

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **INTERIM ORDER PO-3395-I**

Appeal PA12-240

Ministry of Northern Development and Mines

September 17, 2014

### **Summary:**

The ministry received a request under the *Freedom of Information and Protection of Privacy Act* for access to “economic and impact analysis” records relating to the ministry’s decision to divest the Ontario Northland Transportation Commission. The ministry granted access to some of the responsive records, but denied access to the remainder, relying on the mandatory exemption for Cabinet records at section 12 of the *Act*, the mandatory exemption for third party information at section 17(1), the discretionary exemption for advice and recommendations at section 13(1) and the discretionary exemption for economic and other interests at section 18(1). The requester appealed the ministry’s decision, claiming that there was a compelling public interest in the disclosure of the records, as contemplated by section 23. The adjudicator upholds the ministry’s decision to withhold certain records under the mandatory exemption for Cabinet records at section 12. The adjudicator finds that, subject to the ministry’s exercise of discretion, the remainder of the records are exempt under the discretionary exemption at section 13(1), and that the public interest override at section 23 of the *Act* does not apply to them. The adjudicator orders the ministry to exercise its discretion with respect to those records.

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

**Orders and Investigation Reports Considered:** Orders P-60, P-1137, P-2320.

**Cases Considered:** *John Doe V. Ontario (Finance)*, 2014 SCC 36.

## OVERVIEW

[1] The appellant submitted a request to the Ministry of Northern Development, Mines and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Memos, agendas, letters, presentations and other representations made to the Minister or Minister's staff in respect of economic and social impacts of the sale of Ontario Northland Transportation Commission [ONTC]; and

1. Any communications between the Minister or Ministerial staff and other members of Cabinet or their respective staff in respect of the sale of Ontario Northland Transportation Commission [ONTC].

[2] The request was ultimately clarified as follows:

All economic and impact analysis documentation that informed the decision to divest the ONTC.

[3] Based on this clarified request, and after receiving input from the Ministry of Finance, from which some records originated, the ministry issued a decision in which it granted partial access to 29 responsive records totaling 357 pages. The ministry provided the appellant with an index of records, setting out which records had been released and which had been withheld in full or in part, pursuant to the mandatory exemption for Cabinet records at section 12 of the *Act*, the mandatory exemption for third party information at section 17, the discretionary exemption for advice and recommendations at section 13(1), and the discretionary exemption for economic and other interests at section 18(1). The ministry also advised that some information had been removed from the records as it was deemed not responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision. While the appellant did not object to the ministry's removal of some information from the records on the basis that it was not responsive to his request, he took issue with the exemptions applied by the ministry to the responsive records.

[5] During mediation, the appellant advised that he takes issue with the application of the exemptions cited in the ministry's decision with respect to the records described in the index as records 8, 9, 10, 11, 12, 20, 21, 22, 28, and 29, as he maintains that there exists a public interest in the disclosure of the records within the meaning of section 23 of the *Act*. The appellant also questioned the appropriateness of the mandatory exemption at section 12 of the *Act*, taking into account the need for public scrutiny and accountability of elected officials. No other mediation was possible and the

file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] The adjudicator formerly assigned to this appeal sought and received representations from the ministry and the appellant. These representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*. Portions of the ministry's representations were withheld in accordance with the confidentiality criteria set out in *Practice Direction 7*.

[7] Following receipt of the parties' representations, the file was assigned to me to complete the inquiry. The ministry then provided unsolicited additional reply representations. I have accepted these representations for the reasons set out below under "Preliminary Issues". I then invited sur-reply representations from the appellant. Instead of filing sur-reply representations, the appellant asked that the issue of whether the ministry has conducted a reasonable search be added to this appeal, and stated that he cannot respond to the ministry's reply representations until the search issue is addressed. For the reasons set out below under "Preliminary Issues", I denied the appellant's request. I also provided him with a further opportunity to file his sur-reply representations, but he did not file any.

[8] In this order, I uphold the ministry's decision to withhold records 8, 9, 10, 11, 12, 20, 21 and 22 pursuant to the mandatory exemption for Cabinet records at section 12 of the *Act*. The public interest override in section 23 is not available for records covered by this exemption. I uphold the ministry's claim with respect to records 28 and 29 under the discretionary exemption in section 13(1), and I order the ministry to exercise its discretion with respect to these records pursuant to sections 13(1). I find that the public interest override at section 23 does not apply to records 28 and 29.

## RECORDS

[9] The records at issue include draft and final submissions to Treasury Board/Management Board of Cabinet, and reports prepared by a third party. The following chart is based on the index of records prepared by the ministry and describes the exemptions claimed by the ministry for each record.

<b>Record Number and Description</b>	<b>Pages</b>	<b>Ministry's decision and exemptions claimed</b>
8: Comparison of Figures for ONTC Divestment	1	Fully withheld s.12, s.13, s.18(c)(d)
9: Ministry Strategic Overview	18	Fully withheld s.12, s.13
10: ONTC RbP Options	19	Fully withheld s.12, s.13

11: ONTC Alternative Service Delivery	10	Fully withheld s. 12, s.13
12: ONTC Employees and Community Impacts	1	Fully withheld s.12, s.13
20: ONTC TB20 Final	10	Fully withheld s.12, s.13
21: Appendix to ONTC TB20 Final	17	Fully withheld s.12, s.13
22: Draft of Appendix to ONTC TB20	15	Fully withheld s.12, s.13
28: Third party summary and highlight report re: monetization alternatives for the ONTC	12	Fully withheld s.13, s.18(1)(c)(d)(e)(g), s.17
29: Third party final report re: monetization alternatives for the ONTC	84	Fully withheld s.13, s.18(1)(c)(d)(e)(g), s.17

## ISSUES

- A: Are records 8, 9, 10, 11, 12, 20, 21, and 22 exempt from disclosure by virtue of the mandatory exemption for Cabinet records at section 12 of the *Act*, the discretionary exemption for advice to government at section 13(1) of the *Act*, or the discretionary exemption for economic and other interests at section 18(1) of the *Act*?
- B: Are records 28 and 29 exempt from disclosure by virtue of the discretionary exemption for advice to government at section 13(1) of the *Act*, the discretionary exemption for economic and other interests at section 18(1) of the *Act*, or the mandatory exemption for third party information at section 17 of the *Act*?
- C: Did the ministry exercise its discretion under sections 13(1) and/or 18(1) of the *Act*? If so, should this office uphold the exercise of discretion?
- D: Is there a compelling public interest in disclosure of records 28 and 29 that clearly outweighs the purpose of the exemptions set out in sections 13, 17 and/or 18 of the *Act*?

## **PRELIMINARY ISSUES**

### **The admissibility of the ministry's supplementary reply representations**

[10] The previous adjudicator sought representations from the ministry initially, followed by the appellant and then the ministry in reply. Following the close of representations, the ministry provided unsolicited supplementary reply representations dated June 23, 2014 (the "supplementary reply representations"). The ministry submitted that these supplementary reply representations would ensure that events transpiring after the preparation of its reply submissions would be clarified. The ministry explained:

Given the Appellant's interest in the ONTC, the Ministry wants to ensure that the Appellant is provided with up-to-date information in order to give our position in this appeal appropriate context.

[11] The Information and Privacy Commissioner's *Code of Procedure* applies to appeals under the *Act*. Section 7.08 of the *Code* provides in part:

A party who chooses to submit representations to the IPC shall do so by the date specified in the Notice of Inquiry.

[12] In this case, the ministry's supplementary reply representations were provided several months after the deadline for reply submissions had passed. However, section 2.04 of the *Code* provides me with the power to depart from the procedural requirements of the *Code* where it is "just and appropriate to do so."

[13] I reviewed the ministry's supplementary reply representations and considered the ministry's reasons for submitting them. I decided to admit the supplementary reply representations, despite their lateness, on the basis that the information set out therein was not available at the time the ministry's original reply representations were prepared; that the supplementary reply representations are in reply to the appellant's assertion that the ONTC is not being divested; and that the supplementary reply representations set out additional background information that provides useful context for this appeal.

### **The appellant's request to add the issue of reasonable search to this appeal and to defer his sur-reply representations**

[14] Following receipt of the ministry's supplementary reply representations, I gave the appellant the opportunity to provide sur-reply representations in response to both the ministry's reply and supplementary reply representations. Specifically, I invited him to comment on the impact, if any, of the current status of the ONTC divestment on the substantive issues under appeal.

[15] Instead of filing sur-reply representations on the substantive issues under appeal, the appellant submitted a request to add the issue of the reasonableness of the ministry's search for records to this appeal and submitted that he cannot file his sur-reply until that issue is addressed.

[16] By way of background, a review of the parties' representations indicates that the appellant made a freedom of information request to Infrastructure Ontario, and in response received a chart setting out expressions of interest in the ONTC. The appellant interpreted this chart as indicating that there had been just a single expression of interest in the ONTC. In his initial representations in the present appeal, he submitted that there was no proof that the divestment was proceeding. He submitted that the section 17 and 18 exemption claims are contingent on the assumption that the ONTC is, in fact, being divested, while it appears from the documents he received from Infrastructure Ontario that this is not the case.

[17] In reply, the ministry submitted that it contacted Infrastructure Ontario and was told that the chart in question was an informal chart developed by an administrative assistant who was logging unsolicited calls she received with respect to the ONTC divestment. The ministry in its supplementary reply submitted that the province had announced that it would continue to operate the motor coach, Polar Bear Express passenger rail, rail freight, and refurbishment service of the ONTC as a government-owned transportation company, and that it had approved the sale of Ontera, the telecommunications subsidiary of the ONTC, to a named purchaser. The ministry submitted that as part of the requirements of the Ontera commercial transaction, a number of steps need to occur. It submitted that the records at issue are commercially sensitive and that their release could adversely affect the Ontera commercial transaction and the ongoing operations of the ONTC's transportation business line.

[18] In the appellant's request to add the search issue to this appeal, he submitted:

The view the Ministry appears to be taking is that the only record it has of expressions of interest in the ONTC is one that is incomplete...either the Ministry is claiming it is not obliged to create a complete and accurate chart because it would be [an] unreasonable burden to produce an accurate chart, or it is simply unable to produce an accurate chart.

[19] He further submitted:

The fact that the ministry seems to be unclear about the expressions of interest suggests that they have not conducted a reasonable search [and] that in addition to the other issues I have raised in my initial representations, there is an outstanding question of Reasonable Search.

[20] The appellant stated that he cannot substantively respond to the ministry's representations until this issue is addressed.

[21] By letter dated September 3, 2014, I denied the appellant's request to add the issue of the reasonableness of the ministry's search and to defer the filing of his sur-reply representations. I advised that my reasons for so doing would be explained in my order. Those reasons are as follows.

[22] The information that the appellant now asserts is unclear was provided to him by Infrastructure Ontario, a Crown agency separate and distinct from the Ministry of Northern Development and Mines, in response to a freedom of information request he made to Infrastructure Ontario. The appeal before me is an appeal from the decision of the Ministry of Northern Development and Mines. Therefore, my jurisdiction in this appeal is limited to addressing the issues arising out of the decision of the Ministry of Northern Development and Mines in respect of the appellant's access request to that institution. The appellant's complaint pertaining to the accuracy, or lack thereof, of the chart of expressions of interest provided to him by Infrastructure Ontario is outside the scope of this appeal.

[23] I also find, in any event, that further information about previous expressions of interest in the ONTC would not have a bearing on my findings in this appeal. The ministry's supplementary reply representations provide the current status of the divestment, which also appears to be a matter of public record. The appellant has been given a full opportunity to make submissions on any impact the current status of the divestment has on the issues in this appeal. I see no purpose in deferring my decision until such time as the appellant may receive further information on prior expressions of interest in purchasing the ONTC.

## **DISCUSSION**

### **Background**

[24] The following background provided by the ministry in its original representations assists in understanding the context of the request and records at issue in this appeal:

[It] is helpful to review the background information about the ONTC Divestment. The records remaining at issue consist of various documents which include draft and final submissions to Treasury Board/Cabinet, and reports prepared by consultants to provide the Province with options regarding the ONTC.

The ONTC is a century-old Crown corporation that provides passenger and freight rail services, telecommunication and motor coach services in northern Ontario.

In the past few years, the ONTC has experienced expanding operating losses due to declining ridership and lower freight demand in both the mining and forestry sectors.

Currently the ONTC provides:

- Freight rail services between North Bay and Moosonee;
- Passenger and parcel bus service;
- Passenger train service between Toronto and Moosonee;
- Ferry service between Moosonee and Moose Factory;
- Telecommunications services to communities across northeastern Ontario; and,
- Rail car refurbishment services.

On March 23, 2012, the Province announced the divestment of the ONTC; and the ONTC divestment was also included in the 2012 Ontario Budget. The government has indicated that the divestment will happen [by March 31, 2013].

Generally, the divestment will involve:

- Cancellation of the Northlander passenger rail service;
- Sale of the ONRail – freight rail business;
- Continuation of the Polar Bear Express passenger rail service between Cochrane and Moosonee through a new operator;
- transfer of the ferry service to another Crown corporation;
- sale of the telecommunications services and assets;
- sale of the rail car refurbishment services and assets; and
- sale of any remaining assets.

The specific details of the implementation of the divestment activities are not known at this time. Further work and decisions/approvals regarding the detailed activities are required. It is expected that Cabinet will be asked to make further decisions/approvals regarding the ONTC divestment in the coming months.

Therefore, the Ministry is of the view that the information contained in the records at issue in this appeal continues to be the subject of Cabinet consideration and deliberations in the coming months.



[25] Subsequently, in its supplementary reply representations, the ministry stated as follows:

On April 4, 2014, the province announced that it would continue to operate the motor coach, Polar Bear Express passenger rail, rail freight, and refurbishment services of the ONTC as a government-owned transportation company. At that time, the province also announced that it had approved the sale of Ontera, the telecommunications subsidiary of the ONTC, to [a named company]. A copy of the corresponding news release is attached.

As part of the requirements of the Ontera commercial transaction, there are a number of steps that need to occur as we work towards closing the transaction. The Ministry will be continuing its work with ONTC and [a named company] over the next few months to complete these steps.

### **Cabinet Records**

**A: Are records 8, 9, 10, 11, 12, 20, 21, and 22 exempt from disclosure by virtue of the mandatory exemption for Cabinet records at section 12 of the *Act*?**

[26] Section 12(1) of the *Act* reads, in part:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

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

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

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

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<sup>1</sup> See Orders PO-2320, PO-2554, PO-2677 and PO-2725.

*Section 12(1): introductory wording*

[28] The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).<sup>2</sup>

[29] A record that was never placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or permit the drawing of accurate inferences with respect to those deliberations.<sup>3</sup>

[30] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.<sup>4</sup>

***Representations***

[31] The ministry submits that records 8, 9, 10, 11, 12, 20, 21 and 22 are exempt from disclosure by virtue of the mandatory exemption in section 12 of the *Act*. In particular, the ministry submits that records 8, 9, 12, 20, 21 and 22 are exempt from disclosure under section 12(1)(b) of the *Act*, while records 10, 11 and 22 are exempt under the introductory wording of section 12(1).

[32] The appellant submits with respect to Records 8, 9, 12, 20, 21 and 22 that the timing of submission of the records to Cabinet has been severed from the ministry's representations, making it impossible to know when the record was created relative to any decision of Cabinet. He submits that sections 12(1)(c) and (e) are prospective in nature. I note, however, that the ministry has not relied on sections 12(1)(c) or (e); it has relied on the introductory wording in section 12(1) as well as section 12(1)(b). As noted above, records found to be exempt under section 12(1)(b) remain so after a decision is made that puts into action the policy option or recommendation described in the record. There is also no time limit on the exemption contained in the introductory wording of section 12(1).<sup>5</sup>

[33] The appellant also submits that the burden of proof for any exemption falls on the ministry. The ministry does not take issue with this and the *Act* is clear: section 53 provides that where an institution refuses access to a record or part of a record, the

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<sup>2</sup> See Orders P-22, P-1570, PO-2320, P-1205, PO-2677.

<sup>3</sup> Orders P-226, P-293, P-331, P-361, P-506, P-604, P-901, P-1678 and PO-1725.

<sup>4</sup> Order PO-2320.

<sup>5</sup> See Orders P-1205 and PO-2677.

burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

The parties' submissions specific to each record are considered below.

***Analysis and findings: records 8, 9, 12, 20, 21 and 22***

[34] The ministry submits that records 8, 9, 20, 21 and 22 are exempt under section 12(1)(b) of the *Act*, and that record 22 is also exempt under the introductory wording of section 12(1).

[35] While the ministry does not explicitly argue that section 12(1)(b) applies to record 12, I infer from the ministry's description of record 12 that the section 12(1)(b) exemption is claimed for this record. I have, therefore, considered the applicability of section 12(1)(b) to it.

[36] The ministry submits with respect to this group of records that the records were prepared by the ministry for submission to Cabinet. The ministry submits that the information and recommendations contained in the records were received and deliberated on at these Cabinet meetings, and that Cabinet would have considered the information and recommendations in the records and deliberated on the issues presented.

[37] The appellant submits that the section 12 exemptions were applied incorrectly and that the ministry has failed to satisfy the burden of proof set out in section 53 of the *Act*.

***Record 9 – Ministry Strategic Overview***

[38] The ministry identified only page 9 of record 9 as responsive to the request, as the remainder of the record addresses other items under the ministry's jurisdiction unrelated to the ONTC. The ministry submits that page 9 summarizes the financial impact of various options for the ONTC and the pros and cons of these options. It further submits that the record was presented on a particular date for Cabinet's consideration and deliberation.

[39] I have reviewed page 9 of record 9 and I agree with the ministry's characterization of it. This page expressly sets out a recommended course of action, as well as the pros and cons and the financial implications of the recommended course of action, as contemplated by section 12(1)(b).

[40] I also accept that record 9 was submitted to Cabinet. In addition to the ministry's submission to that effect, the document itself is marked "*Confidential Advice*

to Cabinet”, indicating that it was prepared to be submitted to Cabinet. The appellant does not dispute that record 9 was submitted to Cabinet.

[41] I conclude that page 9 of record 9 is exempt from disclosure under section 12(1)(b) of the *Act*.

*Record 20 – ONTC TB20 Final*

[42] Record 20 is listed in the ministry’s index as the “TB-20 Final” Treasury Board/Management Board of Cabinet Submission regarding the ONTC divestment. The ministry argues that this document was prepared by the ministry for Cabinet regarding the ONTC divestment, and contains policy options and recommendations, thereby qualifying for an exemption under section 12(1)(b). It submits that the information and recommendations contained in this record were received and deliberated at a Cabinet meeting.

[43] Based on my review of the record, including the title page, it is clear that the record was prepared by the ministry for submission to Treasury Board/Management Board of Cabinet, a committee of Cabinet. Further, having read the body of record 20, I agree with the ministry’s characterization of this record. Record 20 constitutes the ministry’s detailed and explicit recommendation regarding a potential divestment of the ONTC.

[44] I also find that record 20 was submitted to the Treasury Board/Management Board of Cabinet, a committee of Cabinet. In addition to the ministry’s representation to that effect, the document itself is marked “*Treasury Board/Management Board of Cabinet Submission*”. The appellant does not dispute that Record 20 was submitted to a committee of Cabinet.

[45] I find, therefore, that record 20 is exempt from disclosure under section 12(1)(b) of the *Act*.

*Record 21 – Appendix to the ONTC TB20 Final*

[46] The ministry describes record 21 as an appendix to record 20, the ministry’s “TB-20 Final” submission. The ministry submits that record 21 contains background explanations and analyses to supplement the TB-20 Final submission.

[47] The ministry states that the record was submitted to Cabinet and the appellant does not dispute that fact. I find that record 21 was submitted to the same Cabinet committee to which Record 20 was submitted, Treasury Board/Management Board of Cabinet.

[48] However, the appellant submits that the record is likely “number crunching” and background explanations or analysis, and not substantive advice. He relies on a previous order of this office, Order P-60, where the records at issue consisted of computer-generated, multi-page charts or matrices. With the exception of titles and column headings, the charts at issue in Order P-60 contained only numbers. Former Commissioner Linden found that, while it could be argued that the titles of the records and their column headings alone reflected some of the options available for consideration, this information by itself was not sufficient to satisfy the requirements for exemption under subsection 12(1)(b).

[49] I have reviewed record 21. It contains an analysis of the impacts, on many fronts, of the recommendations set out in record 20. While record 21 does not explicitly restate the recommendations set out in record 20, the recommendations can be readily inferred from the discussion of their impacts. Record 21 contains much more detailed information about the recommendations than appears to have been the case for the records at issue in Order P-60. I also note that in Order P-2320, former Assistant Commissioner Tom Mitchinson found that costing information for a policy option can be characterized as a component of the policy option, thereby satisfying the first requirement of section 12(1)(b). I agree with the former Assistant Commissioner's approach, and conclude that record 21 is a component of the policy options and recommendations set out in record 20. I am, therefore, satisfied that record 21 is exempt from disclosure under section 12(1)(b).

*Record 22 – Draft of Appendix to ONTC TB20*

[50] The ministry describes this document as a draft of record 21. The ministry submits that record 22 is exempt under both section 12(1)(b) of the *Act* as well as the introductory wording in section 12(1).

[51] The appellant repeats the submissions he made in respect of record 21.

[52] As noted above, section 12(1)(b) sets out a mandatory exemption for a record containing policy options or recommendations submitted, or *prepared for submission*, to Cabinet or its committees. The ministry submits that record 22, although not actually submitted to Cabinet, was prepared for submission to Cabinet.

[53] I have found above that record 21 was submitted to a committee of Cabinet. I have reviewed record 22 and I find that it is a draft version of record 21. Therefore, I find that record 22, a draft of record 21, was prepared for submission to that Cabinet committee.

[54] Further, I find that record 22 contains policy options, as was the case with record 21. This is consistent with Order P-1137, where draft submissions to Cabinet were found to be exempt under section 12(1)(b).

[55] I conclude that record 22 is exempt from disclosure under section 12(1)(b) of the *Act*.

[56] I also find that record 22 is exempt from disclosure under the introductory wording in section 12(1) of the *Act*. Having found that record 21 was submitted to a committee of Cabinet for its consideration and deliberation, I find that the disclosure of record 22, a draft version of record 21, would reveal the substance of the deliberations of a committee of Cabinet or would permit the drawing of accurate inferences with respect to those deliberations.

*Record 8 – Comparison of Figures for ONTC Divestment*

[57] The ministry submits that record 8 is a summary of the ministry's advice to Cabinet regarding the earlier record 9 submission, and was prepared for submission to Cabinet. The ministry advises that record 8 was prepared as an appendix to record 20 (the TB-20 Final Cabinet submission), and that it was presented to Cabinet on a specified date for Cabinet's consideration and deliberation.

[58] The appellant does not dispute that this record was submitted to Cabinet. I find that it was submitted to the Treasury Board/Management Board of Cabinet, the same committee of Cabinet to which record 20 was submitted.

[59] The appellant again submits, however, that the record is likely number crunching and background explanations or analysis, and not substantive advice.

[60] I have examined record 8. Record 8 refers to an earlier submission (record 9) and explains the adjustments in figures made since the preparation of record 9. I find that record 8 is a component of the recommendations outlined in record 20 and submitted to a committee of Cabinet for its consideration and deliberation on a specific date. I am satisfied that record 8 is also exempt from disclosure under section 12(1)(b) of the *Act*.

*Record 12 – ONTC Employees and Community Impacts*

[61] The ministry describes this record as a summary table that provides preliminary estimates of the employment and community impacts of the ONTC divestment. This record was slide 2 of the Appendix to record 20, the TB20 Final submission to Cabinet. The ministry states that it was presented to Cabinet on a specified date for Cabinet's consideration and deliberation.

[62] I note that record 12 is marked "Draft' Confidential Cabinet Document". However, the ministry advises that the record was submitted to Cabinet. The appellant does not dispute this. I therefore find that the record was submitted to the same

committee of Cabinet to which record 20 was submitted, Treasury Board/Management Board of Cabinet.

[63] The appellant has not provided submissions on this record beyond the general submissions noted previously in this order.

[64] I have reviewed record 12 and I agree with the ministry's characterization of it. While it does not set out any recommendations *per se*, it is clearly meant to be read with record 20. The recommendations set out in record 20 can be inferred from the discussion of the impacts of the recommendations contained in record 12. Record 12 can be characterized as a component of the recommendations that were put to a committee of Cabinet in record 20. I am satisfied, therefore, that record 12 is exempt from disclosure under section 12(1)(b) of the *Act*.

***Analysis and findings: records 10 and 11***

[65] The ministry submits in its representations that records 10 and 11 are exempt from disclosure under the introductory wording of section 12(1).<sup>6</sup>

[66] The ministry submits that record 10, listed in the ministry's index as "ONTC RbP Options", was prepared for a series of Minister and Deputy Minister briefings leading up to a Treasury Board/Cabinet meeting on a specified date, and that the document provides an analysis of the ONTC and its operations and provides a range of divestiture options.

[67] The ministry submits that record 11, listed in the ministry's index as "ONTC Alternative Service Delivery", provides details of the ONTC operations and business lines and provides options and advice regarding alternative service delivery models for Cabinet consideration and deliberation. It goes on to submit that record 11 was prepared for a series of Minister and Deputy Minister briefings leading up to a Treasury Board/Cabinet meeting on a specified date.

[68] The ministry does not contend that records 10 and 11 were submitted to Cabinet or its committees or that they were prepared for that purpose. Instead, the ministry argues that these records would, if disclosed, reveal the substance of the deliberations of Cabinet, and as such, are exempt from disclosure under the introductory wording of section 12(1).

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<sup>6</sup> The ministry referred to records 9 and 10 as being exempt from disclosure under the introductory wording of section 12(1). However, on reading the representations as a whole, including the description of the records at issue, in conjunction with the index of records, it is apparent that the ministry is in fact referring to records 10 and 11. I note from reviewing the appellant's responding representations that the appellant understood the ministry to be referring to records 10 and 11.

[69] The appellant submits that records 10 and 11 were not prepared for the Minister exclusively in relation to a submission to Cabinet. He submits that they were used in briefings with the Deputy, who is not a member of Executive Council, and therefore do not meet the test set out in section 12(1)(e). He submits that records 10 and 11 were more broadly intended and used than simply as a Ministerial briefing on a Cabinet matter.

[70] With respect to the appellant's argument relating to section 12(1)(e), I note that the ministry has not argued the application of section 12(1)(e); it has argued the application of the introductory wording of section 12(1). Previous orders of this office have found that briefing notes may fall within the exemption under the introductory wording in section 12(1).<sup>7</sup> I note that some pages of records 10 and 11 are marked as being confidential advice to Cabinet, suggesting that the records were intended as a briefing on a Cabinet matter. Further, records 10 and 11 contain information and recommendations that are very similar to those set out in record 20. Having found that record 20 was submitted to a committee of Cabinet for its consideration and deliberation, I find that the disclosure of records 10 and 11 would reveal the substance of the deliberations of Cabinet or its committees or would permit the drawing of accurate inferences with respect to those deliberations.

[71] I conclude that records 10 and 11 are exempt from disclosure under the introductory wording of section 12(1).

### **Did the ministry turn its mind to Cabinet consent?**

[72] Section 12(2) reads, in part:

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

- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[73] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.<sup>8</sup>

[74] I have reviewed the ministry's representations in this regard. The ministry argues that the records had very recently been submitted to Cabinet or contained information that had been the subject of very recent deliberations before Cabinet. The records related to the ONTC divestment, a project that was underway and for which

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<sup>7</sup> Orders PO-2787 and PO-1677.

<sup>8</sup> See Orders P-771, P-1146 and PO-2554.



Cabinet may have been asked to make decisions in the ensuing months. As such, the ministry determined that it would not be appropriate to seek the consent of Cabinet to release the records at issue.

[75] I am satisfied that the ministry turned its mind to the issue of consent and considered relevant factors in deciding not to seek Cabinet consent to release the records.

### **Conclusion on section 12 of the *Act***

[76] I conclude that records 8, 9, 10, 11, 12, 20, 21 and 22 are exempt from disclosure by virtue of the mandatory exemption in section 12 of the *Act*. The appellant concedes that records exempt under section 12 are not subject to the application of the public interest override found at section 23 of the *Act*.

[77] Given this finding, I do not need to consider the ministry's arguments that the exemptions found at section 13(1) and/or 18(1) of the *Act* also apply to these records.

### **Advice to government**

#### **B. Are records 28 and 29 exempt from disclosure by virtue of the discretionary exemption for advice to government at section 13(1) of the *Act*?**

[78] 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.

[79] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>9</sup>

[80] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[81] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in

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<sup>9</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>10</sup>

"Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>11</sup>

[82] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>12</sup>

[83] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information;<sup>13</sup> a supervisor's direction to staff on how to conduct an investigation;<sup>14</sup> and information prepared for public dissemination.<sup>15</sup>

[84] Section 13(2) creates 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. Sections 13(2) states, in part:

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

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<sup>10</sup> Ibid at paras. 26 and 47.

<sup>11</sup> Orders PO-2084, PO-2028, 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>12</sup> See footnote 10 above at para. 51.

<sup>13</sup> Order PO-3315.

<sup>14</sup> 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.).

<sup>15</sup> Order PO-2677.

(a) factual material;

[85] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations. The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[86] The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

### **Records 28 and 29 – report of a third party consultant; summary and highlight report**

#### ***Representations***

[87] The ministry explains that these documents were prepared by a consultant retained by the Ontario Financing Authority to review the proposed monetization alternatives for the ONTC. The ministry submits that these records contain advice and recommendations to the Minister of Northern Development and Mines regarding the various monetization options in advance of a Cabinet briefing. The ministry cites Order PO-1687, where it was held that a record will qualify as "advice or recommendations" if the information in the record relates to a suggested course of action, which will ultimately be accepted or rejected.

[88] The ministry also refers to the Ontario Court of Appeal's decision in *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*<sup>16</sup> and argues that section 13(1) protects the deliberative process, and that there is no requirement that the ministry be able to demonstrate that the documents went to the ultimate decision maker.<sup>17</sup>

[89] The appellant states in his representations that he does not contest that records 28 and 29 may constitute advice or recommendations of a party under contract to the government.

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<sup>16</sup> 2012, ONCA 125 (C.A.).

<sup>17</sup> The Court of Appeal's decision was upheld by the Supreme Court of Canada following the filing of the ministry's representations: see *John Doe v. Ontario (Finance)*, 2014 SCC 36, supra at note 8.

### ***Analysis and findings***

[90] In *John Doe v. Ontario (Finance)*,<sup>18</sup> released after the parties' initial representations were received, the Supreme Court of Canada upheld the decision of the Ontario Court of Appeal relied on by the ministry. The Court held that "advice" and "recommendations" have distinct meanings and that "advice" has a broader meaning than "recommendations" and includes "policy options" consisting of lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, along with the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[91] The Court noted that sections 13(2) and (3) provide exceptions to the exemption in section 13(1), and characterized the type of information that qualifies for the exceptions as "objective information" and "specific types of records that could contain advice and recommendations." The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made, but rather provide information on matters that are largely factual in nature. The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[92] Record 29 is a report prepared by a consultant setting out monetization options for the ONTC. Having reviewed the report, I accept the ministry's submission that this record contains advice and recommendations to the Minister of Northern Development and Mines regarding the various monetization options for the ONTC. The report very clearly sets out a number of options in this regard. It also makes a recommendation as to which option should be adopted by the Minister.

[93] The report does contain some factual material, both interspersed throughout the body of the report, and set out separately in appendices to the report. Although not argued by the appellant, I have considered whether the exception in section 13(2)(a) applies to any of this factual material.

[94] Previous orders of this office<sup>19</sup> have found that the exception in section 13(2)(a) only applies to a coherent body of facts separate and distinct from the advice and recommendations contained in the record. I find that any factual material in the body of the report is so closely intertwined with the advice and recommendations that it cannot be considered a separate and distinct body of fact, and/or that its disclosure

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<sup>18</sup> Supra note 8.

<sup>19</sup> See, for example, Orders 24, 48 and PO-2767.

would result in disclosure of meaningless snippets of information to the appellant.<sup>20</sup> As such, section 13(2)(a) does not apply to it.

[95] I also find that disclosure of the factual material in the appendices would reveal the actual advice and recommendations set out in the body of the report. I find that an appendix that, if disclosed, would reveal the advice and recommendations set out in the body of the report cannot be considered “separate and distinct” from the advice and recommendations in the report. That being the case, the “exception to the exemption” for factual material in section s. 13(2)(a) does not apply to the appendices.

[96] Record 28 is a summary of record 29, and restates the advice and recommendations set out in record 29. On this basis, I find that record 28 also falls within the exemption at section 13(1) of the *Act*.

[97] I conclude that, subject to my finding on the ministry’s exercise of discretion, below, records 28 and 29 are exempt from disclosure under section 13(1) of the *Act*.

[98] Given this finding, I do not need to consider whether records 28 and 29 are also exempt under the exemptions at sections 17(1) and/or 18(1) of the *Act*.

**C. Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?**

[99] 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 Commissioner may determine whether the institution failed to do so.

[100] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[101] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>22</sup>

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<sup>20</sup> See *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23

<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 43(2).

[102] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>23</sup>

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

### ***Representations***

[103] In the Notice of Inquiry that the previous adjudicator sent to the ministry, the ministry was asked for representations on its exercise of discretion under sections 13

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<sup>23</sup> Orders P-344 and MO-1573.

and 18 of the *Act*, including an outline of the factors considered by it in exercising its discretion under those section.

[104] In its representations, the ministry submits only as follows:

The Ministry submits that in all the circumstances, the Ministry's exercise of discretion to apply the section 13 and 18(1)(c) and/or (d) exemptions was appropriate.

[105] The appellant's representations do not address the issue of the ministry's exercise of discretion.

### ***Analysis/Findings***

[106] Despite a request to do so, the ministry has not provided any meaningful representations outlining the factors it considered when exercising its discretion in favour of non-disclosure of records 28 and 29, both of which the ministry claimed to be exempt under the discretionary exemptions at sections 13(1) and 18(1) of the *Act*.

[107] As it is the responsibility of this office to ensure that the ministry has properly exercised its discretion under the *Act*, my final determination of whether records 28 and 29 are exempt from disclosure under section 13(1) will be deferred until representations have been received from the ministry regarding the exercise of its discretion. Therefore, I order the ministry to exercise its discretion under section 13(1) of the *Act* with respect to records 28 and 29.

**D: Is there a compelling public interest in disclosure of records 28 and 29 that clearly outweighs the purpose of the exemption set out in sections 13 of the *Act*?**

### ***General principles***

[108] Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[109] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[110] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>24</sup>

### ***Compelling public interest***

[111] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.<sup>25</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>26</sup>

[112] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>27</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>28</sup>

[113] A public interest is not automatically established where the requester is a member of the media.<sup>29</sup>

[114] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>30</sup>

[115] Any public interest in *non*-disclosure that may exist also must be considered.<sup>31</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.<sup>32</sup>

[116] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation<sup>33</sup>

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<sup>24</sup> Order P-244.

<sup>25</sup> Orders P-984 and PO-2607.

<sup>26</sup> Orders P-984 and PO-2556.

<sup>27</sup> Orders P-12, P-347 and P-1439.

<sup>28</sup> Order MO-1564.

<sup>29</sup> Orders M-773 and M-1074.

<sup>30</sup> Order P-984.

<sup>31</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>32</sup> Orders PO-2072-F, PO-2098-R and PO-3197.



- the integrity of the criminal justice system has been called into question<sup>34</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>35</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>36</sup> or the province's ability to prepare for a nuclear emergency<sup>37</sup>
- the records contain information about contributions to municipal election campaigns<sup>38</sup>

[117] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations<sup>39</sup>
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>40</sup>
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding<sup>41</sup>
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>42</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>43</sup>

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<sup>33</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>34</sup> Order PO-1779.

<sup>35</sup> Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

<sup>36</sup> Order P-1175.

<sup>37</sup> Order P-901.

<sup>38</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

<sup>39</sup> Orders P-123/124, P-391 and M-539.

<sup>40</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>41</sup> Orders M-249 and M-317.

<sup>42</sup> Order P-613.

<sup>43</sup> Orders MO-1994 and PO-2607.

### ***Purpose of the exemption***

[118] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[119] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>44</sup>

### ***Representations***

[120] The appellant submits that there is an overriding public interest in disclosure of the records. He submits that people in Northeastern Ontario have an interest in knowing why the government chose to close the ONTC, including the passenger rail system, without any public consultation.

[121] The ministry submits that there is a public interest in non-disclosure of records 28 and 29. It submits that the records contain a strategic analysis of the ONTC and the pros and cons of various proposed monetization alternatives, and that the release of the records could compromise the ministry's ongoing negotiations. The ministry submits that the release of the records could compromise these negotiations and jeopardize the outcome of the divestment, negatively impacting Ontarians.

[122] In its recent supplementary reply submissions, the ministry argues that the release of the records could adversely affect the Ontera commercial transaction and the ongoing operation of ONTC's transportation business line.

### ***Analysis and Findings***

*Is there a compelling public interest in the disclosure of records 28 and 29?*

[123] I accept that there is some public interest in the disclosure of these records. The proposed divestment of the ONTC would affect many in Ontario, particularly in northern Ontario, and the public may well be interested to see the advice and recommendations upon which the government relied in making the decision to divest the ONTC.

[124] The appellant, however, has not explained why any public interest in disclosure of these records is compelling. "Compelling" has been interpreted in previous orders of this office as "arousing strong interest or attention".<sup>45</sup> While I accept that the public may be interested in these documents, I find that they do not arouse strong interest or

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<sup>44</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>45</sup> Order P-984.

attention. Also, any public interest in knowing what advice the government relied on in its decision to divest the ONTC is mitigated by the fact that the divestment has in large part been cancelled. Although the Northland passenger rail service has ceased to operate and the telecommunications branch of the ONTC is in the midst of being sold, the government recently announced that the motor coach, Polar Bear Express, rail freight, and refurbishment services of the ONTC will all remain in public hands. I find, therefore, that the public interest associated with disclosing these records has diminished.

[125] I conclude that any public interest in disclosure is not “compelling” within the meaning of section 23.

*The purpose of the section 13(1) exemption*

[126] While the absence of a compelling public interest is sufficient for me to conclude that section 23 does not apply, I have also considered the second part of the test, being whether the public interest “clearly outweighs the purpose of the section 13(1) exemption”. The appellant has not provided any submissions on how the public interest in disclosure clearly outweighs the purpose of the section 13(1) exemption. The purpose of the section 13(1) exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>46</sup> I observe that in many, if not most cases, advice to government will contain an element of public interest. That fact alone cannot be sufficient to trigger disclosure under section 23. My review of the appellant’s representations and the documents themselves do not lead me to conclude that there is a compelling public interest in the disclosure of the documents that “clearly outweighs” the purpose of the section 13(1) exemption.

[127] I conclude that the public interest override at section 23 of the *Act* does not apply to records 28 and 29.

**ORDER:**

1. I uphold the ministry’s decision to withhold records 8, 9, 10, 11, 12, 20, 21 and 22.
2. I order the ministry to exercise its discretion under section 13 of the *Act* with respect to records 28 and 29, within twenty (20) days of the date of this Interim Order, and to provide this office with written notification of its decision regarding the exercise of discretion. If the ministry should decide to exercise its discretion in favour of non-disclosure, I order the ministry to provide its reasons for so doing.

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<sup>46</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

3. I remain seized of this appeal.

Original Signed By: \_\_\_\_\_ September 17, 2014 \_\_\_\_\_  
Gillian Shaw  
Adjudicator