

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3211

Appeal PA12-280

Infrastructure Ontario

May 31, 2013

**Summary:** The appellant sought access to a record entitled, "Lakeshore Psychiatric Hospital Cemetery – Cultural Heritage Assessment and Management Strategy – Report and Recommendations," dated September 2009. Infrastructure Ontario and Lands Corporation (IO) disclosed all of this record to the appellant, except for the information in section 6.0 ("Recommendations"), which it withheld under the discretionary exemption in section 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the information in that part of the record qualifies for exemption under section 13(1), because its disclosure would reveal advice or recommendations of a consultant retained by IO. He upholds IO's decision to refuse access to that information and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 13(1) and 13(2)(k).

### OVERVIEW:

[1] The appellant submitted a request to Ontario Infrastructure and Lands Corporation (IO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Lakeshore Psychiatric Hospital Cemetery Heritage Assessment and Management Strategy – Report and Recommendations.

[2] IO located the record that is responsive to the request. It then issued a notice under section 28(1) of the *Act* to an engineering firm that prepared this report and invited the firm to provide its views as to whether the record should be disclosed. IO did not receive a response from the firm.

[3] IO then issued a decision letter to the appellant in which it granted him access to all of the report, except for specific information that appears under section 6.0 – “Recommendations.” It withheld this information under the discretionary exemption in section 13(1) (advice or recommendations) of the *Act*.

[4] The appellant appealed IO’s decision to the Information and Privacy Commissioner of Ontario (IPC). This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought representations from the parties on the issues in this appeal. IO submitted representations but the appellant did not.

## **RECORD:**

[5] The information at issue in this appeal appears under section 6.0 – “Recommendations” (pages 5-7) of the following record: “Lakeshore Psychiatric Hospital Cemetery – Cultural Heritage Assessment and Management Strategy – Report and Recommendations,” dated September 2009.

## **ISSUES:**

A: Does the discretionary exemption at section 13(1) apply to the record?

B: Did IO exercise its discretion under section 13(1)? If so, should the IPC uphold IO’s exercise of discretion?

## **DISCUSSION:**

**A: Does the discretionary exemption at section 13(1) apply to the record?**

### **Section 13(1): the exemption**

[6] Section 13(1) states:

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

[7] The purpose of section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.<sup>1</sup>

[8] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.<sup>2</sup>

[9] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.<sup>3</sup>

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

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>4</sup>

[11] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines*<sup>5</sup> that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.<sup>6</sup>

[12] There is no requirement under section 13(1) that the institution be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.<sup>7</sup>

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<sup>1</sup> Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

<sup>2</sup> Order PO-2681.

<sup>3</sup> Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

<sup>4</sup> Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra* note 3; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *supra* note 3.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

<sup>7</sup> *Supra* note 1.

[13] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views; and
- a supervisor's direction to staff on how to conduct an investigation.<sup>8</sup>

[14] IO submits that the withheld information that appears under section 6.0 – "Recommendations" (pages 5-7) of the record falls squarely within the section 13(1) exemption. It states:

The information contained in the Appeal Record outlines several options and recommendations for the Province to consider in making decisions about the Lakeshore Psychiatric Hospital Cemetery. Not only does the Appeal Record outline the options and recommendations but [it] also contains detailed steps for each recommended action.

[15] I have reviewed the record at issue and agree with IO that the withheld information falls within the section 13(1) exemption. To satisfy the requirements of section 13(1), it must be shown that disclosure would reveal advice or recommendations of:

- a public servant;
- any other person employed in the service of an institution; or
- a consultant retained by an institution.

[16] According to IO's representations, the record was "commissioned by IO's third party service provider for the purpose of making reports or recommendations to IO." The cover page of the record indicates that an engineering firm submitted the report and recommendations to a property management company. I am satisfied that this property management company was acting as IO's agent in retaining the engineering firm as a consultant to prepare the report and recommendations.

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<sup>8</sup> Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra* note 3.

[17] The withheld information that appears under section 6.0 ("Recommendations") of the record is clearly "advice or recommendations." It reveals courses of action that will ultimately be accepted or rejected by their recipient. In short, I find that disclosing this information would reveal the advice or recommendations of a consultant retained by IO. Consequently, this information qualifies for exemption under section 13(1).

### **Sections 13(2) and (3): the exceptions**

[18] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1).

[19] In my view, none of these exceptions apply to the withheld information in the record at issue. However, IO makes a peculiar submission about the exception in section 13(2)(k). This provision states:

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

a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

[20] In its representations, IO states:

The Appeal Record can be considered a "committee, council or other body report" as described in section 13(2)(k) of *FIPPA*.

The report was commissioned by IO's third party service provider for the purpose of making reports or recommendations to IO. As such, the Appeal Record falls within the exception contained in section 13(2)(k) of *FIPPA*.

[21] IO's submission is peculiar for two reasons. First, it appears to concede that the section 13(2)(k) exception applies to the record, which would mean, in contrast to its access decision, that the section 13(1) exemption does not apply to it. Second, the consultant that prepared the report and recommendations is a private-sector engineering firm. This consultant is clearly not "attached" to IO, nor was it "established for the purpose of undertaking inquiries and making reports or recommendations to the institution," as required by the wording of section 13(2)(k).

[22] In short, notwithstanding IO's peculiar submission on the exception in section 13(2)(k), I find that this exception does not apply to the record at issue, including the withheld advice and recommendations.

**B: Did IO exercise its discretion under section 13(1)? If so, should the IPC uphold IO's exercise of discretion?**

[23] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[24] In addition, the IPC may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[25] In either case the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>9</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>10</sup>

[26] IO states that it took the following factors into account in exercising its discretion to withhold the advice and recommendations in the record under section 13(1):

- a) The exemption is applied specifically and is limited to only the actual recommendations contained in the Appeal Record. Portions of the Appeal Record containing factual information have been disclosed to the requester.
- b) The Appeal Record does not contain the personal information of the requester.
- c) The application of section 13(1) of *FIPPA* was intended to protect the decision-making process as was intended in *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*; and

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<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 54(2) of the *Act*.

- d) Historically, IO has withheld the recommendation portions of reports.

[27] IO further submits that in exercising its discretion, it did not act in bad faith or for an improper purpose and that it took into account relevant and significant factors.

[28] I am satisfied that IO weighed the competing interests of disclosure and non-disclosure and exercised its discretion to disclose all of the record, except for the advice and recommendations under section 13(1). I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors in withholding this information. I find, therefore, that it exercised its discretion under section 13(1) and did so in a proper manner.

**ORDER:**

I uphold IO's decision to withhold the advice and recommendations in the record at issue under section 13(1). The appeal is dismissed.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ May 31, 2013