

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **FINAL ORDER PO-3433-F**

Appeal PA12-240

Ministry of Northern Development and Mines

December 4, 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 several exemptions, including the mandatory exemption for Cabinet records at section 12 of the *Act* and the discretionary exemption for advice and recommendations at section 13(1). The requester appealed the ministry’s decision and claimed that there was a compelling public interest in the disclosure of the records, as contemplated by section 23. In Interim Order PO-3395-I, the adjudicator upheld the ministry’s decision to withhold certain records under the mandatory exemption for Cabinet records at section 12. The adjudicator further found that, subject to her finding with respect to the ministry’s exercise of discretion, the remainder of the records are exempt under the discretionary exemption for records containing advice to government at section 13(1), and the public interest override at section 23 of the *Act* does not apply to them. The adjudicator ordered the ministry to exercise its discretion with respect to those records. The ministry subsequently exercised its discretion in favour of non-disclosure of the records. In this order, the adjudicator upholds the ministry’s exercise of discretion.

### **OVERVIEW:**

[1] This appeal arises from the appellant’s request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for “all economic and impact analysis documentation that informed the decision to divest the ONTC”. The ministry identified responsive records and granted partial access to them, withholding some information

pursuant to several exemptions, including the mandatory exemption for Cabinet records at section 12 of the *Act* and the discretionary exemption for records containing advice and recommendations at section 13(1). The appellant appealed the ministry's decision to this office, objecting to the exemptions applied by the ministry and, further, raising the applicability of the "public interest override" at section 23 of the *Act*.

[2] By Interim Order PO-3395-I, I found that a number of the records at issue were exempt from disclosure pursuant to the mandatory exemption for Cabinet records at section 12 of the *Act*. The public interest override is not available for records exempt under section 12.

[3] I further found that the remaining records, records 28 and 29, are exempt from disclosure under the section 13(1) discretionary exemption for records containing advice and recommendations. I found that the public interest override at section 23 of the *Act* does not apply to those records.

[4] In light of my findings, I did not need to consider the applicability of the other exemptions relied on by the ministry. However, I found that the ministry had not provided any meaningful representations outlining the factors it considered when exercising its discretion in favour of the non-disclosure of records 28 and 29. I ordered the ministry to exercise its discretion under section 13(1) of the *Act* with respect to records 28 and 29, and to provide this office with written notification of its decision regarding the exercise of discretion. I ordered that, should the ministry decide to exercise its discretion in favour of non-disclosure, it provide its reasons for so doing.

[5] The ministry filed representations on October 17, 2014 in which it advised that it was exercising its discretion to withhold records 28 and 29, and provided submissions on the factors it considered in its exercise of discretion. The ministry's representations were shared with the appellant in part. Information that would reveal the substance of the records at issue was removed pursuant to section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*. The appellant was invited to make representations, but did not do so.

[6] In this order, I uphold the ministry's exercise of discretion in favour of the non-disclosure of records 28 and 29 pursuant to section 13(1) of the *Act*.

## **RECORDS:**

[7] The records remaining at issue consist of records 28 and 29 in the index of records that the ministry provided to the appellant and this office.

## **ISSUE:**

[8] The sole issue to be considered in this order is whether the ministry properly exercised its discretion under section 13(1) of the *Act* with respect to records 28 and 29, and if so, whether this office should uphold the exercise of discretion.

## **DISCUSSION:**

[9] 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.

[10] 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.

[11] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>1</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>2</sup>

[12] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>3</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

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<sup>1</sup> Order MO-1573.

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

<sup>3</sup> Orders P-344 and MO-1573.

- 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***

[13] In its representations, the ministry submits that, in making the decision to withhold records 28 and 29 under section 13(1) of the *Act*, it considered the following factors:

- the records contain commercially sensitive information that was supplied in confidence to the ministry, the release of which would influence commercial transactions
- the records, which contain the advice of a consultant, "speak to the core" of what section 13(1) seeks to protect
- there is no reason to believe that the requester, who is a member of a political party, has a sympathetic or compelling need to receive the information

- release of the financial details in the records, which were supplied in confidence to the ministry, could be damaging
- although the information dates back to 2009, the rationale for withholding the documents continues to be relevant, as the records are internal valuations and contain commercially sensitive information and if released would influence commercial transactions.

[14] As noted previously, the appellant did not file representations.

***Analysis/Findings***

[15] Having reviewed records 28 and 29 and the ministry's representations, I am satisfied that the ministry appropriately exercised its discretion in favour of the non-disclosure of these records pursuant to section 13(1) of the *Act*. I find that the ministry took into account relevant factors and that there is no evidence that it exercised its discretion in bad faith or for an improper purpose. In making the decision not to exercise its discretion in favour of disclosure, it was legitimate for the ministry to consider the nature of the information, the interests protected by section 13(1) and whether there was any sympathetic or compelling need for the requester to have the information.

**ORDER:**

I uphold the ministry's exercise of discretion with respect to its decision to withhold records 28 and 29 pursuant to section 13(1) of the *Act*.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

\_\_\_\_\_ December 4, 2014