

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3173-R

Appeal PA11-62-2

Ministry of Finance

February 28, 2013

Summary: This is a reconsideration of Order PO-3128, in which the adjudicator upheld the application of sections 12 (Cabinet records) and 13 (advice or recommendations) to some information but ordered the disclosure of other information, in records relating to the Ontario government's implementation of temporary input tax restrictions during the conversion of the Ontario Retail Sales Tax to a Harmonized Sales Tax. The Ministry of Finance sought a reconsideration of that order with regard to a small portion of one record. The ministry argued that the adjudicator committed an accidental error or omission or similar error pursuant to paragraph (c) of section 18.01 of the IPC's *Code of Procedure* by failing to identify certain specific and limited information in the record as taxpayer information, which it viewed as protected under sections 17(2) (taxpayer information) and 15(b) (information received from another government) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator rejected the reconsideration request, finding that the ministry had failed to establish the necessary grounds under section 18.01 of the *Code* to reconsider Order PO-3128.

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

Orders and Investigation Reports Considered: PO-3128.

OVERVIEW:

[1] The appellant made an access request to the Ministry of Finance (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

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

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

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

[4] During the mediation stage of the appeal process, the ministry confirmed that it was relying upon the exemptions in sections 12(1)(b), (c), (d) and (e), section 13(1), section 15, and sections 17(1) and 17(2) (tax information) to deny access to various portions of the records at issue.

[5] The parties were unable to resolve the appeal during mediation and the file was moved to the adjudication stage for a written inquiry conducted by an adjudicator. During the inquiry, the ministry clarified that with regard to section 15 it was relying on section 15(b) (information received from another government).

[6] As the assigned adjudicator, I conducted an inquiry and issued Order PO-3128. In that order, I reached the following conclusions:

- The mandatory exemption in section 12(1) applies to records 5, 6, 7, 8, 8, 9, 10 and 11, in their entirety.
- The discretionary exemption in section 13(1) applies to record 13 in its entirety (with the exception of all identifiers, which I have severed on other grounds) and to records 3, 4, in part.
- The discretionary exemption in section 15(b) applies to record 4, in part.

- The mandatory exemptions in sections 17(1) and 17(2) do not apply to any of the records at issue.

[7] Pursuant to my decision, I made the following order provisions:

1. I uphold the ministry's application of the exemption in section 12(1) to records 5, 6, 7, 8, 9, 10 and 11 in their entirety.
2. I uphold the ministry's application of the discretionary exemption in section 13(1) to record 13.
3. I order the ministry to disclose records 1, 3, 4 and 12, in part, to the appellant in accordance with the highlighted versions of these records provided to the ministry with its copy of this order, by **December 10, 2012** but not before **December 3, 2012**. To be clear, the ministry is not to disclose to the appellant the portions of these records that have been highlighted in yellow.
4. I order the ministry to provide me with copies of the severed versions of records 1, 3, 4 and 12 that it discloses to the appellant.
5. I remain seized of this matter in order to verify compliance with order provisions 2, 3 and 4.

[8] The ministry subsequently informed this office in an email dated November 28, 2012 of its intention to submit a request for reconsideration of Order PO-3128. On December 10, 2012 the ministry submitted a formal request for reconsideration with regard to a small portion of record 4.

[9] In the interim, I granted the ministry a stay regarding compliance with the order provisions in Order PO-3128. Nevertheless, the ministry issued a decision letter on December 10, 2012 pursuant to which it disclosed those portions of records 1, 3, 4 and 12 that I had ordered it to disclose in Order PO-3128, with the exception of that portion of record 4 which it seeks to have reconsidered.

[10] With regard to its reconsideration request, the ministry argues that I committed an "accidental error or omission or similar error" by "failing to identify certain specific and limited information" in record 4 as "taxpayer information, the confidentiality of which is protected under section 17(2) and [section] 15(b) of [the Act]."

[11] In this order, for the reasons that follow, I conclude that in Order PO-3128 I properly found that section 17(2) does not apply to the portion of record 4 that is of concern to the ministry. With regard to the application of the section 15(b) discretionary

exemption to this information, I conclude that I am not able to consider its application because it was not properly raised as an issue at the appropriate time in the appeal process.

ISSUES:

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-3128?
- B. Is the information at issue in record 4 exempt under section 17(2) or 15(b)?

DISCUSSION:

A. Are there grounds under Section 18.01 of the *Code of Procedure* to reconsider Order PO-3128?

The Reconsideration Process

[12] Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

18.01 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.

18.02 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.

Grounds for the Reconsideration Request

[13] As set out in paragraph (c) to section 18.01, this office may reconsider an order where it is established that there has been an accidental error or omission or other similar error in the decision.

[14] In seeking a reconsideration, the ministry relies on paragraph (c) of section 18.01, stating an accidental error or omission or similar error was made in Order PO-

3128 in “[my failure] to identify certain specific and limited information in record #4 as taxpayer information, the confidentiality of which is protected under subsection 17(2) and s. 15(b)” of the *Act*.

[15] In its representations presented during the inquiry, the ministry described record 4 as a slide deck consisting of “confidential advice to the Minister of Finance on the subject of restricted input tax credits and municipal electricity utilities (MEUs) under the Harmonized Sales Tax (HST).”

[16] As indicated above, the ministry’s reconsideration request is concerned with information found at page 2 of record 4, which addresses the proposed application of restrictions on ITCs to a particular class of taxpayers, namely MEUs.

[17] With regard to the application of section 17(2), the ministry reaffirms its reliance on this exemption in regard to the tax status of MEUs (having relied on it during the inquiry).

[18] The basis for the ministry’s reconsideration request is that I have failed to consistently apply section 17(2) to the information at issue.

[19] The ministry submits that in Order PO-3128 I severed out the name of an MEU taxpayer identified in the portion of record 4 at issue and, in doing so, I applied section 17(2). The ministry submits that disclosing the statement at issue would reveal the names and tax status of all MEUs since a listing of the 81 MEUs currently in existence is available by conducting an internet-based Google search. Accordingly, the ministry argues that while these other 80 MEUs are not specifically identified by name in the record, they are as equally identifiable as the one that I severed.

[20] I acknowledge the ministry’s viewpoint regarding the proposed application of section 17(2) to the information at issue. However, in Order PO-3128 I clearly found that section 17(2) does not apply to the information at issue in record 4. In making that finding I stated, beginning at paragraph 90 of Order PO-3128:

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

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

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

[21] To reiterate, in Order PO-3128 I found that the information at issue is not exempt under section 17(2). This information, including the tax status of all 81 MECs, was not obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax, as required under section 17(2). Accordingly, none of this information meets the test for exemption under section 17(2).

[22] The sole basis for severing the reference to the one taxpayer identified by name was out of caution since I had decided to not notify and seek representations from this entity. However, it was my view then and it remains my view that section 17(2) does not apply to the information at issue in record 4.

[23] I allude above, in paragraph 92 of Order PO-3128, to the removal out of an abundance of caution of all identifying information about affected parties. However, I acknowledge that I omitted to specifically address record 4 in my discussion of this issue in the "Preliminary Matters" portion of Order PO-3128. This was an oversight on my part, which I now acknowledge and clarify.

[24] With regard to the possible application of section 15(b) to the information at issue in record 4, section 15(b) is a discretionary exemption that must be raised within 35 days of the issuance of the Notice of Mediation by this office.

[25] In this case, the Notice of Mediation was issued on April 12, 2011 and the deadline for raising new discretionary exemptions was May 17, 2011.

[26] While the ministry suggests in its representations provided in support of its reconsideration request that it intended to claim section 15(b) for the information at issue as well as for other portions of record 4, there is no indication on the face of this portion of record 4 that section 15(b) was ever claimed. Accordingly, in my view, the ministry clearly missed the May 17, 2011 deadline to rely on section 15(b) for the portion of record 4 at issue and it is not now in a position to raise it.

[27] Alternatively, the ministry suggests in its representations submitted in support of this reconsideration request that since Cabinet has not approved the disclosure of any

section 15 records, it views section 15(b) as a mandatory exemption which can be claimed late, as necessary.

[28] I do not accept the ministry's alternative argument. I reiterate that section 15(b) is a discretionary exemption that the ministry had the right to raise as it saw fit on or before May 17, 2011. It failed to raise this exemption in relation to the information at issue in record 4. It cannot now be raised by the ministry.

[29] To conclude, I find that the ministry has not established the necessary grounds under paragraph (c) of section 18.01 of the *Code* or any other paragraphs under that section, to warrant reconsideration of Order PO-3128.

[30] I reject the ministry's reconsideration request and, having done so, need not comment further on the application of section 17(2) or 15(b) to the information at issue.

ORDER:

1. I dismiss the ministry's reconsideration request of Order PO-3128.
2. I order the ministry to disclose record 4, in part, to the appellant in accordance with the highlighted version of this record provided to the ministry with its copy of Order PO-3128, by **March 14, 2013**.
3. In order to verify compliance with this order, I request that the ministry provide me with a copy of record 4, as disclosed to the appellant.

Original signed by: _____
Bernard Morrow
Adjudicator

February 28, 2013 _____