



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

ORDER PO-2943

Appeal PA09-344-2

Ministry of Finance



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télec: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to sales tax revenue as a result of the implementation of the then proposed Harmonized Sales Tax (HST). The request stated as follows:

Pursuant to [the *Act*], I am requesting the following information from the Ministry of Finance:

- The 2009 Ontario Budget indicates on page 134 the “Conversion of RST [Retail Sales Tax] base to new sales tax base” will generate \$1.7 billion in 2010-11, \$2.2 billion in 2011-12, and \$2.3 billion in 2012-13.
- This is the result of the fact that the increase in sales tax revenue raised from consumers more than offsets the decrease in sales tax revenue raised from businesses (on business inputs).
- For each of the fiscal years listed above (2010-11, 2011-12 and 2012-13), please provide (a) the total forecasted increase in sales tax revenue raised from consumers as a result of the implementation of the HST; and (b) the total forecasted decrease in sales tax revenue raised from businesses as a result of the implementation of the HST.

The Ministry identified records responsive to the request and, relying on the exemptions in sections 12(1) (Cabinet documents), 13(1) (advice or recommendations), 15 (relations with other governments) and 18(1) (valuable government information) of the *Act*, denied access to them, in full.

The requester, now the appellant, appealed the Ministry’s decision.

At mediation, the Ministry provided the appellant with a detailed index of records. The index contains a description of the records and indicates the exemptions that the Ministry claims are applicable to each. The index also clarified that, in the Ministry’s view, only certain portions of the records it identified were responsive to the request.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. Although not set out as an issue on the Mediator’s Report, I decided to add responsiveness of the records as an issue to the Notice of Inquiry.

The Ministry provided representations in response to the Notice of Inquiry. In its representations, the Ministry advised that it was no longer claiming that the discretionary exemption at section 18 of the *Act* applied to Record 1. An amended index of records reflecting the change accompanied the Ministry's representations. I then sent a Notice of Inquiry to the appellant, along with the non-confidential representations of the Ministry. The appellant provided representations in response. I determined that the appellant's representations raised issues to which the ministry should be given an opportunity to respond. Accordingly, I sent a letter to the Ministry along with the representations of the appellant inviting representations in reply. The Ministry provided reply representations.

In both its initial and its reply representations, the Ministry relies extensively on its submissions in appeal number PA09-337, which resulted in Order PO-2919 issued by Adjudicator Stephanie Haly.

RECORDS:

Record Number and Description	Number of Pages	Responsiveness/Exemptions claimed
1 - Background Q & A's	10	Only one section on pages 1 to 3 is responsive Responsive portion denied in full, 12, 13, 15
2 - Briefing Slide Deck	19	Four responsive pages - title page, page 3, page 9 and page 10 Denied in full - 12, 13, 15, 18
3 - Summary of Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18
4 - Summary of Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18
5 - Summary of Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18
6 - Summary of Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18
7 - Data Tables/Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18
8 - Summary of Estimates	1	Most of page is non-responsive Responsive portion denied in full, 12, 13, 15, 18

RESPONSIVENESS OF RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Ministry submits that there are no records, or portions of records, other than those identified in its index of records that are responsive to the request. In its initial representations the Ministry submitted that:

... the wording of the request results in no ambiguity. The appellant is seeking specific financial data: revenue estimates arising from the implementation of the HST.

Records and information that do not provide estimates as specified in the request were withheld as non-responsive, and therefore irrelevant, to the request.

The appellant made no submissions on the issue of responsiveness of the records at issue in this appeal. In the absence of submissions that challenge the Ministry's position, I accept that it properly identified the responsive and non-responsive portions of the records at issue, as reflected in the chart above. In the order that follows, I will be addressing the application of the claimed exemptions to the identified responsive portions of the records at issue only.

CABINET RECORDS

The Ministry claims that the introductory wording of the mandatory exemption in section 12(1), and the specific provisions at 12(1)(b) through (d), apply to the responsive portion of the records.

Section 12(1) reads, in part:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various sub-paragraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-1570, PO-2320].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725].

Section 12(1): Introductory wording

In support of its position that the introductory wording of section 12(1) applies, the Ministry provided a detailed description of the budget process by comparing and contrasting the “usual” Cabinet submission process with the budget process. This process was discussed in detail by Adjudicator Haly in Order PO-2919.

The Cabinet submission process involves the development of a Cabinet submission with recommendations for proposed policies that are submitted to various Cabinet committees for review. The Ministry explains how the budget process is different as follows:

The Budget process proceeds on a separate track from the Cabinet process described above. Out of administrative and operational necessity including the requirement for Budget secrecy, steps 1 to 7 [of the Cabinet approval process] occur concurrently due to the nature of the Budget and the Budget process itself.

...

Pre-budget public consultations are not conducted until after November 15, after the Minister's presentation of the Economic Outlook and Fiscal Review to the Legislative Assembly. Following the Minister's presentation, policy development for Budget matters will begin, usually in the late fall or early winter, leading up to the next year's Budget. In recent years, the Budget has been introduced before the start of the government's fiscal year which begins on April 1st.

Given that the Budget is the major policy document outlining the government's plans for the upcoming fiscal year it will include proposals from throughout the government and not just those of the Ministry. The development, review and legislative drafting processes occur concurrently, as various proposals work their way through the Budget process. Before Budget day itself, the Minister will attend Cabinet to present the proposed Budget measures for deliberation; however, it is open to the Minister to discuss proposed measures with Cabinet colleagues outside of Cabinet.

The Minister presents the Budget to Treasury Board and Management Board of Cabinet at the end of the process for approval following which a Cabinet meeting is convened to approve the budget.

The Ministry goes on to explain the role of Office of the Budget, Taxation and Pensions (OBTP) as the focal point for the planning and production processes relating to the Budget.

The Ministry submits that disclosure of the records would permit the drawing of accurate inferences regarding the substance of deliberations of Cabinet because the information set out in the records relating to the Budget formed the basis of Cabinet discussions concerning it. Further, the Ministry argues that:

Documentation developed for Budget proposals is prepared on the assumption that all the information will proceed to Cabinet for deliberation by necessity as the Minister only has statutory authority under subsection 1.0.14(1) of the FAA [the *Financial Administration Act*] to "*recommend to the Executive Council finance, economic, accounting and taxation policy*". Final decisions regarding Budget proposals will be made by the Executive Council (Cabinet).

Until the proposal is considered by Cabinet, Ministry staff members have no way of knowing which proposals will eventually be approved for inclusion in the Budget and which ones will not. Public servants do not attend Cabinet meetings unless requested to do so in which case it would be for the purpose of answering specific questions. In addition, the Minister decides for himself which material and documentation he will bring with him to Cabinet.

The transition to a single, value-added sales tax was announced in the 2009 Budget. Although legislation permitting the transition to the HST was introduced in Bill 218, which has now received Royal assent, the HST is still in the process of being implemented.

It is the Ministry's position that Records 1 through 8 qualify for exemption under section 12(1). These Records were all prepared for the purpose of briefing the Minister on the proposal to transition to the HST which was brought to Cabinet for deliberation. [Emphasis in original]

The Ministry provided further submissions on the application of the introductory wording of section 12(1), in appendices to its initial representations (some of which cannot be reproduced in this order due to confidentiality concerns) and in its reply representations.

In the non-confidential portion of the appendices to its initial representations, the Ministry states that in preparation for briefings to the Minister on proposed budget measures, "staff will develop extensive documentation examining all aspects of the proposals so that informed decisions will be made." The Ministry submits that "the documentation is prepared by staff with the expectation that all information will proceed to Cabinet for deliberation." In addition, the Ministry submitted that the Minister of Finance attended Cabinet before the 2009 Budget was presented to discuss the proposed Budget measures and that the Minister's meetings with the Secretary of Cabinet, staff of the Premier's Office, and other Cabinet colleagues continued to take place following the Cabinet meeting.

In response, the appellant submits with respect to the application of all the claimed exemptions:

On June 8, 2010, the government released a report entitled *Ontario's Tax Plan for Jobs and Growth - Technical Paper on How the Tax Changes Affect People* [Report]. ...

Table 1, page 6, indicates in year 1 and 3 (presumably 2010-11 and 2012-13) the total forecasted increase in sales tax revenue raised from consumers as a result of the implementation of the HST. Table 1 and Table 8, page 29, shows the total forecasted decrease in sales tax revenue raised from business as a result of the implementation of the HST in these years.

In other words, the government report released four of the six figures requested.

The appellant further submits that as the government has already released most of the requested information, “the records would not reveal the substance of Cabinet deliberations any more than the Ministry’s research paper has already revealed.”

In reply, the Ministry disagrees with the appellant’s assertion and, referencing the appellant’s request, submits that the information sought by the appellant differs from the information set out in Table 1 on page 6 and Table 8 on page 29 of the report.

Analysis and Finding

To establish that the introductory wording of the section 12 exemption applies, the Ministry is required to provide sufficient evidence to satisfy me that disclosure of the records at issue would either reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences regarding the substance of any deliberations on the issue of the HST in the Budget. I find that the Ministry has failed to provide me with such evidence.

I find that in both its confidential and non-confidential submissions, including the confidential submission at paragraph 7 of schedule A of its representations, the Ministry did not provide me with sufficient evidence to establish that the records at issue were *actually* placed before Cabinet or its committees. The Ministry has established that the Budget process, while analogous to the Cabinet process, is more fluid, with policy development, review, and approval occurring concurrently. I accept the Ministry’s position that the records were prepared by staff under the belief that these records could possibly be put before Cabinet. I also accept the Ministry’s submission that the Minister may discuss the Budget proposals with Cabinet colleagues before the Budget is presented to Cabinet for deliberation. I also accept the statement made at paragraph 7 of schedule A of its representations. Unfortunately, none of this information advances the Ministry’s position that disclosure of the records would reveal the substance of deliberations of Cabinet or its committees.

From my review of the evidence and the records at issue, I also find that the Ministry did not provide me with sufficient evidence to establish that the records at issue were provided to Cabinet or its committees for its deliberations. The fact that records were prepared for a budget proposal that may end up before Cabinet or one of its committees, or may have been included in the documentation provided to Cabinet is not enough. The evidence provided by the Ministry is too vague and simply fails to meet the evidentiary standard of proof required.

Further, the Ministry has not provided me with sufficiently convincing evidence to suggest that the information at issue were deliberated upon by Cabinet or its committees. The evidence provided by the Ministry suggests that HST was a topic of discussion and briefings; however, the subject matter or the matter being deliberated on is not evident from either the records or the Ministry’s evidence. Past orders of this office have held that the word “deliberations” means discussions with a view to making a decision [See, for example Order M-184]. It is not clear to me nor am I able to infer from the Ministry’s representations or the records what decision was before Cabinet or one of its committees.

Accordingly, I find that the introductory wording of section 12(1) does not apply to the records at issue.

I will now proceed to consider whether the specific provisions in section 12(1) apply to exempt the records.

Section 12(1)(b): policy options or recommendations

The Ministry submits that section 12(1)(b) applies to all the records as “documentation developed for Budget proposals is prepared on the assumption that all the information will proceed to Cabinet for deliberation by necessity.”

In schedule A to its representations, the non-confidential portions of which were shared with the appellant, the Ministry refers to a number of specific records.

In particular, the Ministry states that Record 1 consists of background questions and answers prepared by the Ministry with respect to the replacement of the RST with the HST. The Ministry submits that Record 1 was prepared to provide advice to the Minister and his staff members with regard to responses to potential questions respecting the HST.

The Ministry states that Record 2 consists of a slide deck that was prepared for the purpose of briefing the Minister.

The appellant made general submissions on the application of section 12, as set out above.

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made [Order PO-2320, PO-2554, PO-2677 and PO-2725].

Based on my review of the records, I find that neither record contains policy options or recommendations. Accordingly, I find that the responsive portions of Records 1 and 2 do not qualify for exemption under section 12(1)(b).

Section 12(1)(c): background explanations or analyses of problems

With respect to the application of section 12(1)(c), the Ministry submits:

The exemption under clause 12(1)(c) may be claimed where the record contains background explanations or analyses submitted to Executive Council or its committees for their consideration in making decisions before those decisions are made and implemented.

As discussed above, documentation developed for Budget proposals is prepared on the assumption that all the information will proceed to Cabinet for deliberation by necessity.

In schedule A to its representations, the non-confidential portions of which were shared with the appellant, the Ministry provides certain particulars with respect to a number of specific records.

The Ministry states that Record 3 is a chart, prepared as part of advice to the Minister that estimates the result of HST on consumers. The Ministry states that numbers from this chart were inputted to create the figures on page 10 of Record 2.

The Ministry states that Record 4 is a chart that sets out estimates on the result of HST on consumers. The Ministry states that the chart was prepared as part of advice to the Minister regarding the total result of HST to consumers before and after the pass through of savings from businesses. The Ministry states that numbers from this chart were also inputted to create the figures on page 10 of Record 2.

The Ministry states that Record 5 is a chart that sets out estimates on the total estimated reduction of tax on businesses. It submits that the chart was prepared as part of advice to the Minister regarding the result of HST on businesses. The Ministry states that numbers from this chart were inputted to create the figures on page 9 of Record 2.

Record 6, the Ministry says, is a chart that sets out estimates on the overall estimated reduction of tax on businesses and the savings to businesses as a result of HST implementation. The Ministry states that Record 6 is similar to Record 5 and the estimates in Record 6 were also used as the basis for figures on page 9 of Record 2. The Ministry submits that the chart was prepared as part of advice to the Minister regarding the result of HST on businesses.

The Ministry states that Record 7 is a chart that sets out estimates of the result on businesses upon conversion to HST.

Record 8 is also a chart. The Ministry submits that numbers from this chart were inputted to create the figures on pages 9 and 10 of Record 2.

The appellant made general submissions on the application of section 12, as set out above.

Section 12(1)(c) is prospective in its application. It will apply to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact [Orders PO-2554 and PO-2677].

Based on my review of the Records 2 to 8, I find that section 12(1)(c) does not apply to exempt the responsive portion of these records. Neither the evidence provided by the Ministry in support of section 12(1)(c) nor my review of the Records themselves indicate in any way that the responsive information in the records are policy options or recommendations that have not yet been implemented.

Section 12(1)(d): consultation among ministers

The Ministry submits that section 12(1)(d) applies to exempt Records 2 to 8. The Ministry states:

The exemption under clause 12(1)(d) may be claimed where the record is used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

As discussed above, throughout the Budget process there are ongoing discussions between the Minister, the Secretary of Cabinet and staff of the Premier's Office and Cabinet members regarding proposed Budget measures. As the 2009 Budget introduced significant tax reform measures, the consensus of Cabinet would have been necessary in order to proceed with the proposed measures.

It is the Ministry's position that Records 2 through 8 qualify for exemption under section 12(1)(d) as, given the significance of the proposed reforms, the information in these Records would, presumably have been discussed between the Minister and his Cabinet colleagues.

The appellant made general submissions on the application of section 12, as set out above.

To qualify for exemption under section 12(1)(d), the record must either have been used for, or reflect, consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy [Order P-920].

Based on my review of the records and the Ministry's representations, I find that section 12(1)(d) does not apply. I find that the Ministry has not provided sufficient evidence to demonstrate that the records at issue were used or reflect consultation amongst the Minister and other members of the Cabinet relating to the budget. The Ministry's submission that the records would have presumably been discussed with the Minister and his Cabinet colleagues is too vague and simply fails to meet the evidentiary standard of proof required to establish the application of section 12(1)(d) to Records 2 to 8.

In summary, I find that neither the introductory wording of section 12(1) nor the exemptions listed in subsections (b) through (d) apply to exempt the records at issue from disclosure.

ADVICE TO GOVERNMENT

The Ministry also submits that the section 13(1) exemption applies to the records at issue.

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 [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.)].

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
- 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 submits that the Office of the Budget, Taxation and Pensions (OBTP)'s work product includes tables and charts, rather than narrative explanations in briefing note or memorandum format. As such, the Ministry submits that:

Information reflected in the documentation will form the basis for decision-making. It is vital that staff be in a position to advise the Minister freely with respect to the full fiscal impact of proposed tax measures as the decision will have an impact on the economy which could be damaging to the economy if a decision is made without full knowledge of the fiscal consequences of the proposed policy.

As noted above, OBTP fulfills its mandate by providing advice and recommendations through the preparation and review of fiscal information often in table and chart form rather than explained as narrative in a briefing note or memorandum. Despite the change in form, the substance and purpose of these records remains unchanged which is to provide advice and recommendations to the Minister (and ultimately Cabinet) with respect to the proposed budget measures.

In schedule A to its representations, the non-confidential portions of which were shared with the appellant, the Ministry provides certain particulars with respect to a number of specific records.

The Ministry again states that Record 1 consists of background questions and answers prepared by the Ministry with respect to the replacement of the RST with the HST. The Ministry submits that it was prepared to assist the Minister and his staff to respond to potential questions respecting the HST.

The Ministry states that Record 2 is a slide deck that was prepared for the purpose of briefing the Minister on the economic and distributional result of sales tax harmonization. The Ministry submits that the responsive portion of this record summarizes the key factors and fiscal result of sales tax reform that was used to brief the Minister.

The Ministry submits that Records 3 to 8 were prepared to brief the Minister on confidential tax policy proposals that were considered for the Budget. The figures in these records, the Ministry says, were included in Record 2 and slides 9 and 10, to provide the Minister with the background materials on the budget proposals.

Finally, the Ministry submits that in "Records 2 to 8, the charts and tables provide underlying background information that was used in the briefing material prepared for the Minister on budget proposals while the substance of Record 1 provides advice to the Minister in respect of the implementation of the HST."

The appellant submits that disclosing the Records would not reveal any more advice or recommendations than is revealed by the Report, described above.

Based on my review of the records and the Ministry's representations, I find that the records do not qualify for exemption under section 13(1). While I agree with the Ministry's argument that the substance and purpose of the record should prevail over its actual form, I find that in the present appeal, the substance of the information claimed exempt, does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. The information at issue consists of information relating to the total forecasted increase in sales tax revenue raised from consumers as a result of the implementation of the HST; and (b) the total forecasted decrease in sales tax revenue raised from businesses or an answer in a record described by the Ministry as containing a series of questions and answers. This is not "advice or recommendation" for the purpose of section 13(1). I find support for my finding in past orders of this office, and especially in Order PO-2115, where former Assistant Commissioner Tom Mitchinson elaborated on the meaning of "advice":

In my view, the key remaining contextual issue in this appeal is whether any or all of the remaining portions of records consist of "advice or recommendations", as those terms are used in section 13(1).

I recently reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order PO-2028. In that order, the Ministry of Northern Development and Mines took the position that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". I did not agree, and stated:

... [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

I accept the Assistant Commissioner's approach and apply it here.

The Ministry has described the information withheld under section 13(1) as background material provided to brief the Minister. Neither the Ministry's representations nor the records suggest a course of action that would be ultimately accepted or rejected by the Minister based on the information contained in the records. Accordingly, I find that the records do not contain advice or recommendations for the purposes of section 13(1).

RELATIONS WITH OTHER GOVERNMENTS

The Ministry takes the position that all of the records qualify for exemption under sections 15(a) and (b), which 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 [Orders PO-2247, PO-2369-F, PO-2715 and PO-2734]. 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 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.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666].

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.); see also Order PO-2439].

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].

The Ministry states that it is entitled to access highly confidential federal data from both Statistics Canada and the Department of Finance (Finance Canada) and explains:

...OBTP is tasked with responsibility for developing budget proposals through research and analysis. Central to this role is the preparation of projections, particularly the fiscal and distributional impacts of a proposed measure. In

developing projections that are accurate and meaningful, the Ministry relies on its access to comprehensive federal data. Access to this data is critical to the tax policy development process.

The Ministry explains that it obtains confidential data from Statistics Canada pursuant to an agreement and argues that its relationship with that body would suffer harm should disclosure occur. The Ministry states:

Without access to this detailed data, estimates and projections developed for proposed tax measures and tax expenditure reporting would be of limited use in informing the policy process and meeting the legislated tax expenditure reporting requirements.

The Ministry is not permitted to disclose any of the confidential information obtained other than to StatsCan employees. In addition, any use of the information other than for statistical, research or verification purposes requires the written consent of StatsCan.

To release these figures publicly without StatCan's consent would be interpreted as a breach of use of the confidential data and presents the risk that StatsCan would stop supplying the Ministry with the confidential data. ...

The Ministry goes on to explain that it also received confidential data from the Department of Finance (Finance Canada) during the negotiations on harmonizing Ontario's RST with the federal Goods and Services Tax (GST). The Ministry explains these files are considered Classified "Secret" information by the federal government.

The Ministry argues that disclosure of the information at issue would undermine the Ministry's relations with the federal government which could affect the future exchange of information between the two governments. The Ministry submits that disclosure may result in discontinued access to either Statistics Canada or Finance Canada data and thus negatively impact its ability to review the fiscal impact of future Budget proposals.

The Ministry states, in particular, that figures contained in Records 1 to 8 are derived from confidential Statistics Canada data. The Ministry submits that releasing this data without Statistics Canada's consent would be contrary to the terms of the agreement with Statistics Canada and give rise to the harms set out above.

The Ministry submits that the figures in Records 1 to 8 are also derived from figures provided in confidence to the Ministry by Finance Canada. It submits that releasing the numbers publicly without Finance Canada's consent could affect federal willingness to share confidential information with the Ministry and also give rise to the harms set out above.

The Ministry also submits that its relations with the federal government require a level of trust which would be harmed should the information received in confidence be disclosed. The Ministry states:

This loss of trust in Ontario's ability to preserve confidentiality could impair future federal-provincial relations in areas beyond tax issues (e.g. pension policy). This would seriously harm Ontario's fiscal and economic interests through the loss of confidential data and information from the federal government.

The appellant submits that the Government of Ontario has already released most of the information originally requested in the Report and that:

It's unclear if the Ministry sought the consent of Statistics Canada and the Federal Department of Finance before releasing their research paper on June 8. If they didn't it suggests that the Ministry has the flexibility to release data like [that] requested. If they did seek consent (and the consent was granted), it suggests both organizations have no problem with the release of this information.

The Ministry submits in reply:

In response to the appellant's comments ... pertaining to Statistics Canada and the Federal Department of Finance, the Ministry submits that the responsive records were not prepared using Statistics Canada's SPSPD/M which is publicly available. The Statistics Canada data that were used were from confidential Input-Output data that is provided under the Ministry's agreement with Statistics Canada. The information at issue in the responsive records was derived exclusively using confidential information from Statistics Canada or Finance Canada.

Based on my review of the records and the Ministry's representations, I find that neither section 15(a) nor 15(b) apply to the information at issue in the appeal. The Ministry states that the figures in the Records are derived from data provided by Statistics Canada or Finance Canada but fails to go the extra step to explain how disclosing the information at issue could reveal the actual information that was supplied by these agencies of the Government of Canada. Based on my review of the information at issue and the Ministry's description, assuming that the figures are a result of calculations using information received in confidence, I am unable to find that disclosure of the information at issue which is "derived from" information received in confidence could reasonably be expected to reveal the actual information received in confidence from Statistics Canada or Finance Canada. Further, I also do not find that disclosure of these figures "derived from" information received in confidence from Statistics Canada or Finance Canada numbers could reasonably be expected to prejudice the conduct of intergovernmental relations between the government of Ontario and the federal government. The Ministry has not provided the necessary "detailed and convincing evidence" that disclosure of the information at issue could reasonably be expected to result in the harms set out in sections 15(a) and (b).

Accordingly, I find that the information at issue is not exempt under sections 15(a) or (b).

I will consider the application of section 18(1)(d) to the information at issue in Records 2 to 8.

ECONOMIC AND OTHER INTERESTS

The Ministry submits that section 18(1)(d) applies to exempt the information withheld in Records 2 to 8. Section 18(1)(d) 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 purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(d) 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.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Section 18(1)(d): injury to financial interests

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", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

The Ministry prefaces its submissions on the application of section 18(1)(d) by recounting the economic downturn that began in the fall of 2008. Against this backdrop, the Ministry submits that disclosure of the withheld information would result in the harm enunciated in section 18(1)(d) because it would present an impact of the HST in Ontario that is incomplete and/or outdated. The Ministry provided further representations on the application of section 18(1)(d), however, the main point in its representations is that disclosure of the figures would present an incomplete picture of the impact of the HST.

It concludes its submissions on the application of the section 18(1)(d) exemption by stating:

Presenting figures that overstate the impact on people due to incomplete and outdated information on the tax benefit to people and the expected pass-through of business savings to consumers would provide a misleading picture of the impact on people.

The appellant submits that the Government of Ontario has already released most of the information originally requested in the Report and that:

If the government was in fact worried about the negative impacts on the economy from the release of these records, they would not have released the information in Table 1 of their recent research paper.

In reply, the Ministry submits:

... that the government was not worried about the negative impacts on the economy from the release of responsive records. Rather, the Ministry's concern is that releasing information that fails to mention the temporary and permanent tax relief for people and that fails to acknowledge any pass-through of business savings could result in an incomplete or misleading picture of the impact on people. Moreover, numbers contained in the responsive records have been updated due to subsequent policy announcements, more current data and improved estimation methodologies.

From my review of the representations, I find the Ministry and the appellant's arguments about the "true" impact of the HST to be irrelevant. The Ministry was required to provide detailed and convincing evidence that disclosure of the information at issue could reasonably be expected to be injurious to the financial interests of the Government of Ontario. It has failed to do so. The Ministry's submissions are speculative at best and its generalized statements as to the anticipated harm do not provide the detailed and convincing evidence necessary for me to find that the exemption in section 18(1)(d) applies.

Accordingly, I find that section 18(1)(d) does not apply to exempt Records 2 to 8.

As no further exemptions were claimed for the information at issue, I will order that the withheld responsive information be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose to the appellant the withheld responsive portions of Records 1 to 8 by February 23, 2011.
2. In order to verify compliance with the terms of provision 1, I reserve the right to require the Ministry to provide me with a copy of the Records as disclosed to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

January 18, 2011