Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3496

Appeal PA13-285

Ministry of Labour

May 28, 2015

Summary: The appellant sought access to the employment safety investigation report of a specified company relating to an identified fatal motor vehicle accident. The ministry located records responsive to the request and granted the appellant partial access to them. The ministry relied on the discretionary exemption in section 13(1) (advice and recommendations) to withhold information from the investigation report and a related memorandum. The appellant appealed the ministry's decision and raised the public interest override as an issue in the appeal. The withheld information is found to contain advice and recommendations that qualifies for exemption under section 13(1) and the decision of the ministry is upheld. The public interest override is found not to apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 23.

Orders and Investigation Reports Considered: Order 24.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.).

OVERVIEW:

[1] The Ministry of Labour (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the employment safety investigation report of a specified company in connection with an identified fatal motor

vehicle accident. The requester advised the ministry that she was not seeking access to any information that required third party consent or consultations with other government institutions for disclosure purposes. Accordingly, information provided to the ministry by the Ontario Provincial Police and the Ministry of Transportation, were removed from the scope of the request.

[2] The ministry located records responsive to the request and issued a decision granting the appellant partial access to them. The ministry relied on the discretionary exemptions in sections 13(1) (advice or recommendations) and 14(1)(c) (law enforcement) and on the mandatory exemptions in sections 17 (third party information) and 21(1) (invasion of privacy) to deny access to portions of the records. The ministry also withheld portions of the handwritten inspectors' notes contained in the records on the basis that they were not responsive to the request.

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

[4] During the mediation stage of the appeal, the appellant questioned the ministry's claim that portions of the inspectors' notes were not responsive to her request. In response, the ministry reviewed the information it had withheld on this basis and identified portions that were in fact responsive. Following this review, it disclosed these additional portions of the records. The appellant in turn accepted that the remaining portions that were withheld as non-responsive were not related to her request. Accordingly, access to the portions of the records withheld as non-responsive is no longer at issue in this appeal.

[5] Also during mediation, the appellant confirmed that she was not seeking access to information in the records that was withheld pursuant to sections 14(1)(c), 17, and 21(1). Accordingly, these exemptions and the corresponding portions of the records are not at issue in this appeal.

[6] As a mediated resolution of the appeal was not possible, it was moved to the adjudication stage of the appeal process for an inquiry under the *Act.*

[7] I sought and received representations from the ministry and the appellant and shared these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.* During my inquiry, the ministry issued a supplementary access decision disclosing page 82 of the File Tracking Record to the appellant, in its entirety. The ministry also indicated that it had located an additional responsive record, a four-page memorandum. The ministry decided to partially disclose this memorandum and relied on sections 13(1) and 21(1) to withhold the remainder of it. I sought the appellant's position on the ministry's supplementary access decision and the resulting additional disclosure. The appellant confirmed that she wished to pursue the appeal and to pursue access to the portion of the newly located memorandum that was withheld pursuant to section 13(1). She also confirmed that she did not wish to pursue access to

the information in the memorandum that was withheld under section 21(1) of the *Act*. As a result, section 21(1) is not at issue in this appeal. Finally, the appellant raised the possible application of the public interest override in section 23 of the *Act* as an issue in this appeal. Accordingly, I sought reply representations from the ministry and sur-reply representations from the appellant addressing this issue.

[8] In this order, I uphold the decision of the ministry and dismiss the appeal.

RECORDS:

[9] The records at issue in this appeal consist of the information withheld under section 13(1) in the second-to-last paragraph of the ministry's Investigation Report (page 6 in the index), and in the last paragraph of the memorandum dated February 6, 2012.

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the withheld information in the records?

B. Is there a compelling public interest in disclosure of the withheld information that clearly outweighs the purpose of the section 13(1) exemption?

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

DISCUSSION:

A. Does the discretionary exemption at section 13(1) apply to the withheld information in the records?

[10] 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.

[11] The purpose of section 13(1) 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.[1]

[1] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[12] "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. "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 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.[2] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[13] 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.[3]

[14] 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.[4]

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

- factual or background information[5]
- a supervisor's direction to staff on how to conduct an investigation[6]
- information prepared for public dissemination.[7]

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[2] *Supra*, note 1 at paras 26 and 47.
[3] Orders PO-2084 and 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.
[4] *John Doe v. Ontario (Finance), supra* note 1 at para 51.
[5] Order PO-3315.
[6] 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.).
[7] Order PO-2677.

[16] Section 13(2)(a) is a mandatory exception to the section 13(1) exemption and if the information falls into this category, it cannot be withheld under section 13. Section 13(2)(a) states:

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

[17] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[8] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[9]

Representations

The ministry's representations

[18] The ministry explains that the fatal motor vehicle accident that is the subject of this appeal, involved migrant workers who are regulated by the *Occupational Health and Safety Act* (*OHSA*). It states that ministry inspectors, who are appointed under section 6(1) of the *OHSA* and designated as provincial offences officers under the *Provincial Offences Act* (*POA*), are authorized to conduct inspections and investigations and enforce the *OHSA* through the issuance of administrative orders and the commencement of regulatory prosecutions under the *POA*. It explains that inspectors report to a Regional Manager, who in turn, reports to a Regional Director appointed under subsection 6(1) of the *OHSA*; the Director, in turn, reports to the Assistant Deputy Minister (ADM) of the ministry's Operations Division. Both the Director and the ADM are appointed as inspectors in the *OHSA* and thus, share the inspectors' mandate to enforce the *OHSA*.

[19] The ministry states that when a recommendation against prosecution following an investigation of a fatality is made by an inspector, the Regional Director and ADM are collectively responsible for making the final decision against prosecution of workplace parties based on the advice and recommendations of ministry inspectors. It describes the recommendation and decision-making process in situations where no prosecution of workplace parties occurs following an investigation of a fatality by an inspector. It also provides a copy of its Policies and Procedures Manual and a ministry decision tree in support of its explanation.

[20] The ministry states that in this case, the inspector conducted an investigation into the fatality in order to determine whether the *OHSA* had been contravened by a

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[8] Order 24.

[9] Order PO-2097.

workplace party. After concluding the investigation, the inspector issued one administrative order against the employer under section 25(2)(h) of the *OHSA* for failure to "take every precaution reasonable in the circumstances for the protection of a worker by ensuring that a competent, properly licensed operator operates the vehicle." The inspector also recommended against the laying of charges against the employer for various reasons, which are specified in the withheld information at issue. The ministry continues that the Regional Director agreed with the inspector's recommendation and decided against prosecution of the employer; she also notified the ADM of her decision, and the ADM did not raise any concerns.

[21] The ministry submits that section 13(1) of the *Act* applies to the withheld information in the investigation report because its disclosure would reveal the advice or recommendations of a ministry inspector. The ministry states that it withheld a paragraph in the investigation report which contains the inspector's recommendation against prosecution and the factors he considered in making his recommendation. The ministry states that it could have withheld the inspector's recommendation against prosecution under section 13(1) in addition to his considerations for it, however, in the interest of openness and transparency it exercised its discretion to disclose the recommendation and withhold only the considerations for it.

[22] The ministry states that the withheld inspector's rationale is the deliberative analysis by which he arrived at his recommendation, and thus qualifies as "advice" within the meaning of section 13(1). It adds that the Regional Directors and the ADM are entitled to confidential advice and recommendations from the ministry's expert inspectors regarding specific enforcement matters. Since they do not attend the workplace in which the fatality occurred, they are completely reliant, when making the final decision against the prosecution of a workplace party, on the confidential analysis, advice and recommendations of the inspectors, who attend the workplace and conduct the investigation into the fatality.

[23] The ministry states that in addition to the necessity of confidentiality in the deliberative process, it is important to note that inspectors must consider prosecution when the investigative evidence indicates that a workplace party has contravened the *OHSA* and when there is a public interest such as deterrence in prosecuting the workplace party. The ministry argues that its inspectors must be free to conduct their investigations and advise and make recommendations to their superiors with these principles in mind. It submits that if inspectors' advice and recommendations, including their rationale for their recommendations about regulatory prosecutions and other enforcement matters, were subject to routine public scrutiny, inspectors' enforcement discretion could be effectively fettered by the fear of public opinion and potential public reprisal; inspectors' advice and recommendations regarding prosecution could be influenced by a fear of how the public would respond to their advice and recommendations instead of an objective and reasonable assessment of the investigative evidence and a consideration of the public interest. According to the

ministry, inspectors could feel compelled to tailor their advice and recommendations to prevailing and potentially misinformed public opinion on enforcement matters, particularly investigations involving high profile worker fatalities which are prominently showcased in the popular media. This, the ministry argues, could in turn affect objectivity and reasonableness of prosecution decisions and could compromise public confidence in the ministry as an impartial and effective regulator.

[24] The ministry further submits that consistent with the *Act's* principles of transparency and openness, it has disclosed most of the records that are responsive to the appellant's request, except for the inspector's considerations in recommending against prosecution because this disclosure would compromise the free flow of advice and recommendations from a public servant to a senior ministry decision-maker on a critical enforcement matter.

The appellant's representations

[25] In her representations, the appellant argues that if section 13(1) has been applied properly to the withheld information, the public interest override provision in section 23 should apply in this appeal. She then provides representations on the application of section 23, which I set out below.

[26] In respect of section 13(1), the appellant submits that the ministry's contention – that if inspectors' advice and recommendations about regulatory prosecutions and other enforcement matters were subject to routine public scrutiny, inspectors' enforcement discretion could be effectively fettered by the fear of public opinion – is groundless and demeaning to ministry inspectors. She disagrees with the suggestion that ministry inspectors would alter their investigations and conclusions based on public opinion. The appellant adds that inspectors' obligation is to ensure that occupational health and safety regulations are followed and workplaces are safe for Ontarians, and they should be unfettered by any influence from the ministry, employers, workers or the public.

The ministry's reply representations

[27] In response to the appellant's representations the ministry submits that the purpose of section 13(1) is to protect the ability of public servants to provide advice and make recommendations to their superiors about operational and policy decisions within their ministry's legal mandate. The ministry relies on the following excerpt from the recent ruling of the Supreme Court of Canada in *John Doe v. Ontario (Finance)* in support of its position that disclosure of "confidential deliberations within the public service" would "erode" the government's ability to "formulate and justify" its decisions:

> The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or

> recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.[10]

[28] The ministry submits that the Supreme Court of Canada clearly acknowledges that unless the confidentiality of public servants' advice and/or recommendations is preserved, partisan considerations can influence their decision-making and their neutrality can be compromised. It asserts that this refutes the appellant's assertion that the suggestion that inspectors would alter their investigations and conclusions based on public opinion is outlandish.

The appellant's sur-reply representations

[29] The appellant argues that the information at issue should be disclosed based on the exception in section 13(2) of the *Act*. She submits that the advice and recommendations exemption does not extend to "objective" and "factual materials"; she argues that because the inspector's conclusions on a health and safety enforcement investigation are rooted in factual material and objective information gathered in a thorough and legally required investigation process, the exemption in section 13(1) should not apply to the withheld information in the memorandum and the investigation report. She adds that because inspectors are guided by the *OHSA* and their recommendations for or against prosecution must be supported by evidence, the recommendations are not mere opinion, nor are they a range of policy options. She submits that the inspector's conclusions are based on facts and facts don't change under the light of public scrutiny. She further submits that disclosing the facts of the investigation, including the inspector's conclusions, would not and should not erode the government's ability to enforce its own labour laws.

Analysis and findings

[30] The withheld information consists of the factors considered by the inspector in recommending that the ministry not proceed with prosecution against the employer. The withheld information contains the considerations involved in the ultimate advice and recommendation the inspector gave as a public servant to his ministry superiors who decided to accept his recommendation. I find that the withheld information falls squarely within the section 13(1) exemption. I further find that the withheld information qualifies for exemption under section 13(1), subject to my review of the ministry's exercise of discretion below and my consideration of whether the public interest override in section 23 applies.

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[10] *John Doe v. Ontario (Finance)*, *supra* note 1, at para 45.

[31] Although the appellant argues that the withheld information is based on factual information and thus falls within the section 13(2)(a) exception to the exemption, I do not agree. Presumably, records containing advice or recommendations to government invariably contain some factual information in an overwhelming majority of situations in the delivery of public service and therefore, adopting the appellant's interpretation would render the section 13(1) exemption meaningless. While the withheld information at issue is based on factual information and may also contain factual information collected by the inspector during the investigation process, this is not a sufficient basis for applying the section 13(2)(a) exception. This office's longstanding interpretation of the "factual material" exception in section 13(2)(a) is that "factual material" contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in a record, for example, an appendix or schedule of factual information supporting a policy document.[11] The "factual material" exception does not extend to occasional assertions of fact found within a record for which the advice and recommendations exemption has been found to apply.[12] I adopt this interpretation and approach in this appeal and find that the exception in section 13(2)(a) does not apply.

B. Is there a compelling public interest in disclosure of the withheld information that clearly outweighs the purpose of the section 13(1) exemption?

[32] 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.

[33] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption. 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, this office reviews 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.[13]

[34] 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

[11] Order 24.
[12] *Ibid.*
[13] Order P-244.

central purpose of shedding light on the operations of government.[14] 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.[15] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[16] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[17]
- the integrity of the criminal justice system has been called into question[18]
- public safety issues relating to the operation of nuclear facilities have been raised[19]
- disclosure would shed light on the safe operation of petrochemical facilities[20] or the province's ability to prepare for a nuclear emergency[21]
- the records contain information about contributions to municipal election campaigns.[22]

[35] A public interest is not automatically established where the requester is a member of the media.[23] Any public interest in *non*-disclosure that may exist also must be considered.[24] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[25] 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[26]

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[14] Orders P-984 and PO-2607.
[15] Orders P-984 and PO-2556.
[16] Order P-984.
[17] 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.).
[18] Order PO-1779.
[19] 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.
[20] Order P-1175.
[21] Order P-901.
[22] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[23] Orders M-773 and M-1074.
[24] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[25] Orders PO-2072-F, PO-2098-R and PO-3197.
[26] Orders P-123/124, P-391 and M-539.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[27]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[28]

- the records do not respond to the applicable public interest raised by appellant.[29]

[36] 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. 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.[30]

Representations

[37] The appellant provides extensive representations and numerous attachments in support of her position that the public interest override should apply in this appeal. She argues that there is a compelling public interest in the disclosure of the information at issue because Ontario workers rely on the *OHSA* and its proper enforcement to ensure workplaces are safe, and the public should be able to gauge the effectiveness of the government's workplace safety system and rules. She argues that redacting an inspector's conclusions in an investigation into a workplace accident that resulted in the death of eleven workers and the serious injury of three other workers, is an affront to the public interest in ensuring that the ministry is properly policing labour laws. The appellant submits that the inspector's conclusions may have broader implications for safety at job sites throughout Ontario and therefore, there are safety reasons and a compelling public interest for disclosing them.

[38] The appellant submits that the ministry makes shedding light on workplace fatalities difficult. She notes that the province of Alberta makes its workplace fatality reports accessible to the public both online and through the government library. The appellant explains that this public access to reports has fostered vital debate about Alberta's workplace safety system and has prompted significant improvement to Alberta's labour policies, including the hiring of additional inspectors and the online publishing of employers' injury and fatality records. She also points out that

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[27] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[28] Order P-613.
[29] Orders MO-1994 and PO-2607.
[30] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, *supra* note 1.

investigation reports of workplace accidents in British Columbia are published online by WorkSafe BC.

[39] The ministry disagrees with the appellant's position that the public's interest in assessing the effectiveness of the provincial occupational health and safety system outweighs the purpose of the section 13(1) exemption. It cites the decision of the Supreme Court of Canada in *John Doe v. Ontario (Finance)* which confirmed the purpose of the section 13(1) exemption is to insulate the public decision-making process from partisan considerations and to maintain the neutrality of the public decision-making process. The ministry submits that it applied section 13(1) in this specific enforcement context to insulate its decision-making regarding a critical enforcement matter from partisan considerations and to maintain its neutrality and efficacy as a public regulator. The ministry states that it has disclosed sufficient information to inform the public about its investigation into the fatal accident at issue. It adds that it has disclosed considerable and sufficient information to the appellant about its investigation of this accident to enable the public to understand the scope, sequence and methodology of the investigation. Specifically, it has disclosed the majority of the investigation report (except for personal information that was redacted) including witness statements, inspector's notes, field visit reports specifying outcomes of past ministry inspections, and photographs of the accident site to the appellant.

[40] The ministry also explains that it proactively and routinely discloses information outside the access context to inform the public about its enforcement activities under the *OHSA* and the aggregated outcomes of its inspection and investigation activities. It then lists the following publications which it says are available on its web site:

- its five-year provincial compliance and enforcement strategy (Safe at Work Ontario) which details the specific operational criteria used to identify employers for proactive inspections

- annual plans for sector and hazard specific inspection blitzes and aggregated outcomes of those blitzes

- significant convictions and sentences obtained against corporate employers for offences under the *OHSA*

- annual sector plans which detail the ministry's sector specific enforcement plans.

[41] As a result of its routine disclosure of this information about its enforcement activities, the ministry submits that it has already addressed the appellant's stated objective of enabling the public to scrutinize and gauge the effectiveness of the occupational health and safety system.

[42] The ministry argues that the appellant has failed to articulate a compelling public interest in disclosure of the remaining information that has not already been addressed through the substantial disclosure it has provided her in this request and through the routine enforcement-related information it publishes. The ministry also submits that consistent with the Divisional Court's decision in *Ontario Hydro v. Mitchinson*[31] I must consider the public interest in non-disclosure of the information when considering the application of the public interest override. It argues that in this appeal, the public interest in non-disclosure of the withheld information is the preservation of public confidence in the ministry as an impartial regulator that makes effective enforcement decisions based on an objective assessment of investigative evidence and whether a prosecution would promote both general and specific deterrence. In conclusion, the ministry asserts that the fact that the appellant is a member of the media does not automatically establish a compelling public interest in disclosure.

Analysis and findings

[43] The appellant argues that there is a compelling public interest in disclosure of the information because it will enable the public to scrutinize whether the ministry satisfied its obligation to properly enforce labour laws in respect of the fatal accident that is the subject of the records and because more broadly, it would permit a public assessment of the ministry's effectiveness in enforcing labour laws. Although I appreciate the importance of the issues the appellant has raised and I commend the appellant on her work to shed light on them, I do not agree that section 23 applies in the circumstances of this appeal.

[44] The information at issue in this appeal is limited to the inspector's considerations in not recommending prosecution. The remainder of the investigation report has been disclosed to the appellant and it provides a considerable amount of information about the ministry's investigation, including: a number of significant conclusions reached by the inspector; the cause of the fatal accident; the contravention of the *OHSA* that the inspector found in his investigation; and the inspector's recommendation, which the ministry could have withheld pursuant to the section 13(1) exemption. Moreover, the ministry has also disclosed portions of the inspector's notes on the investigation, memoranda related to the inspector's recommendation and its approval, field visit reports, witness statements and photographs of the accident site. This disclosure is extensive and significant, and I find that it is sufficient to satisfy any public interest considerations present in the circumstances of this appeal. I also note that the ministry's proactive and routine disclosure of its enforcement activities under the *OHSA* and the aggregated outcomes of its inspection and investigation activities satisfies the broader public interest concerns raised by the appellant. Finally, I agree with the ministry's position that there is a public interest in non-disclosure since disclosure of the withheld information that I have found exempt under section 13(1) could adversely

[31] *Ontario Hydro v. Mitchinson*, *supra* note 18.

affect the provision of full, free and frank advice and recommendations within the public service. For the above reasons, I find that the public interest override does not apply in this appeal.

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

[45] 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. 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.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] This office may not, however, substitute its own discretion for that of the institution.[33] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[34]

- 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 disclosure will increase public confidence in the operation of the institution

[32] Order MO-1573.
[33] Section 54(2).
[34] Orders P-344 and MO-1573.

- 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.

[47] The ministry submits that it exercised its discretion to deny access to the information at issue under section 13(1) in an appropriate and reasonable manner. It states that in exercising its discretion, it first determined that the substance of the withheld information fell squarely within the scope of section 13(1) since it contained advice and recommendations of a ministry inspector. It states that it then considered the impact of disclosure on deliberative decision-making between its staff and thereby, the impartial and effective enforcement of the *OHSA.*

[48] The appellant does not directly address this issue in her representations. Nonetheless, her position is evident; she feels the ministry should have exercised its discretion to disclose the withheld information in this appeal on the basis that disclosure would increase public confidence in the operation of the ministry.

[49] I find that the ministry exercised its discretion in deciding to withhold the information at issue under the advice and recommendations exemption in section 13(1) of the *Act.* Having regard to the significant disclosure the ministry provided, including its ongoing disclosure of relevant information during the appeal process, I am satisfied that the ministry took into account relevant factors in exercising its discretion, including the principle that information should be available to the public and exemptions from the right of access should be limited and specific. There is no evidence before me to suggest that the ministry took irrelevant factors into account or that it exercised its discretion in bad faith or for an improper purpose. Accordingly, I uphold the ministry's exercise of discretion and dismiss this appeal.

ORDER:

I uphold the ministry's decision and dismiss this appeal.

Original Signed By: May 28, 2015
Stella Ball
Adjudicator