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

FINAL ORDER PO-1851-F

Appeal PA-990275-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The College of Dental Hygienists of Ontario (the appellant) submitted a request to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all information regarding the proposed regulation and accompanying standards of practice submitted by the Royal College of Dental Surgeons of Ontario (the affected party) dealing with orders to dental hygienists. The time frame of the request is May 1998 to present.

The Ministry located 76 records and granted partial access to them. The Ministry denied access to the remaining records in whole or in part pursuant to the following exemptions under the *Act:*

- cabinet records - section 12;
- advice or recommendations - section 13;
- third party information - section 17;
- economic and other interests - section 18;
- solicitor - client privilege - section 19; and
- invasion of privacy - section 21.

In addition, the Ministry noted that some information was removed from the records as it considered this information to fall outside the scope of the request.

The appellant appealed the Ministry's decision.

During mediation, the Mediator assigned to this file created an index of records. Upon consultation with the appellant, a number of records and parts of records were removed from the records at issue. Despite the removal of these records and parts of records from the appeal, all of the exemptions claimed by the Ministry as well as the issue of responsiveness of portions of two records continue to be at issue.

I sent a Notice of Inquiry to the Ministry and affected party, initially and both parties made representations in response. In its representations, the Ministry indicates that it reviewed its decision and decided to withdraw its reliance on the discretionary exemption in section 18 of the *Act*. Therefore, this section is no longer at issue. The Ministry also decided to disclose the following "General" records to the appellant, and they are, therefore, no longer at issue:

- Records 2, 6, 9, 10, 14 (pp.1 and 2), 17, 19 (pp.1 and 2), 20 (p.2), 27 (p.1), 30, 33 (p.2), 36 (p.1), 37, 38 and 41 (except the non-responsive parts).

I then sent the affected party's representations and the non-confidential portions of the Ministry's representations to the appellant along with a modified Notice of Inquiry. In this Notice, I indicated to the appellant that I did not require it to make submissions on the application of section 17 of the *Act*. The appellant was asked to review the submissions sent to it in responding to the remaining issues.

The appellant submitted representations in response to the Notice of Inquiry. In its representations, the appellant notes that the Ministry has decided to disclose "General" Record 2 and all of 41 except the non-responsive portions. After considering the Ministry's explanation of the content of the "non-responsive" portion of Record 41, the appellant agrees that they are not responsive and indicates that it is no longer pursuing this record. Accordingly, the responsiveness of records is no longer at issue.

Upon reviewing the remaining portions of the appellant's submissions, I decided that they raised issues in response to those submitted by the Ministry and affected party to which they should be given an opportunity to reply. Accordingly, I sent the modified Notice of Inquiry to them along with the complete submissions of the appellant requesting submissions in reply. Only the Ministry replied to this Notice.

RECORDS:

The records consist of such items as draft versions of a regulation, correspondence, hand-written notations, memoranda and fax transmissions. For the purpose of discussion in this order, I have set out the exemptions claimed by the Ministry and the records to which they have been applied:

General Records

Section 12 - Records 4, 7, 12, 13, 19 (in part), 20 (in part), 24 (in part), 27 (in part), 32, 33 (in part), 34 and 43

Section 13 - Records 3, 9, 12, 14 (in part), 20 (in part), 27 (in part), 29, 40 and 43

Section 17 - Records 9, 13, 24 (in part), 36 (in part) and 43

Section 19 - Records 5, 9, 12,16, 18, 19 (in part), 20 (in part), 22, 23, 27 (in part), 33 (in part), 34, 36 (in part) and 40

Legal Records

Section 12 - Records 5 (in part), 7, 8, 13, 16, 18, 23, 24, 25, 26 and 27

Section 13 - Record 21

Section 19 - Records 5 (in part), 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27

Section 21 - Record 22

In its original representations, the Ministry indicated that it is claiming the application of the discretionary exemption in section 19 of the *Act* to three additional records: G-13, G-24 and G-43. I will address this issue below under the heading "Late Raising of a New Discretionary Exemption".

The affected party submits that section 21 applies to all of the records at issue.

For ease of discussion, I will refer to all "General Records" with a "G" preface and all "Legal Records" with an "L" preface.

PRELIMINARY MATTER:

LATE RAISING OF A NEW DISCRETIONARY EXEMPTION

On August 18, 1999, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until September 23, 1999) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

As I indicated above, the Ministry raised, for the first time in its representations, the application of section 19 to Records G-13, G-24 and G-43.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

Inquiry Officer Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, Inquiry Officer Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

The Ministry acknowledges that it is raising the application of this exemption to these records late in the process. The Ministry also acknowledges the policy reasons behind the Commissioner"s approach to the late raising of new discretionary exemptions. However, it takes the position that the policy reasons do not apply in the circumstances of this appeal. In this regard, the Ministry states:

> In the present case, the application of s. 19 to Records G-13, G-24 and G-43 will not in any way defeat the policy objectives that the Practices were designed to meet. Mediation has not been affected - despite the fact that extensive mediation took place on this file with the appellant limiting this aspect of the appeal to only some of the responsive records, these three records are still at issue. In addition, there are numerous other records still at issue for which the [Ministry] has claimed the application of s. 19. This is not like the situation, which frequently occurs, in which the appellant has removed records for which solicitor-client privilege has been claimed from the scope of the appeal.
>
> Finally, and perhaps most importantly, the claiming of s. 19 to these three records at this time in no way delays the processing of this appeal. At this time, the Adjudicator has decided to send the Notice of Inquiry to the [Ministry] and the affected party. Nothing has been sent to the appellant. No one needs to be re-notified to solicit additional representation on the applicability of the new exemptions. In no way does this delay the processing of the appeal. These additional s. 19 claims may be incorporated into the Notice of inquiry when it is sent to the appellant.

The Ministry also explains why the section 19 exemptions were not claimed after the receipt of the Confirmation of Appeal. The Ministry indicates that after receiving the Confirmation of Appeal, the records were reviewed a second time and that the copies of the records in its possession have additional exemptions marked on some of them. The Ministry notes that, through inadvertence, this information was not communicated to this office, or apparently, to the appellant. The Ministry states that it was not until the records were reviewed again at the time of preparing the representations that the oversight was discovered.

The appellant requests that I decline to accept the Ministry's late claim of the exemption in section 19 to these three records, noting that, at the time of preparing the representations, more than eight months had passed since the deadline for raising additional discretionary exemptions. The appellant points out that the Ministry had sufficient notice and should not now be able to start asserting additional exemptions.

In reply, the Ministry notes that the appellant simply asserts that the policy should be followed and has not stated that it will be prejudiced in any way through delay, efforts in mediation or otherwise. The Ministry explains further why appropriate steps were not taken at an earlier stage in the appeal process. In particular, the Ministry refers to compassionate circumstances involving a key staff member in the Freedom of Information unit and the attempts of other staff to ease the burden in the office. The Ministry reiterates that it was the Ministry's intention to claim the discretionary exemption within the time allocated for doing so. The Ministry submits that given the circumstances at the time "it was inevitable that some matters should 'slip through the cracks'".

I do not accept the Ministry's perspective on the impact of the exchange of representations process on this issue. Although it may not necessitate re-notifying an appellant and thus delaying the matter on that basis, the introduction of a new exemption at a late stage only allows the appellant the time allowed for providing representations to consider it. Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on this issue if it deems it necessary and gives the appellant an opportunity to address it in mediation, for whatever value the appellant might derive from that. In my view, these considerations relate to the overall integrity of the appeals process and must still be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

That being said, however, in the particular circumstances of this appeal, I have decided to permit the Ministry to claim section 19 for these three records. I have reviewed the records for which section 19 has now been claimed. It is apparent on their face that they are of a similar nature to those other records for which this exemption has been claimed. It is also relevant that section 19 was already at issue and its application to a few other records does not introduce a new issue to the appeal. The Ministry's point that these records continue to be at issue despite extensive mediation, and that the appellant continues to pursue the records for which section 19 was claimed is well taken. Finally, I accept that the Ministry made efforts to fully satisfy the requirements established by this office for processing appeals, but that circumstances at its offices were such that this intention was not realized.

In my view, the appellant will not be prejudiced in any way by the late raising of section 19 to Records G-13, G-24 and G-43 as it has been given an opportunity to address the exemption claim and no delay has resulted from the additional claim.

DISCUSSION:

PERSONAL INFORMATION

In order for the section 21 personal privacy exemption to apply, the information in question must qualify as "personal information". Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The affected party takes the position that all of the records contain its personal information. In this regard, the affected party states:

> The Royal College of Dental Surgeons of Ontario is a body corporate without share capital incorporated by Special Act of the Legislature of Ontario. It has a legislative responsibility to govern the dentists of Ontario which currently number more than 7,000. It does so pursuant to a Statutory framework which includes the Regulated Health Professions Act, 1991, its Health Professions Procedural Code ("Code"), the Dentistry Act, 1991 and their respective Regulations. Under the Code and particularly subsection 2(1), the College has "all the powers of a natural person".
>
> ...it is respectfully submitted to you that having all the powers of a natural person under the Code, the College is an individual for the purposes of section 21 of the Act. ...While the word "individual" is not defined within the legislation, it is respectfully submitted that the word must encompass the College having regard for its nature and specifically having regard for its legislated stature as a natural person. To interpret the Act in any other fashion would be in effect to disregard totally the concept that the College, albeit a corporation, could have a personal opinion or could be engaged in correspondence of an explicitly private and confidential nature...

The appellant takes the position that since the Ministry only claimed the application of section 21 for a small amount of information in Record L-22, it is not necessary for me to consider whether the affected party is an individual within the meaning of the *Act*.

The appellant is incorrect in its assumption that I need only consider the application of section 21 to information for which it has been claimed by the Ministry. Section 21 is a mandatory exemption against disclosure and I am obligated to consider it whether or not it has been claimed for a particular record (Orders P-257 and P-590, for example).

That being said, I do not accept the affected party's submission that it is an "identifiable individual" for the purposes of a finding under section 21. In the modified Notice of Inquiry that I sent to all of the parties, I referred to Order P-364, in which Assistant Commissioner Tom Mitchinson reviewed past orders which have dealt with the issue of whether information about "business entities" can be considered "personal information". I then asked the parties to comment on the principles enunciated in this order.

The Ministry did not address this issue and the affected party did not submit representations in reply. As I noted above, the appellant took the position that it was not necessary to address it.

In Order P-364, Assistant Commissioner Mitchinson made the following comments.

> The record relates to the affected parties' cattle farming operation and, as such, contains information related to a business. The question of whether information

about a business can be considered personal information has been canvassed in previous orders. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

> The use of the term 'individual' in the *Act* makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended 'identifiable individual' to include a sole proprietorship, partnership, unincorporated association or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

> It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

Having reviewed the record and the representations provided by the various parties, I feel that this appeal represents the type of exceptional circumstance envisioned by Commissioner Linden in Order 113. The affected parties in this appeal are a couple who own the cattle farming operation which is described in the record. They are in the business of buying and selling cattle, and their livelihood depends to a large extent on the health and condition of their herd. The record contains detailed information about the history, management and health of their cattle, including a description of all purchases and sales made over a two year period. In my view, there is a sufficient nexus between the affected parties' personal finances and the contents of the report to properly consider the information contained in the record to be the personal information of the affected persons. Therefore, I find that the record qualifies as the personal information of the affected persons under section 2(1) of the *Act*, in the particular circumstances of this appeal.

In my view, being granted the powers of a natural person (as noted by the affected party above) falls far short of transforming a corporate body into an identifiable individual as that term has been defined under the *Act*. A determination of how "identifiable individual" should be defined must be made within the context of the *Act*. In this regard, the comments made by former Commission Linden in Order 16 are applicable in the circumstances of this appeal. Had the legislature intended to provide personal privacy protections to 'business entities" and other "corporate" bodies, it would have made this clear. However, a contrary view is expressed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which led to the passage of the *Act* and its municipal counterpart. In commenting on the protections to be provided with respect to "business firms" the Report states (at page 313):

> It is not suggested that business firms have a general "right to privacy". To the extent that information concerning business activity may include information concerning identifiable individuals, the information may fall under another exemption relating to personal privacy. Business firms as such, however, are not accorded an equivalent "privacy" interest in the schemes we have examined.

Accordingly, barring the exceptional circumstances referred to in Orders P-113 and P-364 (above), in order for a person to be identified as an "identifiable individual", that person must be a natural person. The affected party is a corporation. Moreover, the information with respect to the affected party is not such that it only relates to an identifiable individual, that is, a natural person. On this basis, I find that, with one exception, the records do not contain personal information.

The Ministry submits that a small portion of Record L-22 contains the personal information of the legal counsel who drafted the letter that is unrelated to the subject matter at issue.

The appellant states that, if the information in the record relates to the counsel's employment history and is of such a nature that it was felt to be relevant to the issue of the dental orders regulation, it should be disclosed.

I agree with the Ministry that the portion of paragraph two of the letter which was highlighted by the Ministry on the copy of this record that was provided to this office refers to a personal matter involving the counsel and thus qualifies as her personal information.

INVASION OF PRIVACY

Where a requester seeks personal information of other individuals, section 21(1) of the *Act* prohibits an institution from disclosing it unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, the only exception which could apply is section 21(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) states that despite section 21(3), a disclosure does not constitute an unjustified invasion of personal privacy if the information falls within one of three categories set out in paragraphs (a) through (c).

As I noted above, the appellant is of the view that if the personal information was included in the record, it is likely that it had some relevance to the issue of dental orders.

In response, the Ministry notes that it is apparent from the record that there is no relationship between the personal information in this record and the issue of the dental orders regulation.

The personal information of the counsel who drafted the letter is very minor. It does not, in any way, relate to her employment history as suggested by the appellant. Nor does it address, in any substantive way, the issue relating to the dental orders regulation. Rather, it was simply provided, as noted by the Ministry, "as a way for counsel and client to work out the progress of the regulation process". As a result, I find that there are no factors favouring disclosure of this personal information. Accordingly, its disclosure would constitute an unjustified invasion of personal privacy.

CABINET RECORDS

The Ministry submits that General Records 4, 7, 12, 13, 14 (pages three and four), 19 (the last four pages), 20 (the last three pages), 24 (in part), 27 (the last three pages), 32, 33 (the last six pages), 34 and 43 (the last six pages) and Legal records 5 (the last 11 pages), 7 (the last six pages), 8, 13, 16, 18 (the middle six pages), 23 (the last page), 24, 25, 26 and 27 are exempt from disclosure by virtue of the introductory wording of section 12(1) and/or section 12(1)(f) of the *Act*. These sections state:

> 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,
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> > draft legislation or regulations.

I note from reviewing the records that General Record 36 is a duplicate of Legal Record 23. Although the Ministry did not claim the application of section 12(1) for General Record 36, I will consider its possible application under this exemption.

The Ministry submits that all of the records referred to above contain various versions of the proposed dental orders regulation, or comments made on specific sections of the regulation the disclosure of which would reveal the contents of the draft itself. The Ministry refers to the decision of former Commissioner Sidney B. Linden in Order 22 in support of its position that this information is exempt under the introductory wording of section 12(1) and/or section 12(1)(f). In that order, former Commissioner Linden stated:

> In my opinion, 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).

The appellant believes that there have been no deliberations or decisions made by Cabinet regarding the records and implies that they, therefore, do not fall within the introductory wording of the section. In addition, the appellant takes the position that because Cabinet has not yet considered the draft regulation, section 12(1)(f) cannot apply to them. In this regard, the appellant states:

> It is submitted that the wording of s. 12 of the Act is clear and unequivocal and it applies to material that has been the subject of deliberation of Cabinet, which is not the case here. The [Ministry] tries to extend the order of former Commissioner Sidney B. Linden where he states that the word "including" should be interpreted as expanding the definition of the types of records which are deemed to qualify for the Cabinet records exemption...
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> The [Ministry's] attempt to interpret former Commissioner Linden's statements to mean that s. 12(1) applies to records that have not gone to cabinet is not supportable by a plain reading of the section.
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> It is submitted that paragraph 12(1)(f) must be read as part of s. 12(1) itself - the exemption relates to draft legislation that has been considered by Cabinet. That is not the case here. It is not open to the [Ministry] to extend the exemption to records that may some day be seen by Cabinet.

In replying to this argument, the Ministry disagrees that only records which have gone before Cabinet may be subject to the exemption in section 12. The Ministry points out that previous orders of this office have held that certain clauses of section 12 are prospective in nature (Orders P-604 and P-946). Further, the Ministry submits that to accept the appellant's position with respect to section 12(1)(f) would essentially render the exemption meaningless. In this regard, the Ministry notes that regulations are generally submitted to the Statutory Business Committee, the Cabinet Committee that considers legislation and regulations, a few days prior to the regulation going to Cabinet, if approved by Committee. The Ministry states that if approved, the regulation is then gazetted for publication within the following week or so. The Ministry submits that the appellant's interpretation of section 12(1)(f) would mean that the exemption would apply to the regulation only during the few days from the time the regulation was before the Statutory Business Committee until the time of publication.

The Ministry also notes that this office has concluded that it is possible for records that have never been placed before Executive Council or its committees to qualify for exemption under the introductory wording of section 12(1) if disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees or where release would permit the drawing of accurate inferences regarding the substances of the deliberations (Orders P-226, P-331, P-901 and P-1137).

Finally, the Ministry submits that the records at issue in this discussion are analogous to those considered by Senior Adjudicator David Goodis in Order PO-1663. In that order, Senior Adjudicator Goodis noted that he did not have sufficient information to conclude that any of the records, which consisted of submissions from labour organizations in response to the circulation of a draft of the regulation at issue in that case, were actually placed before Cabinet. However, he concluded:

> ... in making submissions, the authors of these records reveal the content of the draft Regulation, either expressly or by implication. Accordingly, major portions of these records would "permit the drawing of accurate inferences with respect to the actual deliberations"of cabinet and, therefore, are exempt either on the basis of the opening words of section 12(1) or on the basis of section 12(1)(f) respecting "draft legislation or regulations".

In my view, the circumstances of and conclusions drawn by Senior Adjudicator Goodis in Order PO-1663 parallel the circumstances of the current appeal. On this basis, I accept the Ministry's position that major portions of these records would "permit the drawing of accurate inferences with respect to the actual deliberations" of Cabinet and, therefore, are exempt either on the basis of the introductory wording of section 12(1) or on the basis of section 12(1)(f).

Severance

In Order PO-1727, Senior Adjudicator David Goodis made the following comments regarding the issue of severance under section 10(2) of the *Act*:

> Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71, the Divisional Court stated:
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> > I would note, however, that while the Commissioner has taken an excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministrymade an effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.

In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.

I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.

Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the *Access to Information Act*, which provides for severance, reads:

Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains any such information or material. [Emphasis added]

Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

> Similarly, in *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)* (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:
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> > To attempt to comply with s. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

I adopt these principles for the purpose of this appeal. In my view, portions of these records would neither reveal draft regulations nor the substance of deliberations of Cabinet. Some of this information is administrative in nature. Some of it identifies or reflects the relationship between the affected party and the Ministry which, in my view, is directly responsive to the appellant's request. Finally, some portions of the records refer to the process of consultation between the Ministry and the affected party relating to these regulations (see: Order P-1570). In this regard, it cannot be said that these portions can be characterized as "disconnected snippets", or as "worthless", "meaningless" or "misleading". Further, this information cannot reasonably be used to ascertain the content of the withheld passages. Consequently, the following records or portions of the records are not exempt under section 12(1) of the *Act*:

- pages 3 and 4 of G-14;
- page 2 and all but paragraph three of page 3 of Record G-36;
- page 4, front and back of G-43;
- pages 1 and 2 of L-16;
- L-23 except for paragraph 3;
- page 1 of L-26; and
- various portions of L-27.

Section 12(2)(b)

I must now determine whether section 12(2)(b) applies to those records which are properly exempt under section 12(1). Section 12(2)(b) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
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> > the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

In Order 24, former Commissioner Sidney B. 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.

The Ministry states that it decided not to refer this matter to Executive Council for consent to grant access because:

1. none of the information contained in these records, except for the gazetted regulation, is available elsewhere in the public domain;

2. there is no indication that this information is of significant interest or any interest to a significant portion of the public;

3. the Ministry did not undertake broad consultations with a number of groups;

4. many of the drafts of the regulations were never seen by the affected party let alone the appellant;

5 the regulation has not yet been passed; and

6. seeking consent for subsequent disclosure could undermine the working relationship between the Ministry and both the affected party and the appellant with respect to such regulations in the future.

The appellant believes that these reasons are speculative and not supported in any way. Further, the appellant refers to the Postscript in Order P-278 in which:

> Assistant Commissioner Tom Mitchinson commented that, where draft regulations have been circulated outside of an institution and the same institution subsequently receives a request for access to the records, an institution should seek consent under section 12(2) for the release of the records whenever practical.

The Ministry notes that it provided similar reasons in Order P-1570 for not seeking the consent of Executive Council which were accepted by the Adjudicator in that case. The Ministry notes further, that in Order P-1570, the regulations at issue had already been passed, but that in the current case, they are still in the "development" stage.

With respect to outside consultation, the Ministry states:

> The [Ministry] submits that the "consultation" which occurred in the present case with the [affected party] was one established by the regulatory scheme of the *Regulated Health Professions Act, 1991* [the *RHPA]* ... In this sense, the [Ministry] submits that the

communications between the [Ministry] and the [affected party] in

> the development of the regulations at issue cannot be characterized as a "consultation" process in the nature of the one at issue in Order P-278. The [Ministry] did not and could not arbitrarily select the [affected party] as an "interested stakeholder", circulate the draft of the regulations to it for comment and then "arbitrarily" decide that no other parties, including the appellant could have access to the materials.
>
> Colleges cannot pass regulations without Ministerial review and the approval of the Lieutenant-Governor-in-Council ... Therefore, the *RHPA* requires that the Ministry consult with a college when the latter requests a regulation ...

In Order P-1570, Adjudicator Donald Hale also found it significant that the draft regulations were not circulated to stakeholders other than the Ontario College of Pharmacists. In the current appeal, however, as is apparent from the chronology of events as set out in an affidavit sworn by the Director of the Program Policy Branch, the appellant did participate to a certain degree in the overall regulation development process and was also "consulted" in this regard. It is also apparent, from the records and other background information provided by the Ministry, that there was considerable disagreement between the appellant and the affected party relating to this issue and that, at a certain point, the appellant was no longer involved in the consultation process.

That being said, however, based on the submissions of the Ministry, I am satisfied that the head considered all of the relevant factors present in the circumstances of this case in deciding not to seek the consent of Cabinet. In particular, I find the fact that the regulations are still in the development stage to be of considerable weight in assessing the Ministry's exercise of discretion in this regard.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that General Records 5, 12, 13, 14, 16, 18, 19 ,20, 22, 23, 24, 27, 33, 34, 36, 40 and 43 and Legal Records 5 (in part), 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 are exempt under section 19 of the *Act*. I found above, that General Records 12, 13, 19 (last four pages), 20 (last three pages), 24, 27 (last three pages), 33 (last six pages), 34, 36 (paragraph 3 of page 2) and Legal Records 5 (last 11 pages), 7 (last six pages), 8, 13, 16 (all but pages one and two), 18 (all but pages 1 and 8), 24, 25, 26 (all but page one), 27 (various portions) and 43 (last six pages) are exempt under section 12(1). Accordingly, I will not consider whether the exemption in section 19 applies to these records and parts of records.

Section 19 provides:

> 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 an institution with discretion to refuse to disclose:

1. a record that is subject to 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).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is . . . In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Thus, section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

The Ministry submits that the records referred to in this discussion all qualify for exemption under solicitor-client communication privilege.

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 [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 ...[*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 [*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 or legal assistance [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

The Ministry indicates that Records G-5, G-14 (the last two pages), G-16, G-18, G-19 (page 3), G-36, L-7 (first three pages), L-12, L-14, L-16 (pages one and two), L-18 (pages 1 and 8), L-22 (page two) and L-23 are all communications between the Ministry's legal counsel and the affected party's Registrar and/or counsel. The Ministry notes that in most cases the correspondence was also copied to the PRB.

The Ministry submits that these records are exempt under section 19 on the basis of "common interest privilege." The Ministry notes that in Order P-1570, Adjudicator Donald Hale found that communications between the Ontario College of Pharmacists (the OCP) and Ministry counsel during the college regulation development process were not exempt under section 19 because "the dominant purpose for which information was prepared by OCP's counsel was to advise the OCP and not the Ministry on issues relating to the implementation of the proposed regulation." The Ministry contends, however, that the Adjudicator erred in his findings in that he failed to take into account previous decisions of this office and the common law on "common interest privilege" and the regulation-development requirements of the *RHPA*.

The Ministry refers to previous orders of this office (Orders P-1137, PO-1663 and M-1205) as establishing a basis for the proposition that there is a common interest between it and the affected party with respect to regulation development. In addition, the Ministry notes that common interest privilege has been recognized by the courts (*Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.) and *Archean Energy Ltd. v. Canada (M.N.R.)*, [1997] A.J. No. 347 (Q.B.). The Ministry notes, in particular, that the court in *Archean* found that the sharing of documents between parties did not constitute waiver where:

> the parties to a commercial transaction are not adverse in interest ... In fact, parties to a commercial transaction have a common interest in seeing the deal done ... It is a reasonable inference that Eagle instructed its solicitors to provide the opinion in order to further the reorganizations and not with an intent to waive privilege.

The Ministry submits that the facts in *Archean* are analogous to the current appeal in that there are two parties; the Ministry and the affected party, sharing legal advice in order to reach a common goal.

With respect to the regulation creation process, the Ministry refers to the requirements of the *RHPA* and in her affidavit, the Director of the Program Policy Branch states:

> A college regulation proposal is initially prepared by counsel to a college, approved by motion of the Council of that particular college and then forwarded to the [Ministry] ... The Unit reviews the regulation, in close collaboration with the Legal Services Branch (the LSB) to ensure that it complies with Ministry policies.
>
> Once the [Ministry] policy unit approves a regulation from a policy perspective, it is provided to the LSB, for further consultations, to ensure that the regulations comply with the law, are authorized, are legally enforceable and challenge proof. The College shares this interest with the [Ministry]

The Ministry concludes:

> In the present case, the [Ministry] submits that the regulatory scheme set out in Exhibit "A" [Subsection 95(1)(g) of Schedule 2 to the *RHPA*] ... requires that counsel for the [Ministry] and the colleges work together to develop a regulation for the approval of the Lieutenant-Governor-in-Council.

In Order MO-1338, Senior Adjudicator David Goodis considered the application of section 12 of the municipal *Act* (the equivalent of section 19) to communications between counsel for the World Wildlife Fund and the City of Toronto relating to the drafting of a sewer use by-law. He commented as follows on purpose of the solicitor-client privilege exemption and the principle of common or joint interest:

In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:

> Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
>
> . . . . .
>
> If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. In Order P-1342, Adjudicator Holly Big Canoe described the principal of "joint interest" as follows:

> It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did

not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:

> Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Although Adjudicator Big Canoe rejected the joint interest argument in Order P-1342, it has been found to apply in other cases. In Order P-49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In this case, based on the representations of the parties, and on the face of the record, it is clear that the client for the purposes of the record is the WWF, not the City. The City submits, however, that it has a joint interest with the WWF. I do not accept the City's submission. I have not been provided with evidence sufficient to establish a "joint interest" between the WWF and the City for the purposes of solicitor-client privilege. The WWF is a public interest organization with a focus on conservation and environmental issues, and in this case was seeking to ensure that the City adopted a by-law which was sensitive to these issues. Although it may be said that the City also had an interest in adopting an environmentally sound by-law, the WWF was acting as an arm's-length public interest group. I am not convinced that the interests of the WWF and the City in regard to the adoption of an environmentally sound by-law are sufficiently connected to be accurately characterized as a "joint interest".

While I accept that it is theoretically possible for a Ministry to have a "common interest" with a non-governmental organization sufficient to attract solicitor-client privilege, I do not agree that the cases or orders referred to by the Ministry are applicable to the current situation.

It is apparent from the materials provided by the Ministry that the affected party and the Ministry are both intended to be involved in the regulation process, although the involvement of the affected party is not an absolute requirement (see section 5(3) of the *RHPA*). It would appear that, on one level, they share a common interest. However, as stated in section 3 of the *RHPA*, the duty of the Minister is:

> ...to ensure that the health professions are regulated and co-ordinated in the public interest, that appropriate standards of practice are developed and maintained and that individuals have access to services provided by the health professions of their choice and that they are treated with sensitivity and respect in their dealings with health professionals, the Colleges and the Board.

Both the affected party and the appellant are self-governing "Colleges of the Regulated Health Professions." As such, they fulfill an important public interest role in licensing, monitoring and, to a certain extent, regulating their particular professions. However, their primary concern is their own particular profession, whereas the Ministry, as the oversight body, must be cognizant of and receptive to the needs and requirements of all professions as well as the public interest. In fulfilling its responsibilities vis-a-vis one profession, the Ministry may find itself at odds with another profession.

In her affidavit, the Director of the PPB notes that it is

> critical to preserve the confidentiality of this regulation-development process in order that the [Ministry] retains the ability to negotiate with the colleges when required to obtain agreement on regulation proposals. The [Ministry] must be able to retain its ability to ensure that a resolution is reached to develop a regulation satisfying the public interest.

In my view, the Ministry is implicitly acknowledging that its interests and the interests of a particular college may not necessarily coincide. Indeed, the circumstances of this appeal reflect the divergence in views between different colleges, and to some extent between the affected party and the Ministry, as noted by the Ministry in its submissions:

> If such communications or the advice of the [Ministry] employees involved in this process were to be disclosed, staff would not feel free to comment frankly and openly on the position taken by the colleges. The colleges could then challenge any of the recommendations made by Ministry staff along the way to the detriment of the process. When the public interest is involved, as it is in the development of college regulations, Ministry staff must feel free to provide advice which a particular college might not agree is in their members' interest. It is the colleges' and the [Ministry's] shared responsibility to ensure that the regulations are in the public interest.

While I accept that there is some commonality in ultimate purpose in developing the regulations, the interests of the affected party and the interests of the Ministry do not coincide such that they can claim a common interest privilege in their shared communications. In my view, the circumstances of this appeal are analogous to the situation considered by Senior Adjudicator Goodis in Order MO-1338. Accordingly, I find that there was neither a solicitor-client relationship between the Ministry and the affected party as a non-governmental body, nor was there a sufficient common interest to bring the communications between them within the "common interest privilege." Therefore, Records G-5, G-14 (the last two pages), G-16, G-18, G-19 (page 3), G-36, L-7 (first three pages), L-12, L-14, L-16 (pages one and two), L-18 (pages 1 and 8), L-22 (page two) and L-23 do not qualify for exemption under section 19 of the *Act*.

The Ministry's representations regarding Record G-43 only address the notes contained in pages one and two (front and back) of the record. Pages three and four of this record also remain at issue, however, I will not consider the application of section 19 to them since the Ministry has not addressed them in this discussion.

The Ministry states that the notes in Record G-43 were made by a PRB policy analyst at a meeting held between the PRB, the legal services branch of the Ministry (the LSB) and the affected party. The Ministry submits that this record reflects the communications between the two solicitors and their clients on the basis of the "common interest privilege." For the same reasons as above, I find that these notes are not privileged under section 19 as there was neither a solicitor-client relationship between the Ministry and the affected party, nor was there a sufficient common interest to bring the communications between them within the "common interest privilege."

The Ministry submits that Records G-22, G-23, G-27 (pages two and three), G-33 (pages one and eight), G-40, L-7 (page four), L-11, L-15, L-19, L-20, L-21, L-22 (page one), L-26 (page one) and L-27 (various portions) are all direct communications between LSB counsel and her clients in the program area. The Ministry notes that while not apparent on its face, Record L-27 was sent from the program area to counsel for counsel's comments, which in turn, are the handwritten notes on the document. The Ministry indicates further that this is the same version as Record G-40.

Based on my review of these records and the Ministry's submissions, I am satisfied that they all qualify as confidential communications between a solicitor and her client which are directly related to the giving, seeking or formulation of legal advice. Accordingly, I find that they are exempt under section 19.

Record L-5 (page two) is a communication between LSB counsel and legislative counsel who was responsible for the drafting of the dental orders regulations. Similarly, Record L-10 is a communication between two counsel in the LSB with respect to the dental orders regulation. The Ministry submits that these records contain the drafting instructions of LSB counsel and the responses of legislative counsel, as incorporated into the next draft are confidential communications between two counsel who were charged with responsibility for the preparation of the regulation. I find that page two of Record L-5 and Record L-10 both represent confidential communications

between Crown counsel and are directly related to the seeking of legal advice regarding the drafting and enactment of the regulations. As such, they are exempt from disclosure under section 19.

In summary, I find that Records G-5, G-14 (the last two pages), G-16, G-18, G-19 (page 3), G-34, G-36, G-43 (pages 1 - 4), L-7 (first three pages), L-12, L-14, L-16 (pages one and two), L-18 (pages 1 and 8), L-22 (page two) and L-23 are not exempt under section 19.

ADVICE OR RECOMMENDATIONS

The Ministry submits that General Records 3, 12, 14 (in part), 20 (in part), 27 (in part), 29, 40 and 43 and Legal Record 21 are exempt under section 13(1) of the *Act*. In its representations, the Ministry states that it withdraws its reliance on the exemption in section 13(1) for General Record 12. In addition, the Ministry states that since it has decided to release pages one and two of Record G-14, it will not be making representations on the application of section 13(1) to the remaining portion of this record. Finally, the Ministry's representations with respect to Record G-43 only address pages one and two of this record, therefore, that is the only portion I will consider in this discussion. I found above that General Records 27, 40, Legal Record 21 and the remaining portions of General Record 20 are exempt from disclosure under either section 12(1) or 19. Therefore, I will only consider the application of section 13(1) to the remaining records and parts of records (Records G-3, G-29 and pages one and two of Record G-43).

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.

The "advice or recommendations" exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making (Orders 94 and M-847). In addition, information in records which would "reveal" the advice or recommendations is also exempt from disclosure under section 13(1), even though it is not itself advisory in nature if disclosure of that information would permit the drawing of accurate inferences as to the nature of the advice and recommendations (Orders P-233, M-280 and P-1054).

The Ministry submits that all of the records at issue in this discussion fall into two categories: those which, on their face constitute the advice or recommendation of a public servant employed by the Ministry; or those the disclosure of which would reveal the advice or recommendations provided by a Ministry employee.

The appellant notes that the Ministry did not provide any concrete examples of how the free flow of advice could be limited by disclosure of the records at issue. The appellant submits that, contrary to the views expressed by the Ministry in its representations and in the affidavit sworn by the Director of the Program Policy Branch, "[t]here is no reason to believe that disclosure of the records would interfere with the relationship between the [Ministry] and the colleges."

In replying to the appellant's submissions on this issue, the Ministry states:

> If such communications or the advice of the [Ministry] employees involved in this process were to be disclosed, staff would not feel free to comment frankly and openly on the position taken by the colleges. The colleges could then challenge any of the recommendations made by Ministry staff along the way to the detriment of the process. When the public interest is involved, as it is in the development of college regulations, Ministry staff must feel free to provide advice which a particular college might not agree is in their members' interest. It is the colleges' and the [Ministry's] shared responsibility to ensure that the regulations are in the public interest.

Record G-3 is a confidential note prepared for the Minister's office by the Professional Relations Branch (the PRB). On reviewing this record, I am satisfied that it contains advice to the Minister's office prepared by staff in the PRB on how to respond to a particular matter that was brought before it relating to the draft regulations.

Record G-29 is a handwritten note to file written by the then Director of the PRB outlining the advice provided to her by a Ministry's policy advisor on College regulatory matters relating to issues of concern. The note also contains the recommended course of action that the Director should follow in addressing the matter.

In my view, these two records fall squarely within the section 13(1) exemption.

Pages one and two of Record G-43 are the notes taken by the PRB policy analyst at a meeting referred to in Record G-40. The Ministry acknowledges that this record does not contain specific advice. However, it submits that disclosure of this record would reveal the advice as set out in Record G-40 (which I have found to be exempt under section 19). It is apparent, from a review of Record G-40 and the first two pages of Record G-43, that the disclosure of the latter would reveal the contents of the former. In particular, Record G-43 contains suggested recommendations under several headings which have been incorporated into the legal advice provided in Record G-40. Accordingly, I find that portions of Record G-43 contain advice or recommendations within the meaning of section 13(1) and that disclosure of the remaining portions would reveal the advice contained in Record G-40.

I find that none of the information in the above three records falls within the category of information described in section 13(2).

THIRD PARTY INFORMATION

The Ministry claims that General Records 13, 24, 36 and 43 are exempt under section 17(1). Since I have found that Records 13 and 24 and portions of Records 36 and 43 are exempt under section 12, I will consider the application of this exemption only to the remaining portions of the latter two records (pages two and three of Record G-36 and pages 4, 5 and 6 of Record G-43).

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), each part of the following three-part test must be satisfied:

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 harms specified in (a), (b) or (c) of subsection 17(1) will occur [Orders 36, P-373].

The Court of Appeal for Ontario recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]*.

Part One: Type of Information

The Ministry submits that the records at issue in this discussion consist of the view, opinions and positions of the affected party relating to the draft orders regulation. The Ministry submits further

that these views, opinions and positions are presented in the context of a regulation regarding procedures involved in the performance of dental surgery, such as scaling of teeth, root planing and injecting anaesthetics, all of which constitute "scientific information." The affected party does not address the application of section 17 to the records pertaining to it.

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in this section (Order P-454).

Page two of Record G-36 is a facsimile cover sheet from the affected party to the Ministry with a letter (page three) attached. The letter, dated July 21, 1998 from the Registrar of the affected party is addressed to the PRB. I found above, that paragraph three of this letter is exempt under section 12(1). Page five of Record G-43 is a mail action document and page six is a facsimile cover, both from the affected party to the Minister. Apart from page three of Record G-36, none of the other records contain any details other than addressee, recipient and date. I find that these portions of the records do not contain any information which could remotely be considered "scientific".

Although page three of Record G-36 refers to the draft legislation, the portions of this document at issue in this discussion do not contain any details pertaining to surgical procedures or other such information as the Ministry refers to above. Mere reference to information which might otherwise be scientific is not sufficient to bring the record within the scope of the definition (Orders MO-1357, PO-1707 and PO-1825).

Accordingly, the section 17 exemption cannot apply to the portions of Records G-36 and G-43 at issue. Based on this finding, it is not necessary for me to proceed to consider parts two and three of the test.

ORDER:

1. I order the Ministry to disclose the following records and parts of records to the appellant by providing it with a copy of these records and parts of records by January 31, 2001, but not before January 24, 2001.

    - G-5, G-16, G-18, L-2 and L-14 in their entirety;
    - pages 3 and 4 of G-14;
    - page 3 of G-19;
    - page 2 and page 3 except for paragraph 3 of G-36;
    - pages 1 to 4 of G-43;
    - pages 1 to 3 of L-7;
    - pages 1 and 2 of L-16;
    - pages 1 and 8 of L-18;

- page 2 of L-22 as severed by the Ministry on the copy of this record provided to this office; and
- L-23 except for paragraph 3 of page 2.

2. I uphold the Ministry's decision to withhold the remaining records and parts of records from disclosure.

3. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records and parts of records which are disclosed to the appellant.

Original signed by: December 22, 2000
Laurel Cropley
Adjudicator