



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

FINAL ORDER PO-2186-F

Appeal PA-010303-2

Ministry of Public Safety and Security



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/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Under s.46 of the *Police Services Act* municipal police officers are forbidden from engaging in political activity except as permitted by the regulations.

I am interested in getting all material concerning this issue received by Ministry of the Solicitor General, produced by the Ministry of the Solicitor General, or sent by the Ministry since June of 1995.

Included in this material should be correspondence between the Ministry and the Toronto Police Services Board, and correspondence between the Ministry and the Ontario Association of Police Services Board.

My understanding as well is that the Ministry prepared a draft amendment to the political activity regulation. In this request would you please include any material prepared by the Ministry in regard to possible amendments to the political activity regulation.

The Ministry granted access to some responsive records, and denied access to the remaining records pursuant to the one or more of the following exemptions in the *Act*:

- section 12(1) - Cabinet records
- section 13(1) - advice to government
- section 19 - solicitor-client privilege
- section 21(1) - invasion of privacy

The Ministry identified the presumption in section 21(3)(d) and the factor listed in section 21(2)(f) in support of the section 21(1) exemption claim.

The requester (now the appellant) appealed the Ministry's decision.

During the mediation stage of the appeal, the Ministry transferred a number of records to the Toronto Police Services Board (TPSB), and issued a revised decision letter to the appellant, denying access to all of the records on the basis that they fell with the exclusions in sections 65(6)1 and 65(6)3 of the *Act*. The Ministry subsequently abandoned the section 65(6)1 claim.

The records that the Ministry transferred to the TPSB were the subject of Appeal MA-020116-1. The sole issue in that appeal was whether the records were excluded from the *Municipal Freedom of Information and Protection of Privacy Act* by virtue of section 52(3)3.

Mediation did not resolve the appeal, so it was transferred to the adjudication stage of the appeal process. Initially, I decided to hold an inquiry on the section 65(6) jurisdictional issue and the section 25(2) transfer issue only. After receiving and considering representations from the

Ministry and the appellant, I issued Interim Order PO-2093-I, where I made the following findings:

- Although the records, including the ones transferred to the TPSB, were “collected, prepared, maintained or used” by the Ministry in relation to “meetings, consultations, discussions or communications” about the regulation governing political activity by police officers under the *Police Services Act (PSA)*, the records were not “about employment-related matters in which the Ministry has an interest.” Rather, the records were collected or prepared in relation to the Ministry’s regulatory and policy-making responsibilities in the area of policing. For this reason, the section 65(6)3 exclusion does not apply.
- In dealing with the transfer of records to the TPSB, because pages 246-282 and 292 were excluded from the access regime pursuant to section 52(3)3 of the municipal *Act*, these records should be excluded from the *Act* pursuant to section 65(6)3. The appellant already has access to pages 283–290, so there would be no useful purpose in considering them further in this appeal.
- Because the order disposes of the records transferred to the TPSB, Appeal MA-020116-1 is closed.

In light of these findings, the remaining records must now be tested under the various exemptions claimed by the Ministry.

Accordingly, I sent a Supplementary Notice of Inquiry on these remaining issues to the Ministry and received representations in response. I then sent the Supplementary Notice to the appellant along with a copy of the Ministry’s representations. The appellant also provided representations.

RECORDS:

There are 43 records (approximately 248 pages) that remain at issue. They are numbered 2-28, 31-41 and 43-47. Records 1, 30 and 42 have been disclosed to the appellant. There is no Record 29. Record 20 is a duplicate of Record 19, Record 40 is a duplicate of Record 38, and pages 299-300 of Record 47 are duplicates of pages 293-294 of the same record. I have removed these duplicate records from the scope of this inquiry.

The remaining records consist of draft amendments, issue notes, orders in council, correspondence, decision documents, briefing material, research and discussion papers, e-mail messages, a draft presentation, an options paper, and an approval form for regulations.

DISCUSSION:

PRELIMINARY ISSUE

In its representations, the Ministry argues that pages 244-245 of Record 46 and pages 293-294 of Record 47 should be excluded from the *Act* by virtue of section 65(6)3. The Ministry states:

The [Assistant Commissioner] in Order PO-2093-I did uphold that pages 246-290 and page 292 were excluded from the *Act* pursuant to section 65(6)3. The [Assistant Commissioner] did note that the above records have been subject to a previous appeal involving the [TPSB] and Order MO-1434 had been issued in that regard.

The Ministry consulted with the [TPSB] and although these specific pages were not responsive to their request they have indicated a position that the records would be excluded pursuant to section 52(3)3 of the municipal *Act*.

A letter from the TPSB to the Ministry is attached to the Ministry's representations.

In Interim Order PO-2093-I, I drew a distinction between records that were the subject of a previous order (Order MO-1434) involving the TPSB and the appellant, and those that were not. I decided, in the unique circumstances of this appeal, that the first category of records was excluded from the *Act* by virtue of section 65(6)3; and that the second category was subject to the *Act*. Pages 244-245, 293-294 were in this second category and, for the reasons outlined in Interim Order PO-2093-I, these records are not excluded.

I am not persuaded that there is any reason to revisit that finding here.

CABINET RECORDS

The Ministry claims sections 12(1)(a), (b), (c) and/or (f) of the *Act* as the basis for denying access to all records, with the exception of Record 8.

These sections read as follows:

12. (1) 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;
- (f) draft legislation or regulations.

Background

As outlined in Interim Order PO-2093-I, the Ministry has regulatory and policy-making responsibilities in the area of policing, as confirmed in section 3(1) of the *Police Services Act* (the *PSA*), which indicates that the *PSA* “shall be administered by the Solicitor General”. Part of this regulatory scheme deals with political activities of police officers. The *PSA* prohibits political activity, except as permitted by regulation. Ontario Regulation 554/91 made under the *PSA*, sets out these permitted political activities for municipal police officers, and Ontario Regulation 123/98 binds Ontario Provincial Police officers to the political activity provisions of the *Public Service Act*.

Regulation 554/91 was amended in 1998 by Ontario Regulation 89/98. Records 2-28 in this appeal were created in the context of these amendments. Further amendments were considered in 2000 but not implemented. Records 31-47 relate to the 2000 review.

Section 12(1)(f)

The Ministry submits that a number of records fall within the scope of section 12(1)(f):

Since the records in question relate to a regulation, many of the records, as listed below, are iterative drafts of the regulation, each one having been prepared by Legislative Counsel in the distinctive format that is used for regulations. The Ministry relies in this instance on prior Orders, including PO-1851-I and PO-2068, which held that section 12 applied to draft regulations and legislation even if they had not been submitted to Cabinet.

I accept the Ministry’s position. The following records are draft regulations, some containing handwritten notes, that were created during the course of either the 1998 or 2000 review of Regulation 554/91 and fall within the scope of section 12(1)(f) of the *Act*:

Records 3, 10, 11, 13, 14, 15, 16, 17, 28, 33, 36, 37, 39 and 44.

Section 12(1)(b)

The Ministry must satisfy the following two criteria for a record to qualify for exemption under section 12(1)(b):

1. the record must contain policy options or recommendations; and
2. the record must have been submitted or prepared for submission to Cabinet or its committees.

[Order 73]

Record 4 is titled “Approval Form For Regulations” and consists of a standard document used by various Ministries in preparing proposed regulatory changes for consideration by the Statutory Business Committee of Cabinet. It is dated February 24, 1998, and signed by the Minister and Deputy Minister of the then-Ministry of the Solicitor General and Correctional Services. Records 12 and 22 are earlier unsigned draft versions of the same record.

Record 38 is a different “Approval Form For Regulations”, dated October 18, 2000, and signed by the Minister and Deputy Minister of the then-Ministry of the Solicitor General.

In addressing the application of section 12(1)(b) to Record 4, the Ministry submits:

This form recommends the approval of the regulation, and contains policy options that were considered. The members of the Statutory Business Committee [of Cabinet] reviewed the form. In Order P-1570, this form was upheld under this exemption. The Ministry submits that this record falls within the meaning of the exemption in clause 12(1)(b).

I accept the Ministry’s position on Record 4, and find that it also applies to Records 12, 22 and 38. These records all contain policy options and recommendations relating to Regulation 554/91, and they were either actually submitted (Records 4 and 38) or prepared for submission (Records 12 and 22) to the Cabinet Committee responsible for considering and approving changes to regulations. Therefore, I find that Records 4, 12, 22 and 38 qualify for exemption under section 12(1)(b).

Record 7 is titled “Decision Document - Cabinet Decision(s) Requested”. It outlines issues relating to the political activity regulation under consideration in 1998, including a series of options and a recommended course of action. The record also includes a proposed Cabinet Minute and a marked up copy of Regulation 554/91. The Ministry points out that it is unclear whether this record was actually submitted to Cabinet, but argues that its title content makes it clear that it was prepared with this intent. Again, I accept the Ministry’s position and find that Record 7 qualifies for exemption under section 12(1)(b) for the same reasons as Records 12 and 22.

Record 31 is a set of presentation slides dated October 26, 2000 on the topic of political activities of municipal police associations. The Ministry submits that this record was prepared for submission to the Priorities, Policies and Communications Board of Cabinet, but never actually submitted. I find that this record contains policy options and recommendations, and it is clear from its title page that it was prepared for the purpose of submission to a Cabinet Committee. Therefore, I find that Record 31 qualifies for exemption under section 12(1)(b).

Section 12(1)(a)

The only records identified by the Ministry under section 12(1)(a) are Records 3, 7 and 37. I have already determined that these records qualify for exemption under sections 12(1)(b) or (f), so I do not need to consider the Ministry's section 12(1)(a) claim.

Section 12(1)(c)

Previous orders have held that section 12(1)(c) of the *Act* is prospective in nature. The use of the present tense in this section precludes its application to matters that have already been considered by Cabinet or its committees [Orders P-60, P-323, P-1623].

For a record to qualify under section 12(1)(c), the Ministry must establish that:

1. the record contains background explanations or analyses of problems to be considered; and
2. the record itself was submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions; and
3. the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees; and
4. the decision at issue either:
 - (i) has not been made; or
 - (ii) has been made but not implemented.

[Order P-1623]

The first category of records (Records 2-28) relate to amendments to Regulation 554/91 made by Cabinet in 1998. Clearly, the content of these records is not under active consideration or scheduled to be considered by Cabinet, so section 12(1)(c) cannot apply.

Similarly, all records in the second category (Records 30-47) were created in the context of discussions concerning Regulation 554/91 taking place in 2000. The Ministry explains in its representations that Cabinet took no action at that time, and there is nothing before me to suggest

that this regulation is under active consideration now. Therefore, I find that section 12(1)(c) cannot apply to any of the second category of records either.

Introductory wording of section 12(1)

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 any record that would reveal the substance of deliberations of Cabinet or one of its committees qualifies for exemption under section 12(1), regardless of whether it is one of the types of records enumerated in the various paragraphs of that section [Orders P-11, P-22 and P-331].

It is also possible for a record that has never actually been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if the Ministry can establish that disclosing the record would reveal the substance of deliberations or permit the drawing of accurate inferences with respect to these Cabinet deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry submits that several records qualify for exemption under the introductory wording of section 12(1). I have already determined that some of them qualify under one of the specified paragraphs of section 12(1), so will not consider those records here. I have also decided to deal with certain records under section 19 rather than section 12(1), so I will eliminate those records from my discussion as well. Accordingly, the records to be considered under the introductory wording of section 12(1) are:

Records 5, 18, 19, 21, 23, 24, 25, 34, 41, 43, 46 and 47.

Record 21 is a report dated February 13, 1998 prepared by an employee of the Ministry's Corporate Policy Branch. It is titled "Draft Amendments to Regulation 554 of the *Police Services Act*: Explanatory Notes and Policy Issues". Records 5, 24 and 25 are earlier versions of Record 21. The footer on Record 5 indicates that the report is being prepared for the "DM", which I assume to mean "Deputy Minister". These records each contain a chart that identifies various issues addressed by Regulation 554/91, the comparable provisions of the *Public Service Act* relating to OPP officers, and the proposed amendment Regulation 554/91 under consideration in 1998.

The Ministry's only submission on Record 21 is that it "contains the same subject matter as was contained in [Record 4]".

Record 21 does not contain "policy options or recommendations", as these terms are used in section 12(1)(b). Rather, it appears to contain "background explanations or analyses of problems", the terms used in section 12(1)(c). While a record of this nature may have qualified for exemption under section 12(1)(c) while Regulation 554/91 was under active consideration by Cabinet in 1998, this exemption is prospective in nature and is no longer applicable here.

I have no evidence that Record 21 was ever placed before Cabinet or its committees for consideration. However, portions of the chart contain the text of draft amendments that I have found to be exempt under section 12(1)(f), and I find that disclosing this same information in Record 21 would reveal the substance of deliberations of the Statutory Business Committee of Cabinet and should not be disclosed. Based on the submissions provided by the Ministry, I am not persuaded that disclosing the rest of Record 21 would have the same impact, and I find that these portions do not qualify for exemption under the introductory wording of section 21(1). I make the same findings for Records 5, 24 and 25, which contain the same or similar information.

Record 19 is a set of slides used at a “Minister’s Briefing” on February 18, 1998. The topic of the briefing is the proposed amendments to Regulation 554/91. The only submissions provided by the Ministry on Record 19 are:

This record was used to brief the Minister about the regulation. It therefore contains the same type of information that would have been deliberated by Statutory Business Committee.

Record 19 by its nature is not the type of record that would have been placed before Cabinet. Rather, it is the kind of record that could have been “prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before [Cabinet]”, the wording used in section 12(1)(e). The Ministry has not claimed section 12(1)(e) for any records in this appeal, and in any event this exemption is prospective in nature and not available after the subject matter has been considered by Cabinet [Orders P-22, P-946, P-1182].

Record 19 contains the same chart as Record 21, and I find that the portions of the chart that would reveal the substance of deliberations of the Statutory Business Committee of Cabinet should not be disclosed. However, based on the submissions provided by the Ministry, I am not persuaded that disclosing the rest of Record 19 would have the same impact, and I find that these portions do not qualify for exemption under the introductory wording of section 12(1).

Record 23 is an undated draft discussion paper titled “Political Activity Rights of Police Officers”. The author of the paper is not identified either on the record itself or in the Ministry’s representations. The Ministry’s only submission on this record is:

This record is a discussion paper concerning the proposed regulation. It contains the same subject matter as would have likely been discussed at Statutory Business Committee, and should not be disclosed for this reason.

Unlike Records 21 and 19, Record 23 does not make reference to the regulations under consideration in 1998 by the Cabinet Committee. It is clearly not the type of record that would have been considered by Cabinet, and would appear to be an internal Ministry document. Based on the Ministry’s representations, I find that it has not discharged the onus of establishing that disclosing this record would reveal the substance of any Cabinet deliberations, and Record 23 does not qualify under the introductory wording of section 12(1).

Record 18 is a 4-page document consisting of two cover memos sent by a Ministry legal counsel to two different government officials, and two e-mail chains to and from various Ministry staff. The Ministry's representations on this record refer only to the cover memos, and state that they contain information that "describe the proposed regulation, and what approvals are needed". Although these pages make reference to the regulatory review underway during 1998, in my view they deal primarily with process issues, and not the substance of any actual Cabinet deliberations on this issue. For that reason I find that the various pages comprising Record 18 do not qualify for exemption under the introductory wording of section 12(1).

Record 41 is a 2-page issue note concerning proposed amendments to Regulation 554/91 under consideration in 2000. The Ministry submits that the record:

... describes the proposed amendments to the regulation, the rationale for such amendments, and it intended for briefing purposes. The Ministry submits that if this record were disclosed, the substance of the records that were submitted to Statutory Business Committee would also be revealed.

Record 41 is undated and the author is not identified either on the record itself or by the Ministry in its representations. Most of the record consists of factual information concerning Regulation 554/91, and a small portion at the end identifies the new approach to the regulated activity under consideration at that time. It is clear that a record of this nature would not itself be considered by Cabinet and, based on the Ministry's representations, I am unable to conclude that its disclosure would reveal the substance of any Cabinet deliberations. In my view, it is essentially an outline which confirms that Regulation 554/91 was under review, a fact that is widely known and otherwise confirmed simply by the identification of the second category of records under consideration in this appeal. I find that Record 41 does not qualify for exemption under the introductory wording of section 12(1).

Record 43 is a 1-page cover memo dated October 13, 2000, with an attached mailing list, sent by the Acting Director of the Ministry's Corporate Policy Branch and asking for comments on materials attached to the memo. The attachments are not included in Record 43. The Ministry submits that "if this record was disclosed, the substance of the records that were submitted to Statutory Business Committee for its deliberation would be revealed". The Ministry does not refer to any specific records considered by the Committee. Based on the Ministry's representations, it has not discharged the onus of establishing that disclosing this cover memo would reveal the substance of any Cabinet deliberations. Accordingly, I find that Record 43 does not qualify for exemption under the introductory wording of section 12(1).

Record 34 is a 1-page list of options relating to amendments to Regulation 554/91. It is undated and unsigned. The Ministry's only submission is that the record "describes the proposed changes to the Regulation 554/91", and that disclosing the record "would reveal the contents of the regulation". I do not accept the Ministry's submission on this record. Absent more detailed evidence linking the contents of this record to any actual deliberations of Cabinet, in my view, Record 34 would appear to be more accurately described as an internal document outlining the views of a Ministry employee on approaches to the review of Regulation 554/91, not a record

that reflects information presented to Cabinet for its consideration. Therefore, I find that Record 34 does not qualify for exemption under the introductory wording of section 12(1).

In its index, the Ministry lists section 12(1) as one of the exemptions claimed for Records 46 and 47, but does not address these records in its representations. Because section 12 is a mandatory exemption I have reviewed Records 46 and 47 independently before concluding that they do not, on their face, qualify for exemption under section 12(1).

Section 12(2)(b)

Section 12(2)(b) provides that, despite section 12(1), an institution shall not refuse to disclose a record where Cabinet consents to its disclosure.

Previous orders have held that, while this provision does not impose a requirement on an institution to seek the consent, the head of the institution must at a minimum turn his or her mind to this issue [Orders P-771 and P-1146].

The Ministry's representations on section 12(2)(b) read as follows:

The Ministry decided not to seek Cabinet consent regarding release of these records. The Ministry considered the nature and content of the records at issue in this appeal. The Ministry noted that the disclosure of these records would reveal the substance of Cabinet's deliberations on the complex and sensitive issues associated with the records. The Ministry also considered the following factors in its decision:

- The information in the records was never made available to the public, and is therefore not in the public domain.
- The records are actual Cabinet records, or resemble the information contained in records that were submitted to Cabinet.
- The records are not necessarily of historical significance, and it is possible that the issues associated with such records could be again brought to the attention of Cabinet for its consideration.

Based on these representations, I am satisfied that the Ministry turned its attention to the requirements of section 12(2)(b), as required under the *Act*.

In summary, I find that only the following records qualify for exemption under section 12(1):

Records 3, 4, 7, 10, 11, 12, 13, 14, 15, 16, 17, 22, 28, 31, 33, 36, 37, 38, 39, and 44, and portions of Records 5, 19, 21, 24 and 25

SOLICITOR-CLIENT PRIVILEGE

The Ministry relies on section 19 of the Act as one basis for denying access to a number of records, including:

Records 2, 5, 6, 8, 9, 18, 19, 21, 23, 24, 25, 26, 27, 32, 34, 35, 41, 43, 45, pages 244-245 of Record 46, and pages 291, 293-296 and 301-341 of Record 47

General principles

Section 19 of the *Act* reads:

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 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

Here, the Ministry relies on solicitor-client communication privilege under both branches. The Ministry does not rely on litigation privilege under either branch. I will first consider the application of common law solicitor-client communication privilege under Branch 1.

Common law solicitor-client communication privilege under Branch 1

General principles

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry submits that the identified records qualify for exemption because they are "written communications of a confidential nature between Ministry legal Counsel and their Ministry client for the purpose of seeking, formulating and giving legal advice."

I have decided to divide the various records into two groups for my discussion of section 19.

Group 1: Records 2, 6, 8, 9, 26, 27, 32, 35, 43, 45, pages 74-75 of Record 18, and pages 291 and 302-341 of Record 47

Records 6 and 26 are memoranda sent by Ministry counsel to Legislative Counsel providing instructions on the preparation of the amendments to Regulation 554/91 under consideration in 1998.

Record 8 is a legal opinion provided by Ministry counsel to a member of the Minister's staff on an aspect of the 1998 regulatory review; and Record 45 is a legal opinion from an articling student to the Ministry's Director of Legal services on a different aspect of the 2000 review.

Pages 74 and 75 of Record 18 are two brief memos authored by a Ministry legal counsel. One was sent to a Cabinet Office staff person and the other to a Ministry official. Both of these memos deal with the regulatory review underway in 1998 and, although they do not contain legal advice, I accept that they fall within the scope of the "continuum of communications" outlined in *Balabel*, and qualify for common law solicitor-client communication privilege for that reasons.

Record 32 is an e-mail message which is copied to Ministry counsel and outlines counsel's assessment of the contents of an affidavit prepared in the context of the 2000 regulatory review; and Record 27 is a 3-page e-mail chain among various Ministry staff and counsel that addresses an aspect of the 1998 review.

Record 2 is an "Issue Note" prepared by Ministry counsel outlining various legal aspects of the proposed 1998 amendments. Record 9 is an earlier draft version of Record 2. Record 35 is a "Housebook Note" prepared by the Ministry's Director of Legal Services, which contains types of information similar to Records 2 and 9 but relating to the proposed 2000 amendments to Regulation 554/91.

The Ministry's representations on section 19 do not refer to Record 43, although the Ministry identifies this exemption for this record on its index. Record 43 is a 1-page cover memo from the Acting Director of the Ministry's Corporate Policy Branch (as described in my section 12(1) discussion). One of the individuals identified on the distribution list for this memo is a legal counsel with the Ministry of the Attorney General. Despite the absence of representations, I am prepared to accept that Record 43 was created for the purpose of receiving legal advice from the Attorney General's counsel, and therefore falls within the scope of common law solicitor-client communication privilege.

Page 291 of Record 47 is a fax cover sheet dated September 19, 2000, wherein an employee of the Ministry's Corporate Policy Branch is informing a Ministry counsel that materials related to an upcoming meeting on the regulatory review are attached (but do not form part of Record 47). The cover sheet also identifies certain types of documents required from the legal counsel in order to undertake further work. The Ministry's representations do not address page 291. Although no legal advice is sought by the employee, I am prepared to accept that the information on this page falls within the scope of the "continuum of communications" outlined in *Balabel*, and qualifies for common law solicitor-client communication privilege for that reason.

Page 302-341 comprise a fax cover sheet from counsel at the Ministry of the Attorney General's Constitutional Law Branch to a Ministry counsel, attaching a 38-page draft affidavit prepared in the context of a court case involving the Toronto Police Association and the Toronto Police Services Board that was before the Divisional Court in 2000. The draft includes notations in the nature of suggested amendments.

I find that all Group 1 records fall within the scope of common law solicitor-client communication privilege. Given their content and the policy reviews of Regulation 554/91 underway in 1998 and again in 2000, I accept that communications to and from legal counsel and their clients would be confidential, as would correspondence between various counsel on issues relating to the review and related litigation. The various records were all either prepared for the purpose of giving or receiving professional legal advice, or constitute working papers directly related to legal advice (*Susan Hosiery*).

Therefore, I find that Records 2, 6, 8, 9, 26, 27, 32, 35, 43, 45, pages 74-75 of Record 18, and pages 291 and 302-341 of Record 47 qualify for exemption under section 19 of the *Act*.

Group 2: Records 5, 19, 21, 23, 24, 25, 34, 41, pages 76-77 of Record 18, pages 244-245 of Record 46 and pages 293-296, 301 and 342 of Record 47

The Ministry's representations on section 19 appear to acknowledge that all of the Group 2 records were not prepared directly by legal counsel. It submits:

... [T]he balance of the records contain legal advice originally prepared by Legal Counsel, which have subsequently been imported into other records. The Ministry submits that solicitor-client privilege is not waived simply because legal advice has been inserted into a package of briefing materials, as an example.

Indeed, this mixing of legal advice with other types of information is an inherent and necessary part of the regulation making process.

As outlined in my discussion of section 12(1), Records 5, 21, 24 and 25 are various versions of a report authored by an employee of the Ministry's Corporate Policy Branch and sent to the Deputy Minister. The Ministry's representations on section 19 do not refer specifically to Records 5, 24 or 25, and simply identify Record 21 as falling into the category of "Explanatory Notes and Policy Issues Documents". Having carefully reviewed the contents of these records, I am unable to identify any legal advice. While I accept that legal advice formulated elsewhere and then incorporated into a policy document may, depending on the circumstances, retain its privileged status, in my view, this can only occur when the legal advice itself is clearly evident on the face of the record or specifically established through representations. None of these records makes specific reference to "legal advice" and, based on the general representations provided by the Ministry, I find that it has not discharged the onus of establishing that the contents of these records were "originally prepared by Legal Counsel" and then "imported into" these records. Therefore, I find that Records 5, 21, 24 and 25 do not constitute or reflect written communications between a solicitor and client and cannot qualify for exemption under section 19.

I have reached the same conclusion for Record 19. The Ministry does not take the position that the briefing materials comprising this record were prepared by legal counsel, nor does it identify any specific legal advice contained in this record. Having reviewed the content of Record 19, I am not persuaded that it was created for the purpose of giving legal advice, nor that it constitutes or would reveal written communications between a solicitor and client. I also find that the Ministry has failed to discharge the onus of establishing that the contents of Record 19 were "originally prepared by Legal Counsel" and then "imported into" this record. For all of these reasons, I find that Record 19 does not qualify for common law solicitor-client communication privilege under section 19.

Pages 76 and 77 of Record 18 consist of e-mail chains exchanged among various Ministry policy staff and others involved in the regulatory review. The content of these pages relates to process issues associated with the amended regulation under consideration in 1998. No legal opinion is referenced in these e-mails, nor has the Ministry identified any legal advice, other than to state that the disclosing the record "would reveal the substance of confidential communications". I find that pages 76 and 77 were not prepared by the authors for the purpose of giving or receiving legal advice, and therefore do not qualify for solicitor-client privilege under section 19 of the *Act*.

The authors of Records 23 and 34 are not identified, although the Ministry's representations would appear to suggest that they are not legal counsel. Having reviewed the contents of these records, I am not able to identify any "legal advice", nor has the Ministry demonstrated how any legal advice originally prepared by legal counsel has been "imported into" either Record 23 or Record 34. Accordingly, I find that Records 23 and 34 do not represent nor would it reveal written communications between a solicitor and a client, and they therefore do not qualify for exemption under section 19.

The Ministry's representations on section 19 do not refer to Record 41, although the Ministry identifies this exemption for this record on its index. Record 41 is 2-page briefing note explaining certain aspects of the review of Regulation 554/91 underway in 2000. It is not authored by legal counsel and does not contain any information in the nature of legal advice. I find that the Ministry has failed to establish that Record 41 was prepared for the purpose of giving or receiving legal advice, and it therefore does not qualify for common law solicitor-client communication under section 19.

Pages 244-245 of Record 46 is a letter from the Solicitor General to the Chair of the Toronto Police Services Board, dated October 5, 2000. Pages 293-294 of Record 47 are a second similar letter sent to and from the same individuals, dated August 31, 2000. Clearly, these records are not communications between a solicitor and a client, nor were they prepared for the purpose of giving or receiving legal advice. Therefore, I find that pages 244-245 of Record 46 and pages 293-294 of Record 47 do not qualify for exemption under section 19.

Pages 295-296 of Record 47 are copies of Regulation 554/91, as amended in 1998. Page 295 has markings on it, but no handwritten notes. Clearly, these pages do not contain legal advice and fall outside the scope of section 19.

Page 301 of Record 47 is a newspaper clipping from the Toronto Star, and page 342 is a copy of By-law No. 130, passed by the Toronto Police Services Board pursuant to Regulation 123/98 of the *Police Services Act*. These two pages also clearly were not prepared for the purpose of giving or receiving legal advice and therefore do not qualify for exemption under section 19.

I have also reviewed all of the Group 2 records against the requirements of the statutory solicitor-client communications privilege and find that none of them qualify for exemption under Branch 2 of section 19.

Sections 12(1) and 19 are the only exemptions claimed by the Ministry for Records 18, 19 and 47. Because I have determined that portions of Record 19, as well as pages 76-77 of Record 18, and pages 293-296, 301 and 342 of Record 47 do not qualify for exemption under either of these sections, they should be disclosed to the appellant.

ADVICE AND RECOMMENDATIONS

I will now consider the Ministry's section 13(1) exemption claim for the remaining records or portions of records that do not qualify for exemption under sections 12(1) or 19. They are:

Records 23, 34, 41, pages 244-245 of Record 46, and the portions of Records of Records 5, 21, 24 and 25 that do not qualify for exemption under section 12(1).

Section 13(1) reads as follows:

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.

Section 13(2) identifies a list of exceptions to this exemption, including section 13(2)(a) which states:

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

(a) factual information;

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the section 13(1) 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". Put another way, the purpose of the exemption is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure (Orders 24, P-1363 and P-1690).

A number of previous orders have established 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 must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

The Ministry points out that all of the records at issue here are "specific to the process of a specific regulation under the *PSA*", and submits:

It is clear from reading the records that they clearly contain express and specific advice and recommendations prepared by public servants. In some of the records there is factual and background information that could allow the drawing of accurate inferences as to the nature of the actual advice or recommendations given to government. As such these records qualify for exemption under section 13.

As noted earlier, pages 244-245 of Record 46 is a 2-page letter dated October 5, 2000 sent by the Solicitor General to the Chair of the Toronto Police Services Board in response to a prior letter

received from the Chair. Clearly, correspondence of this nature between the head of an institution and an outsider to the deliberative process of the provincial government does not qualify for exemption under section 13(1) of the *Act*. I have also reviewed the content of the letter and it does not contain nor would it reveal any advice or recommendations.

Record 23 is a draft discussion paper titled “Political Activity Rights of Police Officers”. As noted in my discussion of section 12(1), this record is not dated and the author is not identified. The discussion paper is divided into four sections: *Background*, *Overview of Legislation*, *Key Issues* and *Conclusion*. Having carefully reviewed the content of these various sections, in my view, most of them contain “factual information” and would therefore fall within the section 13(2) exception. The *Key Issues* section identifies the issues under consideration in the paper, as well as an outline of the then-current legislative and regulatory provisions governing political activity rights, and a “Proposal for Change”. In my view, some portions of the “Proposal for Change” discussion reflect a recommended course of action that will be considered during the deliberative process leading to any amendments to Regulation 554/91, and I find that these portions qualify for exemption under section 13(1). Small portions of other parts of Record 23, if disclosed, would reveal the recommendation outlined in the “Proposal for Change”, and they too qualify for exemption for that reason. The rest of Record 23 does not qualify for exemption.

Record 41 is an undated issue note concerning proposed amendments to Regulation 554/91. As noted earlier, the author of this record is not identified on either the face of the record or in the Ministry’s representations. This record is divided into three sections: *Context*, *Key Information*, and *Proposed Amendment to O. Reg 554/91*. The first two sections contain “factual information” and fall within the scope of the section 13(2) exception. Although the 1-sentence contained in the third section does not itself contain “advice or recommendations” as those terms have been defined in past orders, in my view, disclosing this sentence would reveal a recommended course of action under consideration in the context of the regulatory review. Accordingly, I find that the sentence qualifies for exemption under section 13(1) of the *Act*.

Record 34 is a 1-page list of options relating to amendments to Regulation 554/91. As noted earlier, it is undated and unsigned, and the Ministry’s representations do not provide any details as to who created the record, who if anyone it was provided to, or in what context. The only specific representations on Record 34 consist of the following statement:

The record on clear review [sic] reading contains a series of options and comment specifically related to the Ministry initiative.

In Order PO-2028, I reviewed in some detail the approach this office has taken to the application of section 13(1) to “options”. After reviewing a number of orders, I stated:

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains “advice” for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving

options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain “mere information” and what, if any, contain information that actually “advises” the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing “mere information”, then section 13(1) applies.

Applying this approach to the severed portions of pages 9 and 10, I find they do not contain “recommendations” or “advice”. The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC [Northern Ontario Heritage Fund Committee] does not extend to recommending a particular course of action to be followed”. In my view, the description of each option itself is “mere information”. The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to “advise” the NOHFC in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The “pros and cons” description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

The next question is whether disclosure of these portions would allow one to accurately infer any advice given. When considered as a whole and in the context of the roles played by Ministry staff in providing support to the NOHFC and the Board of that organization as a decision-making body for Northern Ontario project funding, I find that disclosure of the “pros and cons” for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various “pros and cons” it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the “pros and cons” portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.

[See also Order PO-2084]

I take the same approach to Record 34. I find that the options themselves do not constitute “advice or recommendations”. However, in my view, the content of certain comments listed under the various options would allow one to accurately infer advice or recommendations concerning the options. Despite the fact that the author and recipient of Record 34 are not known, given the nature of this record and its content, I accept that it was in all likelihood prepared by an advisor and provided to a decision-maker in the context of the 2000 review of Regulation 554/91. Accordingly, I find that the comments contained in Record 34 qualify for

exemption under section 13(1). The rest of this record, including the options themselves, do not qualify as “advice or recommendations”, and therefore fall outside the scope of the section 13(1) exemption.

Record 21 is a February 13, 1998 report prepared by an employee of the Ministry’s Corporate Policy Branch, titled “Draft Amendments to Regulation 554 of the *Police Services Act*: Explanatory Notes and Policy Issues”. Records 5, 24 and 25 are earlier versions of Record 21. As noted in my section 12(1) discussion, the footer on Record 5 indicates that the report was being prepared for consideration by the Deputy Minister. I have already determined that portions of the chart qualify for exemption under section 12(1)(f). As far as the rest of these records are concerned, I find that the introductory section, the section titled “Scope of the amendments” (with one exception) and the remaining portions of the chart contain “factual information” rather than any “advice or recommendations” and fall within the scope of the section 13(2) exception. A portion of one sentence that appears in the “Scope of the amendments” section, if disclosed, would reveal the policy approach taken in the amendments themselves, and I find that this information is properly characterized as “advice or recommendations” for the purpose of section 13(1). The discussion at the end of each of the records, as well as the handwritten notes on pages 130-132 of Record 25, outline, for the most part, the author’s analysis of the issue under consideration and her recommended approach to various aspects of the regulatory review. Some portions of this discussion are factual in nature but, in my view, the record cannot be severed in any meaningful way without revealing the portions that contain the author’s advice and recommendations. Therefore, I find that the text following the chart in Records 5, 21, 24 and 25, as well as the previously described portion of the “Scope of the amendments” section in each of these records, qualify for exemption under section 13(1). The remaining portions of the records fall within the scope of the section 13(2) exception and should be disclosed.

I will provide a highlighted version of the relevant portions of Records 5, 19, 21, 23, 24, 25, 34 and 41 with the copy of this order sent to the Ministry, identifying the portions that qualify for exemption under sections 13(1) or 12(1).

The Ministry’s section 21(1) exemption claim only applies to Record 2. In light of my finding that this record qualifies for exemption under section 19, I do not need to consider section 21(1).

ORDER:

1. I order the Ministry to disclose the following records or portions of records to the appellant by **October 27, 2003**:

Pages 76-77 of Record 18, pages 244-245 of Record 46, pages 293-296, 301 and 342 of Record 47, and portions of Records 5, 19, 21, 23, 25, 34 and 41.

I have attached a highlighted version of Records 5, 19, 21, 23, 24, 25, 34 and 41 with the copy of this order sent to the Ministry, which identifies the portions that should **not** be disclosed.

2. I uphold the Ministry's decision to deny access to the following records or portions of records:

Records 2-4, 6-17, 21, 22, 24-28, 31-33, 35-39, 43-45, pages 74-75 of Record 18, pages 291 and 302-341 of Record 47, and those portions of Records 5, 19, 21, 23, 24, 25, 34 and 41 not covered by Provision 1 of this order.

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

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ October 3, 2003