



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

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ORDER PO-2945

Appeal PA10-181

Ministry of Training, Colleges and Universities



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NATURE OF THE APPEAL:

The appellant is a member of the media. He submitted a request to the Ministry of Training, Colleges and Universities (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All correspondence, documents, reviews since Jan 1, 2009 concerning the ministry's choice of service providers in Hamilton as part of the reorganization of Employment Ontario announced Jan. 20, 2010; criteria for receiving funding; including any and all documents on whether providers announced Jan. 20 met the criteria.

The Ministry located responsive records and granted partial access to them. Certain information was withheld pursuant to section 13(1) (advice or recommendations) of the *Act*. The appellant appealed this decision.

During the mediation stage of the appeal, the appellant was provided with an index of the records at issue. He subsequently indicated that he sought access to all of the withheld information contained within the records on the basis of section 13(2) of the *Act*, which requires the disclosure of certain categories of information, even if they qualify for exemption under section 13(1). The appellant also clarified that he did not seek access to the portion of Record #12 that was identified as being non-responsive to his request.

As mediation did not resolve the issues on appeal, the file was transferred to the adjudication stage of the appeal process for an inquiry. I sought and received representations from both parties. I note that the appellant was provided with a complete copy of the Ministry's representations.

RECORDS:

The records at issue in this appeal consist of the withheld information contained within the records listed in the index of records. The records at issue are identified as "Service Provider Fact Sheets", e-mails and "service plans."

DISCUSSION:

General principles

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of

government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, 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.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, 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].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

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

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; 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.); Order

PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

The Ministry provides the following background to assist in understanding the request, and its decision regarding the records at issue:

Employment Ontario is Ontario's integrated employment and training network and is administered by the Ministry of Training, Colleges and Universities. It provides individuals with access to Ontario's employment and training programs and services. Some of these programs and services were formerly delivered by the federal government but were transferred to Ontario under the Canada-Ontario Labour Market Development Agreement in 2007.

The Ministry undertook an Employment Ontario transformation in order to align and integrate the former federal programs and services with the existing provincial programs and services so as to improve access for individuals and employers. One of the Ministry's objectives was to ensure that clients could access the full range of programs and services at any service delivery site and that those sites were accessible to as many potential clients as possible.

The Ministry indicates further that it engaged in an evaluation process to assess the delivery capacity of the service provider organizations. According to the Ministry, the service providers that were selected were notified of their selection in January 2010, with the delivery of services to commence in August 2010.

With respect to the appellant's request, the Ministry notes that it has provided him with the majority of the records responsive to his request. The Ministry asserts that the discretionary exemption in section 13(1) applies to the remaining portions on the basis that the withheld portions either contain advice or recommendations, or their disclosure would reveal the advice or recommendations that were made. The Ministry addresses each category of record in its submissions.

Records 2 – 17

These records are entitled "Service Provider – [Name of Provider]". Each record contains a chart with various categories of information and a text portion containing a discussion of the issues relating to the particular service provider. Only the portion of the chart entitled "Recommended for" for each of the service providers and small portions of the text relating to 11 of these service providers have been withheld. The Ministry submits that the "Recommended for" section represents the advice provide by staff "to assist the Ministry in its decision-making with respect to changes to the delivery of employment services." In addition, the Ministry states that the withheld portions of the text contain "strategic information...that advised the decision-maker on the recommended course of action."

Records 34 and 36

These two records contain e-mail chains between staff of the Ministry. The Ministry asserts that the comments made in them “address concerns and reveal discussion about certain funding options and organizational performances.” The Ministry submits further that these comments “were integral to the recommended further steps in the evaluation and selection of the service providers in question.” The Ministry concludes:

The information in the records [Records 34 and 36] also serves the purpose of providing a suggested way of addressing the identified problem regarding the delivery of employment services. The Ministry requires a system where it can seek advice from civil servants, secure in the knowledge that the advice is confidential.

Records 39 and 40

These two records are charts that set out information about the service providers and the groups they service. Only the last column on Record 39, entitled “ES Service Units Allocation” has been withheld. Record 40 contains six columns that relate individually to each of the service providers offering services in the area. Selected portions of the last three columns have been withheld. These columns are titled, “Status and Rationale”, “Future State and Location” and “Implementation Details.” In some cases, none of the information has been withheld, in some cases all or a portion of one or more of the three columns have been withheld.

The Ministry states that the severed portions of these two records contain information “relating to the issues of establishing and implementing the new Employment Ontario model and proposed action plans for providing employment services under the new model. The Ministry submits that the withheld information was provided to assist the Ministry “in deciding the proper course of action.”

The Ministry submits that the exceptions to the exemption in section 13(2) do not apply in the circumstances. In particular, the Ministry takes the position that any factual information contained in the record cannot be severed from the information that is exempt under section 13(1).

The appellant’s submissions on the issues in this appeal are very brief. He explains why he is seeking the information he requested and indicates that without the withheld information, he is unable to understand the Ministry’s actions or write about the Ministry’s rationale in deciding which organizations in Hamilton were chosen to provide employment services as part of the reorganization of Employment Ontario.

Analysis and Findings

Records 2-17

Having reviewed the records at issue, I am satisfied that the “Recommended for” portions of the charts pertaining to each service provider contains a recommended course of action provided by staff to the decision-maker within the Ministry that would ultimately be accepted or rejected by the person being advised. I find further that disclosure of the withheld portions of the text relating to these service providers would permit an accurate inference to be made regarding the recommendations given. Moreover, certain portions of the text also contain comments that are advisory in nature. Accordingly, I find that the withheld portions of Records 2 through 17 qualify for exemption under section 13(1). Additionally, I find that any factual information contained in the records is so intertwined with the advice and recommendations that it is not severable (Order PO-2097). Accordingly, in the circumstances, the exception to the exemption in section 13(2)(a) is not applicable. Moreover, I find that none of the other exceptions listed in section 13(2) applies to the information withheld in Records 2 through 17.

Records 34 and 36

The withheld portion of Record 34 is a response from Ministry staff to a request from the Director of the Western Region *via* the Regional Program Manager for a finalized plan to be used in the decision-making process. I am satisfied that the comments made in the response are advisory in nature as they refer to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Similar to my findings above, I find that the exceptions in section 13(2) are not applicable in the circumstances.

Record 36 is of a different character. Although I accept that the information was provided by staff within the decision-making process relating to the selection of service providers, I am not persuaded that the withheld portions of the e-mail chain contain advice or recommendations, or that their disclosure would reveal the advice or recommendations given. In the portion of the e-mail that was disclosed, a request was made for examples of certain problems regarding an unnamed service provider or service providers. The information provided in the response is factual information only that sets out examples of the problems that had been identified and how they were dealt with. There is no reference to a named service provider and it is not possible to determine the particular advice that might have been given in that particular case. Accordingly, I find that section 13(1) does not apply to the withheld portions of Record 36. As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

Records 39 and 40

Both of these records have the appearance of action plans that have already been established. However, in its representations, the Ministry states that the plans were drafted as “proposed action plans that were provided to assist the decision-maker in deciding the proper course of action.” In the absence of evidence to the contrary, I accept that the withheld portions of these two records contain a recommended course of action that will be accepted or rejected by the

decision-maker as part of the Ministry's process in establishing employment services under the new model. Accordingly, I find that the withheld portions of Records 39 and 40 qualify for exemption under section 13(1). Similar to my findings above, I find that the exceptions in section 13(2) do not apply in the circumstances.

EXERCISE OF DISCRETION

General principles

The section 13 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry explains that in exercising its discretion to withhold portions of the records, it took into account that it had disclosed a significant amount of information that was responsive to the appellant's request, and that the severed portions represented a "very small percentage of the total volume of pages released." The Ministry indicates that "consideration was given to balancing [the principles of] openness and accountability against the need for the free flow of advice within the government's deliberative process." In addition, it indicates that it considered "the appellant's interest in disclosure and the effect disclosure would have on the internal decision-making processes of the Ministry." The Ministry states that it also considered the impact of disclosure on "future work undertaken by public servants in developing proposals." The Ministry concludes:

[D]isclosing these records would be detrimental to the candid exchange of views by public servants and the organizations that have contracts with other ministries in the Ontario Public Service.

Based on the Ministry's submissions, I am satisfied that it has properly exercised its discretion in withholding portions of Records 2-17, 34, 39 and 40 under section 13(1).

ORDER:

1. I order the Ministry to disclose Record 36 to the appellant by providing him with a copy of this record no later than **February 14, 2011**.
2. I uphold the Ministry's decision to withhold the remaining records.

Original signed by: _____
Laurel Cropley
Adjudicator

January 25, 2011