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COURT OF APPEAL FOR ONTARIO

CATZMAN, ROSENBERG AND JURIANSZ JJ.A.

B E T W E E N :

MINISTRY OF NORTHERN DEVELOPMENT AND MINES **Appellant (Applicant)**	**Kim Twohig** **for the appellant**
- and -	
TOM MITCHINSON, ASSISTANT COMMISSIONER, AND JOHN DOE, REQUESTER **Respondent (Respondent)**	**William S. Challis** **for the respondent**

Heard: April 4-5, 2005

On appeal from an order of Justices Tamarin M. Dunnet, Lee K. Ferrier and Gloria J. Epstein of the Superior Court, sitting in the Divisional Court, dated January 19, 2004.

JURIANSZ J.A.:

[1] This is an appeal by the Ministry of Northern Development and Mines (the "Ministry") from an order of the Divisional Court dated January 19, 2004 dismissing the Ministry's applications for judicial review of Orders PO-2028 and PO-2084 made by Tom Mitchinson, the Assistant Information and Privacy Commissioner (the "Commissioner"). The orders were dated June 28, 2002 and December 11, 2002, respectively, and were made under the *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F. 31 (the "*Act*"). Both orders related to requests for access to records prepared by Ministry staff regarding applications for funding of projects made to the Northern Ontario Heritage Fund Corporation (the "Corporation"). Ministry staff provide evaluations to the Corporation so that its Board can decide whether projects will be approved for funding and the terms of that funding.

[2] Order PO-2028 related to a request for records connected to a $1.5 million contribution by the Corporation to the Northern Ontario Tourism Marketing Corporation for the calendar year 2000. The only record at issue in Order PO-2028 was an Evaluation Report dated February 25, 2000. Most of the record had already been disclosed to the appellant. The undisclosed portions consisted of two paragraphs under the heading "Potential Issues" and a number of listed "Funding Options" together with pros and cons for each option. The Minister claimed these paragraphs were exempt from disclosure under s. 13(1) of the *Act*.

[3] Order PO-2084 related to a request for records regarding the proposal to create the Canada Ecology Centre (the "CEC"), the CEC's most recent application to the Corporation for additional funding, all records evaluating or related to that application, and all reports evaluating the performance of the CEC and its prospects for the future. There were some 136 records at issue in Order PO-2084, but this appeal concerns only those records which the Minister claimed were exempt from disclosure under s. 13(1) of the *Act*.

[4] Section 13(1) of the *Act* reads:

> A head [of an institution] 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.

[5] The Ministry raised two issues on appeal:

> 1) whether the standard of review of the Commissioner's interpretation of the words "advice and recommendations" in section 13(1)of the *Act* is one of reasonableness rather than correctness; and
>
> 2) whether the Commissioner's interpretation of section 13(1) of the *Act* was incorrect, or in the alternative, unreasonable.

[6] The Divisional Court found that the standard of review of the Commissioner's interpretation of s. 13(1) of the *Act* was reasonableness, adopted the Commissioner's interpretation of section 13 of the *Act* and upheld the Commissioner's decision to order the Ministry to disclose the records.

[7] This appeal was heard together with the appeal of the Ministry of Transportation in *Ontario (Ministry of Transportation) v. Cropley* (hereinafter referred to as "*MOT*"), which raised some of the same issues. As I indicated in that case, this court decided in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 73 O.R. (3d) 321, that the standard of review that applies to a decision of the Commissioner under the *Act* is reasonableness, even where the decision involves a pure question of law regarding the interpretation of an exemption such as s. 13.

[8] I also held in *MOT* that the Commissioner's interpretation of the words "advice or recommendations" in that case was reasonable. That interpretation is indistinguishable from the interpretation in the two orders at issue in this appeal. At pg. 12 of Decision PO-1993 at issue in *MOT*, the Commissioner said:

> [A]dvice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and

recommendation given also qualifies for exemption under section 13(1) of the *Act* (Orders P-1054, P-1619 and MO-1264).

[9] In PO-2028, the Commissioner said at pg. 2:

> In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993]. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given [see Orders P-1037 and P-1631].

[10] In PO-2084, the Commissioner said at pg. 6:

> A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, 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 P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

[11] In this case, counsel for the Ministry advanced much the same argument as was made by the Ministry of Transportation in *MOT*. She submitted that the presumption against tautology requires that different meanings be ascribed to the words "advice" and "recommendations" in s. 13(1).

[12] In *MOT*, after considering dictionary definitions, the associated words rule, the French version of s. 13(1), and the purpose of the statute, I found the Commissioner's intrepretation to be reasonable. I also noted that the Commission's interpretation leaves ample room to accord the two words different meanings. As in that case, it was unnecessary for the Commissioner to draw a distinction between "advice" and "recommendations" to arrive at the decisions at issue in this appeal.

The Records in this Case

[13] Counsel for the Ministry argued that the portions of the records under the headings "Potential Issues" and "Options" satisfied the Commissioner's interpretation of "advice and recommendations."

[14] The Ministry had taken the position that the paragraphs under the heading "Potential Issues" contain advice insofar as the paragraphs identify matters that the Corporation's Board should take into consideration in reaching a decision on whether or not to approve the project for funding. However, the Commissioner decided that these paragraphs simply draw matters of potential relevance to the attention of the Board. As such these paragraphs do not advise or recommend anything, nor do they permit one to accurately infer any advice given.

[15] The Ministry had also taken the position that the information under "options", which included a series of "pros" and "cons" for each option, is advice to the decision-makers about matters that should be considered by the Board in deciding whether to grant funding and the methods of funding the project if it is approved.

[16] The Commissioner proceeded on the basis that whether records that set out "options" and "pros and cons" reveal advice or recommendations depends on the circumstances of each case. He assessed the context in which the records at issue were created and communicated and determined they contained no information that could be said to "advise" the Board in making its decision on funding, nor did they allow one to accurately infer any advice given. He found that the records consisted of "mere information" broken down into various pre-determined categories.

[17] The Commissioner's conclusions are carefully explained and were reached after careful analysis. The Divisional Court was correct in holding that the decisions of the Commissioner were reasonable.

[18] The appeal of the Ministry is dismissed. There will be no order as to costs.

"R.G. Juriansz J.A.

"I agree – M.A. Catzman J.A."

"I agree – M. Rosenberg J.A."

RELEASED: September 26, 2005