Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3799

Appeal PA17-29

Ministry of the Attorney General

December 29, 2017

**Summary:** The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specific ministry file number. The ministry denied access to the information at issue in the responsive emails in part, citing the discretionary exemption in section 49(a) (discretion to refuse requester's own information) of the *Act*, in conjunction with section 13(1) (advice or recommendations).

In this order, the adjudicator upholds the ministry's decision that the information is exempt under section 49(a), in conjunction with the section 13(1).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 49(a), 13(1).

## OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for records related to a specific ministry file number.

[2] The ministry identified 106 pages of responsive records and issued a decision granting partial access. The ministry withheld some records pursuant to the discretionary exemption in section 13(1) (advice or recommendations) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the course of mediation, the ministry agreed to review its access decision and, subsequently, issued a revised decision granting access to more records.

[5] The ministry continued to withhold some records pursuant to section 13(1) of the *Act*. It subsequently advised that it was claiming section 49(a) (discretion to refuse requester's own information) of the *Act*, in conjunction with section 13(1) of the *Act*, to withhold these records.

[6] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry.

[7] I sought the representations of the ministry initially, which were provided[1] and sent to the appellant, along with a Notice of Inquiry. The appellant provided representations in response.

[8] In this order, I uphold the ministry's decision that the information is exempt under section 49(a), in conjunction with section 13(1).

## RECORDS:

[9] At issue is the information severed from the emails at pages 44, 48, 51, 52, 61, 62, 71, and 72 of the records.

## ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 49(a) (right of access to one's own personal information), in conjunction with the section 13(1) advice or recommendations exemption, apply to the information at issue?

C. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[1] In its representations, the ministry confirmed that there is no information at issue in page 97.

## DISCUSSION:

### A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.[2]

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[15] The ministry takes the position that the records contain the personal information of the appellant in his personal capacity as defined in paragraphs (c) and (h) of the definition of that term in section 2(1). It states that the records relate to letters sent by the appellant to the ministry identifying his concerns and the responses to those letters.

[16] The appellant did not address this issue in his representations.

***Analysis/Findings***

[17] I agree with the ministry that the records contain the personal information of the appellant in his personal capacity, as described by the ministry, and as defined in paragraphs (c) and (h) of the definition of that term in section 2(1). In particular, they contain an identifying number associated with the appellant and the appellant's name where it appears with other personal information relating to him.

**B. Does the discretionary exemption at section 49(a) (right of access to one's own personal information), in conjunction with the section 13(1) advice or recommendations exemption, apply to the information at issue?**

[18] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[19] Section 49(a) reads:

---

[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[20] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[6]

[21] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[22] In this case, the institution relies on section 49(a), in conjunction with section 13(1). 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.

[23] With respect to the information at page 44 (which is duplicated on page 48, pages 51 (bottom) to 52, 62 (bottom) and 71 (bottom) to 72), the ministry submits that:

> …the record is part of an email conversation between public servants. The writer is providing advice in the form of alternative courses of action in relation to a decision that is to be made. In providing this advice, the writer identifies and considers two alternative decisions that can be made. The writer does not suggest one course of action over the other and, as such, no recommendation is made.

[24] With respect to the information at page 51 (top) (which is duplicated on pages 61 (bottom) to 62 (top) and partly duplicated in the earlier email on page 71), the ministry submits that:

> …the records are part of an email conversation between public servants. In the earlier email conversation, the writer is providing advice in the form of a further alternative course of action in relation to a decision that is to be made. In providing this advice, the writer identifies and considers a third alternative decision that can be made. This third option is further to the two options outlined in the record referred to [above]. The writer does

---

[6] Order M-352.

> not suggest one course of action over the others and, as such, no recommendation is made. In the latter email conversation, the writer is referring to the three options presented previously and is suggesting a preferred course of action which will, expressly or inferentially, be accepted or denied by the person being advised and is, therefore, a recommendation.

[25] With respect to the later email at page 71 (top), the ministry submits that:

> … the writer is referring to the three options and is advising the recipient of the recommended course of action along with the provisos to be applied.

[26] The appellant did not address this issue in his representations.

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

[27] 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.[7]

[28] "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.

[29] "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. [8]

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

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

- the information itself consists of advice or recommendations

---

[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[8] See above at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[9]

[32] 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.[10]

[33] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).[11]

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

- factual or background information[12]
- a supervisor's direction to staff on how to conduct an investigation[13]
- information prepared for public dissemination[14]

[35] Based on my review of the information at issue in the records, I agree with the ministry that it contains advice or recommendations as described by the ministry above.

[36] None of the exceptions to section 13(1) in sections 13(2) or 13(3) apply.

[37] As the records contain advice or recommendations, the information at issue is subject to the discretionary exemption in section 49(a), with section 13(1).

[38] I will now review the ministry's exercise of discretion.

---

[9] 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.
[10] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[11] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[12] Order PO-3315.
[13] 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.).
[14] Order PO-2677.

## C. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[39] The section 49(a) 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.

[40] 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.

[41] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[17]

- 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

---

[15] Order MO-1573.
[16] Section 54(2).
[17] Orders P-344 and MO-1573.

- 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.

[43] The ministry states that when exercising its discretion, it took into consideration the purposes of the *Act*, including the principles that:

1. information should be available to the public;
2. individuals should have a right of access to their own personal information;
3. exemptions from the right of access should be limited and specific; and
4. the privacy of individuals should be protected.

[44] The ministry states that it considered the interests the exemption in section 13(1) seeks to protect, namely 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.

[45] In addition, the ministry states that it considered the fact that none of the records would exist were it not for the appellant's letters to the ministry. Furthermore, it considered that the information was the appellant's own personal information and that the appellant's concerns, raised in his correspondence, were clearly addressed in the ministry's responses.

[46] The ministry further states that every effort was made to disclose as much of the record as was reasonable without revealing the advice or recommendations of a public servant.

[47] The appellant did not address this issue in his representations.

### *Analysis/Findings*

[48] I find that the ministry exercised its discretion in a proper manner taking into account proper considerations and not taking into account improper considerations. Accordingly, I uphold the ministry's exercise of discretion and find that the information at issue is exempt under section 49(a), in conjunction with section 13(1).

## ORDER:

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

Original Signed by: December 29, 2017

Diane Smith
Adjudicator