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

ORDER PO-2400

Appeal PA-050001-1

Financial Services Commission of Ontario

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NATURE OF THE APPEAL:

The Financial Services Commission of Ontario (FSCO), an institution under the *Freedom of Information and Protection of Privacy Act* (the *Act*), received a request for information under the *Act*. The Ministry of Finance (the Ministry) is designated by regulation to respond to requests made to FSCO. The Ministry received a request for information from an individual under the *Act*. The request was for:

> A report delivered by …(a named individual)… in the summer 2004 to the Ministry of Finance in regards (sic) to the Government's White Paper "Expert Assessor Network – Proposed Model to Replace the Designated Assessment Centre System" (March 19, 2004)

The Ministry identified the responsive record as a consultant's report consisting of two parts. The Ministry granted access to the first part, entitled *Report to the Superintendent of Financial Services on the Written and Oral Consultations With Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System" – SUMMARY.*

The Ministry denied access to the second portion of the report, entitled *Report to the Superintendent of Financial Services on the Written and Oral Consultations With Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System" – OPTIONS AND RECOMMENDATIONS*. In denying access to this portion of the record, the Ministry relied on the exemption in section 13(1) (advice and recommendations) of the *Act*.

The requester (now the appellant) appealed the decision.

Mediation did not resolve the issues. Therefore, the appeal entered the inquiry stage. I sent a Notice of Inquiry to the Ministry, initially, and the Ministry provided me with representations. I then sent the appellant a Notice of Inquiry, together with a copy of the Ministry's representations, and received representations from the appellant.

RECORDS:

The record at issue is entitled, *Report to the Superintendent of Financial Services on the Written and Oral Consultations With Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System" – OPTIONS & RECOMMENDATIONS*, dated April 27, 2004.

DISCUSSION:

Background

FSCO is an agency of the Ministry, which is responsible for the regulation of insurance, including automobile insurance. FSCO's mandate includes making recommendations to the Minister on matters affecting the regulated sectors. The Superintendent of Financial Services

(the Superintendent) administers and enforces the *Financial Services Commission of Ontario Act, 1997* and other legislation, and is the Chief Executive Officer of FSCO.

FSCO's responsibilities for the regulation of automobile insurance include the statutory accident benefits scheme established under the *Insurance Act*. The scheme provides for payment of accident benefits where a person is hurt or killed in an automobile accident. Since 1994, Designated Assessment Centres (DACs) have been used as part of this scheme to conduct health assessments when a neutral third party opinion is needed about a claimant's injuries and the accident benefits that apply to those injuries.

On March 19, 2004, the government released a consultation paper entitled *Expert Assessor Network - Proposed Model to Replace the Designated Assessment Centre System - A Consultation Paper* (the consultation paper). The consultation paper identified a number of problems with the existing DAC system and offered an alternative assessment model - the expert assessor network (EAN) - as a possible replacement. The consultation paper invited submissions on the proposed assessment model and stated that, following input received in response to it, FSCO would make recommendations to the government regarding the final model to be introduced through regulatory changes.

FSCO retained an external consultant to assist in the consultation process. The consultant is a lawyer with expertise in the area and former chair of the Minister's Committee on the DAC system, a committee established under the *Insurance Act* to oversee the DAC system.

The consultant provided a two-part report to the Superintendent dated April 27, 2004. One section was entitled *Report to The Superintendent of Financial Services on the Written and Oral Consultations With Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System " - SUMMARY*. In this part, the Consultant reported on the responses of stakeholders in regard to the proposed new assessment model, and provided a summary of the issues and submissions that developed from the consultation process. The Ministry provided a copy of this document to the appellant.

The second section was entitled *Report to The Superintendent of Financial Services on the Written and Oral Consultations With Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System " - OPTIONS AND RECOMMENDATIONS*. It dealt with options flowing from the consultation process and the consultant's recommendations. This is the record at issue in this appeal.

In December 2004, the Ministry announced its proposed direction on the DAC system, and published draft regulations for consultation. In the accompanying letter to stakeholders, the Ministry stated that it had given considerable attention to the feedback and suggestions received in response to the proposed EAN model. It proposed to eliminate the DAC system, but not to replace it with the EAN model proposed in the consultation paper. A different model was proposed.

ADVICE TO GOVERNMENT

Does the discretionary exemption at section 13 apply to the record?

As stated above, the Ministry claims that the "OPTIONS AND RECOMMENDATIONS" portion of the report is exempt from disclosure under section 13(1) of the *Act*.

Section 13(1) states:

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

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Order 24, Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information
- analytical information

- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, 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.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913, June 30, 2004)]

Representations, analysis and findings

As stated earlier, the Ministry identified a number of concerns about the DAC system and proposed a new model, the EAN, which in turn received substantial criticism. According to part one of the consultant's report, the terms of the consultant's retainer were to conduct consultation meetings with a limited number of stakeholders with respect to the consultation paper and to provide a written report to the Superintendent "*advising* on: (a) suggestions or refinements that will enhance the model's effectiveness; and (b) any other information that will assist the Superintendent in providing the Minister with direction on the technical paper" [Emphasis added].

In the "Options and Recommendations" portion of her report, which is at issue in this appeal, the consultant identified four options for addressing the perceived problems with the DAC system, which she described as "proposals". She gave her views on the acceptability of each of those options, and made recommendations. The recommendations included not only which option or options to adopt, but also detailed suggestions about how to design and implement the recommended system or systems.

The record contains information that is clearly advice and recommendations. It also contains a set of options, which may or may not be "advice" or "recommendations", as discussed below. In discussing each option, the consultant intermingles clearly factual or background material, such as descriptions of the feedback received and descriptions of the option, with observations, opinions, analysis, evaluations, views, advice and recommendations.

Since all of this information, except the first three paragraphs and the last paragraph of the report, is found under the headings "Option 1", "Option 2", "Option 3", and "Option 4", I will discuss how this office has addressed the question of whether options are advice or recommendations in past orders.

In Order PO-2028, former Assistant Commissioner Tom Mitchinson reviewed how previous orders have dealt with the question of whether presentation and discussion of options constitutes giving advice or making recommendations. He stated:

> The issue of whether or not "options" qualify as "advice or recommendations" for the purpose of section 13(1) has been considered in a number of previous orders.
>
> …
>
> In Order P-529 former Assistant Commissioner Irwin Glasberg had to determine whether certain records relating to the evaluation of proposals for the delivery of bus services to the Ministry of Transportation qualified for exemption under section 13(1). Three of them contained different lists of options, and he found that only one record qualified for exemption as containing "advice". The basis for distinguishing this one record was that, in addition to listing options, this record contained an assessment of the anticipated results or probable outcomes, and, in the circumstances, this information was found to reveal by inference a particular suggested course of action.
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> In Order P-1037, Adjudicator Cropley considered whether a record containing various options for dealing with proposals for a housing project administered by the Ministry of Health qualified for exemption. After considering the facts and argument provided in that appeal, she identified that "some of [the options] include observations about the possible consequences of implementing the particular option to which they are attached", but rejected the section 13(1) exemption claim on the basis that no preferred option was identified and, therefore, the record did not contain "advice or recommendations". In other words, given the particular context she was facing, Adjudicator Cropley was not persuaded that the content of the various options would reveal a suggested course of action.
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> …
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> In Order P-1631, Senior Adjudicator David Goodis examined records used for the purpose of obtaining directions relating to settlement discussions for litigation involving the Ministry of Natural Resources and the Ministry of the Attorney General. In finding that certain records containing "proposed options and courses of action" qualified as "advice or recommendations" for the purposes of section 13(1), he relied on the fact that the options were accompanied by "pros and cons" that could be taken into account by the decision-makers in the settlement negotiations. Senior Adjudicator Goodis determined, based on the facts and arguments presented to him in that appeal, that the consequences of implementing a particular option outlined in the "pros and cons" discussion could be interpreted as revealing a suggested course of action, and found that they qualified as

"advice".

> Finally, in Order P-1034, former Adjudicator Anita Fineberg considered whether portions of a record containing options for implementing a non-tax revenue strategy qualified for exemption under section 13(1). She rejected the exemption claim, based on the fact that the options did not include any "pros and cons"; that the author of the record was not "recommending or advising the senior managers that one option should be adopted in preference to the others"; and that the options were not mutually exclusive.

Based on his review of these orders, Assistant Commissioner Mitchinson enunciated the following approach to determining whether discussion of options constitutes "advice" or "recommendations" for the purposes of section 13(1):

> 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.

In Order PO-2355, Adjudicator Bernard Morrow used the approach set out by Assistant Commissioner Mitchinson to analyze whether comments made by staff of the Ministry of the Environment about a proposal by a company to expand its licensed lime quarry constituted advice or recommendations. The comments were made in response to a request by the Ministry of Natural Resources, which regulates such quarries. They are found in an internal Ministry document (Record 1) and in a draft of a letter from a Ministry of the Environment planner to an MNR aggregate inspector (Record 2).

Adjudicator Morrow found that the information in the internal Ministry document was not advice or recommendations because:

> [T]he author of the options has not set out a suggested course of action to the decision-maker. What the author has done is provide the decision-maker with a list of four "alternative" options with modest discussions of the benefits of implementing one option over another and the implications or consequences of choosing to do so or not. However, the author does not expressly identify a preferred option and one cannot be inferred from the information. I cannot

> discern from the options a suggested course of action. Therefore, I conclude that the information at issue in record 1 should be characterized as "mere information" since none of the information at issue actually advises the decision maker on a suggested course of action.

With regard to the draft letter to the Ministry of Natural Resources (Record 2), Adjudicator Morrow stated:

> In my view, much of the information in this record is clearly best described as "mere" information", including factual, background and contextual, analytical and/or evaluative information.
>
> …
>
> With regard to the four options in Record 2, I find that my analysis of the four options in Record 1 applies. As with Record 1, the options in Record 2 do not suggest a course of action to the decision-maker. The author of Record 2 has presented four alternative options for discussion purposes. While the options present well-articulated alternative approaches, and provide commentary on the consequences of undertaking each option, a preferred option is not expressly identified and cannot be inferred. I am not able to extract from the options a suggested course of action. Therefore, I conclude that the four options are not exempt under section 13(1).

I agree with the Assistant Commissioner that whether information is labeled "options", "conclusions", "findings", "analysis" or is described by some other term is not determinative of whether it is advice or recommendations. Rather, for the purposes of the section 13(1) analysis, what is important is whether the information actually "advises" the decision-maker on a suggested course of action, or allows one to accurately infer such advice, and determining this requires a careful review of the content of the information and an assessment of the content in light of the context.

As Adjudicator Morrow's comments suggest, a moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice". There is a fine line between description and prescription. Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the strength of the views expressed, and whether the discussion is balanced or skewed.

In the record at issue in this appeal, the consultant identified only four options. She described two of them briefly and dismissed them perfunctorily, while discussing the other two at greater length and in greater detail. For one option, the consultant lists eight "expenses/concerns" (i.e., "cons"), but no benefits or advantages (i.e., "pros"). Even though the consultant does not

explicitly state her own preference among the four options, she notes that one of the options is her own creation, devotes more discussion to this option than to the others, and elaborates much more on the design and operation of this system. In her discussion of one option, the author frequently uses the prescriptive word "should". While not determinative, the suggestion that a decision-maker "should" do something points toward a conclusion that the statement is advisory in nature.

Having read the representations of the parties and reviewed the contents of the record in question, it is clear to me that some of the information in the record is explicit advice and recommendations.

Applying the tests described above and taking into account the consultant's mandate and the manner in which she carried it out, I find that, in addition to the explicit advice and recommendations, the cumulative effect of certain other information in the record is to suggest to the decision-maker a course of action. I find that a suggested course of action can be inferred from that information, even if the explicit advice and recommendations in the record are withheld. I find that the information in both of these categories falls within section 13(1), and is, therefore, exempt from disclosure unless it also falls within one of the exceptions in section 13(2) or (3). The information that falls within section 13(1) is highlighted on a copy of the record being provided to the Ministry with this order.

However, there is other information in the record that is factual in nature or contains opinions, views, or analysis that would not necessarily permit an accurate inference as to the suggested course of action. This information is *not* highlighted on the copy of the record being provided to the Ministry. I find that the information in the record that I have *not* highlighted is not advice or recommendations and therefore does not qualify for exemption under section 13(1). I will, therefore, order that it be disclosed to the appellant.

Sections 13(2) and (3): exceptions to the exemption

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. The appellant submits that the information falls within the exceptions in sections 13(2)(i) and 13(3).

In regard to section 13(2)(i), the appellant states:

> [The consultant] played a significant role in proposing the establishment of a new program to replace the DAC system, i.e., claimants and insurers would be allowed to obtain their own medical opinions, with continued access to the dispute resolution system or the courts to resolve any disputes that arise. Under section 13(2)(i)…her report should not be withheld.

Section 13(2)(i) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

In my view, the evidence does not establish that the record contains a "final plan or proposal". The fact that the consultant "played a significant role in proposing the establishment of a new system" does not make her findings a final plan. This report was an intermediate step in the process of developing a final plan or proposal, followed by consideration by the Ministry of the feedback and suggestions received in response to its EAN proposal, development of a draft regulation, and an invitation to the public to comment on the draft regulation.

In regard to section 13(3), the appellant states:

> The Canadian Institute's "Auto Claims Litigation" workshop brochure (scheduled for June 9 & 10, 2005) cites [the consultant] as "author of the DAC review". It further states "hear directly from the lawyer retained to advise the government on DAC reform about what we can expect for the future of DACs, the recommendations emerging from the review and the timetable for implementation of the recommendations *(elimination of the DAC system as outlined in the draft regulations released on December 3, 2004)* and transition measures. [Emphasis in the original].

Section 13(3) states:

> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where … the head has publicly cited the record as the basis for making a decision or formulating a policy.

This exception applies only where the head of an institution, such as FSCO or the Ministry, publicly cites a record as the basis for making a decision or formulating a policy. It does not apply where the organizers of a conference do this. In any event, I do not interpret the language used by the Canadian Institute to constitute a claim that the record in question is the basis for a decision or policy. The report is only one component of the "DAC review".

EXERCISE OF DISCRETION

Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

General principles

The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In explaining how it exercised its discretion, the Ministry states:

> In considering whether the Consultant's report to the Superintendent entitled "OPTIONS AND RECOMMENDATIONS" should be withheld, primary consideration was given to the need for the free flow of advice within the government's deliberative process. FSCO engages in a broad consultation process with the stakeholders of its regulated sectors. The appellant has been provided with the Consultant's report entitled "SUMMARY," describing the consultations that took place. However, FSCO's ability to access full, frank and confidential advice - whether or not acted on - in its task of assisting the government with respect to the formulation of policy and decision making, for which the government is accountable, is essential to the process and to public confidence in it. In FSCO's view, there were no compelling or specific reasons or needs relating to the request that would outweigh this consideration. For these reasons, access to the record at issue was refused.

The appellant has described why, in her opinion, it is important to disclose the consultant's findings:

> [T]he proposed changes to the dispute resolution system for motor vehicle accident victims reduce access to benefits paid for through auto insurance premiums and force injured victims into protracted and litigious systems, effectively removing the public's protection.
>
> As the Government has not produced any cost studies, risk analyses or data to support their decision to eliminate the DAC System, as a member of the public I am deeply concerned that their motivation to do so is not premised on factual information.
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> Having read the "Report to the Superintendent of Financial Services on the Written and Oral Consultations with Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System - SUMMARY', I find no basis for the draft regulations that were released December 3, 2004 for technical consultation. It is for that reason I have requested the "Report to the Superintendent of Financial Services on the Written and Oral Consultations with Respect to the "Expert Assessor Network: Proposed Model to Replace the DAC System – OPTIONS AND RECOMMENDATIONS".

While I appreciate the importance of the issue raised by the appellant, the strength of her views, and the sincerity of her concern, as long as the Ministry exercises its discretion within the parameters described above, this office may not intervene. I do not find any impropriety in the Ministry's exercise of discretion.

ORDER:

1. I order the Ministry to disclose to the appellant the information that I have **not** highlighted on the copy of the record provided to the Ministry with this order by sending the appellant a copy by **July 8, 2005**.

2. I uphold the decision of the Ministry not to disclose the information in the record that I have highlighted.

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

Original signed by:

June 10, 2005

John Swaigen
Adjudicator