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

ORDER PO-1677

Appeal PA-980206-1

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a five-part request under the Freedom of Information and Protection of Privacy Act (the Act) from the Ontario Federation of Justices of the Peace Associations for all documents relating to the Report of the Ontario Justice of the Peace Remuneration Commission, 1995 (the Report). The request identified specific types of records, and made it clear that any and all records dealing with the Ministry's consideration, analysis and response to the Report fell within the scope of the request.

Parts 4 and 5 of the request were transferred by the Ministry to Management Board of Cabinet and the Ministry of the Solicitor and Correctional Services respectively. The Ministry identified 42 records (totalling approximately 230 pages) responsive to the first three parts of the request. The Ministry denied access to all records in their entirety, claiming they fell outside the scope of the Act pursuant to section 65(6)3.

The requester (now the appellant) appealed this decision and Appeal P-9700369 was opened.

After considering representations from the parties and reviewing the records, I issued Order P-1564, in which I found that section 65(6)3 did not apply, and that the records were within the jurisdiction of the Act. I ordered the Ministry to provide the appellant with an access decision, in accordance with section 29 of the Act.

Shortly after I issued Order P-1564, the Ministry applied to the Divisional Court for a judicial review of my order. The Ministry also asked me to stay the provisions of Order P-1564 pending the final disposition of the application for judicial review. After receiving representations from the parties, I denied the request for a stay, and required the Ministry to comply with the provisions of the order. In my decision, I stated:

> If an order for disclosure of records were made at the end of any appeal process, the Ministry could seek a stay of such order at that time, pending the hearing of any application for judicial review on jurisdictional grounds or on the merits of such a decision.

The Ministry then provided the appellant with an access decision. No exemptions were claimed for Records 10, 13, 13a and 19. The Ministry made the following statement with respect to these records:

> Given the decision regarding the stay of Order P-1564..., the records for which no exemptions are claimed are being withheld pending a determination by the Divisional Court on judicial review.

The Ministry denied access to the remainder of the records pursuant to sections 12(1)(b), (c) and (e), 13(1) and 19 of the Act.

The appellant appealed this decision.

I sent a Notice of Inquiry to the Ministry and the appellant, and received representations from both parties.

In its representations, the Ministry withdrew its section 12 exemption claim for Record 9. No other exemptions have been claimed for this record.

The records to which access has been denied consist of briefing notes, House Book notes, Management Board submissions, correspondence, internal memoranda, analysis material, motion records and a legal opinion.

PRELIMINARY MATTERS:

Records for which the Ministry is claiming no exemptions

The appellant submits that because I refused to stay Order P-1564, he should be provided with immediate access to any records for which no exemption is claimed. In the appellant's view, Order P-1564 determined that the Act applies to all responsive records, and that there is no basis for denying access in the absence of an exemption claim, or in situations where I determine that a record does not qualify for exemption.

I disagree with the appellant's position. Passages from the letter I sent to the parties when I denied the Ministry's request for a stay of Order P-1564 make my position on this issue clear:

> If [the Ministry] decides that no exemptions apply to any particular records, [Order P-1564] [does] not provide that these records must be disclosed to the appellant; they simply require any such decisions to be identified in the decision letters. I acknowledge that institutions in issuing decision letters would normally disclose records for which no exemption is claimed. However, the existence of an ongoing judicial review on a jurisdictional issue takes these cases outside the norm. If the appellant is advised that no exemption claims are made for specific records, there is nothing to prevent him from seeking an order from this agency for their disclosure before the judicial review applications have been heard and disposed of by the courts. If this were to occur, the IPC would have to take into account the status of the judicial review proceedings before disposing of any such appeal or making any order for disclosure.
>
> ...
>
> If [the Ministry], or the appellant for that matter, wish to challenge in the courts an order of this Office on the merits of such an appeal, they may do so without prejudice to [the Ministry's] right to continue with the jurisdictional challenge at the same time. If an order for disclosure of records were made at the end of any appeal process, [the Ministry] could seek a stay of such order at that time, pending the hearing of any application for judicial review on jurisdictional grounds or on the merits of such a decision.

I will take into account the status of the Ministry's judicial review application in determining the appropriate order provision for records which are not subject to any exemption claims, as well as any records I find do not qualify for exemption.

Adequacy of the Ministry's decision letter

The appellant complains that the Ministry's decision letter was inadequate in that it failed to provide any reasons for denying access to the requested information, pursuant to section 29(1)(b)(ii) of the Act. The appellant made a similar complaint about the Ministry's decision letter in the previous appeal which led to Order P-1564. In that order I stated:

> I remind the Ministry that a re-statement of the language of the legislation is generally not sufficient to satisfy the requirements of section 29(1)(b)(ii). When reasons why a request has been denied are clearly communicated, requesters are in the best position to decide whether to accept the decision or to appeal. It is in the interest of both requesters and institutions, as well as this office, to avoid the costs and delay associated with appeals arising from inadequate decision letters, and I strongly encourage the Ministry to adhere to the letter and spirit of section 29(1)(b)(ii) when responding to requests in which access is denied.

In one of the early orders of this Office, which also involved the Ministry, former Commissioner Sidney B. Linden discussed section 29(1)(b) of the Act, and the rationale behind the requirement for reasons in section 29(1)(b)(ii). The former Commissioner's comments are useful to repeat in the present appeal.

> To a large extent, subsection 29(1)(b) of the Act reflects recommendations made by the Williams Commission in a Report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy, 1980. The Commission's recommendations regarding the content of a notice of refusal when access to a record has been denied are set out in Volume 2, of the Report at p. 268:
>
> 1. the statutory provision under which access is refused;
>
> 2. an explanation of the basis for the conclusion that the information sought is covered by an exempting provision; (emphasis added)
>
> 3. the availability of further review and how it can be pursued;
>
> 4. the name and office of the person.
>
> The Williams Commission went on to state at p. 268 that:
>
> > Although the obligation to provide reasons for denials may appear to be burdensome, we believe it will be instrumental in encouraging careful determinations of decisions to deny access.
>
> In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail

> required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.
>
> It has been the experience of this office that the more information a requester possesses about the basis for a head's decision, the more likely a mediated settlement of the appeal can be attained. This experience reflects a comment that appears on p. 268 of the Report of the Williams Commission that "... conscientious explanations of the basis for refusal may reduce the number of situations in which the exercise of appeal rights will be thought to be necessary".
>
> In my view, the notice of refusal of the institution in this appeal does not meet the requirements of subsection 29(1)(b)(ii) of the Act. However, as I have dealt with the application of the exemptions to the records in issue in this appeal, I do not see any purpose that would be served by ordering the head to send a new notice of refusal to the appellant. The appellant has raised an issue of general importance to the operation of the Act and I have accepted his position with respect to the obligations of the institution under subsection 29(1)(b)(ii) of the Act.

In the present appeal, I find myself in a situation similar to that faced by former Commissioner Linden. The two Notices of Inquiry provided to the appellant describe the records, and explain the exemptions claimed by the Ministry. Therefore, although the Ministry's decision letter is inadequate, through the actions of this Office the appellant has been provided with sufficient information to enable him to address the issues in this appeal, and I find that no useful purpose would be served in taking any further action at this point.

DISCUSSION:

CABINET RECORDS

The Ministry claims that Records 1, 1a, 2 (in part), 3, 4, 4a, 5, 5a, 6 (in part), 7, 8, 11, 14, 15, 16, 17 (in part), 20, 21, 22, 23, 25, 26 (in part), 26a (in part), 26b (in part) and 27 are exempt from disclosure by virtue of the introductory wording of section 12(1) and/or sections 12(1)(a), (b), (c) and (e) of the Act. These sections read as follows:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the 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;

> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

By way of background, the Ministry explains that after the Report was issued, Management Board of Cabinet (MBC), a committee of Executive Council (Cabinet) considered the remuneration issue for justices of the peace. Cabinet also dealt with the issue after each time it was considered by MBC. The Ministry states that Cabinet made its final decision on the remuneration issue in December 1997, and this decision was announced in January 1998.

The appellant submits that:

> ... it should be noted that where section 12 is used to justify non-disclosure in this case, it must be interpreted strictly and the Government's burden to demonstrate the applicability of the exemption, can only be satisfied if the disclosure of the document in question would cause serious harm. This strict interpretation is mandated by the guarantee of judicial independence provided for in section 11(d) of the Charter [of Rights and Freedoms] as the records in question deal with the Government's decisions respecting the remuneration and financial security of the Justices of the Peace.

It should be noted that the appellant did not include section 12 within the scope of the Notice of Constitutional Question filed in the context of this appeal.

The appellant adds that the Ministry is precluded in this case from relying on subsections 12(1)(c) and (e), because Cabinet has already made a decision on the issues which are the subject matter of the records.

Previous orders have held that section 12(1)(c) (Orders P-60, P-323 and P-1623) and section 12(1)(e) (Orders P-22, P-40, P-946 and P-1182) are both prospective in nature. The use of the present tense in

these sections preclude their application to matters that have already been considered by the Cabinet or its committees. The Ministry acknowledges that the subject matter of the records for which these exemptions have been claimed was considered by Cabinet which "ultimately made its decision on the remuneration of justices of the peace in December 1997, and the decision was announced in January 1998". Therefore, because the subject matter of these records has already been presented to and discussed by Cabinet or one of its committees, I find that sections 12(1)(c) and (e) do not apply.

However, it has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1). It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This result will occur where an institution establishes that the disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees.

Records 1, 1a and 21 are MBC briefing notes that were provided to members of MBC as part of their meeting materials. The Ministry explains that these records contain a list of the items that were being considered, recommendations of Management Board Secretariat (MBS) staff, as well as analyses, options and other comments and recommendations. Record 27 is the first page of a MBC minute. The Ministry submits that disclosure of these records would reveal the substance of deliberations of MBC, a committee of Cabinet.

These records are all clearly identified as records used during the deliberation and decision making process of MBC. In my view, their content relates directly to the issues considered and discussed by MBC, and I find that their disclosure would clearly reveal the substance of deliberations of MBC. Accordingly, these records are exempt under the introductory wording of section 12(1). I also find that Record 27 qualifies for exemption under section 12(1)(a).

The Ministry explains that Records 5, 5a, 8, 11, 14 and 15 are reports and analyses that were used by MBS staff in analyzing the Report and formulating options for the government's response. Specifically, the Ministry states that Records 11, 14 and 15 were prepared by MBS staff in order to develop portions of Records 1 and 1a, the actual Cabinet records.

Records 16 and 22 consist of communication strategies that, according to the Ministry, were prepared for Cabinet's consideration in December 1997 (Record 16) and December 1995 (Record 22) regarding the issue of the remuneration of justices of the peace. The Ministry describes Record 20 as a draft of the same communications strategy contained in Records 16 and 22. The Ministry points out in its representations that section 12(1)(c) was not originally claimed for Record 20, but submits that section 12(1)(c) applies because it contains background explanations prepared for submission to MBC.

Records 3, 4 and 4a are all briefing notes prepared for the Attorney General by Ministry staff. The Ministry states that the purpose of these documents was to brief the Attorney General in respect of matters that were to be brought before Cabinet and that, in fact, were brought before MBC on July 22, 1997. The Ministry further explains that Record 7 contains options and recommendations that were arrived at through a meeting between Ministry and MBS staff and then included in the briefing materials for the Attorney General (Records 3, 4 and 4a), which he ultimately presented to MBC.

Record 23 consists of speaking notes prepared by Ministry staff for the Attorney General for his presentations to Cabinet in August 1997 and MBC in September 1997. The record also includes information identical to Record 16.

Record 25 is an e-mail exchange between two of the Ministry's Assistant Deputy Ministers. The Ministry submits that the content of this record ultimately found its way into the May 1997 Cabinet submission prepared by MBS staff on the justice of the peace remuneration issue.

The Ministry argues that Records 3, 4, 4a, 5, 5a, 8, 11, 14, 15, 16, 20, 22, 23 and 25 all deal with matters that were ultimately considered by Cabinet, and their disclosure would either reveal the substance of the deliberations of Cabinet or permit the drawing of accurate inferences regarding the substance of these deliberations.

It is clear from my review of the records and the Ministry's representations that MBC and Cabinet considered matters relating to the Report and issues stemming from the Report in considerable detail and on a number of occasions during 1997. Having considered the context in which Records 3, 4, 4a, 5, 5a, 8, 11, 14, 15, 16, 20, 22, 23 and 25 were created, and the explanations offered by the Ministry, I find that these records all relate to this subject matter and, in my view, with the exception of Record 20, disclosure of the contents of these records would reveal the substance of deliberations of Cabinet and/or MBC. Therefore, I find that these records, with the exception of Record 20, all qualify for exemption under the introductory wording of section 12(1).

Record 20 is a House Book note, similar in nature to Records 17, 26, 26a and 26b. With the exception of two paragraphs of this record, as described below, I am not persuaded that the record qualifies for exemption under section 12(1). It does not meet the requirements of section 12(1)(c), as submitted by the Ministry, since the subject matter of the record has already been presented to and discussed by Cabinet and/or MBC. I also do not accept the Ministry's description of this record as an earlier draft of Records 16 and 22. Although these three records all deal with the same broad subject matter, Record 20 consists primarily of factual, background information and suggested responses by the Minister, as commonly found in House Book notes. In my view, disclosure of this record would not reveal the substance of deliberations of Cabinet and/or MBC, and I find that it is not exempt under the introductory wording of section 12(1).

The Ministry also claims section 12(1) as the basis for exempting the last sentence of the third paragraph of Record 2 (a two-page internal memorandum), the final two paragraphs on page two of Record 6 (a two-page Ministry briefing note), the final two paragraphs of Records 17 and 20 (House Book notes), and the final paragraph of Records 26, 26a and 26b (House Book notes). In each case, the Ministry submits that

the severed information relates directly to the substance of Cabinet deliberations on the issue of remuneration of justices of the peace.

For the same reasons outlined above for Records 3, 4, etc., I find that disclosure of these exempt portions would reveal the substance of deliberations of Cabinet and/or MBC, and they qualify for exemption under the introductory wording of section 12(1). Although section 12(1) was not claimed by the Ministry for Record 18, the second paragraph on page 3 of this record is identical to the information in Records 26, 26a and 26b which I have found qualifies for exemption under the introductory wording of section 12(1). Consequently, I find that this one paragraph in Record 18 is also exempt for the same reasons.

Because no other discretionary exemptions have been claimed for the remaining portions of Records 2 and 6, and no other mandatory exemptions apply, they should be disclosed to the appellant with the exempted material severed. My order for disclosure of these records will be stayed pending the disposition by the court of the judicial review application regarding the jurisdictional issue in this matter.

ADVICE OR RECOMMENDATIONS

The records remaining at issue for which the Ministry has claimed exemption under section 13(1), either in whole or in part, are Records 12 and 24 and portions of Records 17, 18, 20, 26, 26a and 26b.

Section 13(1) of the Act states:

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

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

Record 12 is a one-page unsigned draft letter from the Chair of MBC to counsel then representing the appellant's client. Record 24 is a one-page draft "key message" prepared by staff concerning aspects of the justice of the peace compensation issue. The Ministry explains that these documents in draft form

provide advice and recommendations of staff regarding the content of the final version of the letter and certain key messages regarding the justice of the peace compensation issue.

The final version of Record 12 was signed and sent by the Chair, and is one of the records at issue in the appellant's companion appeal involving MBC (Record 24 in Appeal PA-980207-1). MBC has not claimed any exemptions for the final version of this record, and is prepared to disclose it to the appellant, as long as the court determines that it is a record within the jurisdiction of the Act. I have reviewed the contents of the draft and final versions of this record, and they are virtually identical, with the exception of three words in one sentence and a handwritten notation that appears beside it. In the circumstances, I accept that this sentence and the handwritten notation are accurately characterized as advice or recommendations for the purposes of section 13(1), and that this information qualifies for exemption under this section. The rest of Record 12, which has in fact already been communicated to the appellant's client in the form of the final signed version of the letter, does not satisfy the requirements for exemption under section 13(1).

Although Record 24 in the present appeal is not in the form of advice or recommendations, I accept that its disclosure would reveal the advice or recommendations of a public servant as to its content and the action to be taken. In my view, the advice and recommendations formed an integral part of the deliberative process of government decision-making regarding the remuneration of justices of the peace, which relates directly to the actual business of the Ministry (see Orders P-94 and P-434). Accordingly, I find that Record 24 qualifies for exemption under section 13(1).

The Ministry explains that Records 17, 18, 26, 26a and 26b are House Book notes prepared for either the Attorney General (Records 17, 20, 26, 26a and 26b) or the Chair of MBC (Record 18). The only portions of these records which are subject to the section 13(1) exemption claim are the "Response" portions of Records 17, 18 and 20, and the "Response" and "Supplementary" portions of Records 26, 26a and 26b. The Ministry submits that these portions qualify for exemption because they provide advice to the respective Ministers on how they should respond if asked particular questions in the Legislature on the issue of justice of the peace remuneration.

I accept that the "Response" and "Supplementary" sections of Records 17, 18, 20, 26, 26a and 26b contain information provided by staff as to the manner in which the Ministers should respond to questions on this issue. However, in my view, they do not contain "advice" or "recommendations" in the sense contemplated by section 13(1). The information is provided to the Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate. For this reason, I find that the "Response" and "Supplementary" portions of these records would not reveal advice or recommendations of a public servant and, accordingly, they do not qualify for exemption under section 13(1) of the Act.

No other discretionary exemptions have been claimed for Records 12, 17, 18, 20, 26, 26a and 26b. Therefore, they should be disclosed to the appellant, subject to the severance of the information which I found exempt under section 12(1). My order for disclosure of these records will be stayed pending the disposition by the court of the judicial review application regarding the jurisdictional issue in this matter.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed section 19 as the basis for exempting Records 28-36.

This section reads as follows:

> 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.

Section 19 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 for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two 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 advisor, **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.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order P-1342]

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (see Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
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> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
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> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Records 28-36 were all created by the same legal counsel who was assigned to provide advice to the Ministry on issues arising from the Report.

The Ministry states that Record 36 consists of hand-written notes created by counsel for use and reference in providing legal advice regarding the government's response to the Report and possible reactions to it. The Ministry explains that Record 35 is a typewritten set of notes prepared by the same counsel for the same purpose. Record 28 is a table prepared by counsel which outlines possible responses by the government to particular potential issues arising from the Report.

I accept that these records consist of notes (hand and typewritten) prepared by counsel in the context of her work on the justice of the peace remuneration file. In Order P-1409, former Adjudicator John Higgins found that handwritten notes are often prepared for use in giving legal advice at a later time, and if this is established, they qualify for exemption under section 19. The same conclusions would apply to typewritten notes of the same nature. In my view, in order to fit within this category there must be an established relationship between the notes and their potential subsequent use in providing legal advise, either from the contents of the notes themselves or through representations provided by the Ministry. As far as the notes comprising Records 28, 35 and 36 are concerned, I find that the Ministry has clearly established a relationship between them and their potential subsequent use in providing legal advice. I also find that these three records fall within the "continuum of communications" as described in Balabel, and could also be properly characterized as part of the solicitor's "working papers" (Susan Hosiery Ltd.) (Order MO-1205). For all of these reasons, I find that Records 28, 35 and 36 qualify for exemption under the section 19 solicitor-client communications privilege.

Records 29-34 are all draft court documents. The Ministry explains that these records were created by Ministry counsel and, in draft form, represent her recommendations and advice with respect to possible actions to be taken by the government in certain potential circumstances. The Ministry submits that these records were prepared by Crown counsel for use in giving legal advice to the government. In my view, although Records 29-34 are not written in the form of advice or recommendations, they also form part of the "continuum of communications" between a solicitor and a client, and represent confidential written communications from counsel to her client Ministry. Therefore, I find that disclosure of Records 29-34 would reveal confidential legal advice, and these records qualify for exemption under section 19.

COMPELLING PUBLIC INTEREST

In its representations, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

Sections 12 and 19 are not subject to section 23. Therefore, the only records which qualify for consideration under section 23 are those that I have found qualify for exemption under section 13(1), specifically Record 24 and the one sentence and handwritten notation in Record 12.

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1998] O.J. No. 420, 107 O.A.C. 341, 5 Admin. L.R. (3d) 175 (Div Ct.), reversed (January 27, 1999), Docs. C29916, C29917 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 13(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis under section 23.

The appellant's representations deal with the application of section 23 of the Act to both sections 13(1) and 18(1). Section 18(1) was at issue in the appellant's appeal involving Management Board of Cabinet (Appeal PA-980207-1). The appellant points to the Supreme Court of Canada decision in Manitoba Provincial Judge's Assn. v. Manitoba (Minister of Justice) (1997), 150 D.L.R. (4th) 577, and submits that:

> ... the Supreme Court of Canada has outlined, not only a compelling public interest but a **constitutionally protected right** of the public to scrutinize decisions regarding the remuneration of judicial officers. Disclosure of the records is necessary to ensure the public's ability to monitor the judicial independence guaranteed by section 11(d) of the Charter. This protection of the public's right far outweighs the negligible, if even existent, potential that disclosure will interfere with the Government's convenience in managing the economy. The Government, therefore, improperly exercised its discretion under sections

> 13 and 18 by failing to disclosure the documents in this case where the public interest and the Charter clearly mandate disclosure of the documents and where there is no counterbalancing public interest in the non-disclosure of the documents. (emphasis in original)

The appellant's position with respect to the application of the Canadian Charter of Rights and Freedoms will be addressed later in this order.

As far as the section 23 issue is concerned, I am not persuaded that there is a **compelling** public interest in the disclosure of **these two specific records**, nor that any public interest that does exist is sufficient to clearly outweigh the purpose of the section 13(1) exemption claim. As described earlier, the information exempt under section 13(1) consists of one sentence and handwritten notation in a draft letter from the Chair of MBC to the lawyer then representing the appellant's client (Record 12), and a one-page draft "key message" on the justice of the peace remuneration issue (Record 24). In my view, the disclosure of this information would not add significantly to the information that will be made available to the appellant by the disclosure of other records, or has already been provided to the appellant's client (e.g. final version of Record 12). Accordingly, I find that there is no compelling public interest in the disclosure of Record 24 or the one sentence and handwritten notation in Record 12.

Therefore, I find that the requirements of section 23 are not present in the circumstances of this appeal.

The Canadian Charter of Rights and Freedoms (the Charter)

In his representations in both this appeal and his related appeal involving Management Board of Cabinet (Appeal PA-980207-1), the appellant raised the constitutional validity and/or constitutional applicability of sections 12 and 13 of the Act under section 11(d) of the Charter. I notified the appellant of the requirements of section 109 of the Courts of Justices Act, and asked him to comply with the notice requirements of this section, or satisfy me that these requirements are not applicable in the circumstances of these appeals. Section 109, which applies to proceedings before tribunals as well as to courts, requires a person who seeks a ruling that a legislative provision is constitutionally invalid, to serve a Notice of Constitutional Question (a NCQ) on the Attorney General of Canada, the Attorney General of Ontario and any other parties.

A NCQ for both appeals was then sent by the appellant to the Attorney General of Canada, and the Attorney General of Ontario.

In the NCQ, the appellant states:

> The Justice of the Peace Remuneration Commission is an independent Commission which was established in 1993 for the purpose of examining and making recommendations on the salaries and benefits paid to Justices of the Peace in Ontario. The Remuneration Commission delivered its report, including salary recommendations, to the Management

> Board [of Cabinet] in 1995. The Government rejected the recommendations of the Remuneration Commission in 1998.
>
> The Association made a freedom of information request to the Government for the disclosure of all records in the Government's possession relating to the Report of the Remuneration Commission.
>
> The Government refused disclosure on various grounds including sections 13 and 18 of the *Freedom of Information and Protection of Privacy Act*, both of which are discretionary rather than mandatory exemptions from disclosure. Section 13 gives the decision maker the discretion to refuse to disclose documents that reveal the advice of public servants while section 18 gives a similar discretion with respect to documents the disclosure of which may prejudice the government's competitive or economic advantage.

As the legal basis for the constitutional question, the appellant states:

> A discretion granted to a government decision-maker must be exercised in accordance with the *Charter of Rights*. Section 11(d) of the *Charter* mandates that, if a government rejects the recommendations of an independent commission on the salaries of judicial officers, the government must publicly justify that decision. Accordingly, the discretion given in sections 13 and 18 should be exercised in favour of disclosure in this case in order to allow for public justification, among other reasons.

Because the constitutional issue raised by the appellant was not included in the original Notice of Inquiry, I issued a Supplementary Notice in order to provide the parties with an opportunity to submit representations on the specific constitutional issues raised in the NCQ. A copy of the Supplementary Notice was also provided to the Attorney General of Canada. Supplementary representations were received from the Ministry only.

Subsequently, in discussions with counsel from this Office, the appellant and the Ministry agreed to share their representations on the constitutional issues. I provided each party's representations to the other, and invited them to respond. Once again, only the Ministry provided additional representations.

The Ministry characterizes the legal issue differently, as follows:

> Whether the Act, which permits the Government to refuse to disclose certain documents on a variety of grounds, or the Government decision pursuant to the Act not to disclose certain documents relating to the Justice of the Peace Remuneration Commission Report, violates the right of accused persons to a fair trial before an independent and impartial tribunal under clause 11(d) of the *Charter of Right and Freedoms*.

Although the appellant's original representations raised the constitutional issue with respect to both sections 12(1) and 13(1) of the Act) (as well as section 18(1) in Appeal PA-980207-1), the NCQ is restricted to discretionary exemption claims (ie. sections 13(1) and 18(1)).

Section 11(d) of the Charter states as follows:

> Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Ministry submits that the constitutional issue is presently before the Courts and it would be contrary to the proper administration of justice to allow the appellant to argue the same issue in these proceedings. The Court proceedings referred to by the Ministry have now concluded with the Divisional Court judgment of March 16, 1999. The Divisional Court found that the government's response to the Remuneration Commission's recommendations did not, in fact, satisfy the constitutional requirements for ensuring the independence of justices of the peace.

The Ministry further submits that:

> ... the *Charter* does not create a constitutional right to disclosure of government documents. The Ontario Divisional Court has held, in the context of freedom of expression under s. 2(b) of the *Charter*, that the *Charter* does not give rise to a general constitutional right of public access to all information under the control of government. Just as there is no public right to disclosure under s. 2(b), s. 11(d) of the *Charter* does not provide Justices of the Peace with a private right to disclosure of information.

The Ministry goes on to submit that:

> ... the concept of judicial independence has no relationship to disclosure under the Act. Judicial independence contemplates statutory and other types of arrangements in place to promote the individual and institutional independence of the judiciary. These arrangements concern the core characteristics of judicial independence: the administrative independence of the courts, security of tenure and financial security of judges. None of these core characteristics has any bearing on documentary disclosure under the Act: *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Wickman; Manitoba Provincial Judges Assn. V. Manitoba (Minister of Justice)* [1997] 3 S.C.R. 1 at 81-82. (the Judges Reference case).

In the alternative, if it is determined that the Judges Reference case does apply to the determination of justice of the peace remuneration, the Ministry submits that the case only states that section 11(d) of the Charter requires a Remuneration Commission process and that the government respond to the Commission's report. The Ministry points out that the government has created the Remuneration Commission and responded to its recommendations in January 1998.

The Ministry submits that:

> The [Judges Reference case] speaks of an obligation on government to **respond** to the Commission's recommendations; it makes no mention of a right to **disclosure**. Where the judiciary is not satisfied with the response it may seek judicial review of the Government's decision, which is precisely what the JP Associations have done in the ongoing Division Court proceeding. (emphasis in original)

The appellant's general position on this issue is reflected in the following submission:

> It has been recognized by the Supreme Court of Canada that financial security of judicial officers is a key ingredient in the judicial independence guaranteed by s. 11(d) of the Charter and the public's ability to scrutinize government decisions concerning the independence of the judiciary, particularly decisions to reject the recommendations of a remuneration commission, is central to the purpose of s. 11(d) ... Therefore, denying access to these records is inconsistent with the public's right to ensure judicial independence guaranteed by section 11(d) and, thus, access to these records should not be denied unless such denial is demonstrably justifiable in a free and democratic society as outlined in section 1 of the Charter. Refusal to give access to the records which would allow the public to scrutinize judicial independence should only be allowed in the clearest of cases.

Specifically in relation to section 13(1) of the Act, the appellant submits:

> Section 13 provides a possible exemption from disclosure for records that reveal the advice of public servants to a government institution. This is not a mandatory exemption, it is, rather, a discretionary one. Before exercising the discretion to refuse to disclose a record on the basis of this exemption, a decision maker must consider whether the issues with which the particular record deals are ones which have already been made. The fact that a decision has already been made weighs in favour of disclosing the records as the rationale for the exemption, that is protecting the free flow of advice for the purpose of decision-making is no longer as pressing after the decision has been made. The fact that a decision has already been made speaks in favour of disclosure in this case in particular since, the records at issue relate, at least in part, to the Government's decision to reject the recommendations of the Remuneration Commission concerning the salaries of Justices of the Peace. The Supreme Court of Canada has held that section 11(d) of the Charter demands that, where a government rejects the recommendations of an independent commission concerning the remuneration of judicial officers, the government must be prepared to justify that decision.
>
> Chief Justice Lamer, writing for the majority of the Court in [the Judges Reference case] held that where the Government rejects the recommendations of an independent

commission on judicial remuneration, the constitution mandates public justification of that rejection. Lamer C. J. wrote:

> [t]he need for public justification, to my mind, emerges from one of the purposes of s. 11(d)'s [of the Charter] guarantee of judicial independence - to ensure public confidence in the justice system (at 653).

In this case, it is inconsistent with the Charter to exercise the discretion under section 13 of the Act in order to refuse to fully disclose the grounds for the Government's decision on judicial remuneration, thus allowing the Government to avoid justifying its decision to reject the Report's recommendations, and preventing the public from testing the *bona fides* of any Government justification.

I have considered the principles set out in the Judges Reference case, which are summarized in the recent judgment of the Divisional Court in Ontario Federation of Justices of the Peace Associations v. Ontario [1999] O.J. No. 786. This case involved the same parties and dealt with the same subject matter as the appeal now before me. At paragraphs 101 to 104 of that judgment, Madame Justice Haley states, in part:

> The recommendations of the commission need not be binding on the legislature or the executive because "decisions about the allocation of public resources are generally within the realm of the legislature and through it, the executive". However, in considering a "positive resolution model" i.e. one in which the government is not required to take any action, as in this case, the Chief Justice [in the Judges Reference case] said at p. 108, paragraph 178:
>
> > However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.
> >
> > What judicial independence requires is that the executive or the legislature ... must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations.
>
> The Chief Justice noted that if the government rejects one or more of the commission's recommendations it must justify its decision with reasons or run the risk of having its unjustified decision declared unconstitutional.

> At p. 110, paragraph 183, he discussed the standard of justification required and the steps a reviewing court must take in determining whether that standard has been met:
>
> > The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 [of the Charter] analysis.
> > ...
>
> With these guidelines in mind we considered the government response and its justification for rejecting all of the recommendations of the Remuneration Commission.

The remedy sought by the appellant in this appeal is an order for disclosure of records which qualify for exemption on the basis of sections 13(1) (and 18(1)) of the Act. The basis advanced for the remedy is that the discretion given to government to refuse to disclose records under these provisions "should be exercised in favour of disclosure ... in order to allow for public justification, among other reasons." I am not persuaded that the constitutional obligations articulated in the Judges Reference case require the exercise of discretion in favour of disclosure of these records under the Act.

In an effort to discharge its constitutional responsibility under section 11(d) of the Charter for ensuring the independence of justices of the peace on issues of remuneration, Ontario decided to appoint an independent Remuneration Commission to make recommendations, received recommendations from the Commission, deliberated regarding the implications of these recommendations, and issued a formal response. It is this formal response, not records which may have been created by the government in the course of formulating the response, which is the measure of the constitutionality of the government's action. Even the reviewing court does not engage in a "searching analysis" of the government's reasons for rejecting the Commission's recommendations.

If the Government decides to depart from the recommendations of the Remuneration Commission, as it did in this instance, the Judges Reference case imposes a requirement that it articulate a "legitimate reason" for doing so. If this standard of justification has not been met, then it is up to a court to determine what measures must be taken by the Government to remedy the constitutional deficiency. The Government's response must stand or fall on its own and, in my view, any deficiency cannot be remedied through an effort to provide "legitimate reasons" through the disclosure of related records under the Act.

In the present circumstances, the Government has made a formal response to the Remuneration Commission's report, and the Ontario Court of Justice (General Division) determined that it is constitutionally inadequate. In this respect, Madame Justice Haley made the following findings, beginning at paragraph 136 of her judgment:

> We have found that the justices of the peace are entitled to the same constitutional guarantees of judicial independence as those accorded to the provincial court judges by the Supreme Court of Canada. The commission process put in place by agreement between the justices of the peace and the government is flawed because:
>
> (a) the government failed to replace the government appointee to the commission which had the effect of preventing the commission from completing its mandate;
>
> (b) the government did not consider the continuation of the commission binding upon it as required by the agreement;
>
> (c) the government did not make a formal response to the commission's recommendations in a timely fashion which resulted in a freeze and a reduction in the real salaries of the justices of the peace;
>
> (d) the government did not give complete or satisfactory reasons, and in some instances gave no reasons at all, for its rejection of the commission recommendations.
>
> In the result the actions of the government which effected a freeze of the salaries of the justices of the peace for the period from April 1, 1996 to April 1, 1999 without resorting to the commission process, as directed by the Supreme Court of Canada, were unconstitutional.

The Court granted the following remedy, as set out at paragraph 148 of the judgment:

> An order will go directing the government to conduct a review of the compensation of the justices of the peace for the period April 1, 1996 to April 1, 1999 and for that purpose to set up a commission meeting the criteria of the Supreme Court of Canada in the Judges Reference within 6 months of the date of these reasons and requiring as a minimum a written response from the government within 90 days of the delivery of the commission's report to the government. The government by way of such review shall provide a proposal to the commission regarding the remuneration of the justices of the peace for the Commission's consideration. In the interim, to avoid further erosion of the remuneration by delay, the government shall index the salary starting at the salary level at April 1, 1996 by the percentage increase in the Average Industrial Wage based on that wage for the year 1995 over that for the year 1994 and for the like increase, if any, for every subsequent year until the commission to be established shall have made its report and the government shall have responded to it.

No part of the Court's remedy required the government to provide "complete or satisfactory reasons" for the decision which the Court had already found to be constitutionally inadequate. Rather, the Court's remedy was to require the government to take steps in the future to bring itself within its constitutional obligations by setting up a new commission and responding appropriately to its recommendations.

In my view, disclosure of the records which I have found to qualify under section 13(1) will not advance the constitutional requirement that government must give complete and satisfactory reasons for its rejection of the recommendations of the Justice of the Peace Remuneration Commission. This obligation exists separate and apart from the provisions of the Act. The failure to discharge this obligation is a matter for the court to remedy, in accordance with constitutional standards for judicial independence, as Madam Justice Haleyhas done in the Ontario Federation of Justices of the Peace Associations v. Ontario case. In the appeal before me, the Act is not a mechanism for ensuring government's compliance with these constitutional obligations.

ORDER:

1. I order the Ministry to disclose Records 9, 10, 13, 13a and 19 in their entirety, and Records 2, 6, 12, 17, 18, 20, 26, 26a and 26b, subject to the severance of those portions which I have found qualify for exemption under sections 12(1) or 13(1) of the Act. I have attached a highlighted version of these records to the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator, which identifies those portions which should **not** be disclosed.

2. My order for disclosure of records under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Order P-1564.

3.. I uphold the Ministry's decision to deny access to the remainder of the records.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: May 12, 1999
Tom Mitchinson
Assistant Commissioner