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

ORDER PO-2666

Appeal PA-050213-1

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of Community and Social Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. The official decisions of the Federal/Provincial/Territorial Ministers Responsible for Social Services that reflect the parameters of the National Child Benefit (NCB) initiative that were committed to by the province of Ontario, and

2. Any and all amendments to those parameters.

   Please note that I want the actual commitments, and any subsequent amendments, not a summary of the commitments.

The Ministry located the responsive records and issued a decision denying access to them under sections 15(a) and (b) (relations with other governments) of the *Act*.

The requester (now the appellant) appealed this decision.

During mediation the appellant confirmed that she was raising the application of the public interest override in section 23 of the *Act* to the records in question. During this time, the Ministry issued a new decision letter, applying section 12 (Cabinet record) to Record 1 in addition to sections 15(a) and (b).

As no further mediation was possible, the file was moved to the adjudication stage of the appeals process. An adjudicator previously assigned to this file first sought and received the representations of the Ministry. These representations were provided in their entirety to the appellant, and the appellant submitted representations. Following a review of the file, further representations were sought from the Ministry, in part to reply to those submitted by the appellant, and in part to address certain specific questions regarding the possible application of section 12. The Ministry declined to provide further submissions, indicating that it would rely solely on those already submitted.

After considering the Ministry's representations, the decision was made to notify all of the other governments identified in the records, and to provide them with an opportunity to address the records at issue. Out of the eleven governments notified (eight other provinces, two territories and the federal government; hereafter the "affected parties"), nine of them (seven provinces and two territories) provided submissions in response. These submissions were shared in their entirety with the appellant, who also responded with additional brief submissions that focused on the application of section 23 of the *Act*.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The records remaining at issue and the exemptions claimed for them are set out below:

Record	Record Description	Decision	Section
1	National Child Benefit Reinvestment Strategy, April 1998	Withheld in full	12, 15 (a), (b)
2	National Child Benefit Performance Measures: Approaches to Measuring and Reporting on Results	Withheld in full	15 (a), (b)
3	National Child Benefit paper		
4	P/T Meeting of Ministers Responsible for Social Services, Toronto Ont. January 13, 1997		
5	P/T Meeting of Ministers Responsible for Social Services, Toronto Ont. January 28, 1997		
6	Final Record of Decisions F/P/T Ministers Responsible for Social Services March 12, 1998 Meeting		
7	National Child Benefit Governance and Accountability Framework (draft Sept. 22/97)		
8	Revised Ontario Positioning Note October 1, 1997		
9	Various recommendations		
10	Ontario Positioning Note (revised September 29, 1997)		
11	National Child Benefit Implementation Timeline		
12	F/P/T Meeting of Ministers Responsible for Social Services October 07, 1997 St. John's, NF		
13	Social Services Minister's [sic] Meeting March 12, 1998 Key Messages		
14	Letter dated March 7, 1997 with attached Final Record of Decisions December 17, 1996		
15	Strategic Overview of October 6/7 of F/P/T Social Services Ministers Meeting		

DISCUSSION:

CABINET RECORD

The Ministry claims that Record 1 qualifies for exemption under the specific provision in section 12(1)(b). Although the Ministry does not explicitly refer to the introductory wording of section 12(1), I have also considered whether it applies in the circumstances, as it is a mandatory exemption.

Section 12(1)(b) reads:

> 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,
>
> > a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

Any record that would reveal the substance of deliberations of 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) [Orders P-22, P-331 and PO-2320].

If disclosing a record that had never been placed before the Executive council, ie. Cabinet or its committees, would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld [Orders P-226, P-293, P-331, P-361 and PO-2320].

Referring to Order P-361, the Ministry made the following submissions in support of its position that Record 1 qualifies for exemption under section 12:

> Although the record in question did not go to Cabinet, it was created for the purpose of presenting it to Cabinet, contains recommendations intended for Cabinet and was used to brief the Minister. In addition, the record was brought to a meeting with Cabinet Office where the intent was to discuss the recommendations brought to Cabinet on this issue.

In responding to the Ministry's representations on this issue, the appellant reviews the decisions in Orders P-361, P-226 and P-293, referred to above, and acknowledges that in each of these cases, documents that were prepared for but not presented to Cabinet were exempted from disclosure. The appellant concedes that this supports the Ministry's position to a point. However, the appellant notes further that in each of these cases, there was evidence that Cabinet had engaged in some deliberations and discussions, and that the exempted documents had played a role in shaping the deliberations.

With respect to Record 1, the appellant submits:

> …there is no indication that the record figured in the deliberations of the Executive Council. In fact, based on the submissions of the Ministry, there is no indication that the Executive Council engaged in any deliberations on the subject matter of the document at all…
>
> The Ministry has offered no support for its position that disclosure of this record would reveal the substance of Cabinet deliberations, or allowing the drawing of accurate inferences about the nature of such deliberations. The Ministry acknowledges that Record 1 "was not considered" by Cabinet. There is no indication that the document or the subject matter of the document was the subject of any discussions or deliberations by Cabinet. As there was apparently no discussion of the subject matter, its disclosure would not reveal the substance of deliberations. A document can only reveal the substance of deliberations *if there were deliberations*. The Ministry's submission offers no evidence of any deliberations or discussions. As such Record 1 has no special status and does not qualify for the exemption. [emphasis in the original]

In the supplementary Notice of Inquiry sent to the Ministry, the Ministry was explicitly asked to provide additional details regarding the application of section 12(1) and 12(1)(b) to Record 1. In particular, the Ministry was asked to provide details regarding the Cabinet meeting to which the record was taken but not presented, including the date of the Cabinet meeting, the purpose of the meeting, whether the subject matter of the NCB was discussed at this meeting and any other relevant details to support its original submissions. The Ministry was also asked to attach supporting documentation to establish the facts of its claim.

As I noted above, the Ministry declined to provide further submissions in response to the appellant's submissions or in response to direct questions on this issue, stating, "[t]he Ministry's position is stated in our previous representations … and at this time, we have nothing further to add."

I have reviewed Record 1 and find nothing on its face to indicate that it was prepared and/or viewed or considered by Cabinet or, for that matter, by the Minister. The Ministry's submissions regarding this issue are not sufficiently detailed, and fail to establish that Cabinet deliberated on the issue, or that disclosure of this record would reveal the subject matter of any deliberations of Cabinet relating to the NCB. Consequently, I am not satisfied that Record 1 qualifies for exemption under section 12(1)(b) or the introductory wording of this exemption, and I find that the exemption does not apply.

RELATIONS WITH OTHER GOVERNMENTS

General principles

The Ministry claims the application of the discretionary exemptions in sections 15(a) and (b) to all of the responsive records. These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Section 15(a): prejudice to intergovernmental relations

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

> 1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

The Ministry's representations

The Ministry claims that Records 1, 8, 13 and 15 set out the particulars regarding Ontario's negotiation position and, therefore, fall under section 15(a). The Ministry takes the position that disclosure of these records would: "a) prejudice the ongoing work of existing federal/provincial/territorial [hereafter F/P/T] committees; and b) undermine the conduct of F/P/T relations in general, in that governments will be less willing to share information."

Later in its representations the Ministry states:

> It is the Ministry's position, that disclosure of the type of records which are at issue in this appeal would call into question the long standing practice and understanding reached among the federal government, the provinces and territories concerning meetings, exchange of information, preparation of common briefing notes, and exchange of documents. All documentation prepared for [F/P/T] Ministers' meetings is always shared on a confidential basis. If the records at issue in this appeal are disclosed, this would severely prejudice relations with the federal government in addition to other provincial and territorial governments and inhibit Ontario's ability to participate in future [F/P/T] meetings and exchanges of information and documents.

The appellant's representations

In her representations on the issue of the application of section 15(a), the appellant argues that the records in question do not relate to intergovernmental relations and, in the alternative, if they do relate to intergovernmental relations, that their release would not result in prejudice to those relations. The appellant states:

> Records 1, 8, 13, 15, as well as Record 10 (which may properly belong in this group given the apparent nature of the document), appear to outline only the position of the government of Ontario. They do not appear to reflect in any meaningful way the substance of intergovernmental negotiations or positions.
>
> In cases where documents have been exempted under 15(a) said documents have been found to contain very detailed information concerning the positions, policies, etc., of other governments - both federal and provincial. It is this aspect that lends them their "intergovernmental" character.

The appellant refers to Order PO-2249 in support of this position, and states that that order exempted very detailed and sensitive information arising from meetings of the provincial and territorial medical directors on billing, coverage under provincial health plans and future policy development. The appellant also refers to Order PO-2247 in which information from the F/P/T Committee on Genetics and Health was exempted. The appellant states that the detailed information found to qualify for exemption in that order was of a sensitive nature, and reflected the possible policy positions of the different provinces. In addition, the appellant refers to Order P-1137, which exempted communications and correspondence between the Deputy Ministers of Health for the provinces, in which the perspectives of other provinces relating to compensation for HIV-infected victims through the blood system were incorporated.

The appellant then states:

> The description of the Records in question gives no indication that the positions of other governments are at all reflected or incorporated therein. The exemption under [section 15(a)] is present to allow governments to exchange information and develop their own policy positions, but cannot extend to documents which contain no such information. These documents appear to relate uniquely to the position of the government of Ontario and, as such, are not "intergovernmental" in nature, and fall outside the exemption under [section 15(a)].

The appellant then argues that, in the alternative, if the records do relate to intergovernmental relations, their release would not prejudice those relations. The appellant states:

> The Ministry claims prejudice to on-going work of the [F/P/T Committee], citing a conversation with the federal government where "it was stressed that the negotiation between the [F/P/T] governments is on-going and that release of these records could jeopardize future negotiations."
>
> Although the NCB program continues to operate, and the provincial and federal government have had an on-going relationship on the NCB for approximately nine years, the negotiations were concluded and agreements were signed in 1997-1998. To the best of our understanding, there are no on-going negotiations.
>
> The Records in issue date back to this initial period, 1997-1998. They are dated and do not relate to on-going, current work of the … committee.
>
> The Ministry also claims prejudice to [F/P/T] relations in general, arguing that governments will be less willing to share information as a result of the disclosure of the records in question. It claims that the "long-standing practice and understanding reached among the federal government, the provinces and territories concerning meetings, exchanges of information, preparation of common briefing notes, and exchange of documents" is jeopardized, and appears to rely on the conversation with the federal government in support of this claim.

> … the documents do not appear to be of such nature as to contain information about the positions of the federal government. Again, the records are dated, and do not reveal the current substance of any negotiations that might be occurring.

The appellant then refers to the standard set out above, requiring parties opposing disclosure to provide "detailed and convincing" evidence to establish "a reasonable expectation of harm". The appellant concludes:

> … the statements of the Ministry and the federal government that disclosure "could" affect relations, does not provide detailed and convincing evidence that could reasonably lead to harm. Given the nature of the documents, their age, and the lengthy relationship between the levels of government, prejudice would be a remote possibility.

The affected parties' representations

All of the affected parties who provided representations took the position that their participation in the F/P/T meetings was with the understanding and expectation that the confidentiality of any information provided to the group during the course of the meeting would be maintained. Many of the affected parties refer to the specific sections of the access to information legislation which governs them, and state that their legislation allows them to exercise their discretion to withhold records of this nature, if a request had been made for those records. They state that their expectations would be the same for requests made to other governments. Most of the affected parties also argue that the release of these records would be harmful to intergovernmental relations or negotiations and would reveal information received in confidence from a government, council or organization.

In addition to the positions taken by all of the affected parties who provided representations set out above, a number of the affected parties also provided additional representations in support of their position that the records ought to be exempt under section 15(a) of the *Act*. The excerpts from some of the affected parties' representations set out below capture the positions taken in support of their views that the records ought not to be disclosed:

> The [affected party] is concerned about the precedent that the release of these records would create. If it becomes clear that records arising from F/P/T Meetings are routinely releasable without the consent of all the parties, the Ministry submits that it is likely that this [affected party] …, would become more circumspect in their interactions with other governments through F/P/T Meetings. The [affected party] would limit the information that they are willing to share with the Province of Ontario and/or its ministries in the future.

> … The [affected party] takes the view that no one government has the authority to release these records as they are considered records "of the forum". By taking this approach, each party to the discussions can contribute fully and frankly. The

[affected party] can confirm that their current practice is to treat as confidential any records that arise through an F/P/T Meeting.

The [affected party] submits that the only way that it would be appropriate for [the Ministry] to release the records at issue would be with the consent of all of the governments who were involved with the NCB negotiation and agreement. At this time, the [affected party] does not consent to their release. The [affected party] respectfully requests that the Commissioner or her delegate uphold [the Ministry's] decision to deny the appellant access to the records at issue.

… there has been a long standing practice and understanding amongst representatives that meetings of the F/P/T Ministers are held in confidence to allow candid discussions of all issues and records before the Ministers. Documentation submitted by the affected Party is provided on a confidential basis. This practice of confidentiality extends beyond the scope of the [NCB] initiative.

… should the records under inquiry be disclosed, the harm to the working relationship of the F/P/T Ministers could include [the affected party's] willingness to participate in an open and frank manner in the future and would have an impact on the types of records [the affected party] may choose to share with the Ontario government or other jurisdictions. This may harm not only the [NCB] initiative but any other initiatives within the purview of the F/P/T Ministers.

… these records contain highly sensitive information which must remain confidential. These records have been created and presented for information as part of the decision making process. The release of such information has the potential to unfairly damage the deliberative process government requires as part of effective decision making.

The records … summarize the discussions and decision-making process between the provinces, territories, and the federal government on the NCB initiative. It is [the affected party's] position that the disclosure of these records will challenge the consistent practice and understanding that all documentation prepared for F/P/T Ministers' meetings are shared on a confidential basis. Likewise, our former Minister attended the meetings that occurred on the NCB initiative with the understanding that information sharing would be protected under the provisions of access and privacy legislation on intergovernmental relations. If the

> records at issue in the appeal are disclosed, future associations and exchanges of [the affected party] on intergovernmental matters may be hindered.
>
> ---
>
> The ability of governments in Canada to share information and develop common positions in confidence is critical to our ability to work together successfully. As Sections 15(a) and 15(b) of your legislation recognize, granting public access to information contributed in confidence, or to positions taken at intergovernmental meetings by another government, would undermine this working relationship.
>
> ---
>
> If information prepared for F/P/T meetings is released, it would discourage participants from preparing adequately, contributing freely or identifying issues of concern. This type of disclosure would impair relations now and in the future - causing harm or detriment to negotiations, general associations and exchanges.
>
> … My officials have consulted with [two other departments of the affected party]. It is our view that the proposed disclosure could jeopardize F/P/T relations of jurisdictions working together in partnerships, emphasizing open communications between partners. The release of these background discussions and working papers would undermine the working relationships needed for this process to be effective.
>
> ---
>
> Where information is not been made public but is supplied by [the affected party] in confidence, it is assumed that we can also trust other governments to respect that confidence.
>
> ---
>
> To maintain the effectiveness of the Forum of Social Services Ministers, it is necessary that Ministers and Deputy Ministers are able to have a free exchange of ideas at meetings and consider policy option papers in confidence. I am concerned that the release of these types of records would be harmful to the ongoing and future work of this federal/provincial/territorial forum.

A number of the affected parties also provided representations specific to certain records. Most of the affected parties did not provide representations on the application of section 15 to Records 8, 13 and 15, recognizing that these records were records of the Ontario government. However, one affected party does address those records, and states:

> … records 8, 13 and 15 reveal the negotiating position of Ontario. This province is concerned that sharing this type of information could prejudice the ongoing and future work of existing F/P/T discussions and negotiations. … it is [the affected party's] position that these records not be released as they [reveal advice or recommendations].

With respect to the other specific records at issue in this appeal, a number of affected parties addressed these records specifically. One affected party stated:

> These documents include speaking points and key messages, agenda items, discussions of implementation, measurements and reporting (Records 2, 3, 8, 13, 15).
>
> The release of confidential records describing the results of these meetings would also undermine confidence in the meetings and discourage participation. This applies to records of decision (Records 4, 5, 6, 12, 14) and also other records types, such as discussions of implementation timelines, governance and accountability framework and review of public responses (includes Records 3, 7, 10 and 11).
>
> Since the work related to the development and implementation of the National Child Tax Benefit involved a series of meetings, the results of previous meetings are often used in preparation for the next meeting - so both preparation and results are in many of the same documents.

Another affected party stated as follows, after reviewing the access issues in the legislation which applied to it:

> Following application of appropriate exceptions, [the legislation which applies to this affected party] requires me to insist that Records 4, 5, 6, 12, 14, and 15 (various meeting record of decisions) be withheld in full. As a reason for withholding these records I point to the discretionary exception [in this affected party's legislation] that states disclosure of such records may be harmful to intergovernmental relations. The exception is discretionary, not mandatory however I believe these records contain highly sensitive information which must remain confidential.
>
> In regards to Records 1, 2, 3, 7, 9, and 11, I also recommend these records be withheld in full. After a review of these records which detail various options for accountability frameworks, strategies, reporting approaches, tools and techniques, I believe these records fall under the category of advice …. This exception [in the legislation which applies to this affected party] is discretionary, not mandatory however I believe these records contain highly sensitive information which must remain confidential. These records have been created and presented for

> information as part of the decision making process. The release of such information has the potential to unfairly damage the deliberative process government requires as part of effective decision making.

Another affected party states:

> The records requested include several documents of particular concern [to this affected party] since they were jointly prepared by F/P/T, and P/T governments to support decision-making or report joint decisions of F/P/T Ministers at intergovernmental meetings. Specifically we are concerned about release of Records 2-7 (inclusive), 9, 11, 12, and 14.

Another states:

> The remaining records, namely 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 14, also fall under section 15 as they could undermine the conduct of [F/P/T] relations.

Lastly, one of the affected parties provided lengthy representations which specifically referenced previous orders of this office. It refers to those orders in support of its position that the records at issue in this appeal ought not to be disclosed. It begins by referring to Order P-236 and, after reviewing the representations in that order, quotes as follows from its finding:

> … disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations. The relations which would be prejudiced are intergovernmental relations between the institution and an agent of another government, the British Lord Chancellor's Department. Further, the expectation that prejudice would arise as a result of disclosure is reasonable.

The affected party then states:

> The Affected Party submits that the issues in this appeal are similar. The NCB Governance and Accountability Framework sets out "[t]his process emphasizes transparent and open communications between partners, de-emphasizes formalized, bureaucratic agreements between orders of government, and accentuates accountability to the general public". The Framework goes on to address objectives, operating principles, partnership between Governments, problem solving and accountabilities. Some of the key ingredients are listed as transparency in the actions of all partners and open, timely communication between partners. As outlined in Order P-236, if records created and shared with an implicit understanding of confidentiality were to be disclosed, it would have a chilling effect on the open communication between F/P/T Ministers which is so vital to the forum's proper functioning.

Ontario's Information and Privacy Commissioner's Order PO-2249 is directly on point with this Appeal. In that Appeal, the appellant sought access to the minutes and agendas for the meetings of Provincial and Territorial Medical Directors. Notice was provided to other provinces and territories as affected parties. Ten [of the affected parties] … provided representations and all of them, objected to the release of the information in the records. Page 4 of Order PO-2249 outlines [identified] objections to disclosure of the information. Those same objections are relevant to [the current appeal]. In Order PO-2249, the Adjudicator at page 5 stated:

> … I am satisfied that the records relate to intergovernmental relations.

The Adjudicator went on to state:

> I am also satisfied that disclosure of much of the information in the records could reasonably be expected to prejudice the conduct of intergovernmental relations. The general purpose of the meetings is the exchange of information about payment for medical services under the different provincial and territorial health insurance plans. I accept the representations of the Ministry and other provinces and territories that during the course of the discussions, government representatives provide information about negotiations, funding and management issues related to their plans. Although much of the information provided is factual, in the sense of reporting on the treatment of particular medical services under the different health insurance plans, participants may also provide information that departs from the official position of the provinces they represent, or that reports on ongoing negotiations or shares initial policy thinking or planning.
>
> I also accept that the participants in these meetings have a shared expectation that their discussions are 'in camera', and this permits them to be frank in providing their views and information on the issues discussed. The minutes are quite detailed in recording the input of the provincial and territorial representatives on the matters under discussion. I find that disclosure of the information in the records could reasonably be expected to result in less candour at the meetings, less sharing of information and generally less of an inclination to continue with these informal exchanges.
>
> The representations of the provinces and territories establish that these meetings are a valuable means for these governments to share information and make use of informal working relationships

> to assist in developing their own policies on payment for medical services. Disclosure of the proceedings of the meetings could reasonably be expected to undermine these relationships and, therefore, to prejudice the conduct of intergovernmental relations.
>
> I am therefore satisfied that section 15(a) would apply to exempt disclosure of the agendas, minutes and supporting material found in the records.

The Adjudicator in Ontario's Information and Privacy Commissioner's Order PO-2369-F also considered … section 15(1)(a). At page 9:

> [An affected party] provided detailed representations capturing the concerns raised by the other governments.... [The affected party] considered and expected that its participation on [the Canadian Blood Committee] would be based on confidentiality, taking into consideration what it refers to as the long-standing practice and tradition that materials submitted to or prepared for intergovernmental committees are confidential unless otherwise stated.
>
> [The affected party] submits that the records contain significant confidential policy and financial information. The [Canadian Blood Committee] served as a forum for provinces to share information regarding various intergovernmental issues related to the national blood system in Canada.... It is [the affected party's] view that disclosure of the information will reveal information received from [the affected party] or its agents, the disclosure of which will harm intergovernmental relations between Ontario and [the affected party]. It submits that the ability to share information and conduct frank and open discussions with its counterparts in Ontario and other jurisdictions will be harmed because not respecting the confidentiality of intergovernmental information will make the process of cooperative work and deliberation on all future committees more difficult. [The affected party] states that disclosure will set a precedent that will jeopardize the functioning of all F/P/T committees and working groups.

The affected party then refers to page 13 of the order, which refers to and quotes from the decision in Order PO-2249. The affected party goes on to state:

> It is noted that Order PO-2369-F recognized the unique circumstances of that Appeal, where the issues had been so publicly and extensively scrutinized that the

usual climate of confidentiality no longer applied to the issues. Notwithstanding the unique circumstances of that Appeal, the Adjudicator stated at page 14:

> What remains is the possibility that disclosure of the records will affect the general willingness of provincial and territorial governments to engage in intergovernmental relations for the public benefit. It is this more general type of prejudice that is identified in the representations of the objecting provinces and territory. [An affected party's] submission, for instance, states that disclosure will set a precedent that will jeopardize the functioning of all F/P/T committees and working groups.

The appellant's reply representations

Although the appellant's reply representations focus on the public interest override in section 23, the appellant briefly addresses the representations made by the affected parties on the application of section 15. The appellant refers to the evidentiary standard set out above and then states:

> While the responding provinces and territories have alluded to a potential impact on intergovernmental relations, it is the position of the appellant that this is insufficient to meet the evidentiary standard required to apply the exemption.

Analysis

I have carefully examined the records at issue in this appeal, as well as the representations of the parties. In my view, section 15(a) applies to some of the records at issue in this appeal, but does not apply to all of them.

As identified above, in order for a record to qualify for exemption under that section, the parties must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

The representations of the parties in support of the application of section 15(a) to the records, particularly the representations of some of the affected parties, provide significant information about the expectations of the provinces and territories involved in the F/P/T meetings. They identify the confidentiality expectations that were held by their representatives when they attended the meetings, and state that the release of the records at issue would be harmful to intergovernmental relations or negotiations and would reveal information received in confidence from a government, council or organization.

Many of the representations of the parties are general in nature, and state that the disclosure of the records "may" prejudice the conduct of intergovernmental relations, or "could" result in such prejudice. If this was the extent of the representations received from the parties, I would agree with the appellant that representations of that nature would not likely be sufficiently "detailed and convincing" to find that section 15(a) would apply. However, some of the affected parties provided more cogent information about what would occur if the records at issue were to be disclosed.

One of the affected parties specifically stated if records arising from F/P/T Meetings are routinely releasable without the parties' consent, that affected party "would limit the information that they are willing to share with the Province of Ontario and/or its ministries in the future". Another affected party stated that if the records were to be disclosed, the harm to the working relationship of the F/P/T Ministers could include that party's willingness to participate in an open and frank manner in the future, and would "have an impact on the types of records [that affected party] may choose to share with the Ontario government or other jurisdictions". A third affected party referred to the fact that governments in Canada share information and develop common positions in confidence, and that disclosure of information contributed in confidence, or to positions taken at intergovernmental meetings by another government, would undermine this working relationship. Another affected party stated that disclosure "would discourage participants from preparing adequately, contributing freely or identifying issues of concern", would "impair relations now and in the future" and that the release of "these background discussions and working papers would undermine the working relationships needed for this process to be effective".

Based on these specific representations of the affected parties, which state that disclosure of the records would negatively impact the conduct of these affected parties in intergovernmental meetings, I am satisfied that some of the records contain information that qualifies for exemption under section 15(a).

However, some of the representations of the parties suggest that, as the records at issue relate to these intergovernmental meetings, all of the information in all of the records ought to qualify for exemption under section 15(a). I do not accept this approach to the application of this exemption. Section 15(a) applies to "a record" where the disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution. The onus is still on the parties claiming the exemption to satisfy me that the identified harms would result from the disclosure of the record or part of a record (See, for example, Order P-2191). Taking this approach, I find that some of the records at issue do not qualify for exemption under section 15(a).

In the first place, a number of the records at issue originated with the government of Ontario. Some of these records appear to have been prepared by Ontario and simply reflect the position of Ontario regarding issues and decisions facing Ontario, arising from the F/P/T meetings. In my view, records that relate directly and exclusively to Ontario and its approach to identified issues,

and which do not reveal or discuss intergovernmental matters, do not qualify for exemption under section 15(a).

In addition, a few of the records remaining at issue are general position records which have essentially already been made public on the NCB's public website. In my view, notwithstanding the representations of the parties, I am not satisfied that disclosure of certain records which are essentially available to the public on a public website, could reasonably be expected to result in the harms set out in section 15(a).

With this in mind, I make the following findings:

Records 4, 5, 6, 12 and 14

These records contain a summary or review of the discussions or decisions made at the F/P/T meetings. Because of the nature of these records, I am satisfied that they "relate to intergovernmental relations". In addition, based largely on my review of these records and the specific representations of the affected parties set out above, I am satisfied that the disclosure of these records could reasonably be expected to prejudice the conduct of intergovernmental relations.

Records 3, 9 and 11

These records contain either a review of the discussions of the F/P/T meetings (Record 3) including a summary of various options considered, as set out in an appendix, or contain information about "next steps" to be taken (Records 9 and 11). In the circumstances, I find that disclosure of these records would reveal discussions or decisions made at the F/P/T meetings, and that their disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations.

Records 2 and 7

Record 2 is a document entitled "National Child Benefit Performance Measures: Approaches to Measuring and Reporting on Results." Record 7 is a draft of a document entitled "National Child Benefit Governance and Accountability Framework". Copies of these documents, which are substantially similar to the ones at issue in this appeal, are also available to the public. Because these records have already been essentially disclosed, I am not satisfied that they qualify for exemption under section 15(a), as I find that disclosure could not reasonably be expected to prejudice the conduct of intergovernmental relations.

Record 1

On my review of Record 1, I find that although it appears to have been prepared as a result of the intergovernmental meetings, the record itself does not relate to intergovernmental relations. Rather, it contains decisions and courses of action (or proposed courses of actions) taken by

Ontario as a result of the meetings. In my view, this record does not relate to intergovernmental relations.

Even if Record 1 were to relate to intergovernmental relations, in my view the disclosure of this record could not reasonably be expected to prejudice the conduct of intergovernmental relations. As identified earlier, this record reflect Ontario's position and decision-making processes, and I am not satisfied that it qualifies for exemption under section 15(a).

Records 8 and 10

Records 8 and 10 appear to have been prepared by Ontario, and these records contain decisions and courses of action (or proposed courses of actions) taken by Ontario as a result of the identified meetings. Even if these records were to relate to intergovernmental relations, in my view the disclosure of most of the information in these records could not reasonably be expected to prejudice the conduct of intergovernmental relations. As identified earlier, these records reflect Ontario's position and decision-making processes and (with the exception of two small portions) I am not satisfied that they qualify for exemption under section 15(a).

The two exceptions are short excerpts from page 1 of Record 8 and page 1 of Record 10, which reveal a position taken by an identified provincial government. In my view, because these excerpts contain the position taken by a particular provincial government, I find that these two excerpts "relate to intergovernmental relations" and that disclosure of them could reasonably be expected to prejudice the conduct of intergovernmental relations. However, the remaining portions of these records do not, in my view, qualify for exemption under section 15(a).

Records 13 and 15

Records 13 and 15 also appear to have been prepared by Ontario, however, both of these records contain specific information about identified F/P/T meetings. Record 13 contains a list of "Key Messages" from an identified Social Services Ministers Meeting, and Record 15 is a "Strategic Overview" of another identified F/P/T meeting.

In the circumstances, and because these records contain information or summaries of identified F/P/T meetings, I find that these two records "relate to intergovernmental relations". In addition, with the exception of one part of Record 13, I find that the disclosure of the information in these records could reasonably be expected to prejudice the conduct of intergovernmental relations. These records contain the results of identified meetings, and Record 15 includes references to the specific position taken by various affected parties involved in these meetings. From my review of these records, and based on the representations of the affected parties set out above, I am satisfied that these records qualify for exemption under section 15(a).

The one exception to this is the portion of Record 13 which contains specific references to Ontario. Because this small portion of Record 13 relates exclusively to Ontario, I find that its

disclosure could not reasonably be expected to prejudice the conduct of intergovernmental relations.

In summary, I find that Records 3, 4, 5, 6, 9, 11, 12, 14 and 15, the first part of Record 13, and two small portions of Records 8 and 10 qualify for exemption under section 15(a), but that Records 1, 2, 7, the last section of Record 13, and the remaining portions of Records 8 and 10 do not qualify for exemption under section 15(a).

Section 15(b): information received in confidence from another government

Section 15(b) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Representations

The Ministry states:

> The … records [including Records 2, 7, and 10] were prepared by the federal government and discussed with other provinces and territories, as a summary of discussion between provinces, territories and the federal government. Section 15(b) clearly applies to these records.

A number of affected parties identify their position that Records 2 and 7 were "jointly prepared" by F/P/T and P/T governments to support decision-making or report joint decisions of F/P/T Ministers at intergovernmental meetings. One affected party points out that its representatives participated in the meetings (including preparation and follow-up) and that confidential input from its Minister was included in the resulting positions, comments and decisions endorsed by the participants. Another affected party states that disclosure "would reveal information about [the affected party's] strategic position on issues that were before the forum."

As noted above, the federal government did not provide representations in response to the invitation to do so.

Finding

As identified above, I have found that Records 3, 4, 5, 6, 9, 11, 12, 14 and 15, and portions of Records 8, 10 and 13 qualify for exemption under section 15(a), and it is not necessary for me to review the possible application of section 15(b) to these records or portions of records.

With respect to the records or portions of record which I have found do not qualify for exemption under section 15(a) (that is, Records 1, 2, 7 and portions of Records 8, 10 and 13), I am not satisfied that their disclosure could reasonably be expected to reveal information received in confidence from another government or its agencies by an institution.

As identified above, Record 1 and the relevant portions of Records 8, 10 and 13 all relate to information about Ontario.

It is possible that records prepared by or relating to the Ontario government may, in certain circumstances, reveal information received in confidence from another government. For example, in finding that Record 15, and portions of Record 8 and 10, qualified for exemption under section 15(a), I found that those records, which appear to have been prepared by Ontario, "include references to the specific position taken by various affected parties" or "reveal a position taken by an identified government". However, on my careful review of Record 1 and the remaining portions of Records 8, 10 and 13, I am not satisfied that their disclosure would reveal information received in confidence from another government or its agencies. On my review of these records, I cannot identify any references to specific positions taken by any identifiable affected parties, nor any information which was received in confidence from another government or agency.

Similarly, on my review of Records 2 and 7 (which are essentially publicly available), I also cannot identify any references to specific positions taken by any identifiable affected parties, nor any information which was received in confidence from another government or agency. The general information contained in these records identifies decisions and approaches which were jointly decided, and I am not satisfied that their disclosure could reasonably be expected to reveal information received in confidence from another government or its agencies by an institution. Although it may be that various parties contributed to the decision, I am unable to identify any

specific information in these records which was received in confidence from another government or its agencies, nor has any party specifically identified any such information to me.

Accordingly, I am not satisfied that section 15(b) applies to any of the records remaining at issue.

Public Interest Override

As identified above, in this appeal the appellant takes the position that there is a compelling public interest in the disclosure of the records, and that section 23 of the *Act* applies. That section 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.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. 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 the citizenry about the activities of their government, 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found not to exist where, for example:

> - a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
> - a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

The appellant's representations

In her initial representations, the appellant states:

> The disclosure of the records in question would serve the compelling public interest of accountability and transparency, particularly in light of the fact that the negotiations were concluded behind closed doors and the agreements have never been released to the public. The release of these records would most certainly shed light on the operations of government, particularly in this area where the process and outcomes have been shrouded in secrecy.
>
> The NCB is a significant public program, with expenditures of $8 billion in 2003-2004 alone, and affecting the lives of 3.1 million Canadian families with 5.6 million children, that has been developed behind closed doors.
>
> There is significant public interest in the goal of combating child poverty, and the justification for the clawback of the NCBS from families on social assistance, as is evidence by the work of such groups as Campaign 2000 and the Coalition Against Child Poverty, and yet there is no way for the public to critically examine the commitments made by governments and evaluate the success of these programs.
>
> Official decisions and activities of the F/P/T Ministers' meetings are disclosed in the form of Official Communiques and News Releases to be found at www.nationalchildbenefit-ca. Given the significance of the decisions on the lives of Canadians, Canadians are entitled to more than a press release. Such an approach does not meet any reasonable standard of transparency or accountability.
>
> The NCB negotiations were conducted and agreements concluded behind closed doors. As discussed above, increasingly, these types of negotiations are supplanting the legislative process and are resulting in decisions that have profound impacts on the lives of Canadians, without giving them the right to participate or access the agreements reached and documents relied on.
>
> Governments cannot be permitted to legislate behind closed doors and there is an overwhelming public interest in the release of the records under section 23 of the *Act*.

In her subsequent representations, the appellant again refers to the application of section 23. She also refers to sections of access to information legislation in other Canadian jurisdictions which permit disclosure of documents relating to intergovernmental relations and confidential information after a period of time. She then states that, conversely, Ontario has determined that

it may be appropriate to release records relating to intergovernmental affairs at any time, if there is a clear public interest in doing so. She then states:

> The government has made a decision to accept the risks associated with disclosure; that is, possible harm to intergovernmental relations, rather than run afoul of principles of democratic governance.
>
> This is one such instance where the rights of citizens to access records and documents must take precedence over the confidentiality interests of governments, given the magnitude of expenditures and the impact on the lives of Canadian families with children.
>
> Further, many of the documents requested are already a decade old. It is the submission of the appellant, that the impact on intergovernmental relations will likely be minimal, but that the on-going impact to the public is great and outweighs these concerns. Withholding the foundational documents of the NCB initiative means that the public is not and cannot critically assess the actions of government undertaken in its name and for its benefit. Public participation - a critical element in the democratic process - is absent. Public confidence and accountability can only be ensured by disclosing the documents requested.

Finding

In the circumstances of this appeal, I find that section 23 does not apply to override the application of section 15(a) to the records which I have found that section to apply to.

As identified above, previous orders have stated that the first requirement to establish that section 23 applies is that there must be a "compelling public interest in disclosure", and that the word "compelling" means "rousing strong interest or attention" [Order P-984]. Although I accept the appellant's position that there is a public interest in a number of the issues referred to by the appellant (for example, combating child poverty), I am not persuaded that a compelling public interest exists in the records remaining at issue in this appeal. The records remaining at issue, which the appellant characterizes as the NCB's "foundational" documents, record the decisions made a number of years ago in the course of establishing the NCB, as well as decisions and options about other matters, including some of its processes and standards. However, I am not persuaded that there exists a "compelling" public interest in the disclosure of these records sufficient to override the section 15(a) exemption in this appeal.

In addition, although the appellant refers to the NCB's website and states that the material provided to the public "does not meet any reasonable standard of transparency or accountability", on my review of that site, I note that it does include certain "foundational" documents (including certain records at issue in this appeal, as addressed above).

Accordingly, in this appeal, I have not been provided with sufficient evidence to indicate that the public has a compelling interest in the disclosure of the records remaining at issue, and I find that section 23 does not apply.

ORDER:

1. I find that Records 3, 4, 5, 6, 9, 11, 12, 14 and 15, the first part of Record 13, and two small portions Records 8 and 10 qualify for exemption under section 15(a), and uphold the Ministry's decision to deny access to those records.

2. I find that Records 1, 2 and 7, the last section of Record 13, and the remaining portions of Records 8 and 10 do not qualify for exemption, and order the Ministry to disclose those records to the appellant by **June 3, 2008** but not earlier than **May 29, 2008**. I have provided the Ministry with a highlighted copy of Records 8, 10 and 13, highlighting those portions of those records which should **not** be disclosed.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: April 29, 2008
Frank DeVries
Adjudicator