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

Reconsideration Order PO-2899-R

Appeal PA09-140

Order PO-2872

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

BACKGROUND:

This order addresses a request by the Ministry of Finance (the Ministry) that I reconsider Order PO-2872, in which I ordered the Ministry to disclose the records at issue to the requester. That order concerned 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 denied access to the responsive 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 under the *Act*.

During adjudication of the appeal, and prior to issuing Order PO-2872, I invited representations from the parties in the manner described in this paragraph. Initially, I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry, inviting its representations. 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. After review of the appellant's representations, I decided that it was not necessary to seek representations in reply from the Ministry.

After issuance of Order PO-2872, the Ministry provided me with representations seeking a reconsideration of this order and replying to the appellant's representations that I referred to in that order. I then provided the appellant with a copy of the Ministry's representations requesting that the order be reconsidered. Portions of the Ministry's representations were withheld due to confidentiality concerns. The appellant responded with representations, and in its response, the appellant reiterated its reliance on certain portions of its initial representations. Therefore, I sent a copy of the appellant's response, along with a copy of the appellant's initial representations, to the Ministry, seeking its representations in reply. I received representations in reply from the Ministry.

RECORDS:

The records at issue are described in the following chart:

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) Title: Note on Tax Avoidance Strategy	1	no	13(1)
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:

In this order, I will consider whether to grant the Ministry's request that I reconsider Order PO-2872.

THE RECONSIDERATION PROCESS

Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;

> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

GROUNDS FOR THE RECONSIDERATION REQUEST

Fundamental defect in the adjudication process

The Ministry submits that a fundamental defect in the adjudication process occurred when it was not provided with an opportunity to reply to the appellant's representations. In support, the Ministry relies on the following four reasons:

1. The Ministry was entitled to obtain a copy of the appellant's representations prior to the issuance of Order PO-2872;

2. The Ministry was entitled to provide representations in reply to the appellant's representations;

3. The Ministry was entitled to provide confidential representations at the reply stage that would not be shared with the appellant; and,

4. The Ministry was not required to demonstrate a link between the records and the claimed exemptions in its initial representations.

I will consider each of the Ministry's reasons separately.

1. The Ministry was entitled to obtain a copy of the appellant's representations

The Ministry submits that I did not exercise my discretion in a proper and correct manner in deciding to not provide a copy of the appellant's representations to the Ministry as none of the criteria for withholding the appellant's representations set out in this office's *Practice Direction 7* concerning the sharing of representations were applicable. The Ministry appears to be arguing that as the appellant provided only non-confidential representations, that *Practice Direction 7* did not apply and it is entitled to receive a copy of these representations. The Ministry cites sections 5 and 6 of this practice direction which read:

> 5. The Adjudicator may withhold information contained in a party's representations where:

> (a) disclosure of the information would reveal the substance of a record claimed to be exempt; or
>
> (b) the information would be exempt if contained in a record subject to the Act; or
>
> (c) the information should not be disclosed to the other party for another reason.

6. For the purpose of section 5(c), the Adjudicator will apply the following test:

> (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party;
>
> (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;
>
> (iii) the relation is one which in the opinion of the community ought to be diligently fostered; and
>
> (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit gained for the correct disposal of the appeal.

Although the Ministry states that it requested a copy of the appellant's representations, there is no indication of this in its initial representations.

Analysis/Findings

I agree with the Ministry that the confidentiality criteria in *Practice Direction 7* do not apply to the appellant's initial representations, as they were not claimed to be confidential. I find, however, that the provision of non-confidential representations by a party does not give another party to an appeal the right to obtain a copy for their review.

In this case, I followed the usual procedure outlined in section 7 of the *Code*, as follows:

> 7.03: If the Adjudicator decides to conduct an inquiry, the Adjudicator sends a Notice of Inquiry to the party bearing the initial onus and invites submissions.
>
> 7.04: Upon receipt of that party's submissions, the Adjudicator may, if he or she considers it necessary, send a Notice of Inquiry to the second party and invite submissions.

> 7.05: Upon receipt of the second party's submissions, the Adjudicator may, if he or she considers it necessary, send a modified Notice of Inquiry to the first party inviting further representations in reply.
>
> 7.07: The Adjudicator may provide some or all of the representations to the other party in accordance with *Practice Direction 7*.

Under section 7.05 of the *Code*, I decided that it was not necessary, in the interests of fairness, to invite reply representations from the Ministry. Below I explain my reasons for that decision. Accordingly, following the usual procedure of this office, I did not share the appellant's representations with the Ministry. Therefore, the decision to withhold the appellant's representations was not based on any confidentiality interest of the appellant, but rather was based on following the usual procedure of this office where the adjudicator decides that it is necessary only to proceed to steps one and two of the process (*i.e.*, seeking representations from the institution initially, then seeking representations from the appellant, under sections 7.03 and 7.04 of the *Code*).

In advancing its claim that it had a right to obtain a copy of the appellant's representations, the Ministry makes no mention of section 52(13) of the *Act* which reads:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made [emphasis added].

Therefore, based upon the wording of section 52(13), and on the fact that I followed the usual process of this office under section 7 of the *Code* where only two steps are necessary, I find that I did not err in failing to provide the Ministry with a copy of the appellant's representations and I dismiss this ground for reconsideration.

2. The Ministry was entitled to provide representations in reply to the appellant's representations

The Ministry states that the process followed in the appeal followed the procedure set out in the *Code* save for one exception, that I did not send the Ministry the appellant's representations and invite its reply representations, which was contrary to the Ministry's expectations. The Ministry states that:

> …over the last twenty years, the IPC has unfailingly sent the Ministry copies of an appellant's representations and invites a reply, unless the Adjudicator makes a decision in the Ministry's favour.

The appellant submits that:

> The Ministry claims that it expected to be able to reply to the appellant's representations. That claim ignores the possibility that the appellant might not have put in any representations. More important, the Ministry did not communicate its alleged expectations at the material time – i.e. when it submitted its initial representations in this Appeal. In other words, the Ministry did not advise the Adjudicator at that time that it was submitting superficial representations and that it wished to reserve the right to provide additional representations and evidence after the appellant had put in its representations.

In reply, the Ministry submits that:

> … [T]he Ministry does not have to reserve the right to make further representations to reply to the appellant. *Practice Direction 7* addresses the "Sharing of Representations". Unless one of the exemptions stated in *Practice Direct 7* apply, each party can reasonably expect to be able to receive a copy of the other party's representations. There are only certain reasons given in *Practice Direction 7* for not sharing the representations of the other party: namely, that the records would be betrayed (and this never applies to the appellant) or the material is otherwise exempt (and this never applies to the appellant) or that there is some other reason exists for not sharing (and this did not apply to the appellant in this case). Therefore, consistent with *Practice Direction 7*, the appellant's reasons should have been shared.

Analysis/Findings

As I explained above, sections 7.03 to 7.05 of the *Code of Procedure* describe the procedure for seeking representations in an inquiry. Section 7.03 states that the adjudicator "sends" a notice of inquiry to and seeks representations from the party bearing the initial onus. This is the first stage of the inquiry. By contrast, sections 7.04 and 7.05 (the second and third stages) indicate that the adjudicator "may", if he or she considers it necessary, seek submissions from the given party. Therefore, the adjudicator has discretion as to whether to proceed to the second or the third stage of the inquiry. Once an inquiry proceeds to the second stage, there is nothing in the *Code of Procedure* to indicate that an adjudicator will always proceed to the third, reply stage. To the contrary, the *Code of Procedure* indicates that an inquiry may end after the second stage.

Further, based on section 52(13) of the *Act*, there no party has a right to review and reply to the representations of any other party.

The Ministry submits that this office "unfailingly" seeks reply representations unless the adjudicator decides in the Ministry's favour. I note that in several cases involving the Ministry, this office has decided it was not necessary to seek reply representations from the Ministry, despite the fact that the appeal was not resolved entirely in the Ministry's favour. See, for example, Orders PO-2556, PO-2235 and PO-2059-I. The Ministry has not provided the necessary "unequivocal" evidence of a past practice of this office to always seek reply representations where the Ministry's decision is not upheld (see *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28 at para. 133).

Therefore, while the Ministry may have had an expectation that it would be given an opportunity to reply to the appellant's representations, this expectation has no valid or legitimate basis in the *Act*, the *Code of Procedure*, or in the general practices of this office.

The decision as to whether or not to proceed to the latter stages of the inquiry is based on all of the circumstances of the case, including the content of the submissions already provided, as well as considerations of procedural fairness.

In this case, after reviewing the appellant's submissions, I decided that the appellant had not made any submissions to which the Ministry should be given an opportunity to reply. The appellant's representations essentially consisted of explanations as to why the Ministry had not discharged its burden of proving the application of the claimed exemptions. The appellant did not raise new issues, or cite new statutory provisions or case law which would warrant a reply from the Ministry.

I note that section 2.04 of the *Code of Procedure* states that this office "may in its discretion depart from any procedure" in the *Code*, "where it is just and appropriate to do so." If the Ministry wanted this office to depart from its usual practice, for example, by "reserving" the opportunity to provide reply representations, it ought to have asked me to do so during the course of the inquiry. The Ministry failed to do so until after the inquiry was completed and my order was issued.

In *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39, the Supreme Court of Canada held that the duty of fairness will vary according to the circumstances, but that those affected by a decision should be afforded the opportunity to put forward their views and their evidence fully. Justice L'Heureux-Dubé stated in the *Baker* case that:

> …the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp.

> 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd*., 1990 CanLII 132 (S.C.C.), [1990] 1 S.C.R. 282, per Gonthier J.

In *Forest Industrial Relations Ltd. v. I.U.O.E., Local 882*, [1961] S.C.J. No. 65, the Supreme Court of Canada held that the duty of fairness is not violated if a decision maker, having heard all the evidence, decides that a debate has gone on long enough and denies a party the right to reply to a reply [see also *Canada Post Corporation v. Canadian Union of Postal Workers*, 2007 BCSC 1702].

I find that the Ministry was afforded the opportunity to put forward its views and evidence fully in this appeal. Therefore, I find that the Ministry was not entitled to provide representations in reply to the appellant's representations and I dismiss this ground for reconsideration.

3. The Ministry was entitled to provide confidential representations at the reply stage that would not be shared with the appellant

The Ministry submits that it was prejudiced by not having an opportunity to reply to the appellant's representations. It submits that:

> In this Appeal, the Ministry followed the IPC's normal procedure and deliberately wrote its representations in such a way that they could be shared with the appellant. The Ministry anticipated that its representations would be shared with the appellant in accordance with the IPC *Code of Procedure*. None of the criteria for keeping the representations confidential in accordance with *Practice Direction 7* apply to the Ministry's original representations, as the Ministry consented to share them [emphasis added].

The Ministry relies on its experience in another appeal where I rendered a sharing decision concerning the Ministry's confidential representations. In that appeal, the Ministry submitted a Request for Reconsideration of my sharing decision of its representations. In that case, upon reconsideration, I agreed with the Ministry that certain portions of its representations should remain confidential. The Ministry goes on to state that:

> Cognizant of the fact that the Adjudicator would want to share the Ministry's confidential representations with the appellant in this Appeal, as in her previous case, the Ministry did not submit any confidential representations this time, fearful that another twenty pages would be needed to change her mind on that point after a draft order as before. When confidences are breached, trust breaks down quite easily. The Ministry was afraid to submit confidential representations, and as a result was less able to link the records to the exemptions…

> The Ministry expected to be able to address the arguments raised by the appellant, and even use confidential representations if necessary at [the reply] stage [emphasis added].

The appellant submits that:

> …having failed to establish its claimed exemptions, the Ministry claims in its Request that it was "afraid to submit confidential representations, and as a result was less able to link the records to the exemptions". The Ministry's insinuation that the IPC cannot be trusted with confidential representations is absurd and without any evidentiary foundation…
>
> The tactics employed by the Ministry in this Appeal should not be sanctioned or countenanced. The Ministry's intentional failure to put its best case forward, all the while expecting that it could later re-argue its case and enter fresh representations and evidence under the guise of a reply or a reconsideration request, is wholly improper. The Ministry's tactics undermine the integrity of the appeal process, add considerable delay and cost to the appeal and prejudice parties' right to timely access to information under the *Act*.

In reply, the Ministry submits that:

> …the problem of trust when the Adjudicator orders the disclosure of confidential representations subject to a Request for Reconsideration is reflected in paragraph 6(ii) of *Practice Direction 7* which states that when ordering the disclosure of the representations the Adjudicator will apply the following as a test: "(ii) whether confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party". The result of an order to share representations leads to Ministry compliance with the IPC's preference of non confidential representations for the very reason of trust erosion. In non-confidential representations, the Ministry is not able to freely discuss the contents of the Records as it would reveal the subject matter for which an exemption is sought. Non confidential representations favour the Appellant, as they reduce the ability of the Ministry to make its case forthrightly; trust in a fair process is called into question for another reason, particularly in the face of s. 55 of the *Act* [emphasis added].
>
> …far from being improper, the Ministry's approach has been to correct the wrong of not being given an opportunity to reply by replying rather than dwell on it.

Analysis/Findings

The Ministry appears to have undergone a case-splitting tactic in this appeal where it intentionally reserved important argument in anticipation of being invited to provide reply representations, in which it planned to refer to the contents of the records, and to explain in detail

why it claimed the records are exempt under the *Act*. Apparently, the Ministry assumed that, if it proceeded in this manner, its reply representations would not be shared with the appellant.

I note, however, that the initial Notice of Inquiry advised the Ministry that:

> …under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

It was also advised in the Notice of Inquiry that it could submit confidential representations, as follows:

> The sharing of representations is addressed in *Practice Direction Number 7*, issued by this office
>
> Your representations may be shared with other parties to the appeal unless they meet the confidentiality criteria identified in *Practice Direction Number 7*, which are reproduced on page 3 of the enclosed "Inquiry Procedure at the Adjudication Stage".
>
> **Please state your position concerning the sharing of your representations.**
>
> **If you believe that portions of your representations should remain confidential, please identify these portions and explain why the confidentiality criteria apply to the portions you seek to withhold** [emphasis in original].

I find that the Ministry should and could have provided complete representations, including confidential representations if necessary, when it provided its initial representations in response to the Notice of Inquiry.

The Ontario Divisional Court has considered and upheld the approach taken by this office to the sharing of representations in the case of *Toronto District School Board v. Ontario (Information and Privacy Commissioner)*, [2002] O.J. No. 4631 (Div. Ct.) (although the court partially reversed the adjudicator's sharing of representations decision in Order MO-1521-I, on the particular facts of that case).

In that decision, during the adjudication stage of the appeal, Adjudicator Cropley, upon receipt of the submissions of the institution, expressed her intention to release portions of the institution's submissions to the appellant. Upon judicial review of that order, the argument was raised as to whether the adjudicator erred in deciding that she had jurisdiction to order the release of the institution's representations under section 41(13) of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent of section 52(13) of the *Act*).

In that case, the institution submitted that section 41(13) of the municipal *Act* does not grant power to the adjudicator to order the disclosure of representations made, but was instead a clear expression of the legislature's intent to override the requirement for procedural fairness under the rules of natural justice.

The Court referred to the interpretation of an identical provision (found in section 52(13) of the *Freedom of Information and Protection of Privacy Act*) articulated by former Commissioner Sidney B. Linden in Order 164:

> Counsel for the institution argues that these express grants of authority constitute the limits to the Commissioner's discretion, and that I may not arrogate to myself any power not explicitly given.
>
> ... I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the right to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.
>
> Counsel for the institution is correct when he states that the *Statutory Powers Procedure Act* does not apply to an inquiry under the *Freedom of Information and Protection of Privacy Act, 1987*. Thus, the only statutory procedural guidelines that govern inquiries under the *Freedom of Information and Protection of Privacy Act, 1987* are those which appear in that *Act*. However, while the *Act* does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
>
> ...
>
> Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed ... allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

The Court accepted this approach of Commissioner Linden concerning the power of an adjudicator to order the exchange of representations between the parties.[1] Mr. Justice Then, speaking for the Court, specifically found that:

> While [section 41(13) of the municipal *Act*] properly interpreted, provides a discretion to the Commissioner to disclose representations, a proper interpretation necessarily imposes limitations on its exercise which are consonant with the purposes of the *Act*. In our view, those limitations are appropriately contained in the guidelines developed by the Commissioner as information contained in the representations of the parties may be withheld by the Commissioner in circumstances where:
>
> > (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded; or
> >
> > (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
> >
> > (c) the information should not be disclosed to the other party for another reason.
>
> …to interpret [section 41(13)] in the manner advanced by Commissioner Linden would preserve the policy that the section is meant to foster, namely, full and frank submissions, in circumstances where the parties could more fully exercise their rights to natural justice. The Commissioner, as adjudicator, would reap the benefit of shared submissions, limited only, by the exclusion of those submissions which would expose the privacy rights at issue.

I agree with the submissions of the appellant on this issue. The Ministry is not entitled to case-split by providing superficial non-confidential initial representations, and then providing its substantive representations at the reply stage, thereby seeking to avoid having parts of its representations shared with the appellant,. In addition, if the Ministry was not satisfied with a sharing decision concerning its representations, it was fully aware that it could have sought a reconsideration of that decision under section 18 of the *Code* or seek judicial review of the sharing decision. I also do not accept the Ministry's claims based on lost trust. In my view, the Ministry's allegations about previous cases and its relationship with this office are unjustified on the facts and entirely without merit.

[1] In doing so, the Court relied on the following decisions: *Gravenhurst v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.); *Attorney-General v. Mitchinson*, [1998] O.J. No. 5015, (November 30, 1998) Toronto Doc. 383/98, 681/98, 698/98 at p. 3 (Div. Ct.); and *Solicitor General and Minister of Correctional Services et al. v. Information and Privacy Commissioner et al*. (June 3, Sept. 10, 1999) Toronto Doc. 103/98, 330/98, 331/98, 681/98, 698/98 at pp. 1-2 (Div. Ct.).

I also note that this use of reply representations would not be consistent with the purpose of inviting a reply to another party's submissions, which does not usually entitle a party to introduce new issues. In addition, the Ministry seems to assume that its representations at the reply stage, if it had provided them, would not have been shared. However, this assumption is not valid. It is entirely possible that non-confidential portions of the Ministry's reply representations, if it had provided them, would have been shared with the appellant for sur-reply purposes, and this approach would not have advanced the Ministry's objective of not sharing its representations.

I find support for these views in the Divisional Court's decision in *Maidstone (Township) v. Starzacher* (January 10, 1994), London Doc. 796972 (Ont. Div. Ct.). In rejecting an institution's submission that this office's process was unfair, the court stated:

> The [institution] argues that the [adjudicator] failed to conduct a full and proper inquiry because he did not seek clarification or elaboration of the position taken by the head of the [institution]…In our opinion the [institution] had every fair opportunity to present its case. The fact that if failed to do more than baldly state its position does not detract from the fairness of the [adjudicator's] conduct of the hearing. The hearing conformed to all requirements of fairness set out in the statute.

For all these reasons, I do not accept the Ministry's argument that it should have been entitled to provide confidential representations at the reply stage that would not be shared with the appellant and I dismiss this ground for reconsideration.

4. The Ministry was not required to demonstrate a link between the records and the claimed exemptions in its initial representations

The Ministry submits that it should not have been expected to demonstrate a link between the claimed exemptions and the information in the records. It submits that:

> Because the Ministry did not make its representations to the Adjudicator in confidence, it could not reveal the contents of the records at issue in the Appeal. In spite of this, the Ministry nonetheless provided detailed and convincing evidence to the extent that it could without revealing the contents of the records. The Ministry relied on the good judgment of the Adjudicator to look at the records to judicially notice the match between the records and the exemptions claimed, as is necessary with confidential representations.
>
> In the Order, the Adjudicator found that the Ministry's evidence was not sufficiently detailed and convincing proof of:
>
> - The link between the records and the Ministry's decision making process (p. 8);

- The link between the records and intergovernmental relations (p. 12); and

- The harm to the Ministry in the anticipated litigation that would arise as a result of disclosure of the records (p. 16).

> To the extent that the Ministry's representations were not sufficiently detailed and convincing, it is because the link between the records and the Ministry's decision making process, and the link between the records and intergovernmental relations are not part of the tests for meeting exemptions under section 13(1) and 15(a) that are set out in the IPC's Orders, and which are quoted in the Ministry's representations. In not assisting the Ministry with the links, the Adjudicator was effectively demanding that confidential representations be made and denying the IPC preferred procedure of non confidential representations from having any effectiveness. Either method is unacceptable to the adjudicator. To the extent that such linkage was required beyond marking the exemptions on the records at the appropriate place, the Ministry could have submitted confidential representations that make such links by referring to the contents of the records [emphasis added].

In response, the appellant submits that:

> In response to the Notice of Inquiry, the onus was on the Ministry to put its best case forward to attempt to establish its claimed exemptions.

In reply, the Ministry submits that:

> …there is nothing in the IPC *Code of Procedure* or *Practice Directions* which precludes the inclusion of further evidence in a reconsideration request. Article 18.02 of the *Code of Procedure* simply states: "The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision." The Ministry's position is that there was a fundamental defect in the adjudication process, in that the Ministry was not provided with an opportunity to respond to the Appellant's representations, and is the basis for the reconsideration request.
>
> The procedure of tribunals is not regulated like that of courts other than by the published procedures of the tribunal itself. In a court there is only one trial event of consecutive days and only one occasion for the evidence to be brought and there are hundreds of rules for excluding evidence. In this tribunal there are no rules for excluding evidence. The rule for tribunals is not to decide without hearing all the evidence. It is quite normal to provide further affidavit in a reply to the Appellant. Whenever representations are made for an exemption that requires proof, Practice Directive 5 includes in its checklist: "Have you provided detailed and convincing evidence?" and "Have you provided facts to support your claim?" Affidavit evidence and facts provided by the lawyer are part of every representation.

> In this iterative process, to address the issues raised by the IPC and by the opposing party, additional facts, or clarifications may be necessary. "Representations" is defined on page 3 of the *Code of Procedure* to include evidence. Further expenditure of time in this kind of work usually clarifies the contentious issues. Far from being unfair and improper, in this tribunal, this is a necessary and common practice. Generally, replies are limited to existing issues, and are not an opportunity to raise new issues. The nature of replying is to respond in a different way bearing in mind what the other side has said.
>
> More evidence on the contentious issues is not proscribed. The Ministry's proper and fair purpose is to take the additional rebuttal time in a reply to assist the Adjudicator in understanding the Ministry's reasoning in claiming the exemptions [emphasis added].

Analysis/Findings

Section 53 of the *Act* states that:

> Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

This principle was reiterated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23, where it was stated: "The Minister asserting the exemption has the burden of demonstrating that it applies" (para. 23).

This office's *Practice Direction 2 "Representations: General guidelines"* provides that:

> This Practice Direction offers practical guidelines to help improve the effectiveness of representations made to the IPC under the *Act*.
>
> The parties should submit representations that are relevant and factual, and refer to the connections between exemptions claimed under the *Act* and the records in question, or alternatively, explain why an exemption should not apply [emphasis added].

This office's *Practice Direction 5 "Guidelines for institutions in making representations"* provides that:

> Each exemption under the *Act* has certain requirements which must be satisfied. It is important that institutions claiming an exemption address each component of these requirements. If representations are too general or if the necessary connections are not clearly made, the representations will fail to establish that the exemption applies. The questions below are intended to assist institutions in assessing the issues in an appeal and the topics to cover in their representations [emphasis added].

> For every exemption claimed:
>
> • Have you clearly identified the record or part at issue?
>
> • Have you identified the exemptions that apply to each part of the record which has been withheld from disclosure?
>
> • Have you reviewed the Notice of Inquiry which the Adjudicator has provided to your institution for guidance?
>
> • Have you addressed each of the issues and/or answered each of the questions set out in the Notice of Inquiry?

Again, I agree with the appellant that the Ministry bore the onus of proof in its initial representations. The Ministry was not entitled to await the reply stage before producing the necessary evidence or argument in order to do so. The decision in *Maidstone* I cited above reinforces this conclusion. In addition, I would point out that, contrary to the Ministry's reference to whether this is required by the "test" for sections 13(1) and 15(a), *every* exemption must be connected to the record for which it is claimed based on the evidence and argument provided. In some instances the best evidence of the connection is the record itself. In this appeal, I did conduct the record-by-record review expected by the Ministry.

Based on section 53 of the *Act* and the clearly articulated advice on proving an exemption claim set out in *Practice Directions 2* and *5*, I dismiss the Ministry's argument that it was not required in its representations to demonstrate a link between the records and the exemptions claimed.

Conclusion re: reconsideration request

I find that the Ministry has not established that a fundamental defect in the adjudication process has occurred and I will not reconsider Order PO-2872. However, even if I were to reconsider Order PO-2872, I would not modify or reverse this order, as the Ministry has not provided evidence or argument that would persuade me to reach different conclusions than those set out in Order PO-2872. I will describe below the key points of the Ministry's evidence, which are for the most part contained in its representations filed initially in support of its reconsideration request.

Section 13(1) - Advice or recommendations

Section 13(1) reads:

> 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.

In its reconsideration representations, the Ministry submits:

> The Adjudicator stated that the information the Ministry provided was "not sufficient to establish a connection" between the records and the deliberation. The fact that the legislation settled on one of the options establishes the required connection, as set out in the Ministry's representations. A decision was made on retroactivity. The presenters and the decision makers are named. The award to the Chief Budget Advisor for advising the Minister on difficult decisions like this is in the Budget Speech. ….
>
> The Adjudicator also found that the "draft nature" of the Records did not bring them within the ambit of section 13(1) of the Act. The drafts do not differ significantly. A reasonable inference could be made about the final version of the option paper by reading Records I-IV and the summary on V and are therefore equally exempt under section 13(1). The Affidavit of [the Director of the Corporate and Commodity Tax Branch] states that these options were presented to the decision maker who was the Minister, and she provides the agenda for that meeting in April, 2005. She recalls no difference between these option papers and the final one and would not swear to which was the final one. It does not matter, because these were the only options there were, and they were presented before the decision makers. The information on these records is the same as the information which would have been on the record presented. A reasonable inference could be made that the final document contained these options and recommendations… [emphasis added]

In support, the Ministry provided the affidavit of the Director of the Corporate and Commodity Tax Branch, who states:

> I participated at the relevant time in reviewing and advising on the tax policy option papers which are Records I-IV.
>
> To the best of my recollection, these records formed part of the Budget briefing process, which involved briefings of the Assistant Deputy Minister, Office of the Budget and Taxation, the Deputy Minister of Finance and the Minister of Finance…
>
> …it is my recollection that these options were included for explanation and decision by the Minister [emphasis added].

Concerning Record VI, the Ministry submits that:

> The Adjudicator's reason for rejecting the Ministry's evidence as conflicting is not sensible or sufficient. The implication is that a tax expert's advice will not be taken and put into an option paper for a high level briefing, when, in fact, that is what always happens. Ideas of this tax complexity are not arrived at without a tax

> expert's advice and recommendations. Various iterations in the records show that process.

Analysis/Findings

As stated in Order PO-2872, 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. Concerning Records I to V, I still find, based on the representations cited above, there remains no clear evidence of communication of the information in these records from one person to another [Orders P-1097 and P-1341]. As I stated in Order PO-2872:

> 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.

Concerning Record VI, I find that the Ministry has not provided any substantive information in its reconsideration representations to demonstrate that the information at issue in this record suggests a course of action that will ultimately be accepted or rejected by the person being advised.

Section 15(a) – Intergovernmental relations

Section 15(a) reads:

> 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

In its reconsideration representations, the Ministry states that:

> The *Corporations Tax Act* [s. 98] mandates that once one government gets information from another government furnished in relation to any one of the corporations tax acts of various jurisdictions, sub (1) plays a role to restrict any further disclosure such as disclosure to the Appellant…

The Ministry also relies on the *Ministry of Revenue Act*, and states that:

> …This supports the confidentiality as between communications among jurisdictions even if no harm were proven. With due respect to [the *Act*], nonetheless, harm has been proven by statements of the jurisdictions that the inter-jurisdictional relationships of trust would be harmed.

The Ministry then makes reference to section 55 of the *Act* which requires the Commissioner and her delegates to keep confidential all matters that come to their attention in the performance of their duties. It makes reference to Exchange of Information intergovernmental agreements and states that:

> …if the parties can rely on the statutory requirement of confidentiality to imbue an expectation of confidentiality in providing records and confidential materials to the IPC, then the Ministry can also rely on its statutory provisions to impart the same expectation with respect to materials on the subject of intergovernmental discussions. The Commissioner undoubtedly has follow up policies, security practices and educational materials to make sure that the section is honoured, as the Ministry of Revenue does [emphasis added].
>
> … The government knows it need not disclose intergovernmental confidences and opinions or documents which reveal those confidences…

The Ministry filed an additional affidavit of the Audit Manager responsible for Tax Avoidance Audits at the Ministry of Revenue. Portions of this affidavit were not shared with the appellant due to confidentiality concerns. In the non-confidential portions of this affidavit, the Audit Manager states that:

> The scheme and its impact on other provinces was discussed with them directly and also indirectly at the federal-provincial Subcommittee on Inter-provincial Tax Avoidance whose task it is to come up with recommendations to deal with inter-provincial tax avoidance satisfactory to provinces and the federal government…
>
> The legislative amendments benefited other provinces and the impact on them was considered in drafting the legislation and the timing of its implementation. Disclosing the documents, … would thus be prejudicial to the relationships established through a frank and open discussion of multi-jurisdictional inter-provincial tax avoidance schemes and their impact and resolution…
>
> The other provinces would expect confidentiality, and a breach of that confidentiality would be prejudicial to Ontario's relationship with those provinces…
>
> The prejudice to tax authorities and administrators resulting from the disclosure of the tax policy records II-IV involving planning for consequences in other provinces is the deterrent and chilling effect and reduced trust and confidence that will result causing such entities not to again engage in the future in inter-jurisdictional initiatives such as occurred subsequently in addressing other inter-provincial tax avoidance schemes [emphasis added].

Analysis/Findings

The Ministry appears to be making two arguments in support of its reconsideration of the decision that section 15(a) does not apply to the portions of records for which it has been claimed. Firstly, that other statutes and agreements override the provisions of the *Act* and that a disclosure of the information at issue would lead other provinces to not trust the Government of Ontario in future tax discussions.

Concerning the first argument, section 67(1) of the *Act* provides that:

> This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise

Section 67(2) does not list either the *Corporations Tax Act* or the *Ministry of Revenue Act* as containing confidentiality provisions that prevail over the *Act*. Nor do those other provisions indicate that they prevail over the *Act*. Therefore, I find that the *Act* applies. Neither the statutes cited by the Ministry, nor the agreements referred to in its reconsideration representations, would prevent disclosure of information found not to be exempt under the provisions found in the *Act*, or affect my jurisdiction under the *Act* to determine whether the claimed section 15(a) exemption applies.

Concerning its second argument, for section 15(a) to apply, the Ministry must demonstrate that disclosure of the information at issue in the records "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].

The Ministry appears to be claiming that a reasonable expectation of harm would result from disclosure of any tax-related information discussed at intergovernmental meetings because this could result in other provinces losing trust in the Government of Ontario. I find that the Ministry's evidence is speculative rather than detailed and convincing. Even if I were to accept that the information at issue was related to intergovernmental relations, the Ministry has only provided general statements of harm.

Upon review of both the confidential and non-confidential portions of the Ministry's reconsideration representations, I find that the Ministry has not provided detailed and convincing evidence that this claimed harm could reasonably be expected to result from disclosure of the information at issue in the records.

As stated in Order PO-2872, based on the general nature of the information contained in the records and the date of the records (pre-May 2005), I still do not find that disclosure of the information at issue in the records could reasonably be expected to prejudice the conduct of intergovernmental relations [Reconsideration Order R-970003].

Section 18(1)(d) – Economic and other interests

Section 18(1)(d) reads:

> 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 Ministry is concerned that the information at issue in the records could be used by the appellant or others in possible tax-related litigation. It provided an affidavit from the Senior Manager, Operations and Collections containing both confidential and non-confidential portions. In the non-confidential portions, he states that:

> Presumably the policy advisor was only considering the legislative point and not the litigation point, since this was an option paper to choose an effective date and legislate it.
>
> …nonetheless, such a statement [in the records] will probably be harmful to the litigation … [emphasis added].

Analysis/Findings

The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

In Order PO-2490, Senior Adjudicator John Higgins in considering section 64(1) determined that:

> The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:
>
> > The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

I agree with this analysis of Senior Adjudicator Higgins concerning section 64(1). I find that the Ministry's argument about the usefulness of the information at issue in the records in a potential court case in and of itself does not result in a finding that information is exempt under the *Act*.

In addition, based upon my review of the records and the representations, I confirm my findings in Order PO-2872, where I stated that:

> 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.

Therefore, I find that disclosure of the information at issue 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.

ORDER:

1. I uphold my decision in Order PO-2872.

2. The Ministry is ordered to disclose the records to the appellant by no later than **July 26, 2010.**

Original signed by: July 5, 2010
Diane Smith
Adjudicator