

CITATION: Minister of Finance (Ont.) v. Smith, 2011 ONSC 2030
DIVISIONAL COURT FILE NO.: 368/10
DATE: 20110401

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: MINISTER OF FINANCE FOR THE PROVINCE OF ONTARIO

Applicant

AND:

DIANE SMITH, ADJUDICATOR, INFORMATION AND PRIVACY
COMMISSIONER/ONTARIO and JOHN DOE, REQUESTER

Respondents

BEFORE: ASTON, LINHARES de SOUSA & LEDERER JJ.

COUNSEL: *Leslie M. McIntosh*, for the Applicant

William S. Challis, for the Information and Privacy Commissioner/Ontario,
Respondent

Alex D. Cameron & Kevin Yip, for John Doe, Respondent

HEARD: March 29, 2011

ENDORSEMENT

[1] Pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.32 ("*FIPPA*"), an Adjudicator ordered that certain records of the Minister of Finance be disclosed. This is a judicial review of that finding.

[2] The standard of review is reasonableness. This has been the finding of the courts in judgments dealing with a succession of decisions made by Adjudicators under the provisions of the ("*FIPPA*").

[3] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within the range of possible, acceptable outcomes (see: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 47).

[4] In this case, we are concerned with six records comprising nine pages. The submissions made on behalf of the applicant, the Minister of Finance, rely on the exemption provided in s. 13(1) of *FIPPA*. It 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.

[5] Ms. McIntosh, on behalf of the Minister, agreed that, to be accepted as "advice or recommendations", the material or information provided must be related to a preferred option or a recommended course of action.

[6] We accept her submission that it is not the records that are at the core of the analysis, but the deliberative process in which the public servants took part. It is not necessary that a document was actually presented to the "ultimate decision maker". It is sufficient that the document reflect advice or recommendations within a process that would ultimately result in a decision by the government.

[7] Dealing first with Records I to V, in the context of this case and on the record before her, the Adjudicator found that no "advice or recommendations" had been shown to be part of the deliberations. She found that there was no recommended course of action demonstrated in these documents. This decision falls within the range of possible acceptable outcomes and is, thus, reasonable.

[8] Ms. McIntosh agreed that for the information contained within Records I to V to be "advice or recommendations", it would be necessary to demonstrate that it was communicated to the decision-maker. The Adjudicator determined that it was not demonstrated that such communication had taken place. This determination falls within the range of possible acceptable outcomes and is, thus, reasonable.

[9] Records I to V do not attract the protection of the exemption found in s. 13(1) of *FIPPA*. They are to be released.

[10] Record VI stands apart. The Minister proposed to redact three phrases in the document. The rest was to be released. The Adjudicator determined that the redactions should be made public. We disagree. Record VI opens with the phrase: "We agree with.." and then goes on to identify the subject of that agreement. On its face, this is a recommendation. The other redactions contain further advice as to how the issue could be dealt with. The communication of the advice or recommendation found in the document, within the deliberative process, was not contested.

[11] The author, Simon Thompson, offered an opinion on two options and expressed his advice and recommendation to his director, Ann Langleban, who was to prepare the briefing note to the final decision-maker.

[12] The redactions to Record VI proposed by the Minister are properly the subject of the exemption found in s. 13(1) of *FIPPA*. They are to be withheld.

[13] No costs are sought as between the Minister and the Commissioner. Costs are requested as between the representative taxpayer (John Doe) and the Minister. For his part, Mr. Cameron, on behalf of the taxpayer, expressed a concern that his client not be required to pay costs that might have been paid by the Commissioner, but for the agreement between the Commissioner and the Minister. The issues were important. The results were mixed. In the circumstances, this is a case where no costs should be awarded.

[14] Order to go according to these reasons.

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ASTON J.
LINHARES de SOUSA J.
LEDERER J.

Date: 20110401