



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1398

Appeal P_9600439

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant, a journalist, submitted a request to the Ministry of Finance (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to “all documents on the economic, social & Ontario budget impacts of Quebec independence compiled since January 1, 1995.”

The Ministry identified 11 responsive records. In its decision letter to the appellant, the Ministry denied access to these records in their entirety, relying on the following exemptions in the Act:

- advice or recommendations - section 13(1)
- relations with other governments - section 15(a)
- economic and other interests - section 18(1)(d).

The appellant appealed this denial of access. In his letter of appeal, the appellant also raised the possible application of the “public interest override” in section 23.

This office sent a Notice of Inquiry to the appellant and the Ministry, inviting them to submit representations on the exemptions claimed, as well as the possible application of section 23. In response to this notice, both parties submitted representations. The appellant’s representations referred me to the comments in his letter of appeal, which I have considered in reaching my decision in this order.

The appellant’s representations also requested access to the Ministry’s representations. The Ministry, in its own representations, made it clear that it would object to such a disclosure. Section 52(13) of the Act indicates that “... no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person”. In certain circumstances, the Commissioner or his delegates may authorize disclosure of one party’s representations to the other. In this case, however, I decided not to authorize such a disclosure because of the references to the records in the Ministry’s representations, and the other sensitive information they contain about Ontario’s intended bargaining positions in the event of a “Yes” vote in a future Quebec referendum on independence.

The Ministry’s representations indicate that it has decided to disclose Record 8 (using the Ministry’s numbering system), entitled “Survey of predictions regarding economic impact of a Yes victory in the Quebec referendum”. Accordingly, I will order the Ministry to disclose this record to the appellant.

Records 1 through 7, inclusive, and Records 9 through 11, inclusive (again using the Ministry’s numbering system), are at issue in this appeal. They consist of analytical summaries of agreements and other relations between the governments of Ontario and Quebec and their respective business communities, a paper on the possible economic consequences of Quebec independence, a summary of possible models for division of Canada’s national debt, and a paper setting out strategies for relations with Ontario’s creditors in the event of Quebec independence.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

This exemption is found in section 13(1) of the Act, which 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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

The Ministry claims that this exemption applies to the following:

- the portions of Record 1 under the headings “Message” or “Possible Ontario Response”;
- the portions of Records 6 and 7 under the heading “Message” wherever it appears;
- Record 10 in its entirety.

The Ministry submits that these records were prepared by public servants to advise the Minister of Finance on suggested courses of action which may be taken in respect of a wide range of issues relating to the possible independence of Quebec.

I agree that the portions of Records 1, 6 and 7 identified by the Ministry, and Record 10 in its entirety, set out suggested courses of action to be accepted or rejected by their recipient during the deliberative process, and therefore qualify for exemption under section 13(1).

In most orders, when an exemption has been found to apply to particular information, it is not necessary to consider whether other exemptions claimed with regard to that information also apply. However, in this appeal, I must also consider the possible application of the “public interest override” in section 23, which will require me to weigh any compelling public interest in disclosure against the purpose of any exemption that is applicable. Therefore, in this order, I will

consider each exemption claimed by the Ministry for all parts of the records to which the Ministry has sought to apply it.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry relies on the part of this exemption found in section 15(a) of the Act, which 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.

The Ministry claims that this exemption applies to all the records at issue in this appeal, in their entirety. Order P-908 includes an analysis of the language of section 15(a) and indicates that, for a record to qualify for exemption under this section, the Ministry must establish that:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**
2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

Records 1-7 and Record 9 all analyse aspects of the relationship between the governments of Ontario and Quebec and their respective business communities, as well as the possible effects of Quebec independence on these relations and on the government of Ontario. Therefore, I find that the first requirement has been met with respect to these records.

Record 10 is about the relations between Ontario and its investors. It is possible that Ontario's relations with its creditors could affect relations between the Ontario and Quebec governments in the event of Quebec independence, but I am not satisfied that Record 10 is sufficiently linked to relations between the governments of Ontario and Quebec to meet the first requirement. (Nor, in my view, is the link sufficient to establish that disclosure of the record "could reasonably be expected to prejudice" relations with another government under the second requirement.) I find that Record 10 is not exempt under section 15(a).

Record 11 deals with possible relations between the governments of Quebec and Canada. Since section 15(a) refers to relations between Ontario (or an institution under the Act) and another government, I find that Record 11 does not meet the first requirement. Also, given the contents of the record and the fact that they have, to some extent, already been published elsewhere, I find that the possibility that disclosure of Record 11 could affect Ontario's relations with Quebec or the federal government is not sufficient to justify a conclusion that disclosure "could reasonably be expected to prejudice" relations with another government under the second requirement. I find that Record 11 is not exempt under section 15(a).

The next question to address is whether Records 1-7 and Record 9 meet the second requirement. The Ministry has made detailed submissions concerning the impact of disclosure on its relations with Quebec in the event of a "Yes" victory in a referendum on Quebec independence. The Ministry submits that disclosure would compromise its ability to successfully conduct the negotiations with Quebec which would be a necessary result of a "Yes" victory.

The appellant submits that research conducted by civil servants does not bind the government, nor does it represent the views of the government, and that therefore, a reasonable expectation of prejudice has not been established. However, in this case, the records set out detailed analyses of contracts and other relations with the government of Quebec, with suggested Ontario positions in the event of a "Yes" victory in a referendum on Quebec independence. This is standard practice in the development of government policy, and analyses of this kind are frequently the basis of such policies.

I am satisfied that, in the event of a "Yes" victory, disclosure of Records 1-7 and Record 9 would be prejudicial to the Ontario government's position in negotiations between Ontario and Quebec which would undoubtedly occur as a result of this development. Could it be said, in turn, that this could reasonably be expected to prejudice the relationship between the governments of Ontario and Quebec? In my view, the following comments by Inquiry Officer Anita Fineberg in Order P-961 are relevant to this question:

In many instances, each party to such negotiations will have different interests in the relationship which it seeks to protect. One party may wish the negotiations to proceed in a certain manner, with specific issues as priorities. The other party may well have its own negotiating agenda and strategy. Thus, while disclosure of certain information may be beneficial or not affect the position of one of the parties, it could negatively affect that of the other which, in turn, could prejudice the relationship between the two parties.

Moreover, it is not only the interests in the negotiating relationship which may differ between the parties, but also the policy considerations which each brings to the negotiating table. Again, because the policy agendas of the negotiating parties may not coincide, disclosure of certain information could negatively impact on one party and not on the other. This, in turn, could result in prejudice to the relationship between the parties.

I agree with this reasoning and adopt it for the purposes of this order. In a way similar to that explained by Inquiry Officer Fineberg in Order P-961, I find that, in the event of Quebec independence, or a "Yes" victory in a referendum on that subject, harm to Ontario's negotiating position could reasonably be expected to prejudice the relationship between the governments of Ontario and Quebec.

A remaining question is whether there is a reasonable expectation that such negotiations will ever occur; if they do not, the harm envisaged by the Ministry as a result of disclosure will not take place. It is not possible to predict, with certainty, whether or not Quebec will ever vote "Yes", or become independent, and thus trigger the negotiations to which the Ministry has

referred. However, in the circumstances, my assessment is that if the records were disclosed, there would be a reasonable expectation of prejudice to intergovernmental relations between Ontario and Quebec. Therefore, since Records 1-7 and Record 9 meet both requirements for exemption under section 15(a), they qualify for exemption under this section.

ECONOMIC OR OTHER INTERESTS

The Ministry relies on the part of this exemption found in section 18(1)(d) of the Act, which states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

The Ministry claims that this section applies to all the records at issue. Its submissions in support of this claim are similar to those advanced under section 15(a). Briefly stated, the Ministry takes the position that a “Yes” vote in any future referendum on Quebec independence would lead to considerable economic upheaval, requiring action by the Ontario government, and that disclosure of the records would make it more difficult for the government to avoid negative economic consequences for Ontario. The Ministry’s representations in this regard are detailed. I have decided not to include any further information about them in order to avoid disclosing the contents of the records.

I am satisfied that disclosure of any of the records at issue could reasonably be expected to be injurious to the ability of the government to manage the economy of Ontario, in the event of Quebec independence or a “Yes” victory in a referendum on that subject. As noted previously, it is not possible to predict with certainty whether these events will ever occur. Nevertheless, in the circumstances, my assessment is that if the records were disclosed, there would be a reasonable expectation of injury to the ability of the Government of Ontario to manage the economy of Ontario. Therefore, I find that all the records at issue are exempt under section 18(1)(d).

PUBLIC INTEREST IN DISCLOSURE

As noted earlier, the appellant claims that the “public interest override” in section 23 of the Act applies in this case. This section states:

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

In Order P-241, Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. 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 the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments and I have followed the procedure advocated by Commissioner Wright by conducting an independent review of the exempted records. Later in this discussion, I will set out the findings which resulted from this review.

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The Ministry submits that:

... it is not enough to establish a public interest in regard to a general issue. To fall within the parameters of section 23, the compelling public interest must be present with respect to the specific records at issue in the appeal.

The Ministry cites Order P-1210, issued by former Assistant Commissioner Tom Mitchinson, as authority for this interpretation. The Ministry appears to be arguing that members of the public must have identified and expressed a specific interest in a record or records at issue before section 23 can apply. I do not agree with this interpretation, nor do I find that it is supported by Order P-1210. Although the Ministry does not identify which passages in Order P-1210 it relies on in this regard, I surmise that the following is the basis for the Ministry's submission:

However, I find that the appellant has failed to establish that this interest is present with respect to the disclosure of the specific records at issue in this appeal.

In my view, this statement means that a record or records at issue would have to be related to a compelling public interest or section 23 does not apply. I will follow this approach in this order.

Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

As the Ministry points out in its representations:

The break up of a country like Canada would be an unprecedented event and there is no historical example for predicting the economic consequences of same.

The possible consequences of Quebec independence, or a "Yes" victory in a referendum on that subject, have been a prominent feature of discussion and debate in the Canadian media and among members of the public for much of the past two decades. This debate has been characterized by strongly held views, often expressed in an impassioned way. Much of the discussion has focussed on the economic and legal difficulties which could result from Quebec independence, or a "Yes" vote, the potential for a diminished international presence for Canada, and a host of other significant consequences, many of which would clearly affect Ontario and its residents.

In my view, this indicates "strong interest or attention" by the public, and I am therefore satisfied that there is a compelling public interest in disclosure of information about this subject. This compelling public interest relates to the need for informed public discussion.

I am also satisfied that the records at issue **are** related to the compelling public interest I have just identified. I have reached this conclusion because, in the circumstances of this appeal, I believe that disclosure of the records would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard.

Accordingly, I am satisfied that there is a compelling public interest in disclosure of the records at issue.

The next question to address is whether this compelling public interest outweighs the purposes of the exemptions which have been found to apply. This requires an analysis of the purposes of each of the exemptions claimed by the Ministry, since I have found that certain records (or parts) qualify for exemption under each.

Section 13(1)

I have found that portions of Records 1, 6 and 7, and Record 10 in its entirety, qualify for exemption under section 13(1).

In Order 24, former Commissioner Sidney B. Linden indicated that the purpose of section 13(1) was to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure.

As previously discussed, the former Commissioner discussed this exemption further in Order 94, stating that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

I have weighed the compelling public interest I have identified above against the purpose of this exemption. In my view, the real potential for very serious consequences for the Ontario public if Quebec votes "Yes" or becomes independent indicates that the need for informed public discussion is a very important consideration. On this basis, I have concluded that the public interest in disclosure of the information which I have found to qualify under section 13(1) is very compelling. While I recognize that the formulation of government policy in a confidential environment is also an important public policy concern, I have decided that this case represents an instance where this objective must yield to the public interest in disclosure. Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the records at issue are disclosed. For these reasons, in the circumstances of this appeal, I find that the compelling public interest in disclosure clearly outweighs the purpose of the section 13(1) exemption, which therefore does not apply.

Section 15(a)

I have found that Records 1 - 7 and Record 9 are exempt under this section. I have also found that there is a compelling public interest in disclosure of the records.

In this discussion, I must weigh this compelling public interest against the purpose of the section 15 exemption.

In Order P-1202, in the context of a consideration of the possible application of section 23, former Assistant Commissioner Tom Mitchinson commented on the purpose of the section 15 exemption, including a specific reference to section 15(a). He stated:

Section 15 of the Act recognizes that the Ontario government will create and receive records in the course of its relations with other governments, and that individual institutions should have discretion to refuse to disclose records where it is expected that disclosure would result in any of the consequences enumerated in this section. **In my view, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.** (emphasis added)

I agree with this conclusion and adopt it for the purposes of this order.

I have weighed the compelling public interest identified above against the purpose of this exemption. The possibility of a "Yes" vote, or the independence of Quebec, is a political issue of virtually unprecedented importance in the history of the Canadian nation, and has a significant potential impact on the people of Ontario. In my view, the need for informed public discussion of this issue is a very important consideration, and for this reason, the public interest in disclosure is very compelling. I recognize that protecting intergovernmental working relationships is also an important public policy concern. However, I have decided that this case

represents an instance where this objective must yield to the public interest in disclosure. It is also clear that contacts between the governments of Quebec and Ontario will continue, of necessity, even if the records are disclosed. In the circumstances of this appeal, I find that the compelling public interest in disclosure clearly outweighs the purpose of the section 15(a) exemption, which therefore does not apply.

Section 18(1)(d)

I have found that all of the records at issue are exempt under this section. I have also found that there is a compelling public interest in disclosure of the records.

In this discussion, I must weigh this compelling public interest against the purpose of the section 18(1)(d) exemption.

Generally speaking, section 18 is intended to protect certain interests, economic and otherwise, of the Government of Ontario and other government institutions. Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the “ability of the Government of Ontario to manage the economy of Ontario”, I find that section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.

In my view, the inclusion of this reference to the government’s ability to manage the economy has important implications relating to the purpose of this exemption. No democratic government has full control of the economy it supervises, but one can expect that such a government will “manage” the economy using the tools normally available (i.e. legislation, tax measures, grants, agreements, etc.). In considering scenarios which might “be injurious to” the government’s ability to “manage the economy”, I have concluded that many of these would likely be related to some kind of serious threat to Ontario’s economic security. It follows, therefore, that the inclusion of the reference to the government’s ability to “manage the economy” means that this exemption is, among other things, aimed at avoiding or minimizing serious threats to Ontario’s economic security.

The potential economic difficulties for Ontario associated with a “Yes” victory, or Quebec independence, would in my view represent a serious threat to Ontario’s economic security. Minimization of any potential negative effects on Ontario’s economy would therefore represent an important public interest for Ontarians.

In my view, disclosure of the parts of the records which outline Ontario’s strategic plans for dealing with a “Yes” victory, or with Quebec independence, would interfere with the government’s ability to minimize any potential negative effects on the Ontario economy. I find this to be the case despite the fact that the records relate to the referendum held in October 1995, because I am satisfied that similar strategies would be used in relation to a future referendum. In my view, the public interest in minimizing negative economic effects is more important than the importance of informed public discussion, and for this reason, I find that the compelling public interest in disclosure of the information I have just described above does **not** clearly outweigh the purpose of this exemption and section 23 does not apply to it.

Similarly, disclosure of detailed information in the records about the impact of a “Yes” victory, or Quebec independence, on particular sectors of the Ontario economy, would interfere with the government’s ability to avoid negative economic effects, possibly even in advance of any referendum being held. Again, therefore, I find that the compelling public interest in disclosure of this information does **not** outweigh the purpose of this exemption and section 23 does not apply to it.

I have reached a different conclusion about those portions of the records which do not reveal such strategies or detailed information about affected sectors of the Ontario economy, but simply provide information about agreements and other economic relations between Ontario and Quebec and the impact of a “Yes” victory, or Quebec independence, on these relations. In weighing the compelling public interest in disclosure against the purpose of section 18(1)(d) with respect to such information, I have considered the Ministry’s view, expressed in its representations on this exemption, that disclosure of any of the information at issue would compromise the government’s ability to maintain confidence in the Ontario economy. However, in my view, there is a distinction to be drawn between the information described in the last two paragraphs, to which I have not applied section 23, and the remaining information in the records.

In my view, confidentiality of information about the government’s negotiating strategies or detailed information about the affected sectors of the Ontario economy is vital to the government’s ability to protect the Ontario economy, and I have not applied section 23 to it for this reason. However, I have concluded that confidentiality of the remaining information is not as closely linked to achieving this important public interest. Therefore, in the circumstances of this appeal, and in view of the great importance of informed public discussion of this issue, I find that the compelling public interest in disclosure of the remaining information clearly outweighs the purpose of the section 18(1)(d) exemption.

To summarize, I have concluded that section 18(1)(d) applies to portions of the records which reveal strategic plans for dealing with a “Yes” victory or Quebec independence, or detailed information about affected sectors of the Ontario economy, but not to the remainder of the records at issue. Accordingly, I will order the Ministry to disclose the remainder of the records, which provide information about agreements and other economic relations between Ontario and Quebec, and the impact of a “Yes” victory, or Quebec independence, on these relations.

The information which remains exempt under section 18(1)(d) includes parts of Records 1, 2, 3, 4, 5, 6 and 7, and Record 10 in its entirety. This means that the remaining parts of Records 1, 2, 3, 4, 5, 6 and 7 are not exempt under any provision claimed by the Ministry. Section 10(2) of the Act provides for disclosure of those parts of a record which are not exempt, and accordingly, in my view, the non_exempt parts of Records 1, 2, 3, 4, 5, 6 and 7 should be disclosed.

I have also concluded that as a result of section 23, the exemptions claimed by the Ministry do not apply to Records 9 and 11 in their entirety. Accordingly, these records should be disclosed. I have highlighted the information in Records 1, 2, 3, 4, 5, 6 and 7 which remains exempt on the copies of these records which are being forwarded to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 10 in its entirety, and to the parts of Records 1, 2, 3, 4, 5, 6 and 7 which are highlighted on the copies of these records which are being forwarded to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order.
2. I order the Ministry to disclose Records 8, 9 and 11 in their entirety, and the parts of Records 1, 2, 3, 4, 5, 6 and 7 which are **not** highlighted on the copies of these records which are being forwarded to the Ministry's Freedom of Information and Privacy Co_ordinator with a copy of this order, to the appellant by sending copies of the records to the appellant by **June 17, 1997**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed pursuant to Provision 2.

Original signed by: _____
John Higgins
Inquiry Officer

_____ May 27, 1997