of dollars in tax revenue. Taxpayers could use this information to challenge the Ministry's official position under the anticipated appeals of their tax assessments. The information is not contained in the official position, and could be used to undermine the Ministry's official position in court.
>
> … If the Ministry disclosed its deliberations in interpreting the *CTA*, it would assist the taxpayer with attacking the Ministry's position and could be harmful to the Province's economic interest, the tax revenue base. The Ministry's official position has already been released to the Requester in the form of the Summary Position Paper, and it contains all of the information and analysis that the Ministry relied on in reaching its conclusion on the taxpayer's assessment. If the Ministry were to release the information it used but did not rely on in making the specific assessment, that information could be harmful to the Ministry's position in potential future appeals of the tax assessments of the Requester and other taxpayers.

[38] I disagree with the ministry that it has been unable to provide representations in this appeal on the harm of disclosure of a particular record, including the information at issue in Record P7H, to the tax case and therefore to the economy of Ontario. The ministry's representative in this appeal, who was also the representative in the appeals referred to above,[7] is fully aware of the provisions in the *Act*[8] and *Practice Direction 7* which allow the ministry to provide confidential representations in support of its exemption claim that may not be shared with the other parties to an appeal. The ministry did not provide confidential representations concerning this record, nor did it submit any specific representations as to the harm to the economy of Ontario concerning the particular information at issue in this record.

[39] As stated in the Notice of Inquiry sent to the ministry, for section 18(1)(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must

[7] See Interim Order PO-3006-I in this appeal. See also Orders PO-2872 and PO-2899-R, which were issued earlier and concerned six of the same records that are at issue in this appeal.
[8] Section 52(13).

provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[9]

[40] Based on my review of the information at issue on pages 2 and 3 of Record P7H, I find that in Interim Order PO-3006-I did consider the ministry's representations and the application of section 18(1)(d) to this information. Therefore, I am dismissing the ministry's reconsideration arguments under section 18.01 of this office's *Code of Procedure* concerning this information.

Failure to consider exemption claims - Record P8T

[41] The ministry states that it claimed sections 15(a) and (b) for the full five pages of P8T, not just the three severances which were claimed under section 17(2). The ministry states:

> While the adjudicator ruled that meeting arrangements were not exempt under section 15, the first two thirds of page three itemizes an agenda for the meeting planned with …Alberta's tax authority for January 26, 2006. This is more sensitive and substantive than time and place and participants.

[42] The appellant submits that in addition to generally discussing the parties' submissions on the claimed exemptions and how the exemptions apply to this particular record,[10] my reasons demonstrate that I considered whether any portion of this record was subject to the claimed exemptions. The appellant states:

> For example, after referring specifically to the severances, you found that "[t]he information in the remainder of this record contains general information such as arrangements for the meeting and does not come within sections 15(a) or (b)." Your references to the severed portions in respect of which section 17 protection was claimed appear simply to be a method of identifying particular passages for the parties' benefit. It does not indicate that you failed to consider other portions of the record under section 15.

[43] In reply, the ministry states that the bullet points on page 3 of Record P8T are portions of the collective intergovernmental agenda provided by the Government of Alberta.

> These agenda items should be exempt under the mandatory sections 15(a) and (b), and therefore the entire record other than the s. 17(2)

[9] Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)].
[10] Paragraphs 100-101, 188-200 and 335-358 and paragraphs 176-179, 290-292 and 380-382.

> sections is not about travel arrangements, as the interim order states. The other jurisdictions specifically stated that agenda items were considered by them to be confidential, and Order PO-2249 was cited in which agenda items and contents of meetings were held exempt by another Ontario adjudicator.
>
> The travel arrangements themselves were certainly not requested; there is a little personal information in them and for those reasons these should not be disclosed.

[44] In sur-reply, the appellant relies on its representations made in response to the reconsideration request.

Analysis/Findings re: Record P8T

[45] The ministry states that I failed to consider the sections 15(a) and (b) exemption claims for all of the information in Record P8T. In Interim Order PO-3006-I, I stated at paragraph [380] that the first and third severances of Record P8T for which section 17(2) was also claimed contain information that comes within the sections 15(a) and (b) exemptions. The remaining portions of Record P8T contain general information pertaining to arrangements for a meeting and do not come within sections 15(a) or (b).

[46] It is not apparent from a reading of my analysis of this record in Interim Order PO-3006-I, whether I considered the application of sections 15(a) and (b) specifically to the information in the record that did not concern the arrangements for the meeting. This information has been identified specifically by the ministry as the suggested meeting agenda items on page 3 of this record. Therefore, I will now consider whether sections 15(a) and (b) apply to this specific agenda information.

[47] I have considered the parties' representations and find, relying on Order PO-2249, that the suggested agenda items as set out in the bullet points of page 3 of Record P8T are not exempt by reason of section 15(a). In that order, the agenda revealed the actual topics discussed at the meetings. However, in Record P8T, the bullet points on page 3 simply list a number of very general suggested topics. In contrast, the draft agenda in Record P8G that I found subject to sections 15(a) and (b) is extremely detailed and reveals the specific intergovernmental concerns that may or may not be raised at the meeting.

[48] Concerning section 15(a), I have not been provided with "detailed and convincing" evidence to establish a reasonable expectation of prejudice to the conduct of intergovernmental relations by the Government of Ontario or an institution should these general suggested topics on page 3 of Record P8T be disclosed.

[49] Concerning section 15(b), based on the general nature of the suggested agenda topics on page 3 of Record P8T, I find that disclosure would not reveal information received in confidence from another government or its agencies by an institution, and section 15(b) does not apply.

[50] The ministry has suggested that the remaining information in this record should not be disclosed as it is non-responsive or personal information; the ministry did not raise these arguments until its reconsideration request. I find that its current position that the information is non-responsive does not form the basis for a reconsideration under section 18.01 of the *Code of Procedure*. In addition, although the ministry now states that this record contains personal information, it has not identified where this information is located in the record. Based on my review of the record, I find that the mandatory personal privacy exemption in section 21(1) does not apply as the record does not contain personal information.

[51] Therefore, I uphold my decision in Interim Order PO-3006-I concerning the non-application of sections 15(a) and (b) to the information remaining at issue in Record P8T.

Failure to consider exemption claims – attachment to Record P8U

[52] The ministry submits that I did not consider the application of section 19 to this record. It states that:

> [The] last line [of paragraph 395 of Interim Order PO-3006-I] anticipates discussion under s. 19, but this record is not mentioned under s. 19. Sending a settlement offer to all the parties similarly situated is not an external disclosure. Just because there are many parties expected to appeal and similarly situated does not mean that the document is not sent from the CRA in confidence to all.

[53] The appellant agrees that Interim Order PO-3006-I does not explicitly address whether the attachment to Record P8U are subject to the section 19 discretionary exemption.

Analysis/Findings re: Attachment to Record P8U

[54] This record consists of a two-page memorandum attaching a draft letter. I had found in Interim Order PO-3006-I that the memorandum was subject to the discretionary exemption in section 13(1). I agree with the parties that I did not consider the application of section 19 to the attachment to this record.

[55] In its initial representations on section 19 concerning this record, the ministry stated that:

> This record contains legal advice derived from counsel, and is thus exempt.
>
> Records that were the product of confidential communications between counsel and management of a branch of the Ministry were held to be exempt under s. 19(a) in Order PO-2719. Also, e-mail exchanges by non-legal staff which addressed the subject matter for which legal counsel had been consulted and often referred to the need

[56] I found in Interim Order PO-3006-I,[11] that the attachment is a draft letter to an accounting firm that represents corporate taxpayers. This attachment to Record P8U was drafted as a result of the advice or recommendations contained in the covering memo entitled "Collaboration on Inter Provincial Tax Avoidance." This letter is addressed to a named accounting firm. It does not reveal the names of any corporate taxpayers. I stated that:

> According to the Ministries, this record is the same as the final letter that was sent to numerous accounting firms. Based upon my review of the information in this letter and on the fact that this information was widely communicated outside of government, I find that disclosure of the attachment to Record P8U could not reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario nor reveal information received in confidence from the CRA.

[57] The ministry now states that this letter is a settlement offer that is subject to privilege under section 19(b).

[58] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta CA*),[12] the records that were found to be exempt by reason of section 19 were documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Those records were found to be explicitly cloaked in confidentiality. Before undertaking the mediation, the parties in *Magnotta CA* signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions.

[59] In this appeal, although the attachment to Record P8U appears to contain an offer to various taxpayers to comply with certain conditions to avoid certain costs, and can be construed as an offer to them, there is nothing in this record or in the ministry's representations to suggest that there were any confidentiality provisions as between

[11] Paragraphs 294 and 295.
[12] 2010 ONCA 681 (CanLII).

the government and the recipient taxpayers. Therefore, I find that section 19(b) does not apply to this letter and I reject the ministry's reconsideration request under section 19(b) with respect to the attachment to Record P8U.

Inconsistent application of exemptions – Record P7C

[60] The ministry states that there was an intergovernmental pre-meeting in this record that excluded taxpayer representatives. On that basis, it states that pre-meeting notes and post-meeting notes (also intergovernmental) should be exempt under section 15(a). The ministry points to the application of this exemption to the post-meeting notes in Record P7D.[13]

[61] The appellant states that:

> The ministry's concern with your analysis of Record P7C appears to stem from what it believes can be inferred from the disclosure of that record what was discussed by intergovernmental agents prior to the meeting which is the subject of Record P7C. However, you explicitly found that Record P7C relates to a meeting, not pre-meeting notes, that the information at the meeting was discussed with several non-government individuals, and that the record's disclosure would not reasonably be expected to prejudice intergovernmental relations.

[62] In reply, the ministry states that this was a meeting only of tax authorities from the various jurisdictions, that other email records demonstrate that a pre-meeting was planned for that time period, and that the taxpayers' representatives were to attend this pre-meeting later that same day.[14]

Analysis/Findings re: Record P7C

[63] The ministry describes Record P7C in its index of records as a "Pre Meeting Handwritten Notes and Post Mortem". In Interim Order PO-3006-I, I describe this record as containing point-form notes of a meeting attended by representatives of the CRA, the ministry and individuals from accounting and law firms representing corporate taxpayers. Following the issuance of Interim Order PO-3006-I, I received confidential representations from the ministry explaining that the notes reflect not only the intergovernmental pre and post meetings, but also contain notes of the actual meeting with outside accountants for taxpayers.

---

[13] Interim Order PO-3006-I, paragraph 229.

[14] The ministry relies on the information at the top of page 7 of Record P8A and the email from the Manager, Tax Avoidance Unit, Ottawa Tax Office, dated July 10, 2006 in Record P7G.

[64] After the issuance of Interim Order PO-3006-I, I wrote to the appellant as follows:[15]

> I have received confidential representations from the Ministries concerning Record P7C. Apparently they did not intend to withdraw their claim that the mandatory exemption at section 17(2) applies to the name of a corporate taxpayer in this record (this is not the appellant's name). I have allowed the Ministries to sever this corporate name from this record.
>
> Additionally, part of the notes in Record P7C refers to a pre-meeting and the remainder refers to the actual meeting with taxpayer representatives. It was not clear from a reading of this record that it concerned both a pre-meeting and the meeting. I have allowed the Ministries to delete one dollar amount from the pre-meeting portion of this record as section 15(a) applies to this amount.

[65] Based on my review of this record, and the ministry's reconsideration representations, along with its confidential representations,[16] I find that section 15(a) applies to the portions of Record P7C that refers to the intergovernmental pre and post meetings. Disclosure of this information could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution. However, based on my review of both the ministry's confidential and non-confidential representations, I find that section 15(a) does not apply to the notes from the actual meeting. Furthermore, adopting my analysis above concerning the attachment to Record P8U,[17] I find that the meeting notes in Record P7C are not subject to section 19(b).

[66] Therefore, I will order the ministry to exercise its discretion concerning the disclosure of the pre and post meeting notes in Record P7C that I have found subject to section 15(a). I maintain my decision in Interim Order PO-3006-I that the meeting notes contained in this record be disclosed.

Inconsistent application of exemptions – Records P8A, P8D, P8I, and P8K

[67] Record P8A consists of emails to which is attached a draft letter. The emails are between Quebec, the CRA, the ministry and Alberta regarding "Meeting July 14, 2006 Tax Avoidance Arrangement Exploiting Ontario Tax Provisions." The draft letter is to a named accounting firm from the CRA Director General, Director General's Office.

[68] In Interim Order PO-3006-I, I found that pages 1 to 3 and part of one email on page 4 and the attachment to Record P8A contain information that comes within the

---

[15] Letter to appellant, November 2, 2011.
[16] Received following the issuance of Interim Order PO-3006-I.
[17] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, cited above.

sections 15(a) and (b) exemptions. I found that the remaining information in the emails contains general information such as about arrangements for the meeting and does not come within sections 15(a) or (b) and I ordered this remaining information disclosed, as no other exemptions had been claimed for this record.

[69] The ministry states in its reconsideration request that I ordered the same portions of Record P8A to be both disclosed and subject to an exemption. It also states that a paragraph of this record is a duplicate of a paragraph in Record P8I, each with different portions ordered subject to an exemption.

[70] In addition, the ministry states that the attachment to Record P8A is virtually identical to Record P8I and the attachments to Records P8D, P8K and P8U, yet the attachment to Record P8A is subject to sections 15(a) and (b), while the other letters are ordered disclosed.

[71] The appellant submits that to the extent that such internal inconsistencies exist, it agrees that they represent clerical or technical errors for which reconsideration may be an appropriate remedy.

Analysis/Findings re: Records P8A, P8D, P8I and P8K

[72] As stated above, I found pages 1 to 3 of Record P8A subject to sections 15(a) and (b); however, it appears that I inadvertently highlighted information to be disclosed by the ministry on pages 1 to 3 of Record P8A in the copy of the order sent to the ministry with Interim Order PO-3006-I. Accordingly, under section 18.01(c) of the *Code of Procedure* as there was a clerical error, accidental error or omission or other similar error in the decision. Therefore, my findings that pages 1 to 3 are subject to sections 15(a) and (b) remains.

[73] Similarly, the same information appears on page 4 of Record P8A and on page 2 of Record P8I. This was determined to be exempt in Record P8A and is also exempt in Record P8I. This information begins in both records with "Now we ..." and ends with "… on Monday". Both paragraphs in each record were not highlighted. Therefore, they were not to be disclosed. The highlighting in Record P8I may have run over some of the text in the paragraph in Record P8I. I maintain my decision that this paragraph found in both Records P8A and P8I are subject to sections 15(a) and (b).

[74] Concerning the attachment to Record P8A, the draft letter, in Interim Order PO-3006-I I found this subject to sections 15(a) and (b). Although the attachments are similar in Records P8A and P8U, they are not identical. In Record P8A, it is a draft letter circulated inter-governmentally. The attachment to Record P8U and the letter that comprises Record P8K is the final letter that was circulated among taxpayer representatives. The attachment in Record P8D is a different letter than that in Record P8K and in the attachments in Records P8A and P8U.

[75] Furthermore, I find that section 19(b) does not apply to the letters[18] that I ordered disclosed. As stated above, there is nothing in these letters or in the ministry's initial representations to suggest that there were any confidentiality provisions as between the government and the recipient taxpayers.

Failure to Apply Settlement Privilege

[76] The ministry asks that I reconsider whether all of records at issue in this reconsideration, except for Record P7H,[19] are subject to either litigation or settlement privilege under section 19 of the *Act*. The ministry relies on the findings in *Magnotta CA*. It raises this argument even for the records that it did not previously claim the application of section 19.

[77] I received extensive representations from both the ministry and the appellant on this issue. The appellant succinctly summarizes the parties' representations in its sur-reply representations, as follows:

> First in its reconsideration request, the ministry submitted that it ought to be able to assert settlement privilege under section 19 of the *Freedom of information and Protection of Privacy Act* (the "*Act*") on the basis that IPC orders existing at the time of the ministry's original submissions held that section 19 did not encompass settlement privilege.[20]
>
> It argued that the Ontario Court of Appeal's decision in *Ontario (Liquor Control Board) v. Magnotta Winery Corp)* ("*Magnotta CA*") first determined that section 19 protected against the disclosure of records prepared for use in the settlement of litigation. In response, we explained that *Magnotta CA* did not change the law, that the Divisional Court's June 12, case came to similar legal conclusions, and that the ministry had failed to make submissions concerning this line of jurisprudence in a timely fashion

[18] Record P8K and attachment to Record P8U.
[19] Records P7C, P7G, P8A, P8B, P8E, P8I, P8G, P8L, P8T, P8O, P8K and the attachments to Records P8D, and P8U.
[20] The appellant states that: "The ministry's claims either imply that common law settlement privilege applies directly (e.g. ministry's reply at p. 7, paras. 2-3) or attempt to expand on the Court of Appeal's decision in *Magnotta CA* by incorporating common law settlement privilege into section 19 of the *Act*, despite the provision's clear test (e.g. ministry's reply at pp. 7-8, paras. 1, 4-6). The ministry claims, for example, that "any records created in furtherance of the settlement of the litigation should be exempted from disclosure under the second branch of section 19 *FIPPA*", not only those created by or for Crown counsel (ministry's reply at p 8, para 5). Given that *Magnotta CA* emphasizes the importance of the "prepared by or for Crown counsel" precondition to protection under section 19 (see e.g. *Magnotta CA* at paras. 37, 44, 45), the ministry's reliance on such arguments is especially problematic since its underlying basis for reconsideration is that *Magnotta CA* was not released until October 2010…".

> either in its supplemental representations or at any point in the intervening two-year period leading up to the Interim Order. While these facts should be final to its reconsideration request, we went on to explain how the ministry had incorrectly interpreted *Magnotta CA* and how the relevant question under section 19 of the *Act* (in the event that you were inclined to grant reconsideration on Ground C) was whether the disputed records were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." We concluded by explaining why the disputed records were unlikely to meet these requirements.
>
> Although it reasserts the ministry's original section 19 argument, the ministry's reply also appears to (improperly) advance a supplemental claim that the disputed records are protected from disclosure under common law settlement privilege. It does this despite that the Court of Appeal explicitly declined to consider the application of common law settlement privilege in *Magnotta CA*, which demonstrates that the ministry's new argument is independent of the Court's decision in that case. This makes it all the more clear that the ministry had no reason not to raise these issues at an earlier stage of these appeals, including at the time of its initial representations in June 2009. Such unreasonable delay prejudices the appellant and decreases public confidence in the freedom of information system as a whole.
>
> Second, the ministry's reconsideration request was clearly made on the basis that the Interim Order reflected errors or defects falling within the authority to reconsider matters under section 18.01 of the IPC *Code of Procedure*. It appears that the ministry is now broadening the legal basis for its request by claiming that you are yet to render a final decision and that, as a result, you have additional powers to reconsider the Interim Order based on general administrative law principles. We submit that it is inappropriate for the Ministry to attempt to expand the scope of its request in its reply.

Analysis/Findings re: Failure to Apply Settlement Privilege

[78] Regardless of whether the ministry should be able to raise the application of settlement privilege on a reconsideration request, I will determine whether section 19(b) and the principles set out in *Magnotta CA* apply to the records at issue.[21]

[21] Except for Record P7H.

[79] In *Magnotta CA*, the records had been prepared for mediation by Magnotta and were in the institution's possession. These records included copies of all agreements pertaining to the settlement and the Minutes of Settlement.[22]

[80] The Court of Appeal in *Magnotta* describes the records as follows:

> The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions.[23]

[81] It stated that:

> Section 19 is accepted as having two branches. The first branch is an exemption for records that are subject to solicitor-client privilege. The second branch is for records that were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation"…[24]

[82] In *Magnotta CA*, the dispute was over whether documents prepared for mediation and settlement were prepared for use in "litigation".[25] The Court of Appeal determined that the Divisional Court did not err in finding that the records fell within the second branch of section 19 of *FIPPA*. In doing so, it stated that:

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by Magnotta – fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. Furthermore, it is antithetical to the public policy interest in settlement of litigation because it would lead to situations in which the government

[22] At paragraphs 9 and 10.
[23] At paragraph 45.
[24] At paragraph 22.
[25] At paragraph 32.

> entity's records would be exempt from production while the private party's mediation material would be producible.[26]

[83] Section 19 read at the time of the request in *Magnotta CA*, as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[84] At the time of the request in these appeals, section 19 had been amended to read as follows:

> 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 for use in giving legal advice or in contemplation of or for use in litigation.

[85] Since then, section 19(c) has been amended to include hospitals.

[86] At all relevant times, section 19 included the wording found in section 19(b), which is what the ministry is relying on.

[87] Unlike the situation in *Magnotta CA*, the records at issue in this order were not prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of a litigation process. The records concern meetings, emails and letters with respect to proposed audits and reassessments of taxpayer companies involved in tax avoidance arrangements. The records at issue were not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[88] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated. [27]

[89] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P.

---

[26] At paragraph 44.
[27] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

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.

[90] The request in this appeal was made on May 15, 2007. All of the records at issue are dated between July 2005 and March 2007. The ministry did not issue a reassessment notice to the appellant until May 2, 2007.

[91] The records concern a discussion of various tax avoidance arrangements. Some records concern a discussion regarding the initiation of audits or reassessments of taxes. None of the information at issue in the records in this order reveals the identity of, or is addressed to, a particular taxpayer. These records were not explicitly cloaked in confidentiality.[28]

[92] Based on my review of the records and the parties' representations, I find that there was not more than a vague or general apprehension of litigation at the time of the records creation. The records do not give rise to a reasonable prospect of litigation within the meaning of section 19(b).

---

[28] *Magnotta CA* at paragraph 45.

[93] Accordingly, I find that the information at issue in the records that are subject to this reconsideration order is not subject to the litigation privilege aspect of either Branch 1 or Branch 2 of section 19(b).

Failure to consider all the evidence

[94] The ministry states that a fundamental defect in the adjudication process occurred under section 18.01(a) of the IPC *Code of Procedure* as I failed to consider the evidence of other jurisdictions in making my findings under sections 15(a) and (b). It asks, therefore, that I reconsider my findings in Interim Order PO-3006-I concerning Records P8A, P8B, P8E, P8I, P8T, P8G, and the attachments to Records P8D and P8U.

[95] The ministry submits that its evidence discloses an expectation of confidentiality in the relationship between Ontario, Alberta and Canada, as well as the prejudice to their relationship if the records were disclosed. It states that I did not properly consider records or information sent by other governments which were contained in tab 10, which was provided in conjunction with their initial reply representations.

[96] Tab 10 contains a letter from the Department of Finance Canada's Director of Intergovernmental Tax Policy, Evaluation and Research, who also chaired the Subcommittee on Interprovincial Tax Avoidance, and reads in part as follows:

> I am replying on behalf of federal participants to the Subcommittee on Inter-provincial Tax Avoidance to your e-mail of October 22, 2009, regarding a request under the *Freedom of Information and Protection of Privacy Act* of Ontario for records.
>
> Senior federal officials who were involved with the project have carefully reviewed the document package provided by the government of Ontario. It is their view that the release of these documents, many of which were prepared by the federal government and provided to provincial governments on a confidential basis, would seriously prejudice intergovernmental relations by inhibiting the release of future documents to provincial governments. To have effective federal-provincial policy development and consultation, the federal government must be assured that confidential documents provided to provincial governments will not be publicly disclosed. Release of this information would seriously compromise the ongoing work of multijurisdictional committees examining tax issues. Furthermore, the release of these documents to the private sector could provide the recipients with a financial gain by allowing them to better assess the risks of entering into a provincial tax avoidance scheme, both in terms of the legal framework currently in place as well as the audit strategy used by the Canada Revenue Agency to protect provincial tax revenues from these tax avoidance schemes…

[97] Also included in Tab 10 were emails from all of the provincial members of the Subcommittee on Interprovincial Tax Avoidance[29] agreeing with Ontario's position concerning disclosure of the records, as follows:

> Disclosure of Record Group 1
> Records are:
>
> 1. Discussion Paper (and drafts thereof) on Interprovincial Income Tax Avoidance - for discussion purposes only and not for dissemination; and
>
> 2. Two Slide Presentations for the Subcommittee
>
> If these records were disclosed, Ontario's position is:
> X) This record was received in confidence from another jurisdiction.
> Y) Our intergovernmental relationship would be prejudiced,
> Z) Ongoing negotiations among our jurisdictions would be harmed.
>
> Disclosure of Record Group II:
> Records are: Agendas, Next Steps, Minutes whether typed or handwritten.
>
> If these records were disclosed, Ontario's position is:
> X) All but handwritten minutes were received in confidence from another jurisdiction, and the handwritten notes reflect what was received from another jurisdiction.
> Y) Our intergovernmental relationship would be prejudiced
> Z) Ongoing negotiations among our jurisdictions would be harmed.
>
> Disclosure of Record Group III
> Records are: Ontario's internal discussions by e-mail of interprovincial matters including tax avoidance around the time of these meetings where other provinces interests are mentioned with our own.
>
> If these records were disclosed, Ontario's position is:
> X) Our intergovernmental relationship would be prejudiced, and
> Y) Ongoing negotiations among our jurisdictions would be harmed.

[98] The appellant concedes that a failure to determine an issue properly raised before a tribunal may serve as the basis for reconsidering that tribunal's order, it sees no such failure in these circumstances concerning the application of sections 15(a) and/or (b) where claimed. It further states that:

---

[29] Except Nova Scotia, which could not be contacted at the email address provided to the ministry.

> Given the complexity of the issues involved, the quantity of disputed records, and the breadth of the parties' written representations, it is unreasonable to expect that your reasons would have explicitly referred to every piece of supporting documentation considered in adjudicating these appeals. Moreover, you were under no legal obligation to provide that level of detail in your reasons…
>
> In particular, the vague statements made by other Canadian tax authorities and referred to by the ministry did not demand an extended analysis in your reasons. With respect to the statements themselves, we maintain our prior submission that cooperation from other tax authorities at this stage cannot retroactively ground an expectation of confidentiality that has not otherwise been shown to exist.

[99] Concerning the ministry's tab 10, the appellant states that other than a description of the record set out in the ministry's initial representations:

> No further description is provided of the documents reviewed by the individuals making these statements, whether the purported expectations of confidentiality existed at the time the communications were held, or how the individuals are aware of these purported facts. Furthermore, it appears that none of the statements relate to portions of the disputed documents that simply provide a record of information communicated to third-party accounting firms.

Analysis/Findings re: Failure to consider all the evidence

[100] I will review each record or portion at issue to determine whether I failed to consider all relevant evidence. Only the ministry provided representations on individual records concerning whether I considered all of the evidence.

Record P8A

[101] As stated above, pages 1 to 3, and one email on page 4, and the attachment to this record is subject to sections 15(a) and (b). The ministry asks that I find the remaining emails in this record subject to section 15(b).

[102] Except for a portion of one paragraph on page 7 of this record, the information remaining at issue in this email is about meeting arrangements or general information concerning the circulation of the draft letter. I note that the provinces did not specifically comment about this information. In the discussion above, I decided to reconsider that portion of my decision addressing the emails on page 7 of this record, as they contain a discussion about substantive matters concerning next steps or interprovincial plans about the recovery of taxes. Accordingly, I did not fully consider

all of the evidence of the ministry as set out in tab 10 referred to above. Concerning the remaining information, I find that the ministry has not provided "detailed and convincing" evidence to establish a "reasonable expectation of harm", and I decline to reconsider my decision.[30]

Record P8B

[103] Portions of this record, which consists of an email chain, were ordered disclosed in Interim Order PO-3006-I. Some of these emails are exchanged between government officials and accounting firms. The ministry relies on its representations for Record P8A.

[104] Except for certain portions of page 1 of this record, the information remaining at issue in this email is about meeting arrangements. As I stated for Record P8A, the provinces did not specifically comment about this information. I have reconsidered my decision with respect to portions of the emails on page 1 of this record, as they contain a discussion about substantive matters concerning next steps or interprovincial plans about the recovery of taxes. I find that I did not fully consider all of the evidence of the ministry which was set out in tab 10 referred to above concerning this information only. In so far as the remaining information is concerned, I find that the ministry has not provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" and I uphold my decision in Interim Order PO-3006-I.[31]

Record P8E

[105] Portions of this record which consists of email chains were ordered disclosed. The ministry refers to certain information on pages 1 and 2 of this record containing agenda items.

[106] I find that the email on page 1 is an internal ministry email. The paragraphs at issue in the email on page 2 discuss generally a publicly available document. I find that disclosure of this information would not permit the drawing of accurate inferences with respect to information received from another government. I am upholding my decision in Interim Order PO-3006-I concerning this record.

Record P8I

[107] All of this email chain was ordered disclosed except for one email on page 2. The ministry refers to an email on page 1 of this record that I had ordered disclosed in Interim Order PO-3006-I. It states that this email contains agenda items. I find that this email on page 1 does not contain actual agenda items but refers to a possible agenda

---

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

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

item proposed by an outside accounting firm. I find that the ministry has not provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" concerning this email, nor the remaining information at issue in this record, except for portions of one email found on pages 4 and 5 of this record.[32]

[108] Pages 4 and 5 of this record contain the same email as found on page 7 of Record P8A, portions of which I have decided above is subject to sections 15 (a) and (b). For the same reasons as set out above for Record P8A, I will reconsider my decision concerning this information.

Record P8T

[109] The ministry asks that I reconsider my decision concerning the suggested agenda topics on page 3 of this record and refers to Alberta's agreement with Ontario set out in Tab 10 concerning agendas. I found above that section 15(a) did not apply as the suggested agenda items set out in the bullet points of page 3 of Record P8T as the bullet points on page 3 simply list a number of very general suggested topics. I confirm this decision, taking into account the information in tab 10.

[110] I also confirm my finding above concerning section 15(b) that based on the general nature of the suggested agenda topics on page 3 of Record P8T, disclosure would not reveal information received in confidence from another government or its agencies by an institution.

Record P8G

[111] In Interim Order PO-3006-I, I ordered the meeting notes in this record to be disclosed as not being subject to sections 15(a) and/or (b). The ministry submits that I failed to take into account the information in tab 10 from Canada, Quebec and Alberta that these minutes were received in confidence and that ongoing negotiations among the jurisdictions would be harmed by their disclosure. It specifically refers to the statement by Canada that: "The handwritten notes reflect what was received [by Ontario] from another jurisdiction". The ministry states that:

> These meeting minutes are a confidential record of what 4 jurisdictions said to 4 accounting firms on litigious tax avoidance matters leading to a number of cases (some now in progress). The firms also stated on behalf of their clients their legal taxpayer positions and the governments stated their positions. Attempts to avoid litigation and make settlement is a confidential subject matter for the parties to the litigation (governments and accounting firms) and disclosure compromises the governments who gave their parts in confidence.

---

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

[112] Based on my review of the information in tab 10, I find that disclosure of the meeting notes in this record could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution under section 15(a). As stated in the letter from the Chair of the Subcommittee on Interprovincial Tax Avoidance in tab 10:

> …the release of these documents to the private sector could provide the recipients with a financial gain by allowing them to better assess the risks of entering into a provincial tax avoidance scheme, both in terms of the legal framework currently in place as well as the audit strategy used by the Canada Revenue Agency to protect provincial tax revenues from these tax avoidance schemes…

[113] The meeting notes in Record P8G are quite detailed and contain information about individual jurisdictions positions regarding specific tax resolutions. In contrast, the meeting notes in which I discussed above. Record P7C are general discussion notes.

[114] As I have found the meeting notes in Record P86 subject to section 15(a), there is no need for me to also consider whether these notes are also subject to section 15(b).

Attachment to Record P8D

[115] In Interim Order PO-3006-I, I describe the attachment to Record P8D as:

> …a template of a letter that was sent to many corporate taxpayers by the CRA Manager, GAAR and Technical Support Section of the Tax Avoidance and Special Audits Division. It is a general letter requesting information.

[116] The ministry states in its reconsideration request that:

> This draft letter was sent to Ontario and the other jurisdictions for approval or correction. As such it was a follow up to or part of the interprovincial discussions after the Oct. 3 meeting. This short letter was not the final template used. Adjudicator failed to consider the evidence of other governments or address their refusal to consent to "next step" materials.

[117] The emails attached to this letter in Record P8D indicate that this letter is not a draft letter, but is a letter that was sent to a number of taxpayers. I also disagree with the ministry that anything categorized by it as "Next Steps" in the records in and of itself gives rise to the application of sections 15(a) and/or (b).

[118] Considering the general information contained in this letter and the fact that it was sent to many taxpayers, and taking into account the information in tab 10, I maintain my decision that this letter is not subject to sections 15 (a) or (b).

Attachment to Record P8U

[119] In Interim Order PO-3006-I, I describe the attachment to Record P8U as:

> …a draft letter to an accounting firm that represents corporate taxpayers. This attachment to Record P8U was drafted as a result of the advice or recommendations contain in the covering memo entitled "Collaboration on Inter Provincial Tax Avoidance."…

[120] Concerning the application of sections 15(a) and/or (b), I stated that:

> According to the Ministries, this record is the same as the final letter that was sent to numerous accounting firms. Based upon my review of the information in this letter and on the fact that this information was widely communicated outside of government, I find that disclosure of the attachment to Record P8U could not reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario nor reveal information received in confidence from the CRA.

[121] In its reconsideration request, the ministry states that:

> The evidence of Tab 10, ignored by the adjudicator shows that the CRA refused to disclose "Next Steps" such as this undated (draft) letter following from their meetings. That was because disclosure would prejudice the intergovernmental relationships and would be disclosure of a record sent from Canada to Ontario in regard to settlement of these cases. Although there was no contradictory evidence, this evidence was not addressed or considered in the context of this record.

[122] The information at issue is a detailed offer to various accounting firms from the CRA with respect to the avoidance of reassessments by the accounting firms' clients.

[123] Relying on the letter from the Chair of the Subcommittee on Interprovincial Tax Avoidance in tab 10, I find that disclosure of the letter, which is the attachment to Record P8U, could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution under section 15(a). Disclosure could provide the recipients with a financial gain by allowing them to better assess the risks of entering into a provincial tax avoidance scheme, both in terms of the legal framework currently in place as well as the audit strategy used by

the CRA. Accordingly, I find the attachment to Record P8U to be subject to section 15(a).

ORDER:

1. I order the ministry to exercise its discretion concerning the disclosure of the information at issue in:

   - 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.

For ease of reference I have provided the ministry with a highlighted copy of this information that I have reconsidered in this order.

2. I order the ministry 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 their explanation to the appellant, with the copy to this office, by no later than **September 20, 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 my decision in PO-3006-I with respect to the remaining information at issue in this order and I order the ministry to disclose this information to the appellant by **September 20, 2012**.

Original signed by: August 29, 2012
Diane Smith
Adjudicator