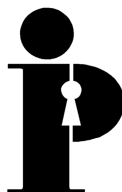

ORDER PO-2872

Appeal PA09-140

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/Téléc: 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:

> [all] records or parts of records in the Ministry of Finance and the Ministry of Revenue which consider the issue of retroactivity and the effective date of the amendments to subsections 2(1) and (2) of the *Corporations Tax Act*, which was effective May 11, 2005, including all records which provide the reasons for not deciding to make subsections 2(1) and (2) retroactive.

The Ministry located the responsive records and issued a decision denying access to the records, citing sections 13(1) (advice or recommendations) and 18(1)(d) (economic and other interests) of the *Act*.

The requester, now the appellant, appealed this decision.

During mediation, the Ministry issued a revised decision in which it added section 15(a) (relations with other governments) to Records I to III, removed section 13(1) from Record IV, removed section 18(1)(d) from Record V and disclosed part of Record VI. No other mediation was possible and this file was moved to adjudication where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry initially. I received representations from the Ministry, a complete copy of which was sent to the appellant along with a Notice of Inquiry. In its representations, the Ministry added the application of section 15(a) to Record IV and re-claimed the application of section 13(1) to Record IV. I received representations from the appellant in response.

RECORDS:

The records at issue are described in the following index:

Index of Records

Record #	Ministry Doc. #	Description of Record	# of pages	Disclosed?	Exemptions claimed
I	47	Undated - (2 pages) Draft Option Paper: Tax Haven Corporations - Timing of Implementation	2	no	13(1), 15(a), 18(1)(d)
II	48	a version of Record 1	2	no	13(1), 15(a), 18(1)(d)
III	49	another version of Record 1	2	no	13(1), 15(a), 18(1)(d)
IV	51	a version of Record 1 with three date options	1	no	13(1), 15(a), 18(1)(d)
V	71	Undated - (1 page)	1	no	13(1)

		Title: Note on Tax Avoidance Strategy			
VI	74	Feb. 28, 2005 - (1 page) CRA [Canada Revenue Agency] retroactivity criteria (main text prepared by the Manager, Tax Avoidance Unit, Ottawa Tax Office)	1	part	13(1)

DISCUSSION:

Preliminary Issue: Late Raising of Discretionary Exemptions

As set out above, the Ministry advised in its representations that it wishes to add the discretionary exemption in section 15(a) (relations with other governments) to Record IV in this appeal.

The *Code of Procedure* for appeals under the *Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Previous orders have identified that the objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. [Order PO-2113] However, the 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35- day period [Orders PO-2113 and PO-2331].

Furthermore, in Order PO-1832, Adjudicator Donald Hale stated as follows in reviewing this issue:

> In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

The Ministry submits that:

> Record IV is almost identical to [Records] I-III; it is not much of a stretch to see that the same exemptions apply to the same lines of text. Furthermore it would be unseemly for the Adjudicator to award an exemption for a record but not for its twin. No further words were added as the same argument was made once for all. No new responses would be needed by the appellant.

The appellant points out that the Ministry has not offered any explanation for the late raising of section 15(a) to Record IV. He states that the Ministry had ample opportunity to raise this exemption since the time that the request was filed on February 23, 2009. Furthermore, the Ministry would have received, on or about May 19, 2009, a Confirmation of Appeal, which indicated that the Ministry had 35 days to raise any new discretionary exemptions not originally claimed in its decision letter. He submits that the Ministry could have raised this exemption during the mediation phase when it issued its revised decision letter adding this exemption to Records I through III.

The appellant relies on Order MO-2468-F in which Adjudicator Laurel Cropley stated:

> End of the day decision-making regarding the applicability of possible exemptions is contrary to the access provisions of the *Act*, which require that a decision be given within 30 days of receiving the request (or any time extension contemplated by the *Act*), and strains the bounds of the IPC policy regarding the late raising of new discretionary exemptions.

The appellant claims that he is prejudiced by the delay caused by the Ministry's actions in the late raising of this discretionary exemption which ought to have been dealt with, for example, during the mediation phase. The appellant is also prejudiced by the additional cost that it has incurred in responding to the Ministry's request to add the Late Exemptions and in making alternative representations herein to address the inapplicability of the Late Exemptions to Record IV.

Analysis/Findings

Upon my review of the records, I note that Record IV is almost identical to Records I to III. The same information for which the Ministry is seeking to claim section 15(a) is the same information for which this exemption is claimed in Records I to III.

In the particular circumstances of this appeal, I have decided to permit the Ministry to claim section 15(a) for Record IV. The Ministry's basis for the application of this exemption to this record is the same as to its argument with respect to its claim that the exemption applies to Records I to III. I am not satisfied that the factors identified above as supporting the application of the rule are present in this case. Most importantly, I find that the appellant was not prejudiced by the late raising of section 15(a). The appellant has been given an opportunity to address the exemption claim and no delay has resulted from the additional claim. As the appellant did not have to provide a separate set of representations, the issue of the appellant's additional cost is not

relevant. Accordingly, I will allow the Ministry's claim that the discretionary exemption at section 15(a) applies to the Record IV.

ADVICE OR RECOMMENDATIONS

I will now determine whether the discretionary exemption at section 13(1) applies to the records.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

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

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].
Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

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

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

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

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

Representations

In its Index of Records, the Ministry titles Records I to IV as "Draft Option Paper: Tax Haven Corporations - Timing of Implementation". It states therein that these records are:

> …slightly different versions of the same option paper presented to Director [name] and from there to the Chief Budget Advisor. Paper was to assist the Chief Budget Advisor in making a decision on the proposed effective date of the anti avoidance legislation for tax haven corporations for the Minister to approve. It is not clear which is the final version, if any.

The Ministry titles Record V in the Index of Records as a "Note on Tax Avoidance Strategy" and describes this record as containing four options, three of which are repeats of the options in Records I to IV. According to the Ministry, all of the options in this record consist of recommendations.

In its representations, the Ministry submits that Records I, II, and III are papers prepared for a decision maker to be aware of a decision to be made with suggestions for reasonable alternatives to be considered. The decision was made by the Chief Budget Advisor, the Assistant Deputy Minister Budget and Taxation (the ADM), and was concurred in by the Minister.

Concerning Record V, the Ministry submits that it documents the retroactivity decision to be made. In this record, four options were first recommended by a civil servant noting some consequences for each recommendation, leaving all options viable. This would have gone for decision to the director but she chose to escalate it further to her ADM, the Chief Budget Advisor.

The Ministry then states:

> To the extent that any or all of the four documents [Records I to III and V] are drafts of what went to the decision maker, and some of them certainly are, they reflect the final document which did go to the decision maker, and an accurate inference could be made as to what was in the final document [emphasis added]…

The Ministry states in the Index of Records that Record VI is "Note by [name] dated Feb 28, 2005 (main text prepared by [tax expert at the Ministry of Revenue])" and that the undisclosed portions of this record are specific recommendations of this tax expert to prefer two options or courses of action over the other options.

Concerning Record VI, the Ministry submits in its representations that it was prepared for the director and incorporates advice from a corporations tax expert in another branch. According to the Ministry, the undisclosed information in this record consists of advice and recommendation to be used in the briefing note to the final decision maker and the result outlined therein is the legislative choice made.

The Ministry submits that:

> In these records, there is no need to infer the recommendations given as they are patent throughout the four records. Recommendations are not limited to the recommendation which was taken by the Chief Budget Advisor and adopted by the Minister. They include all the recommendations made, all the alternatives suggested.

The Ministry also provided an affidavit from the current Audit Manager responsible for Tax Avoidance Audits at the Ministry of Revenue who has held that position since July 2005. Prior to that time, from November 2004 to July 2005, his position was to provide advice and support to the Ministry's proposed transfer of its tax administration of Ontario's then *Corporations Tax Act*, R.S.O. 1990, c. C. 40, as amended to the Federal government. He does not discuss in his affidavit the specifics details of the records. His affidavit focuses on the effect on intergovernmental relations if the information in the records is disclosed.

The appellant submits that as the Ministry does not specify a preferred option or course of action in Records I through V, there is no suggested course of action and therefore no "advice or recommendations". He also submits that none of these records indicates who actually authored or communicated the information therein.

Concerning Record VI, the appellant submits that the Ministry merely claims that this record "incorporates advice" from an individual in another branch and not that it actually "reveals advice" as required by section 13(1). He also states that although the Ministry provided an affidavit from the very individual whose advice is allegedly incorporated into Record VI he did not make mention of this record, or any of the other records, in his affidavit.

The appellant submits that:

> For section 13(1) to apply, a preferred option must be expressly identified or be inferred. Contrary to the Ministry's representations, “[d]ocument[ing] recognition of [a] need” is not a “recommendation”; the presentation of multiple options is not... In fact, the Ministry’s representations state …that all of the options were viable, which is the opposite of “advice or recommendations”...
>
> [T]he Ministry speculates that “the paper” “would have” been presented to someone. The Ministry does not specify which record “the paper” refers to. Nor does the Ministry state that the unidentified paper was actually communicated to anyone. One might infer that “the paper” refers to an alleged unidentified “final document” later mentioned by the Ministry, not to any of the records actually at issue in this appeal.
>
> Similarly… the Ministry speculates that “[t]his would have gone for decision”. Assuming that “this” refers to Record V, which is by no means clear, the Ministry has failed to state that Record V was actually communicated to anyone.

The appellant points out that if a “final document” did exist, it would have been responsive to the request and would have been listed in the index of records. He also submits that:

> [T]he Ministry makes the vague assertion that “some” of Records I, II, III and V “certainly are” drafts of an alleged “final document” that went to a decision maker. The Ministry has not identified or produced the alleged “final document”, if such a document exists, that would demonstrate the communication of any alleged “advice or recommendation” or that would permit any in references to be drawn regarding the contents of the records...
>
> The Ministry suggests that “an accurate inference could be made as to what was in the final document”. The Ministry does not, however, assert that the “final document”, if such a document exists, contained any specific “advice or recommendation”, let alone whether the records would reveal that. There is no evidence on which it can be said that an inference can be drawn about what was contained in an alleged “final document” when there is no “final document” to compare the records to...
>
> [R]ather than suggesting that the disclosure would “inhibit the free flow of advice or recommendation to the government” …the Ministry asserts the real reason, indeed the only reason, that it decided against disclosure of the records: “to prevent harm to the Ministry in litigation …and protect the tax base from any indirect or side assault”. The Ministry’s reason for withholding the records has nothing to do with the free flow of advice or recommendations to government.

Analysis/Findings

Records I to V are different versions of the same draft option paper. As referred to above, concerning Records I to IV, the Ministry states in the Index of Records, "It is not clear which is the final version, if any". With respect to Records I to III and V, the Ministry states in its representations that: "To the extent that any or all of the four documents are drafts…"

Based upon my review of the records, the Ministry's Index of Records and representations, I am not persuaded that a final version of Records I to V exists. As stated above, 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. In this appeal there is no clear evidence of communication of the information in Records I to V from one person to another [Orders P-1097 and P-1341]. It is not apparent that the information in these five records, which are draft records, was communicated to the person being advised and, therefore, used in the Ministry's deliberative processes. The information provided by the Ministry is not sufficient to establish a connection between Records I to V and any deliberations or decision-making.

In particular, the draft nature of these records does not bring them within the ambit of section 13(1) of the *Act*. In Order P-872, Inquiry Officer Anita Fineberg considered the claim of the Ministry of Community and Social Services (that a draft report which reviewed the operations of a sexual assault crisis centre was exempt under section 13(1):

> Both the Ministry and counsel for the Centre submit that, because the report is a draft, the entire document satisfies the section 13(1) exemption. Counsel states that "... it is specifically noted to be a provisional document, requiring further assessment and input before final, reliable or accurate conclusions could be reached". I do not agree that the exemption applies merely because a document is a draft. In my view, the determination of the application of the exemption depends on whether it contains a suggested course of action made within the deliberative processes of government. This approach is consistent with the purpose of the Act set out in section 1(a)(ii) that necessary exemptions from the right of access should be limited and specific.

Similarly, in Order PO-1690, Adjudicator Holly Big Canoe considered whether a draft environmental report could be considered exempt under section 13(1). She stated:

> A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.

Further, this office has found that the mere use of the word “recommendations” is not determinative of the issue of whether or not the information that follows is shielded from exemption [see, for example, Order P-442]. Moreover, past orders have also emphasized that beyond matters of format, and word choice in headings, it is the content of a record said to be subject to section 13(1) that must be assessed in light of the context in which the record was created and communicated to the decision-maker (see Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)*, supra).

I agree with the reasoning in these orders. In my view, the circumstances surrounding this appeal are such that none of the information contained in Records I to V qualifies for exemption as advice or recommendations under section 13(1) of the *Act*.

Furthermore, even if Records I to V were draft versions of a final document where I had evidence that the information therein had been communicated to the person being advised, based upon my review of these records, I would have found that only the actual recommendation portion in Option 3 of Records I to III and Record V consisted of information which suggests a course of action that will ultimately be accepted or rejected by the person being advised. Concerning the remainder of the information in these records, as a preferred option is not expressly identified and cannot be inferred, therefore, there is no suggested course of action and no "advice or recommendations" [Orders PO-2028, PO-2355 and PO-2400].

According to the Ministry’s Index of Records, Record VI is a document distinct from the other records. Record VI was disclosed in part by the Ministry. The Ministry has made three severances to this record. The Ministry has provided information in its representations as to who authored and communicated the information in this record. However, the Ministry has provided conflicting information as to whether this record suggests a course of action that will ultimately be accepted or rejected by the person being advised. In the Index of Records, it states that the undisclosed portions of this record are specific recommendations of a tax expert (the person whose affidavit accompanied the Ministry’s representations), to prefer two options or courses of action over the other options. In its representations, the Ministry states that the undisclosed information in this record consists of advice and recommendation to be used in the briefing note to the final decision maker and the result outlined therein is the legislative choice made. From my review of the information in this record, I find that it does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. Therefore, I find that Record VI is also not exempt by reason of section 13(1).

I will consider below whether sections 15(a) and 18(1)(d) apply to Records I to IV. As only section 13(1) was claimed for Records V and VI, I will order these two records disclosed.

RELATIONS WITH OTHER GOVERNMENTS

I will now determine whether the discretionary exemption at section 15(a) applies to Records I to IV. The Ministry claimed this exemption for the two lines after the dash under Option 2 in Records I, II, III and IV and in Record III the two lines following the last dash in Option 1.

Section 15(a) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

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].

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 submits that:

> The subject matter of the information at issue in [Records] I-IV under subsection 15(a) is intergovernmental… considers the impact on other provinces of the choice of effective date. This information trickled down from intergovernmental anti avoidance meetings which were held prior to the drafting of the legislation…
>
> The Ministry submits that the intergovernmental portions of the records are prejudicial to government relations since there is a reasonable expectation of confidentiality between governments … when discussing the sensitive subject matter of tax avoidance and the General Anti-Avoidance Rule (GAAR). Disclosure of these discussions would prejudice the carefully cultivated relations between Ontario and the other taxing authorities. Specifically, disclosure would have a "direct and adverse impact on the good working relationships" that Ontario has established with other provinces and the CRA. This harm to government relations is compounded by the hundreds of millions of tax dollars at stake for Ontario and other governments making the sensitive subject matter of these discussions all the more important to the different provincial governments

> involved. The Ministry submits that harm to further frank and open communication with other governments is prejudicial to governmental relations (Order PO-1927-1). The governments continue to meet to discuss anti-avoidance issues. These meetings would be prejudiced, reduced or eliminated by the disclosures of any of their findings. Confidentiality is the expectation as participants have told me.

As stated above, the Ministry provided an affidavit from the Audit Manager responsible for Tax Avoidance Audits at the Ministry of Revenue. In his affidavit, he states that:

> It is a matter of great concern to Ontario that the release of this information could have a detrimental effect on intergovernmental relations between the provinces and territories and the CRA after Ontario has worked so hard to build on trust and develop networks.
>
> The broken promises of confidentiality and the broken trust which result from disclosure will in all likelihood result in an inability on the part of tax authorities to communicate important confidential information relating to tax avoidance schemes and will impact the tax base of the participating jurisdictions in the hundreds of millions of dollars.
>
> The inability of regulators to engage in inter-jurisdictional initiatives such as this one in the future will result from concerns that confidential information may be released,
>
> It is my belief and understanding that the disclosure of intergovernmental impacts and issues will prejudice the conduct of intergovernmental relations.
>
> The effect that the release of this information could have on intergovernmental relations between the provinces and territories throughout Canada is a matter of great concern to me. The disclosure of confidential information received by one jurisdiction from another could not be anything but harmful to the continued cooperation between jurisdictions.

The appellant submits that Records I to IV were not "created" or "received" in the course of the Ministry's relations with other governments. He states that as his request was for records about why the government of Ontario chose not to make the May 2005 Amendments to the *CTA* retroactive, these records are internal Ministry records. He also submits that the Ministry failed to provide details of:

> (a) the dates or locations of the alleged intergovernmental meetings;
>
> (b) which alleged meetings were the source of the information that allegedly "trickled down" to the records;
>
> (c) the sources of the information that allegedly "trickled down" to the records;

> (d) the individuals in attendance at the alleged meetings;
>
> (e) the identity of the other government(s) in attendance at the alleged meetings; or
>
> (f) what, precisely, the Ministry means by "trickled down".

The appellant also addressed the issue of prejudice to intergovernmental relations. He states that:

> Consistent with the appellant's position that the information in Records I, II, III and IV is not confidential, the Ministry did not claim section 15(b) in this appeal. That section addresses information received in confidence from other governments…
>
> [The Ministry's] affidavit focuses on the disclosure of alleged "confidential information…
>
> [T]he affidavit …also does not identify the subject matter in Records I though IV that is alleged to be "intergovernmental"…
>
> [The] affidavit refers to discussions about tax avoidance but does not state that those discussions are in any way related to or connected with the Records;…
>
> Notably, the Ministry did not submit any evidence from representatives of any other governments in this appeal…
>
> Finally, the appellant notes that, as part of the move to the single administration of Ontario's corporate tax system, the *CTA* was replaced effective for taxation years ending after December 31, 2008 with the *Taxation Act (Ontario)* (the "*OTA*"). The *OTA* incorporates the Federal rules of taxing corporations based on residency. Accordingly, the issues addressed in the records will unlikely ever be relevant again and thus cannot harm the future relations between governments in respect of those issues…

Analysis/Findings

As stated above, for section 15(a) to apply, the Ministry must demonstrate that disclosure of the records "could reasonably be expected to" lead to the specified result. To meet this test, it must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm. I agree with the appellant that the Ministry has not provided the requisite evidence. The appellant's sought records concerning "…the issue of retroactivity and the effective date of the amendments to subsections 2(1) and (2) of the *Corporations Tax Act*…" The records contain very general information on the impact on other provinces of the choice of effective date for the

implementation of this Ontario legislation in May 2005. These records are internal Ministry records, not records that would have been utilized in intergovernmental relations.

The Ministry, relying on Order P-1137, submits that although the records are internal documents that they qualify for exemption under section 15(a). In Order P-1137, Inquiry Officer Anita Fineberg described the records at issue in that appeal as consisting of:

> …communications exchanged directly between Ontario and the other provinces and/or territories, as well as correspondence between these other parties which was copied to Ontario. Some of these records were created by the Ministry for internal use and incorporate the information received from the other provinces and/or territories.

Similarly, the Ministry relies on Order P-961, for the proposition that internal records may be eligible for exemption under section 15(a). In that order, the records were clearly intergovernmental as they related to the relationship between Ontario and the federal government. The records consisted of correspondence between the Ministry of Natural Resources and the federal government, as well as this Ministry's communications strategy in conducting consultations required by the federal government prior to the Aboriginal Communal Fishing Licence Regulations enacted under the federal *Fisheries Act* were promulgated.

In this appeal, the records at issue were neither exchanged directly between Ontario and the other provinces or the CRA nor created by the Ministry for internal use and incorporating the information received from these other governments.

Even if the records did relate to intergovernmental relations, based on the general nature of the information contained in the records and the date of the records (pre-May 2005), I would not find that disclosure of the records could reasonably be expected to prejudice the conduct of these relations [Reconsideration Order R-970003].

Therefore, I find that I do not have sufficient evidence to support a finding that disclosure of the information at issue could reasonably be expected to jeopardize the relationship between other provinces and the Government of Ontario or an institution as claimed by the Ministry. On that basis, I find that section 15(a) does not apply to the information at issue in Records I to IV.

ECONOMIC AND OTHER INTERESTS

I will now determine whether the discretionary exemption at section 18(1)(d) applies to Records I to IV.

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].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

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 submits that the financial interests of the Government of Ontario could reasonably be expected to be injured significantly because disclosure of the information at issue in the draft option papers would result in prejudice to Ministry in its response to anticipated tax appeals, including a possible tax appeal initiated by the appellant. The Ministry submits that it is contrary to its financial interests to reveal the options in the records, including the weaknesses of each

timing option and the option taken, from the point of view of delivering it into the hands of one's opponent in the litigation. Furthermore, if the Ministry loses this anticipated litigation, the other options in the option paper are still open and available to the Ministry to adopt.

The Ministry states that the various options in Records I to IV are a complex body of interrelated statutory solutions. It relies on Order PO-1716, in which the appellants submitted that they were "not seeking any information relating to the financial or economic interests of the Province of Ontario, and if such information is determined to be contained within the records, it could be severed and withheld." In that order, this office found that such information could not be severed from the records, because:

> ... it is not information relating to the financial or economic interests of the Province of Ontario which is contained in the records, but information the disclosure of which **would impact on the financial interests of the Government of Ontario** which is contained in the records. ... [A] partial disclosure of the records or parts of records remaining at issue is not a viable option, because the records form a complex body of interrelated commercial terms (emphasis in original).

The appellant submits that:

> The possible financial "loss" of which the Ministry complains is one that flows, not from the disclosure of the records, but instead from a combination of two other events, neither of which has occurred:
>
> > (a) the commencement of litigation between [certain taxpayers that were issued reassessments (the Taxpayers)] and the Ministry; and
> >
> > (b) a judicial determination in the litigation that the Ministry's Reassessments were erroneous in some manner, with the result that the government must return to the Taxpayers taxes that they did not have to pay.
>
> There is no "clear and direct linkage" between disclosure of the records and any injury that section 18(1)(d) is intended to protect against.
>
> The Ministry's position is that it should be entitled to refuse to disclose documents that might shed light on whether it did something for which the government might be required to return taxes to the Taxpayers pursuant to a court order. That is not the kind of interest that section 18 is designed to protect. Section 18(1)(d) of the *Act* does not exist to shield the government from legal liability.
>
> In its analysis, the Ministry ignores the fact that, if the Reassessments are erroneous, then it would be beneficial, not injurious, to the financial interests of

> the government to settle or narrow the issues with the Taxpayers, thereby avoiding the time, expense, legal costs and interest expense (all paid for by the taxpayer), that would occur if litigation were to take place. If the records shed light on whether the Reassessments were erroneous, then their disclosure will contribute to such an outcome and thereby be beneficial to the financial interests of the government…
>
> [T]he Ministry has [also] failed to provide "detailed and convincing" evidence to establish a reasonable expectation of harm…
>
> [T]he Ministry suggests in passing that the options in the records that the Ministry did not pursue would still be available for the Ministry to adopt even if it loses anticipated litigation with the Taxpayers. The issue addressed in the records is the effective date of the May 2005 Amendments; they were made effective in 2005. The Ministry made its choice about the effective date and enacted the legislation on that basis; as such, it cannot be said that the "other options" in the Records are "still open and available to the Ministry to adopt".

Analysis/Findings

Based on my review of the parties' representations, including the Ministry's affidavit, I find that Section 18(1)(d) does not apply to Records I to IV. The Ministry's representations concerning the usefulness of the information in the records at issue in a tax appeal is speculative at best. The Ministry has not indicated how this information would be relevant to litigation which involves a reassessment decision made by the Ministry concerning the tax payable by a taxpayer. It is also not apparent from a review of the information in these records how this information could be of any use to the Ministry in a tax appeal.

The Ministry also argues that the options set out in the records at issue are still open and available to the Ministry to adopt. As set out above, these records are draft documents, for which there may not have been a final version. As stated by the appellant in his request, the records concern the effective date of the May 2005 amendments to section 2(1) and 2(2) of the *CTA* and the reasons why these amendments were not made retroactive. These sections of the *CTA* read:

> 2(1) Subject to subsection (5), every corporation resident in Canada that has a permanent establishment in Ontario at any time in a taxation year shall pay to Her Majesty in right of Ontario the taxes for the taxation year imposed by this Act at the time and in the manner required by this Act. 2005, c. 28, Sched. D, s. 2 (1); 2007, c. 11, Sched. B, s. 2 (1).
>
> (2) Subject to subsection (5), every non-resident corporation shall pay to Her Majesty in right of Ontario the taxes for a taxation year imposed by this Act at the time and in the manner required by this Act if, at any time in the taxation year or in a previous taxation year,

> (a) the corporation had a permanent establishment in Ontario within the meaning of section 4;
>
> (b) the corporation owned real property, timber resource property or a timber limit in Ontario and the corporation's income from the property or timber limit,
>
> (i) arose from the sale or rental of the property or timber limit, or
>
> (ii) is a royalty or timber royalty; or
>
> (c) the corporation disposed of property,
>
> (i) that would be taxable Canadian property as defined in subsection 248 (1) of the Income Tax Act (Canada) if the reference in that definition to section 2 of that Act were read as a reference to this section, and
>
> (ii) that is deemed under the regulations to be situated in Ontario. 2005, c. 28, Sched. D, s. 2 (1); 2007, c. 11, Sched. B, s. 2 (2).

Even if the Ministry would one day be in a position to revisit an amendment to these sections of the *CTA*, the Ministry has not demonstrated a connection between the timing options outlined in Records I to IV concerning the retroactivity of an amendment to the *CTA* in 2005 and any injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

As noted above, for 18(1)(d) to apply, the Ministry must demonstrate that disclosure of the records "could reasonably be expected to be injurious" to its financial interests and must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". I find, that the Ministry has failed to provide the kind of "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated under section 18(1)(d).

In summary, I find that the Records I to IV do not qualify for exemption under section 18(1)(d) of the *Act*, as disclosure of the information in these records could not 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. As no exemptions apply to these records, I will order them disclosed.

ORDER:

1. I order the records to be disclosed to the appellant by **March 11, 2010**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

Original Signed By:________________________ February 18, 2010
Diane Smith
Adjudicator