



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

ORDER P-278

Appeal 890405

Ministry of Financial Institutions



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O R D E R

BACKGROUND:

On July 25, 1989, the requester submitted a request for access to records relating to Bill 108, The Insurance Amendment Act, 1986. The time frame encompassed by the request was January 1, 1986 through August 1, 1987 and March 21, 1989 through July 24, 1989. The request was made to the Ministry of Financial Institutions (the "institution").

The institution provided access to one record and denied access to other records pursuant to sections 12(1)(c), 12(1)(e), 12(1)(f), 15(a), 15(b) and 19 of the Freedom of Information and Protection of Privacy Act (the "Act").

The requester appealed the head's decision to this office.

During the course of mediation, the institution disclosed several additional records. By letter dated February 12, 1990, the institution provided the appellant with access to two records, and indicated that sections 12(1)(a), 13(1), 17(1)(b), 18(1)(e) and 22 were being cited as further exemptions to deny access to the remaining records.

Between April 17, 1991 and June 20, 1991, the institution granted the appellant access to 18 additional records.

Because further attempts at settlement were unsuccessful, the appeal proceeded to inquiry, and a Notice of Inquiry was sent to the appellant and the institution. An Appeals Officer's Report,

which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry. Subsequently, because the institution had changed its position with respect to

exemptions, and had granted access to various records over a period of time, the Appeals Officer prepared a compilation of the institution's exemption claims for each record. This was sent to the appellant and the institution and further representations were invited.

Representations were received from the institution, but not from the appellant. The institution's representations make no reference to the claims for exemption under sections 15(a) and 22, and I assume that these exemptions have been withdrawn.

The Appeals Officer also sent a Notice of Inquiry to 12 parties whose interest might be affected by the outcome of the appeal (the "affected parties"). Replies were received from 11 of the affected parties.

All records at issue in this appeal relate to the new property and casualty insurance scheme being developed by the government at that time.

Before I discuss the proper disposition of the various records, a few facts should be noted. First, the institution has claimed that Record *4 is not responsive to the request and I concur, given that the date of the record is October 3, 1989, which is clearly outside the scope of the appellant's request. Second, I note that Record 1G has the notation "...2" at the bottom of the page, but no page 2 is attached. The institution has been

unable to locate any second page of the record, despite conducting a detailed search. I am satisfied that the institution has made a thorough search for the remainder of Record 1G, and I accept that, for the purposes of this appeal, there is only one page to Record 1G. Third, a number of records identified by the institution are duplicates. During the course of the appeal, with the consent of the institution, the appellant was provided with an index which generally described the records and highlighted the duplicates. There is no dispute between the parties about the duplicates. Finally, it became obvious that what the institution classified as Record P&P 10 should have been divided into two separate records. Accordingly, for the purpose of this appeal I have divided the record in two parts and designated the parts as P&P 10(1) and P&P 10(2). Copies of these two records are being forwarded to the institution with this Order for reference.

The records to be dealt with in this Order are 1B, 1C, 1D, 1E, 1G, 1H, 1I, 1J, 1K, 1L, 1M, 1N, 1O, 1P, 1Q, 1R, 1S, 1T, 1U, 1W, 1Y, 1Z, 1AA, 2A, 2B, 3E, 3F, 3G, 3H, 3K, 3Q, 3R, 3S, 3T, 6A, 6B, 6F, 7A, 7B, 8C, 8F, Policy & Planning (P&P) 2, P&P 5, P&P 8, P&P 10(1), P&P 10(2), P&P 11, P&P 13, P&P 15, P&P 17, P&P 18, *1, *2 and *3.

All other records initially at issue in this appeal have either been disclosed to the appellant, are duplicates, or are not responsive to the request.

For ease of reference, I have attached an appendix to this Order which consists of a chart of the exemptions claimed by the institution, and my final determination with respect to each record.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A. Whether the mandatory exemption provided by section 12 of the Act applies to any of the records.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to any of the records.
- C. Whether the discretionary exemption provided by section 15(b) of the Act applies to any of the records.
- D. Whether the mandatory exemption provided by section 17(1) (b) of the Act applies to any of the records.
- E. Whether the discretionary exemption provided by section 18(1) (e) of the Act applies to any of the records.
- F. Whether the discretionary exemption provided by section 19 of the Act applies to any of the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 12 of the Act applies to any of the records.

The representations of the institution make reference to sections 12(1) (a), 12(1) (f), and the introductory wording of section 12(1). The institution has not submitted representations respecting sections 12(1) (c) or (e) and, in my view, sections 12(1) (c) and (e) are not relevant in the circumstances of this appeal.

Sections 12(1) (a) and (f) of the Act read as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(f) draft legislation or regulations.

It has been established in previous Orders that the types of records listed in sections 12(1)(a) through (f) are not the only ones eligible for exemption under section 12; any record which satisfies the requirements of the introductory wording of the section also qualifies for exemption under section 12(1).

Section 12(1)(a)

The institution submits that Records P&P 17, *2 and *3 are exempt pursuant to section 12(1)(a) of the Act.

Records *2 and *3 are the unsigned and signed versions of an Order In Council. Both records contain the phrase "On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that" It is clear that these records are properly considered to be "other records" of the deliberations or decisions of the Executive Council, and qualify for exemption under section 12(1)(a).

Record P&P 17 is a formal proclamation of The Insurance Amendment Act, 1986, made by the Minister of Government Services, and witnessed by the Lieutenant Governor of Ontario. The Concise Oxford Dictionary of Current English (8th ed.),

defines proclaim as "announce or declare publicly or officially". A record already disclosed to the appellant by the institution indicated that the proclamation of this statute was published in the Ontario Gazette on June 6, 1987. In my view, a proclamation, which by its very nature constitutes an announcement to the public, cannot qualify for exemption under section 12(1)(a); to find otherwise would be contrary to the intent of the section 12 exemption. Accordingly, I find that section 12(1)(a) does not apply to Record P&P 17.

Section 12(1)(f)

The institution submits that Records 1C, 1I, 1W, 7B, P&P 15 and P&P 18 are exempt pursuant to section 12(1)(f) of the Act. After reviewing the records, I feel that Records 1D and P&P 10(1) should also be examined under this mandatory exemption.

In its representations, the institution outlined the general process followed by the government in developing policy and

drafting legislation. It submits that the concept of a proposed property and casualty compensation scheme went before the Cabinet Committee on Justice on December 19, 1985, and that this policy was later formulated into a cabinet submission. It further submits that:

Counsel for the Ministry [of Financial Institutions] instructed Legislative Counsel to prepare the legislation. Legislative Counsel ultimately refers to the Cabinet minutes to ensure that there is proper authority to draft the legislation. In this case, Legislative Counsel prepared draft legislation and regulations based on the instructions received.

Having reviewed the representations and the records, it is clear that the attachment of Record 1I, Records 1W, 7B, P&P 15 and P&P 18 are either draft legislation or draft regulations. Record 1C contains two sections which are also clearly draft legislation or draft regulations. These two sections are titled "Schedule IV to By-Law No. 1., Insurance Amendment Act, 1986, Explanatory Notes" and "Proposed Draft Regulations Under the Insurance Amendment Act, 1986". Record 1D also contains a section titled "Proposed Draft Regulations Under the Insurance Amendment Act, 1986". While this section appears to have been submitted by one of the affected parties, based on information provided by the institution, I am satisfied that the section was prepared by Legislative Counsel incorporating comments of the affected party. Finally, Record P&P 10(1) is comprised of a covering memo, the second and third paragraphs of which describe inadvertent omissions in the attachment, and the attachment, which consists of proposed amendments to the Property and Casualty Insurers Compensation Plan.

I am satisfied that the exemption provided by section 12(1)(f) properly applies to the attachment to Record 1I, Records 1W, 7B, P&P 15 and P&P 18, the two parts of Record 1C and the part of Record 1D outline above, and the second and third paragraphs of the covering letter and the entire attachment of Record P&P 10(1).

Introductory Wording of Section 12(1)

The institution submits that Records 1S and 2A are exempt pursuant to the introductory wording of section 12(1) of the Act. The institution's second set of representations appear to make reference to the application of this part of section 12(1) to Record P&P 17. After reviewing the records, I feel that

Record 7A should also be considered under this mandatory exemption.

In Order 22, former Commissioner Sidney B. Linden stated:

...the use of the word 'including' in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption, regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for exemption; any record where disclosure would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1). [Emphasis added.]

I have reviewed Record P&P 17 to determine whether the record would reveal the substance of the deliberations of an Executive Council or its committees. As noted earlier, this record is the formal proclamation of The Insurance Amendment Act, 1986. I find the public nature of this proclamation brings it outside the scope of the section 12(1) exemption.

Record 1S describes proposed amendments to the Insurance Amendment Act, 1986. It is prefaced with the phrase "...was discussed at Cabinet Committee on Justice" and gives the Committee's recommendations. In my view, disclosure of this record would reveal the deliberations and decisions of an Executive Council committee, and I find that it is properly exempt from disclosure pursuant to section 12(1) of the Act.

Record 2A is an internal memorandum which contains a status report on the General Insurance Compensation Plan. Most of the

memorandum recounts facts relating to the development of the plan. However, on page three there is a section titled "Ontario's Participation in the Compensation Plan". The first sentence in this section states "on January 8, 1986, Cabinet gave direction as follows...", and lists five points. In my view, disclosure of this section would reveal the deliberations and decisions of an Executive Council committee, and I find that the five points listed on pages 3 and 4 of Record 2A are properly exempt under section 12(1) of the Act.

Record 7A is an internal memorandum which includes a section which outlines decisions made by the Policy and Priorities Committee of Cabinet regarding Regulations under the Insurance Act. I find that disclosure of this record would reveal the deliberations and decisions of an Executive Council committee and, in my view, the first paragraph and the three points on page one of Record 7A are properly exempt under section 12(1).

In summary, Records *2 and *3 are properly exempt under section 12(1)(a); Records 1I, 1W, 7B, P&P 15, P&P 18 and part of Records 1C, 1D and P&P 10(1) are properly exempt under section 12(1)(f); and Record 1S, and part of Records 2A and 7A are properly exempt under the introductory wording of section 12(1).

Section 12(2)(b)

Section 12(2)(b) provides:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

In Order 24, Commissioner Linden stated that while section 12(2) (b) does not impose a mandatory requirement for the head to seek the consent of Cabinet, the head must address the issue of whether or not consent should be sought.

In its representations, the institution advised that the head had given due consideration to whether Cabinet consent should be sought, and exercised his discretion against doing so. It should be noted that the Executive Council for which these records were prepared is not the current Executive Council. I have reviewed the reasoning contained in these representations, and I find nothing improper or inappropriate with the exercise of discretion by the head as it relates to records exempt under section 12(1).

ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies to any of the records.

The head submits that Records 1C, 1G, the "Response" section of Record 1L, 1M, 1N, the "Response" section of Record 1Q, 1T, 2B, 3E, 3F, 3T, 6A, 6B, 6F, 7A, 8C, P&P 10(1) and P&P 10(2) are exempt under section 13(1) of the Act.

Section 13(1) of the Act provides that:

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.

Advice or Recommendations of a Public Servant

Records 1G, 1T, 7A and 8C are internal memoranda from a variety of public servants regarding proposed amendments to the Insurance Amendment Act, 1986.

Commissioner Linden identified the type of information which would qualify as advice in Order 118, where he stated:

In my view, "advice", for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have examined Records 1G, 1T, 7A and 8C, and, in my view, the third paragraph of Record 1T, which spans the bottom of page 1 through the top of page 2, contains a suggested course of action which could be accepted or rejected by the recipients of the record. Accordingly, I find that this paragraph qualifies for exemption under section 13(1) of the Act.

With respect to Record 8C, the last sentence in paragraph 3, the last sentence in point 1 on page 1, and the last two sentences in point 2 on page 2 also contain suggested courses of action which could be accepted or rejected by the recipients of the record. In my view, these sentences also qualify for exemption under section 13(1).

The remainder of Records 1T and 8C as well as all of Records 1G and 7A contain what can be properly characterized as factual

background information about amendments to the Insurance Amendment Act, 1986, and not advice. As such, I find that they do not meet the requirements for exemption under section 13(1) of the Act.

Records 1L and 1Q are both issue sheets prepared to brief the head of the institution regarding the proposed Property and Casualty Compensation Plan. Both records contain sections titled "Issue", "Response" and "Background". Record 1Q also contains a section titled "Status".

In Order 92, Commissioner Linden considered the application of section 13(1) to the "Response" section of Minister's issue notes. In that Order, he accepted the institution's position that the "Response" section of the issue notes contained "advice and recommendations of a public servant" and therefore fell within the scope of section 13(1). I similarly find that the "Response" section of Records 1L and 1Q contain "advice and recommendations of a public servant" and are properly exempt under section 13(1). As far as the "Topic", "Background" and "Status" sections of these records are concerned, I find that they contain factual information, not advice or recommendations, and do not satisfy the requirements of the section 13(1) exemption.

Having decided that parts of Records 1L, 1Q, 1T and 8C meet the requirements for exemption under section 13(1), I must now determine whether any of the exceptions outline in section 13(2) apply to cause any of these parts to be disclosed.

Section 13(2) (a) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

factual material,

Section 13(2)(a) is the only exception, in my view, to the section 13(1) exemption which has potential relevance, and it relates only to the "Response" sections Records 1L and 1Q. Having reviewed the records, I find that, the factual information contained in the "Response" sections is so intertwined with the advice given, that it is not possible to disclose the factual material without also disclosing the material which is properly exempt. Therefore, I find that the exceptions provided by section 13(2) do not apply to the above-noted parts of Records 1L and 1Q.

Because the section 13 exemption is discretionary, it is my responsibility to ensure that the head has properly exercised his discretion in deciding not to grant access to the exempt records. In the circumstances of this appeal, I have found nothing to indicate that the head's exercise of discretion was improper, and I would not alter it on appeal.

Accordingly, I uphold the institution's decision to exempt the "Response" sections of Records 1L and 1Q, the third paragraph of Record 1T and the four above-mentioned sentences contained in Record 8C.

Advice or Recommendation of a Consultant Retained by an Institution

Records 1C, 1M, 1N, 2B, 3E, 3F, 3T, 6A, 6B, 6F, P&P 10(1) and P&P 10(2) involve parties external to the institution. The institution claims that section 13 applies because these external parties are "consultant(s) retained by an institution". Although an external party consulted by an institution might fall within the dictionary definition of a "consultant" (i.e. one who consults), the word is qualified in section 13(1) by the phrase "retained by an institution". In my view, this presupposes a formal engagement of professional services.

The institution submits that:

... there is no requirement in s.13(1) that a consultant be retained on a fee for service basis in order to be "retained by an institution"; a consultant need only be engaged to advise an institution in order to qualify for the exemption.

I do not agree with the institution's position. While it could be said that the institution used a consultation process in developing the Insurance Amendment Act, 1986, the parties contacted by the institution cannot properly be considered consultants under

retainer. To find otherwise would be inconsistent with the purposes of the Act, which state that exemptions to disclosure are to be limited and specific.

Accordingly, I find that Records 1C, 1M, 1N, 2B, 3E, 3F, 3T, 6A, 6B, 6F, P&P 10(1) and P&P 10(2) do not qualify for exemption under section 13 of the Act.

ISSUE C: Whether the discretionary exemption provided by section 15(b) of the Act applies to any of the records.

The head has claimed section 15(b) as the basis for exempting Records 1B, 1E, 1H, 1J, 1K, 1R, 1U, 1AA, 3K, 8C, 8F, P&P 5, P&P 8 and *1.

Section 15(b) of the Act reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

 reveal information received in confidence from another government or its agencies by an institution;

 and shall not disclose any such record without the prior approval of the Executive Council.

In Order 210, Commissioner Tom Wright determined that in order for records to qualify for exemption under section 15(b), the records must meet the following test:

1. The records must reveal information received from another government or its agencies; and
2. The information must have been received by an institution; and
3. The information must have been received in confidence.

Records 1R and *1 are letters from the institution to the federal government's Department of Consumer and Corporate Affairs. I have been provided with no evidence to indicate that the disclosure of these records would reveal any information which was originally received in confidence from another government, nor is this evident on a reading of the records. Records 1H, 1K and 3K are letters to the institution from the federal Minister of State for Finance, and Records 1B and 8C are internal memoranda. I have received no evidence which would indicate that disclosure of these records would reveal information received in confidence from another government or its agencies, nor is it evident on a reading of these records. Therefore, I find that parts 1 and 3 of the test have not been satisfied with respect to any of the above-mentioned records, and the section 15(b) exemption does not apply to Records 1B, 1H, 1K, 1R, 3K, 8C and *1.

With respect to Records 1E, 1AA, P&P 5 and P&P 8, the various other provincial and federal government departments who created these records have provided no evidence to indicate that they expected them to be treated confidentially by the institution. Further, they all indicated that they have no objection to the disclosure of these records. In my view, in order for the third part of the section 15(b) test to be satisfied, there must be an expectation of confidentiality on the part of the supplier and the receiver of the information. Accordingly, I find that the third part of the section 15(b) test has not been satisfied, and that Records 1E, 1AA, P&P 5 and P&P 8, do not qualify for exemption under section 15(b) of the Act.

Records 1J, 1U and 8F are documents received from the Gouvernement du Québec. In his representations, the Québec Superintendent of Insurance states:

The records specified above contain the opinion of Québec in the negotiations held between the insurance industry and the regulators of the Canadian provinces pertaining to the establishment of the Property and Casualty Insurance Compensation Corporation, and the information contained therein was sent in confidence to another regulator involved in these discussions, the Ontario Office of the Superintendent of Insurance.

The institution's representations also indicate that the information was treated confidentially upon receipt. I find that the three part test for exemption has been satisfied with respect to Records 1J, 1U and 8F, and these three records are exempt from disclosure pursuant to section 15(b) of the Act.

Because the section 15 exemption is discretionary, it is my responsibility to ensure that the head has properly exercised his discretion when deciding to deny access to these records. In the circumstances of this appeal, I have found nothing to indicate that the head's exercise of discretion in favour of refusing to disclose Records 1J, 1U and 8F was improper, and I would not alter it on appeal.

ISSUE D: Whether the mandatory exemption provided by section 17(1) (b) applies to any of the records.

The head has claimed the section 17(1) (b) exemption with respect to Records 1C, 1D, 2B, 3T, 6A, 6B and 6F.

Section 17(1) (b) provides that:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

In Order 36, dated December 28, 1988, Commissioner Linden established a three part test, each part of which must be satisfied in order for a record to be exempt under section 17(1) (a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a), (b) or (c) is as follows:

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

Turning to part 3 of the test, it has been established in a number of previous orders that the burden of proving the applicability of the section 17 exemption lies both with the institution and the affected party who has resisted disclosure.

(See Orders 80, 101, 166, 204, P-228 and P-249). The institution and/or the affected

party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information were disclosed. (See Orders 36, 47, 48, 68 and P-249).

Representations relating to the application of section 17(1)(b) were received from the institution and two of the affected parties.

In its representations, the institution submits, "disclosure of the records would prejudice the ability of the government or its institutions to deal candidly with [an affected party] on ongoing and future projects". The affected parties submit that if recommendations such as theirs were made public, they "would be less likely to bring forth recommendations to the government" (emphasis added). In my view, these arguments are not sufficient to discharge the burden of proving a reasonable expectation of harm to the affected parties if the records were disclosed, and I find that part 3 of the test has not been satisfied.

Because failure to satisfy any one of the three parts of the test renders the section 17(1)(a), (b) or (c) exemption claim invalid, I find that Records 1C, 1D, 2B, 3T, 6A, 6B and 6F do not qualify for exemption under section 17(1)(b) of the Act.

ISSUE E: Whether the discretionary exemption provided by section 18(1)(e) applies to any of the records.

The head has claimed the section 18(1)(e) exemption for Records 1P, 1Y, 1Z and 3Q.

Section 18(1)(e) of the Act provides that:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In Order P-219 Commissioner Wright established the following criteria an institution must establish in order for records to qualify for exemption under section 18(1)(e):

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

The institution, in its representations, acknowledges the four part test established by Commissioner Wright, but submits that:

... the words "carried on" do not restrict protection to negotiations being presently carried on. It is submitted that the words "carried on" reflect past and present negotiations and in no way should be limited to the present tense.

I do not agree with the position taken by the institution. As stated in Order P-219, the wording of the exemption can only be interpreted to refer to the present ("are being carried") or future ("will be carried") tenses. Further, as any negotiations relating to records at issue in this appeal have been completed, it is not possible for the positions, plans, procedures, criteria or

instructions "to be applied to" these negotiations. I find therefore, that the institution has not satisfied the third part of the test for exemption under section 18(1)(e), and Records 1P, 1Y, 1Z and 3Q do not qualify for exemption under section 18(1)(e) of the Act.

ISSUE F: Whether the discretionary exemption provided by section 19 applies to any of the records.

The head has claimed exemption under section 19 with respect to Records 1B, 1D, 1O, 2A, 3G, 3H, 3R, 3S, 7A, P&P 2, P&P 11 and P&P 13. All of these records are internal memoranda.

Section 19 of the Act provides that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In Order P-218, Commissioner Wright stated the tests for inclusion under Branch 1 of the section 19 exemption:

In order for a record to be subject to the common law solicitor-client privilege the institution must provide evidence that the record satisfies either of the following tests:

1. (a) There is a written or oral communication, and
 - (b) The communication must be of a confidential nature, and
 - (c) The communication must be between a client (or his agent) and a legal adviser, and
 - (d) The communication must be directly related to seeking, formulating or giving legal advice;
- OR
2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

I have examined Records 10, 3S, P&P 2 and P&P 11 and the hand-written comments of the Manager of Legal Services found in Record 1D, and find that they all satisfy the four criterion in the first part of the above-noted test. According, I find that Records 10, 3S, P&P 2 and P&P 11 and the hand-written comments found in Record 1D qualify for exemption under section 19 of the Act.

I have also examined Records 1B, 2A, 3G, 3H, 3R, 7A and P&P 13 and the remainder of Record 1D and find that none satisfy the fourth criterion of the first part of the above-noted test; none are communication directly relating to the seeking, formulating or giving of legal advice. Further, in my view, these records do not qualify for exemption under the second part of the Branch 1 test; I have been provided with no evidence that the records were created or obtained for the purposes of existing or contemplated litigation. Accordingly, I find that Records 1B, 2A, 3G, 3H, 3R, 7A and P&P 13 as well as the remainder of Record 1D do not qualify for exemption under Branch 1 of the section 19 exemption.

I will now examine Records 1B, 2A, 3G, 3H, 3R, 7A, P&P 13 and the remainder of Record 1D under Branch 2 of the section 19 exemption.

At page 14 of Order 218, Commissioner Wright outlined the tests for inclusion under Branch 2 of the section 19 exemption:

To meet the requirements for inclusion under this second branch, the institution must demonstrate that:

- (1) The record was prepared by or for "Crown counsel"; and
- (2) The dominant purpose for the preparation of the record was for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

All eight of the above-noted records were prepared by or sent to employees who qualify as "Crown counsel" in the employ of the institution, thereby satisfying the first requirement for exemption.

In reviewing these records, it is apparent that they were prepared to either obtain or provide information. However, I have been provided with no evidence to suggest that the dominant purpose for the preparation of these records was for use in giving legal advice, in contemplation of litigation, or for use in litigation. Accordingly, I find that Records 1B, 2A, 3G, 3H, 3R, 7A and P&P 13 and the remainder of Record 1D do not qualify for exemption under Branch 2 of the section 19 exemption.

In reviewing the head's exercise of discretion in favour of refusing to disclose Records 10, 3S, P&P 2 and P&P 11 and the hand-written comments contained in Record 1D, I have found nothing to indicate that the exercise of discretion was improper, and I would not alter it on appeal.

ORDER:

1. I uphold the head's decision not to disclose Records 1S, 1W, 7B, P&P 15, P&P 18, *2 and *3 and the aforementioned parts of Records 1C, 1D, 1I, 2A, 7A and P&P 10(1) pursuant to section 12 of the Act.
2. I uphold the head's decision not to disclose the third paragraph of Record 1T, the "response" sections of Records 1L and 1Q and the aforementioned four sentences in Record 8C pursuant to section 13 of the Act.

3. I uphold the head's decision not to disclose Records 1J, 1U and 8F pursuant to section 15(b) of the Act.
4. I uphold the head's decision not to disclose Records 10, 3S, P&P 2, P&P 11 and the hand-written comments contained in Record 1D pursuant to section 19 of the Act.
5. I order the head to disclose Records 1B, remainder of 1C, remainder of 1D, 1E, 1G, 1H, remainder of 1I, 1K, remainder of 1L, 1M, 1N, 1P, remainder of 1Q, 1R, remainder of 1T, 1Y, 1Z, 1AA, remainder of 2A, 2B, 3E, 3F, 3G, 3H, 3K, 3Q, 3R, 3T, 6A, 6B, 6F, remainder of 7A, remainder of 8C, P&P 5, P&P 8, remainder of P&P 10(1), P&P 10(2), P&P 13, P&P 17 and *1.
6. I order the head not to disclose the records listed in provision 5 of this Order until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that

the records listed in provision 5 of this Order be disclosed within thirty-five (35) days of the date of this Order.
7. The head is further ordered to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made. The notice concerning disclosure

should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

POSTSCRIPT:

In my discussion of Issue A, I found that certain records qualified for exemption under section 12(1)(f) of the Act. Although I am satisfied that my decision is correct and is in accordance with the provisions of the Act, I want to comment on what I see as some concerns that this decision raises.

During the course of developing the proposed new property and casualty insurance scheme, the institution decided to release draft versions of legislation and accompanying regulations to a select group of organizations for consultation and input. In so doing, the institution took records which receive the strongest level of protection under the Act (ie. those subject to a mandatory exemption), and released them to certain outside organizations. In my view, this approach raises two concerns. First, it creates a potentially inequitable situation under the Act. By this I mean that it gives certain members of the public access to records through the government consultation process, while denying other people the right of access to these same records under the Act, through the application of the section 12(1)(f) mandatory exemption. And second, it calls into question the importance of the section 12(1)(f) exemption; more particularly, whether records that are subject to this mandatory exemption should retain this status if released outside the institution.

In making these comments I am not suggesting that the presence of section 12(1)(f) of the Act should in and of itself deter the

government from obtaining input in developing public policy. However, in circumstances where draft legislation and/or draft regulations have been circulated outside an institution, and that same institution subsequently receives a request for access to these records under the Act, this would seem to represent an appropriate situation, whenever practical, for an institution to seek consent of the Executive Council under section 12(2) of the Act for release of these records.

Original signed by:
Tom Mitchinson
Assistant Commissioner

DATE: March 4, 1992

APPENDIX A

<u>Record #</u>	<u>Exemptions Claimed</u>	<u>Status</u>
1B	s.15 (b); s.19	Disclose
1C	s.12 (1) (f); s.13(1); s.17 (1) (b)	Exempt 2 sections (s.12); disclose rest (highlighted copy provided to institution)
1D	s.17 (1) (b); s.19 (s.12);	Exempt 1 section exempt hand-written comments (s.19); disclose rest
1E	s.15 (b)	Disclose
1G	s.13 (1)	Disclose
1H	s.15 (b)	Disclose
1I	s.12 (1) (f)	Exempt attachment (s.12); disclose covering memo
1J	s.15 (b)	Exempt (s.15 (b))
1K	s.15 (b)	Disclose
1L	s.13 (1)	Exempt response section (s.13); disclose rest
1M	s.13 (1)	Disclose
1N	s.13 (1)	Disclose
1O	s.18 (1) (e); s.19	Exempt (s.19)

1P	s.18 (1) (e)	Disclose
1Q	s.13 (1)	Exempt response section (s.13); disclose rest
1R	s.15 (b)	Disclose
1S	s.12 (1); s.12 (1) (f)	Exempt (s.12)
1T	s.13 (1)	Exempt 3rd paragraph (s.13); disclose rest
1U	s.15 (b)	Exempt (s.15 (b))

Record #

Exemptions Claimed

Status

1W	s.12 (1) (f)	Exempt (s.12)
1Y	s.18 (1) (e)	Disclose
1Z	s.18 (1) (e)	Disclose
1AA	s.15 (b)	Disclose
2A	s.12 (1); s.19	Exempt 5 points p. 3-4 (s.12); disclose rest
2B	s.13 (1); s.17 (1) (b)	Disclose
3E	s.13 (1)	Disclose
3F	s.13 (1)	Disclose
3G	s.19	Disclose
3H	s.19	Disclose
3K	s.15 (b)	Disclose
3Q	s.18 (1) (e)	Disclose

3R	s.19	Disclose
3S	s.19	Exempt (s.19)
3T	s.13(1); s.17(1)(b)	Disclose
6A	s.13(1); s.17(1)(b)	Disclose
6B	s.13(1); s.17(1)(b)	Disclose
6F	s.13(1); s.17(1)(b)	Disclose
7A	13(1); s.19	Exempt first paragraph and 3 points on page 1 (s.12); disclose rest
7B	s.12(1)(f)	Exempt (s.12)
8C	s.13(1); s.15(b)	Exempt 4 sentences (s.13); disclose rest (highlighted copy provided to institution)
8F	s.15(b)	Exempt (s.15)
<u>Record #</u>	<u>Exemptions Claimed</u>	<u>Status</u>
P&P 2	s.17(1)(b); s.19	Exempt (s.19)
P&P 5	s.15(b)	Disclose
P&P 8	s.15(b)	Disclose
P&P 10(1)	s.13(1)	Exempt 2nd and 3rd paragraph of covering memo and all of attachment (s.12); disclose rest (highlighted copy provided to institution)
P&P 10(2)	s.13(1)	Disclose (copy provided to institution)

P&P 11	s.19	Exempt (s.19)
P&P 13	s.19	Disclose
P&P 15	s.12 (1) (f)	Exempt (s.12)
P&P 17	s.12 (1); s.12(1) (a)	Disclose
P&P 18	s.12 (1) (a); s.12(1) (f)	Exempt (s.12)
*1	s.15 (b)	Disclose
*2	s.12 (1) (a)	Exempt (s.12)
*3	s.12 (1) (a)	Exempt (s.12)