

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3029-I

Appeal PA10-215

Alcohol and Gaming Commission of Ontario

December 23, 2011

Summary: The appellant sought access to a copy of any and all reports, memoranda or other written documents prepared by the consultant retained to review the organizational structure of the AGCO. The AGCO denied access pursuant to the exclusionary provision in section 65(6)3, the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 13(1) (advice or recommendations). This order does not uphold the AGCO's decision, except for the application of section 13(1) to certain information in two records. This order also requires the AGCO to re-exercise its discretion with respect to the information subject to section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 65(6)3, 13(1), 13(2)(f), 17(1).

Orders and Investigation Reports Considered: M-941, MO-2332, PO-2057, PO-2157, PO-2819, PO-2913, PO-2928.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct).

OVERVIEW:

[1] The Alcohol and Gaming Commission of Ontario (the AGCO) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to following records:

...a copy of any and all reports, memoranda or other written documents prepared by the consultant retained to review the organizational structure of the AGCO in or about 2005 who provided recommendations in or about May 2006 as referenced in the 2005-2006 and 2006-2007 Annual Reports of the AGCO.

[2] The AGCO located the responsive records and pursuant to section 28 of the *Act*, notified the consultant whose third party information may be contained in the records requesting its views regarding the possible disclosure of the records. The consultant did not respond to the AGCO's third party notification. The AGCO subsequently issued a decision to the requester informing it that access had been denied in full to all of the records pursuant to the discretionary exemption in section 13(1) (advice or recommendations), the mandatory exemption in section 17(1) (third party information) and the exclusionary provision in section 65(6)3 of the *Act*.

[3] The requester (now the appellant) appealed the AGCO's decision to deny access.

[4] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Representations were sought from the AGCO, the consultant and the appellant. Representations were received from the AGCO and the appellant and shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. In its representations, the AGCO abandoned its section 65(6)3 claim with respect to Records 9 and 10. It also identified that it relied on paragraphs (a) and (b) of section 17(1). The AGCO also abandoned its section 17(1) exemption with respect to Records 5 and 12.

[5] Subsequently, I sought representations on the application of the mandatory third party information exemption in section 17(1) of the *Act* from seven other North American alcohol and/or gaming commissions whose information may be contained in Record 9. I received representations in favour of disclosure from four of these third parties. I did not receive representations from the other three commissions.

[6] In this order, I do not uphold the AGCO's decision except for the application of section 13(1) to certain information in two records. This order also requires the AGCO to re-exercise its discretion with respect to the information subject to section 13(1).

RECORDS:

[7] The records identified by the AGCO as responsive to the request consist of email correspondence, meeting agendas and presentations, and reports. The appellant provided the following description of the records at issue that it compiled from the non-confidential portions of the AGCO's representations:

Record #	Description	Exemptions Claimed
1	email from consultant to Director, Corporate Services listing information required by the consultant	65(6)3 17(1)
2	proposed agenda prepared by the consultant for an initial meeting	65(6)3 17(1)
3	proposed agenda prepared by the consultant outlining questions for the CEO	65(6)3 17(1)
4	agenda for a meeting with Steering Committee	65(6)3 17(1)
5	slides setting out options for change	65(6)3
6	slides setting out organizational issues/challenges	65(6)3 17(1)
7	slides setting out organizational options	65(6)3 17(1)
8	slides setting out organizational issues/challenges	65(6)3 17(1)
9	organization review of other jurisdictions	17(1)
10	concepts review of other jurisdictions	17(1)
11	slides setting out organizational issues/challenges	65(6)3 17(1)
12	slides setting out recommendations for organizational issues/challenges	65(6)3 13(1)
13	summary report and recommendations	65(6)3 17(1) 13(1)
14	draft version of the report of the consultant	65(6)3 17(1) 13(1)

ISSUES:

- A. Does section 65(6)3 exclude the records (except Records 9 and 10) from the *Act*?
- B. Does the mandatory exemption at sections 17(1)(a) or (b) apply to the records (except Records 5 and 12)?

- C. Does the discretionary exemption at section 13(1) apply to Records 12, 13 and 14?
- D. Did the AGCO exercise its discretion under section 13(1) with respect to the information subject to section 13(1) in Records 12 and 14? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does section 65(6)3 exclude the records (except Records 9 and 10) from the *Act*?

[8] Section 65(6)3 states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[9] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[10] In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject matter of that section. For section 65(6) to apply, there must be some connection between "a record" and either "proceedings or anticipated proceedings", "negotiations or anticipated negotiations" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."

[11] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

[12] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer

and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[13] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[14] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

[15] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

[16] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[17] The AGCO provided both confidential and non-confidential representations on this issue. In its non-confidential representations, the AGCO submits that in 2005, a consultant was retained to conduct an organizational review of the structure of the AGCO, review its processes, and provide it with recommendations. The records were prepared by the consultant to be used by the AGCO.

[18] The AGCO states that where records concern an examination of workload and working relationships and were created in response to workload and other human resources concerns, therefore, the records deal with the overall management of the institution's workforce.¹

¹ Orders MO-2332 and PO-2507.

[19] The AGCO describes each of the records as follows:

- Record 1 is an email from the consultant to the Director, Corporate Services outlining employment-related information required by the consultant in order to undertake the review.
- Record 2 is a proposed agenda prepared by the consultant for the initial meeting with the Director, Corporate Services.
- Record 3 is an agenda prepared by the consultant outlining questions for the CEO of the AGCO.
- Record 4 is an agenda for a meeting with the Steering Committee.
- Record 5 is a set of slides setting out options for change in the current organizational structure, excluding the OPP and Hearings.
- Record 6 is a version of a slide presentation outlining organizational issues/challenges.
- Record 7 is a later version of the slide presentation including organizational options.
- Record 8 is the version of the slide presentation that was presented to senior management. Record 11 appears to be a version of the slide presentation.
- Record 12 is a slide presentation of recommendations to address organizational issues and challenges identified by the consultant.
- Record 13 and 14 are the final product of the consultant's undertaking. Record 13 is a summary report and recommendations prepared by the consultant. Record 14 is a draft version of Record 13.

[20] In response, the appellant referred to an excerpt from the AGCO's 2005-2006 annual report which states that the:

...organizational review of the Commission... was necessary to determine the best organizational design for the AGCO; one that would assure that the Commission would be able to successfully deliver on its key priorities and core business functions. We also needed to assess our current strengths and weaknesses to position our operations in a manner that would allow us to meet new challenges. The consultants were also instructed to audit internal communications needs and recommend enhanced performance measures for the Commission.

[21] The appellant also referred to the AGCO's 2006-2007 annual report which included the following:

One of our commitments was to conduct a review of our organizational structure. We engaged a consultant to assist us with this project and the recommendations were provided to us in May of last year. Areas for improvements regarding operational efficiency and effectiveness and areas where staff indicated the organization required additional effort, such as improving opportunities for career/personal development, were identified. Other improvements we have made or are working on include the development of an enterprise-wide risk management framework, a review of our due diligence process to improve regulatory decision making and the development of a more comprehensive senior management report for the Board. It was also determined that more effective communication should be a corporate priority.

[22] The appellant states that this annual report, therefore, seems to suggest that a development of an enterprise-wide risk management framework had resulted from the operational review suggesting it was a topic covered in the consultant's report.

[23] The appellant states that it appears that at least some of the information in the records would not be substantially connected to employment-related matters², and that none of the records are directly employment-related, such as would be in the case of personnel files and complaint records.

Analysis/Findings

[24] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

² Order P-1223.

Part 1: collected, prepared, maintained or used

[25] Based upon my review of the records and the parties' representations, I find that part 1 of the test has been met as the records were collected, prepared, maintained and used by the AGCO. As well, certain records were prepared by the consultant on behalf of the AGCO.

Part 2: meetings, consultations, discussions or communications

[26] Based upon my review of the records and the representations, I agree with the AGCO that the records were used for meetings, consultations, discussions or communications. Therefore, I find that part 2 of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[27] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123];
- an employee's dismissal [Order MO-1654-I];
- a grievance under a collective agreement [Orders M-832 and PO-1769];
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F];
- a "voluntary exit program" [Order M-1074];
- a review of "workload and working relationships" [Order PO-2057]; and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

[28] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]; and

- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

[29] The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

[30] The records collected, prepared, maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions [*Ministry of Correctional Services*, cited above].

[31] Based upon my review of the records, I do not agree with the AGCO that the information at issue comes within part 3 of the test. The records concern a general operational review of the AGCO. The report of the consultant, Record 13, is a summary report and recommendations and, as described by the AGCO, is the final product of the consultant's undertaking “to provide an organizational review of the AGCO, review processes, and provide recommendations.” The other records at issue concern the preparatory steps taken in the process to produce this report.

[32] As stated above, this office has generally found that organizational reviews are not subject to the exclusionary provision in section 65(6)3.³ The AGCO relies on Order MO-2332, where one of the records at issue was a review of the organization and structure of the City of Hamilton’s Legal Services Department. In that order, Adjudicator Frank DeVries found that the record also addressed “... (in considerable detail) matters such as workload issues, workload management, staff management, working relationships, compensation plans, remuneration, and performance initiatives.” Adjudicator DeVries stated:

Although former Assistant Commissioner Mitchinson stated in MO-1654-I that “The fact that a review of this nature involves organizational issues and job design is not, in my view, sufficient to alter the purpose of the review and the nature of the records produced in that context”, the records at issue in this appeal, in my view, do more than simply “involve organizational issues and job design”, they address a number of employment-related issues in considerable detail.

[33] In Order MO-2332, Adjudicator DeVries considered the wording of the appellant’s request that sought:

³ See also Order MO-2660.

All reports and presentations by [the consulting firm], with respect to the compensation structures, salary classifications, remuneration and related matters for the position of lawyers employed in the City of Hamilton Legal Services Division...

[34] In determining that the exclusion in section 52(3)3 of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent to section 65(6)3 of the *Act*) applied, he found that:

...the appellant's request was for matters that are integral to the employment relationship between the city and its own workforce.

[35] In my view, the record in Order MO-2332 clearly relates to employment-related matters and the institution's relationship with its workforce, given its emphasis on classifications and remuneration, and for that reason, is distinguishable from the records at issue here, which concern an operational review.

[36] The AGCO also refers to Order PO-2507. The record in that appeal was a report prepared by a Human Resource consultant and a Risk and Assurance consultant, Audit Services Branch of the Ministry of Public Safety and Security. Adjudicator Laurel Cropley found that the record related to a review conducted by the ministry to examine workload and workforce issues. She stated that:

It is apparent from the submissions of both parties that the Ministry initiated the Joint Review in response to workload and other human resources concerns raised by employees of the Probation office. I accept that the Ministry, as an employer, has an interest in addressing and resolving these issues as part of the overall management of its workforce.

[37] This appeal is also distinguishable from the facts in Order PO-2819. In that appeal, the record was a workplace investigation report prepared by an external consultant and the cover letter prepared by the consultant summarizing the findings of the report. This investigation was a result of a complaint made by the union's representative for the employees regarding human rights abuses and poor leadership. In Order PO-2819, the appellant did not appear to dispute the fact that the record related to labour relations or employment-related matters in which the institution had an interest. In fact, the appellant stated that, "the union local has indicated that it intends to use the information from the [report] study solely to help prevent similar incidents for occurring in the workplace."

[38] In this appeal, the appellant's request was for:

... a copy of any and all reports, memoranda or other written documents

prepared by the consultant retained to review the organizational structure of the AGCO in or about 2005 who provided recommendations in or about May 2006 as referenced in the 2005-2006 and 2006-2007 Annual Reports of the AGCO.

[39] The annual reports referred to in the request contain information, as quoted above, that clearly confirms that consultant's mandate was to undertake an organizational-wide review of the AGCO. This is confirmed by the contents of the records and also by the confidential and non-confidential representations of the AGCO.

[40] I find that neither the report (Record 13) nor the other records contain matters that are integral to the employment relationship between the AGCO and its own workforce, as was the case in Orders MO-2332 and PO-2507.

[41] Rather, based upon my review of the records, I find that they concern generic training or operational issues. In Order PO-2928, I addressed the application of the exclusion to similar information as follows:

In Order PO-2913 Adjudicator Laurel Cropley considered the application of section 65(6)3 [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 52(3)3 of the *Act*] to training materials prepared for use at the OPP Academy in training police officer recruits, instructing them on the safe use of firearms, tasers and restraints. She found that that the *Act* applies to these and other generic training materials. She determined that whether or not section 65(6) applies to a record rests with the nature of circumstances in which the particular record is used.

In particular, Adjudicator Cropley found the records would be excluded under section 65(6)3 of the *Act* (or its municipal *Act* equivalent, section 52(3)3) if they were prepared or used in relation to communications about the employment-related training or qualifications of a particular individual. In that situation, their use was, therefore, about the employment of the individual by an institution. She found that records relating to matters in which the institutions are acting as employers and the terms and conditions of the employment of specifically identified individuals are at issue fall within the ambit of the section 65(6)3 exclusion.

With respect to generic training materials that are similar to the record at issue in this appeal, Adjudicator Cropley found section 65(6)3 is not directed at records of this nature because these records are communications about operational procedures to be followed by the institution's employees generally, and do not relate to specific employees.

She determined that the training materials at issue in that appeal contained information about:

...OPP-wide procedures used to establish consistency in, and adequacy of training. As well, they are tools for ensuring that the OPP as an organization meets its statutory mandate as a police agency, as noted by the Ministry. In addition, although not determinative of the issue, I would suggest that the establishment of training standards is one facet of holding the police accountable to the public with respect to the overall performance and behaviour of its officers, and particularly with respect to the use of force, including the use of firearms, tasers and restraints.

Previous orders have found that where records are prepared in the course of routine procedures, such as police officers' notes or occurrence reports, they would not typically fall under the exclusion in section 65(6). However, when allegations of misconduct are made, the records subsequently retrieved from the case file for the purposes of the investigation have been excluded from the *Act* [See, for example: Orders MO-2428 and PO-2628]. I accept that once a performance issue arises as a result of a particular police officer's actions, records that describe the training that the officer received may well engage the interests of the institution in its capacity as employer.

However, I am not persuaded that the records at issue, which consist of generic training materials, relate to matters in which the Ministry is acting as an employer and the terms and conditions of the employment of specifically identified individuals are at issue. For this reason, the communications represented by the records are not "about" employment-related matters" within the meaning of section 65(6)3. Accordingly, I find that the records at issue do not meet the requirements of part 3 of section 65(6)3 and they are subject to the *Act*.

I agree with and adopt Adjudicator Cropley's findings in Order PO-2913. The DVD at issue in this appeal is a generic tool for police officers. Therefore, it is more accurately described as a communication about operational procedures to be followed by the institution's employees. As a result, the record is not "about employment-related matters" within the meaning of section 65(6)3, and it does not meet the requirements of part

3 of section 65(6)3. Accordingly, I find that the DVD is subject to the *Act* and I must determine whether it is exempt under sections 14(1), 18(1) or 21(1).

[42] Similarly, the records in this appeal contain generic training and operational procedure information. The review that resulted in the creation of the records in this appeal was not initiated in response to workload and other human resources concerns raised by the AGCO's employees, as was the case in Order PO-2507.

[43] The records in this appeal were also not prepared as a result of a labour dispute about employment conditions as was the case in Order PO-2157; another order relied upon by the city. In Order PO-2157, the records were institutional review reports prepared by the Office of the Child and Family Service Advocacy during March to May 2002 in relation to a number of youth facilities under the jurisdiction of the ministry. The reports were prepared during the course of a labour dispute between the Ontario Public Service Employees Union (OPSEU) and the provincial government.

[44] In Order PO-2157, Adjudicator Sherry Liang found that an important purpose of the reviews contained in the records was to document the effects of the labour dispute on the conditions at young offender facilities. Rather than touching generally on matters of labour relations, the reviews focused on the labour dispute and its impact on the delivery of services at these facilities. As the labour dispute arose out of an impasse in collective agreement negotiations between OPSEU and the provincial government, Adjudicator Liang determined that the information in the records was collected and used in relation to a "labour relations" matter for the purposes of section 65(6)3 of the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

[45] The information in the records in this appeal was also not prepared as a result of an examination into the conduct of city personnel as was the case in *Reynolds v. Binstock*,⁴ another case relied upon by the city. In *Reynolds*, the terms of reference of the investigation were to examine the conduct of the city personnel in the preparation of a specific Request for Proposals (RFP), the evaluation of the responses and the selection of the preferred proponent. The court found that this was "...beyond doubt an employment-related exercise." By contrast, in this appeal, the terms of reference were to determine the best organizational design for the AGCO. The purpose of the report was not to examine whether there was misconduct by specific employees.

[46] In the case of *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, the Ontario Divisional Court defined "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject matter of that section. As stated above, section 65(6) provides that, subject to section 65(7), the *Act* does not apply to records collected, prepared,

⁴ 2006 CanLII 36624 (Div. Ct.).

maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[47] In *Ontario (Ministry of Correctional Services) v. Goodis* (cited above), the Divisional Court determined that section 65(6) of *FIPPA* should be interpreted in light of the purpose of the *Act*, which is found in section 1 which states:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[48] In that same decision, the court determined that not all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. The court also determined that whether or not a particular record is "employment-related" will turn on an examination of the particular document. It found that the type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue.

[49] All institutions operate through their employees. Employees are the means by which all institutions provide services to the public. In this appeal, the records were not created to address matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue, in the sense intended by section 65(6). The records concern an operational review of AGCO. As stated by the AGCO:

As part of our long-term planning process, the AGCO develops Business Plans which set the corporate priorities and direction for the organization over a 3 to 5 year horizon. These plans assist us in establishing and delivering on key priorities and business functions, while ensuring we are

well positioned to address any operational challenges that may arise. One of our commitments was to conduct a review of our organizational structure. We engaged a consultant to assist us with this project and the recommendations were provided to us in May of [2006].⁵

[50] Taking into account both the confidential and non-confidential representations of the AGCO and the jurisprudence cited above, I find that the records are not excluded from the application of the *Act* by reason of section 65(6)3. Accordingly, the records are subject to the *Act*.

[51] I will now proceed to determine whether the mandatory exemption in section 17(1) or the discretionary exemption in section 13(1) applies to them.

B. Does the mandatory exemption at sections 17(1)(a) or (b) apply to the records (except Records 5 and 12)?

[52] Section 17(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that that similar information continue to be so supplied;

[53] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

⁵ AGCO Annual Report 2006-2007.

[54] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1- type of information

[55] The AGCO submits that:

- Record 1 is an email from the consultant to the Director, Corporate Services, requesting information to be provided to the consultant. This is the information deemed relevant by the consultant in undertaking its comprehensive review of the AGCO;
- Record 2 is an agenda for a meeting with the Director, Corporate Services outlining topics to be addressed;
- Record 3 is a list of key questions to be addressed by the CEO and Registrar of the AGCO;
- Record 4 is an agenda for a meeting with the steering committee and provides a project schedule and next steps;
- Records 6 to 8 and Record 11 [are] slide presentations prepared for the steering committee and providing the consultant's work plan summary, identify emerging issues and challenges, and provide updates on the status of the review including making recommendations;
- Records 9 and 10 are reviews of other jurisdictions prepared by the consultant; and
- Records 13 and 14 are the results of the process undertaken by the consultant. Record 14 is a draft version of Record 13.

...Records 1 to 4 outline the techniques or processes through which the consultant undertakes an organizational review and, it is submitted, qualify as trade secrets or commercial information. Disclosing these records would reveal specific expertise, analytical skills and proprietary tactics developed and used by the consultant to perform evaluations... A release of these records could harm the competitive position of the consultant, in what is an extremely competitive industry. There is also the real danger that the release of this type of information would result in the consultant no longer agreeing to do business with the AGCO ...

Records 9 and 10 [contain] trade secret or commercial information that cost the consultant something to gather and compile. While much of the information about each jurisdiction is publicly available, a compilation of this material is proprietary information.

[56] As stated above, the consultant did not provide representations in this appeal.

[57] In addition, the four third party alcohol and/or gaming commissions who responded to the Notice of Inquiry seeking representations on the application of section 17(1) to Record 9, did not address the issue as to what type of information is contained in this record.

[58] The appellant submits that a description of work being performed or the scope of work to be performed without disclosing the actual formula, method, programme or technique to be employed or any specificity about the methodologies to be undertaken does not qualify as a "trade secret" for the purposes of s. 17(1)⁶. The appellant states that all of the records would appear to be general requests for information, provision of information about other jurisdictions, a summary of concerns identified from information provided by the AGCO, or recommendations by the consultant. The appellant states that:

The description of Records 2 and 3 suggest that the purpose of the records was to outline the information that was necessary or useful to be obtained or elicited from the AGCO to complete the review rather than information being provided by the consultant.

Analysis/Findings re: part 1- type of information

[59] As stated above, the AGCO submits that Records 1 to 4, 9 and 10 contain "trade secrets". It did not indicate what type of information is contained in Records 6 to 8, 11 and 13 to 14.

⁶ Orders MO-1564 and P-1605

[60] "Trade secret" information has been discussed in prior orders as meaning information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

[61] Records 1 to 4, 6, 9 and 10 are all information exchanged between the AGCO and the consultant concerning the information needed to prepare the final product, Record 13 (the organizational review report). Taking into consideration the contents of these records and the representations of the AGCO, and in the absence of representations from the consultant, I find that the records do not contain information that qualifies as the trade secrets of the consultant. I have not been provided with sufficient evidence to find that these records contain information that is not generally known in the consultant's business and that also has economic value from not being generally known.

[62] The AGCO also submits that Records 9 and 10 contain "commercial information". This type of information has been defined in prior orders as meaning information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010].

[63] Record 9 contains a compilation of information by the consultant concerning seven public institutions outside of Ontario as to how these organizations are structured and operate. Record 9 lists the names of these organizations. Record 10 contains general information about other jurisdictions that does not identify any particular one. Record 9 contains information about the selling of alcohol and gaming services in other jurisdictions related. The remainder of the information in Records 9 and 10 is not about the buying, selling or exchange of merchandise or services by other jurisdictions.

[64] I find that part 1 of the test has not been met for Records 1 to 4, 6 to 8, 10 and 11 to 14. As Record 9 contains commercial information, I will consider whether part 2 of the test under section 17(1) applies to it.

[65] As no other exemptions have been claimed for Records 1 to 4, 6 to 8, 10 and 11, I will order these records disclosed. I will consider below whether the discretionary exemption in section 13(1) applies to Records 12, 13 and 14.

[66] I will now consider whether part 2 of the test has been met for the information in Record 9 that I have found to be comprised of commercial information of third party alcohol and/or gaming commissions.

Part 2: supplied in confidence

Supplied

[67] The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

[68] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

[69] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

[70] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the consultant to the institution. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above)].

In confidence

[71] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

[72] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

[73] The AGCO submits that Record 9 was prepared and supplied directly to the AGCO by the consultant who supplied this information in confidence with a reasonable expectation of confidentiality.

[74] As stated above, I sought representations on the application of the mandatory third party exemption in section 17(1) of the *Act* from seven other North American alcohol and/or gaming commissions whose third party information may be contained in Record 9. I received representations in favour of disclosure from four of these third parties. I did not receive representations from the other three commissions, nor did I receive representations from the consultant. Two of the four commissions that did respond stated that the requested information in Record 9 is public information.

[75] The appellant disputes the AGCO’s claim that Record 9 contains confidential information. It also states that:

In terms of the expectation of confidence, it was not treated as entirely in confidence. The consultant's work and recommendations in summary form were reported in the annual reports (Order PO- 2724).

Analysis/Findings re: part 2 – supplied in confidence

[76] Based upon my review of the information at issue in Record 9, I find that it was not supplied with a reasonable expectation of confidentiality to the AGCO or its consultant. In particular, this information was not communicated by the seven other commissions to the AGCO or its consultant on the basis that it was confidential and that it was to be kept confidential. The information of these third party alcohol and/or gaming commissions was also not prepared for a purpose that would not entail disclosure.

[77] Furthermore, based upon my review of this record and in the absence of representations from the consultant, I do not find that Record 9, which is a compilation of general and/or public information about third party commissions, was communicated to the AGCO by the consultant on the basis that it was confidential and that it was to be kept confidential.

[78] Accordingly, part 2 of the test under section 17(1) has not been met for Record 9 and as no other exemptions have been claimed for this information, I will order Record 9 disclosed to the appellant.

C. Does the discretionary exemption at section 13(1) apply to Records 12, 13 and 14?

[79] 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.

[80] 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.)].

[81] 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].

[82] "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].

[83] 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)]

[84] 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)].

[85] The AGCO provided both confidential and non-confidential representations in support of the application of this exemption to Records 12 to 14. In its non-confidential representations, it states that the information contained in these records relates to a

suggested course of action which will ultimately be accepted or rejected by the AGCO during a deliberative process and that disclosure of the information in these records would inhibit the free flow of advice and recommendations within the AGCO's deliberative process.

[86] The appellant submits that there is nothing in the description of these records to support the AGCO's submission that the internal processes of formulating advice to the government is in them. The appellant states that the AGCO implemented the report's recommendations without legislative or ministry level changes. Further, the appellant submits that the report contained organizational changes to improve its functions, not policy or legislative changes or any other matters relating to the advice to government.

Analysis/Findings

[87] Record 12 is a chart prepared by the consultant for the AGCO. Record 13 is the consultant's final report and Record 14 is the consultant's findings in the study it undertook of the AGCO and a draft version of the final report.

[88] Based upon my review of the records at issue and the confidential representations of the AGCO, I agree with the AGCO that disclosure of all of Record 12 and portions of Records 13 and 14 would reveal the advice or recommendations of the consultant retained by the AGCO. This information suggests courses of action that will ultimately be accepted or rejected by the person being advised

[89] The information that I have found to not contain advice or recommendations in Records 13 and 14 is factual, background or analytical information and does not suggest courses of action that will ultimately be accepted or rejected by the person being advised or permit one to accurately infer the advice or recommendations given by the consultant to the AGCO.

[90] As no other exemptions have been claimed for the information in Records 13 and 14 that I have found not subject to section 13(1), I will order this information disclosed. I will now consider whether the exceptions in section 13(2) apply to the information in Records 12 to 14 that I have found subject to section 13(1).

Sections 13(2) and (3): exceptions to the exemption

[91] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Sections 13(2) and (3) state:

- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
 - (a) factual material;

- (b) a statistical survey;
- (c) a report by a valuator, whether or not the valuator is an officer of the institution;
- (d) an environmental impact statement or similar record;
- (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
- (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
- (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
- (h) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;
- (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
- (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries

and making reports or recommendations to the institution;

- (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
 - (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
 - (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

[92] The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

[93] Neither the AGCO nor the appellant provided representations as to whether the exceptions to section 13(1) in section 13(2) apply to Records 12 to 14. However, based upon my review of sections 13(2), I find that the exception to section 13(1) in section 13(2)(f) applies to the information at issue in Record 13, the final report. Record 13 is a report or study on the performance or efficiency of the AGCO.

[94] Section 13(2)(f) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution [Orders M-941, P-658].

[95] I find that Record 13 in this appeal is similar to the record under consideration in Order M-941.

[96] In that order, Inquiry Officer Mumtaz Jiwan described the record as:

...a report of an operational review of the Town's Department of Public Works, prepared by consultants retained by the Town for this purpose. The report, dated October 1990, identifies and addresses issues in the following areas: operational and strategic planning, communications, department structure and staffing, operating changes in each section, overall management direction and financial implication.

[97] In Order M-941, Inquiry Officer Jiwan found that the exception in section 7(2)(e) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) the equivalent to section 13(2)(f) of the *Act* applied to the record. In that order, she stated:

...that the record is a preliminary step in the review exercise. Therefore, in my opinion, it would be quite removed from the deliberative process of decision-making and policy-making which has yet to take place.

In my view, disclosure of such a report prepared by consultants retained by the Town would not inhibit the free flow of advice and recommendations within the Town's deliberative process of decision-making and policy-making.

I find that only certain portions of the record contain advice or recommendations pursuant to section 7(1) of the [*Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), the equivalent to section 13(1) of the *Act*]. The remaining portions contain factual information, analyses, opinion and survey responses, the disclosure of which would not reveal the advice and recommendations nor would it permit the drawing of accurate inferences about the substance of the recommendations.

I must now consider whether any of the mandatory exceptions contained in section 7(2) of the [municipal] *Act* apply to those parts of the record that I have found to be exempt under section 7(1).

Section 7(2)(e) provides that an institution shall not refuse to disclose a record which contains "a report or study on the performance or efficiency of an institution". This section is unusual in the context of the *Act* in that it constitutes a mandatory exception to the application of an exemption for discrete types of documents, namely reports on institutional performance. Even if the report or study contains advice or recommendations for the purpose of section 7(1), the Town must still disclose the entire document if the record falls within this category.

As indicated previously, the record is an operational review of the public works department relating to the efficiency and effectiveness of the department. The record is clearly a report which includes factual information, survey results, analyses and recommendations. In my view, the primary focus of the report is to find ways in which to increase the productivity of the public works department or in other words, to improve its performance or efficiency. I find that the record falls squarely within the exception provided by section 7(2)(e).

In reaching this decision, I am mindful of the differences between the wording of the exception in section 7(2)(e) of the [municipal] *Act* and the concordant section, section 13(2)(f) of the provincial *Act*.

The latter section prohibits a head from refusing to disclose "a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy".

Previous orders of the Commissioner have adopted a broad interpretation of this section in order to not restrict access to those reports or studies which focus on one or more discrete program areas within an institution, rather than the institution as a whole. This interpretation is consistent with the general principle of providing requesters with a general right of access to government information and accords with the plain meaning of this exception. If the interpretation of section 7(2)(e) of the [municipal] *Act* was limited to performance or efficiency reports of an institution as a whole, the exception would be rendered virtually meaningless and result in an anomalous distinction between the scope of access provided under the municipal as opposed to the provincial legislation. This distinction would be nonsensical given that the purposes and principles of both access schemes are the same (Orders P-658 and M-700).

[98] I agree with this approach and adopt it for the purposes of this appeal.⁷ In the present appeal, Record 13 is an operational report reviewing the performance or efficiency of the AGCO. Therefore, by reason of the exception in section 13(2)(f) for reports or studies on the performance or efficiency of an organization, none of the portions of Record 13 that I have found subject to section 13(1) are exempt under that section. As no other exemptions were claimed and no mandatory exemptions apply to Record 13, I will order it disclosed.

[99] None of the exceptions in section 13(2) apply to the information in Records 12 or 14 that I have found subject to section 13(1). I will now consider whether the AGCO

⁷ See also Order MO-2204.

exercised its discretion under section 13(1) in a proper manner concerning all of the information in Record 12 and the information I have found subject to section 13(1) in Record 14.

EXERCISE OF DISCRETION

D. Did the AGCO exercise its discretion under section 13(1) with respect to the information subject to section 13(1) in Records 12 and 14? If so, should this office uphold the exercise of discretion?

[100] The section 13(1) 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.

[101] 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.

[102] 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)].

[103] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[104] The AGCO submits that it has recognized that the principles of access and openness are important and that the exemptions claimed under section 13(1) are limited to information whose release would negatively affect the AGCO's internal processes of formulating and providing advice to government. In its non-confidential representations, it states that:

Given that disclosure pursuant to a *FIPPA* request is disclosure to the world, the release of the privileged materials would put the consultant at a great competitive disadvantage on future consulting matters.

[105] The appellant did not provide representations on the AGCO's exercise of discretion under section 13(1).

Analysis/Findings

[106] Based upon my review of the AGCO's confidential and non-confidential representations, I find that it exercised its discretion under section 13(1) with respect to the information at issue in Records 12 and 14 in an improper manner, taking into account irrelevant factors.

[107] The information at issue is not privileged information, but is information that contains advice or recommendations of a consultant to the AGCO. As stated above, the section 13(1) exemption seeks 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.

[108] It is also not a relevant consideration to an exercise of discretion by an institution under section 13(1) as to whether disclosure of the advice or recommendations would place the consultant who provided this advice to the institution in a "great competitive disadvantage on future consulting matters."

[109] Accordingly, I will order the AGCO to re-exercise its discretion with respect to all of the information in Record 12 and the information in Record 14 that I have found subject to section 13(1).

ORDER:

1. I order the AGCO to re-exercise its discretion concerning the information I have found to be subject to section 13(1) in all of Record 12 and in portions of Record 14. For ease of reference, I have provided the AGCO with a copy of Record 14, highlighting the information therein that I have found subject to section 13(1). I order the AGCO to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the AGCO continues to withhold all or part of this information, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The AGCO is required to send the results of its re-exercise, and its explanation to the appellant, with the copy to this office, by no later than **January 19, 2012**. If the appellant wishes respond to the AGCO's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold the information subject to section 13(1) in Records 12 and 14, the appellant must do so within 21 days of the date of the AGCO's correspondence by providing me with written representations.
2. I order the AGCO to disclose to the appellant Records 1 to 11 and 13 and the information not subject to section 13(1) in Record 14 by **February 2, 2012 but not January 26, 2012**.
3. In order to verify compliance with order provision 2, I reserve the right to require the AGCO to provide me with a copy of the records provided to the appellant.

4. I remain seized of this matter pending the resolution of the issue outlined in order provision 1.

Original Signed By: _____
Diane Smith
Adjudicator

_____ December 23, 2011