

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3675

Appeal PA10-57

Ministry of Revenue

December 9, 2016

**Summary:** The appellant filed a new access request for records that the Ministry of Revenue had removed from an earlier appeal before the IPC because they were allegedly not responsive to his original access request for records relating to specific taxation matters. The ministry retrieved these records and denied access to them under various exemptions in the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that these records are exempt from disclosure in full under sections 12(1) (Cabinet records), 15(a) (relations with other governments) and 17(2) (third party tax information) of the *Act*. He upholds the ministry's decision to deny access to these records and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 12(1), 15(a) and 17(2).

**Orders Considered:** Order PO-2999.

### OVERVIEW:

[1] The appellant submitted an access request to the Ministry of Revenue (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to specific taxation matters. The ministry denied him access to these records, and he appealed the ministry's access decision to this office. However, the ministry removed certain records from the scope of the appeal, asserting that they were not responsive to the appellant's access request.

[2] The appellant then submitted a new access request to the ministry for those records that the ministry had removed from the scope of his appeal. In addition, he also sought access to "A list of participants at the conferences referred to in the above emails, or any records that list the participants."

[3] In response, the ministry issued an access decision to the appellant which provided him with partial access to these records. It denied access to a number of records in full under the discretionary exemptions in sections 13(1) (advice or recommendations), 15(a) and (b) (relations with other governments), 17(2) (third party tax information) and 18(1)(e) (economic and other interests) of the *Act*.

[4] In response to a request from the appellant, the ministry subsequently provided him with an index of records, which identified the records remaining at issue and the exemptions claimed for each record. This index also contained two new exemptions claims made by the ministry for certain records: the discretionary exemption in section 19 (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[5] The appellant appealed the ministry's access decision to this office, which assigned a mediator to assist the parties in resolving the issues in dispute. This appeal was not resolved during mediation and was moved to adjudication for an inquiry.

[6] An adjudicator sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the ministry. In response, the ministry submitted representations on the exemptions in sections 12(1), 13(1), 15(a) and (b), 17(2) and 19 of the *Act*. It withdrew its claim that section 18(1)(e) applies to parts of some records. In addition, although it claimed that some information in one record is exempt under section 21(1), it did not provide representations on that exemption. Finally, the ministry included a revised index which re-numbered the records at issue, and removed references to duplicate copies of the records. As a result, there are 10 records remaining at issue in this appeal.

[7] The adjudicator then sent a Notice of Inquiry, along with the ministry's non-confidential representations, to the appellant. In response, the appellant asked that this appeal be placed "on hold" for an extended period of time. After this appeal was re-activated, the appellant stated that he wished to proceed but declined to submit representations.

[8] This appeal was then transferred to me for a decision. In this order, I find that the records at issue are exempt in full under sections 12(1), 15(a) and 17(2) of the *Act*, and I dismiss the appeal.

## **RECORDS:**

[9] The 10 records remaining at issue in this appeal are summarized in the following chart, which is based on the ministry's revised index of records and my review of these

records:

<b>Record number</b>	<b>Number of pages</b>	<b>General description</b>	<b>Ministry's decision</b>	<b>Exemptions claimed</b>
I	6	Emails between ministry employees re amendments to Ontario's tax legislation	Withheld in full	ss. 12(1), 13(1), 19
II	5	Draft legislation – Part VII, Special Cases, Tax Shelters and Avoidance	Withheld in full	ss. 12(1), 19
III	2	Emails between ministry employees re amendments to Ontario's tax legislation	Withheld in full	ss. 12(1), 13(1)
IV	7	Emails between ministry employees re amendments to Ontario's tax legislation	Withheld in full	ss. 12(1), 13(1), 19

V	2	Emails from ministry employee to counterparts in other provinces re meeting of Sub-committee on Inter-Provincial Tax Avoidance	Withheld in full	ss. 15(a), (b)
VI	2	Attachment to record V – Subcommittee on Inter-Provincial Tax Avoidance, Next Steps	Withheld in full	ss. 15(a), (b)
VII	1	Emails between ministry employees re meeting of Sub-committee on Inter-Provincial Tax Avoidance	Withheld in full	ss. 13(1), 15(a)
VIII	3	Emails between ministry employees re tax liability of specific corporation	Withheld in full	ss. 13(1), 15(a), 17(2)
IX	3	Emails between ministry	Withheld in full	ss. 13(1), 17(2)

		employees re tax liability of specific corporation		
X	26	Emails between ministry employees re tax liability of specific corporation	Withheld in full	ss. 13(1), 15(a), 17(2), 19, 21(1)

**ISSUES:**

- A. Does the mandatory exemption at section 12(1) apply to the records?
- B. Does the mandatory exemption at section 17(2) apply to the records?
- C. Does the discretionary exemption at section 15(a) apply to the records?
- D. Did the ministry exercise its discretion under section 15(a)? If so, should the IPC uphold the ministry's exercise of discretion?

**DISCUSSION:**

**CABINET RECORDS**

**A. Does the mandatory exemption at section 12(1) apply to the records?**

[10] The ministry submits that records I, II, III and IV are exempt under the Cabinet records exemption in section 12(1) of the *Act* and particularly under section 12(1)(f). Section 12(1) 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,

...

- (f) draft legislation or regulations.

[11] 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 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>1</sup>

[12] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.<sup>2</sup>

[13] The ministry submits that record II is exempt under section 12(1)(f) because it is draft tax legislation that was prepared by a lawyer at the Office of Legislative Counsel. It submits that records I, III and IV are exempt under both the opening wording of section 12(1) and section 12(1)(f) because they contain both discussions about the wording of the draft legislation and actual excerpts from this legislation. It asserts that disclosure of these records would:

- reveal the contents of the draft legislation;
- reveal the substance of the deliberations of Cabinet by revealing the draft legislation or the drafting process; or
- permit the drawing of accurate inferences with respect to those deliberations.

[14] The appellant did not submit representations in this appeal and I do not, therefore, have any arguments to rebut the evidence submitted by the ministry that disclosing these records would reveal the substance of deliberations of Cabinet or its committees, including draft legislation, as stipulated in section 12(1)(f).

[15] In 2007, a new piece of tax legislation – the *Taxation Act, 2007*, came into effect in Ontario. This new act generally replaced the provincial *Corporations Tax Act* and the *Income Tax Act* for the taxation years ending after December 31, 2008. Records I, II, III, and IV all document the deliberations that took place within the ministry in 2005-2006 as this new tax legislation was being drafted. In particular, Record II contains one part of the draft legislation that led to the *Taxation Act, 2007*. Records I, III and IV are emails between ministry employees that contain both discussions about the wording of the draft legislation and actual excerpts from this legislation.

[16] In my view, because record II contains a part of the draft tax legislation, it falls squarely within section 12(1)(f). Similarly, I find that the excerpts from this legislation that are found in the emails between ministry employees are also exempt under this

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<sup>1</sup> Orders P-22, P-1570 and PO-2320.

<sup>2</sup> Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

provision. Finally, I find that the discussions between ministry employees about the wording of the draft legislation are exempt under the opening wording of section 12(1), because this draft legislation eventually went before Cabinet. Consequently, disclosing these discussions would reveal the substance of deliberations of Cabinet or permit the appellant to draw accurate inferences with respect to these deliberations.

[17] In short, I find that records I, II, III and IV are exempt from disclosure in full under section 12(1) of the *Act*.

### **THIRD PARTY TAX INFORMATION**

#### **B. Does the mandatory exemption at section 17(2) apply to the records?**

[18] The ministry submits that records VIII, IX and X are exempt from disclosure under the mandatory third party tax information exemption in section 17(2) of the *Act*.

[19] Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[20] Records VIII, IX and X are emails between ministry employees about the tax liability of a specific corporation. The ministry states that:

- record VIII is an email chain that contains a discussion between ministry employees about the tax situation of a specific, named corporate taxpayer;
- record IX is an email chain between ministry employees that discusses the merits of the same corporate taxpayer's submissions regarding its tax assessment; and
- record X is an email chain between ministry employees that details competing positions on the assessment of this same corporate taxpayer.

[21] The ministry submits that the primary purpose of section 17(2) is to protect information about businesses that the government receives for tax purposes. It cites Order PO-2059, which found that the tax system relies on a high degree of voluntary compliance, which would not be maintained if the information provided to government for taxation purposes is disclosed. It submits that records VIII, IX and X all reveal information that was gathered for the purpose of determining tax liability or collecting a tax, which meets the requirements of section 17(2).

[22] The appellant did not submit representations in this appeal and I do not, therefore, have any arguments to rebut the evidence submitted by the ministry that disclosing these records would reveal information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax, as stipulated in

section 17(2).

[23] Based on the ministry's evidence and my review of the records, I am satisfied that the information in these records meets the requirements of the mandatory section 17(2) exemption. These records are emails between ministry employees that contain detailed discussions about the tax liability of a specific, named corporate taxpayer, and they clearly reveal information that was gathered for the purpose of determining tax liability or collecting a tax, as stipulated in section 17(2).

[24] In short, I find that records VIII, IX and X are exempt from disclosure in full under section 17(2) of the *Act*.

## **RELATIONS WITH OTHER GOVERNMENTS**

### **C. Does the discretionary exemption at section 15(a) apply to the records?**

[25] The ministry submits that records V, VI, VII, VIII and X are exempt from disclosure under the discretionary exemption in section 15(a) of the *Act*. However, I have already found that records VIII and X are exempt in full under section 17(2). Consequently, it is only necessary to determine whether records V, VI and VII are exempt under section 15(a).

[26] Section 15(a) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

...

and shall not disclose any such record without the prior approval of the Executive Council.

[27] The exemptions in section 15 recognize that the Ontario government will create and receive records in the course of its relations with other governments. In particular, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.<sup>3</sup>

[28] In order for a record to qualify for exemption under section 15(a), an institution must establish that:

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<sup>3</sup> Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.



1. the record relates to intergovernmental relations, that is relations between an institution and another government or its agencies; and
2. disclosure of the record could reasonably be expected to prejudice the conduct of intergovernmental relations.<sup>4</sup>

***Part 1 - Intergovernmental relations***

[29] I will start by determining whether records V, VI and VII are about "intergovernmental relations."

[30] These records are emails between ministry employees and also with their counterparts in other jurisdictions that contain information about a Sub-Committee on Interprovincial Tax Avoidance.

[31] The ministry states that the members of this sub-committee work collaboratively to promote consistent assessments of interpretations involving more than one jurisdiction based on a common or reciprocal interpretation of their legislation. It submits, therefore, that records V, VI and VII all relate to "intergovernmental relations," for the purposes of section 15(a).

[32] In assessing whether the records relate to "intergovernmental relations" it is useful to examine the context underlying the records, the substance of the records themselves and previous IPC jurisprudence involving similar records.

[33] The *Taxation Act, 2007* included a new Ontario General Anti-Avoidance Rule (GAAR). Prior to the introduction of the bill that led to this new tax act, Cabinet authorized the Minister of Finance to enter into a tax collection agreement on behalf of the Government of Ontario with the Government of Canada under which the Government of Canada would collect the taxes payable under the new act on behalf of Ontario and make payments to Ontario in respect of those taxes. This agreement included a commitment by both governments to work collaboratively on combating tax anti-avoidance by corporations.

[34] In Order PO-2999, which involved the same appellant and the same ministry, Adjudicator Frank DeVries also had records before him that related to the Sub-Committee on Interprovincial Tax Avoidance. He stated:

. . . I am satisfied that the records relate to intergovernmental relations (relations between an institution and another government or its agencies). The ministry has identified that the records "concern the meetings of the Subcommittee on Interprovincial Tax Avoidance (the Subcommittee), a confidential subcommittee set up by Ontario to explore and negotiate

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<sup>4</sup> Reconsideration Order R-970003.

common approaches to tax avoidance among the participating jurisdictions.”

The ministry has also identified that the federal government now administers Ontario’s corporations tax, and that the subcommittee met with the federal government and the provincial governments to discuss issues arising from the tax avoidance administration. Based on this information, I am satisfied that the subcommittee and, accordingly, the records at issue, relate to intergovernmental relations. . . .

[35] I agree with Adjudicator DeVries’ analysis and find that it applies to records V, VI and VII in this appeal. The sub-committee that is discussed in these records was established to address inter-jurisdictional issues relating to tax avoidance by corporations. The members of this subcommittee included representatives from the federal government and the provinces, including Ontario, and they worked collaboratively to establish a common approach to addressing tax avoidance. I find, therefore, that the records about the sub-committee clearly relate to “intergovernmental relations,” for the purposes of section 15(a).

***Part 2 – Prejudice the conduct of intergovernmental relations***

[36] I will now assess whether disclosing records V, VI and VII could reasonably be expected to prejudice the conduct of intergovernmental relations by the Ontario government or an institution, as stipulated in the section 15(a) exemption.

[37] To establish that section 15(a) applies to these records, the ministry must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>5</sup>

[38] The ministry submits that disclosing records V, VI and VII, which describe inter-governmental communications with respect to efforts to counter tax avoidance, could reasonably be expected to prejudice the conduct of intergovernmental relations between the Ontario government and other governments, including the federal government. It states:

Releasing information publicly about the development and administration of anti-avoidance discussions could assist those businesses that attempt to avoid the application of anti-avoidance rules and illegitimately reduce taxes. The matter of inter-provincial tax avoidance (i.e. arrangements by

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<sup>5</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

taxpayers to reduce or eliminate tax liability in an abusive manner) is a particular challenge since companies shift income between provinces in an effort to avoid taxation. Inter-provincial tax avoidance can in many cases only be dealt with through coordinated efforts by different provinces and the federal government. The failure of the provincial and federal governments to work together on issues related to tax avoidance could have a huge adverse impact on government revenues.

[39] To support its position on section 15(a), the ministry provided an affidavit from its Assistant Deputy Minister, Sales Tax Reform. In this affidavit, he states that disclosing records V, VI and VII to the appellant could reasonably be expected to prejudice the Ontario government's relationship with the federal government and other provincial governments, because it would make those other governments reluctant to share sensitive information with the Ontario government about tax avoidance.

[40] The Assistant Deputy Ministry also attached letters from representatives of the federal government and eight other provincial governments. The ministry had sent these governments the records at issue in both the appeal resulting in Order PO-2999 and this appeal and asked them to comment on the impact of disclosing these records. All of these governments claimed that disclosing these records could reasonably be expected to prejudice relations between the Ontario government and themselves. In addition, the Director of the Intergovernmental Tax Policy division of the federal Department of Finance stated:

Release of this information would seriously compromise the ongoing work of multi-jurisdictional committees examining tax issues. Furthermore, the release of these documents to the private sector could provide the recipients with a financial gain by allowing them to better assess the risks of entering into a provincial tax avoidance scheme, both in terms of the legal framework currently in place as well as the audit strategy used by the Canada Revenue Agency to protect provincial tax revenues from these tax avoidance schemes.

[41] The appellant did not submit representations in this appeal and I do not, therefore, have any arguments to rebut the evidence submitted by the ministry that disclosing the records could reasonably be expected to prejudice the conduct of intergovernmental relations by the Ontario government or an institution, as stipulated in section 15(a).

[42] Records V, VI and VII are emails between ministry employees and also with their counterparts in other jurisdictions that all relate to a sub-committee that was established to address inter-jurisdictional issues relating to tax avoidance by corporations. In my view, the evidence submitted by the ministry to show that disclosing these records could assist corporations to engage in tax avoidance not just in Ontario but elsewhere in Canada, is credible. In these circumstances, I accept that

disclosing these records would likely make other governments reluctant to share sensitive information with the Ontario government about tax avoidance. Consequently, I find that the ministry has provided the detailed and convincing evidence required to show that disclosing these records could reasonably be expected to prejudice the conduct of intergovernmental relations by the Ontario government.

[43] In short, I find that records V, VI and VII are exempt from disclosure in full under section 15(a) of the *Act*.

### **OTHER EXEMPTIONS**

[44] The ministry has claimed that some information in the records at issue is exempt from disclosure under several other exemptions in the *Act*, including sections 13(1), 15(b), 19 and 21(1). However, given that I have found that the records at issue are exempt from disclosure in full under sections 12(1), 15(a) and 17(2), it is not necessary to determine whether some of the information in those records is also exempt from disclosure under those other exemptions.

### **EXERCISE OF DISCRETION**

#### **D. Did the ministry exercise its discretion under section 15(a)? If so, should the IPC uphold the ministry's exercise of discretion?**

[45] I have found that some records are exempt from disclosure under section 15(a). This discretionary exemption permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. It is necessary, therefore, to determine whether the ministry exercised its discretion under section 15(a) and, if so, whether I should uphold that exercise of discretion.

[46] The IPC may find that the institution erred in exercising its discretion where, for example,

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

[47] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>6</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>7</sup>

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 54(2).

[48] The ministry states that it exercised its discretion regarding the records at issue in good faith, taking into account only relevant considerations and no irrelevant considerations. It states that it exercised its discretion to withhold specific records under the discretionary exemptions in the *Act*, including section 15(a), because it concluded that the harms contemplated in those exemptions would occur if it disclosed those records. It submits that the IPC should uphold its exercise of discretion.

[49] I am satisfied that the ministry exercised its discretion in denying access to the records under section 15(a) and did so appropriately. The appellant did not submit representations in this appeal and I do not have any evidence before me to suggest that the ministry exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. In short, I uphold the ministry's exercise of discretion under section 15(a).

**ORDER:**

I uphold the ministry's decision to deny access to the records at issue. The appeal is dismissed.

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

December 9, 2016 \_\_\_\_\_