



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2432

Appeal PA-050037-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

1. All documentation, created or received during the years 1989 to 2004, including but not limited to communication of any nature or kind, to or from the Ministry, internal memoranda of the Ministry and briefing notes, correspondence, technical or other reports or data, submissions, opinions, contracts, minutes or notes of meetings, notes of telephone conversations, e-mail and other relevant information in any form relating in any way to:
 - (a) the possible or actual de-listing of physiotherapy services and the implications of such a decision;
 - (b) Schedule 5 Physiotherapy Facilities and their principals;
 - (c) any and all negotiations, discussions, approvals or other activities related to the agreement in principle between Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004; and
 - (d) any and all discussions or other activities related to the circumstances in which the agreement in principle between Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004 was not signed.

2. All documentation, including but not limited to communications of any kind or nature, memoranda, correspondence, reports, data, submissions, opinions, contracts, minutes, notes of meetings, notes of telephone conversations, e-mail and other information in any form, exchanged between the Ministry and the College of Physiotherapists of Ontario between the years 1989 and 2004 relating in any way to:
 - (a) the possible or actual de-listing of physiotherapy services and the implications of such a decision;
 - (b) Schedule 5 Physiotherapy Facilities and their principals;
 - (c) any and all negotiations, discussions, approvals or other activities related to the agreement in principle between Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004; and
 - (d) any and all discussions or other activities related to the circumstances in which the agreement in principle between

Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004 was not signed.

3. All documentation, including but not limited to communications of any kind or nature, memoranda, correspondence, reports, data, submissions, opinions, contracts, minutes, notes of meetings, notes of telephone conversations, e-mail and other information in any form, exchanged between the Ministry and the Ontario Physiotherapy Association between the years 1989 and 2004 relating in any way to:
 - (a) the possible or actual de-listing of physiotherapy services and the implications of such a decision;
 - (b) Schedule 5 Physiotherapy Facilities and their principals;
 - (c) any and all negotiations, discussions, approvals or other activities related to the agreement in principle between Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004; and
 - (d) any and all discussions or other activities related to the circumstances in which the agreement in principle between Schedule 5 Physiotherapy Facilities and the Ministry for a 3-year term commencing in 2004 was not signed.

The Ministry located 80 responsive records, 53 documents totaling 131 pages in its Legal Services Branch and 27 records comprised of 578 pages from its Provider Services Branch. The Ministry granted access to some of the responsive records, in whole or in part. Access to other records and parts of records was denied on the basis that they contained information that qualified for exemption under the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic or other interests) or 19 (solicitor-client privilege) and the mandatory exemptions in sections 12 (Cabinet records) and 21(1) of the *Act* (invasion of privacy). The Ministry also refused to disclose information that it considered to be “not responsive” to the request. It provided the requester with an Index setting out a brief description of the records and the exemptions applied to each of them.

The requester, now the appellant, appealed the Ministry’s decision.

During the mediation stage of the appeal, the appellant agreed that he was not seeking access to those portions of the records that the Ministry described as “not responsive” and those portions to which it had applied the mandatory invasion of privacy exemption in section 21(1). As further mediation was not possible, the appeal was moved to the adjudication stage of the process.

I sought and received representations from the Ministry, a copy of which was attached to a Notice of Inquiry that was provided to the appellant. One paragraph of the Ministry's representations was not shared with the appellant because the disclosure of its contents to him would reveal the contents of the records at issue in the appeal. The appellant also provided me with representations which were shared, in turn, with the Ministry. I then received additional submissions from the Ministry by way of reply.

In its submissions, the Ministry points out that many of the records contain information relating not only to physiotherapy and physiotherapists, but also to its consideration of other professions and providers. It submits that such information is, on a strict reading of the request, non-responsive and should not form part of the records. I agree that those portions of PSB Records 14, 43, 44, 45, 46, 47, 54, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 103, 110, 116, 117, 119, 140, 164, 165 and 187 which relate to other professions and service providers are not, strictly speaking, responsive to the request. Accordingly, where these records are ordered disclosed, only the responsive portions are to be released to the appellant.

The Ministry also points out that some of the records are duplicates of other records and that they ought to be removed from the list of responsive records. Specifically, it indicates that PSB Records 14 and 75, 121 and 123, 175 and 176, 177 and 178, 180 and 181, and 52 and 213 are duplicates of each other. I have reviewed the contents of each and concur. As a result, I will not be considering whether the exemptions claimed in the Index of Records apply to PSB Records 75, 123, 176, 178, 181 and 213.

The Ministry has also asked that I consider the application of the exemptions to the records as outlined in its representations, rather than as described in its decision letter, as it has re-examined its approach with respect to which exemptions apply to which records. As a result of this re-examination, it submits that it is agreeable to the disclosure of those portions of PSB Records 5, 41, 51, 83, 84, 85, 89, 92, 93, 101, 107, 108, 112, 114, 118, 127, 129, 130, 131, 137, 148, 149, 157, 159, 162, 172, 174, 175, 180, 182, 183, 185, 189, 190, 193, 194, 196, 199, 200, 205, 210, 224, 225, 226 and 227 that contain information relating to Schedule 5 Physiotherapy Facilities. I will not, therefore, consider the application of the exemptions originally claimed for these records and will order that they be disclosed to the appellant.

RECORDS:

The records remaining at issue consist of various e-mails, draft regulations, notes, correspondence, memoranda and reports from the Legal Services Branch (the LSB records numbered 1 through 53) and Provider Services Branch (the PSB records numbered 1 through 227), with the exception of those records, and parts of records, discussed above that are not responsive or are duplicates.

DISCUSSION:

CABINET RECORDS

The Ministry takes the position that LSB Records 2, 5, 14, 15, 17, 18 and 19 are exempt under the mandatory exemption in section 12(1)(f) as they represent draft regulations, or their disclosure would reveal the contents of the draft regulations to which they are appended. In addition, it argues that LSB Record 25 also contains information which is exempt under the introductory wording of section 12(1) as its disclosure would reveal the substance of certain concerns raised by Management Board of Cabinet (MBC), one of the committees of Cabinet, about a particular subject.

The Ministry has also claimed the application of the introductory wording to section 12(1) as the ground for denying access to PSB Records 16, 19, 21, 40, 42, 46, 47, 49, 55, 66, 76, 81, 96, 103, 116, 119, 120, 140, 141, 143, 145, 147, 164, 165, 166, 167, 186, 187, 188, 192, 207 and 220. It has applied section 12(1)(a) to PSB Records 65, 67, 146 and 218, section 12(1)(b) to PSB Records 43, 44, 45, 54, 57, 63, 65, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 110 and 117 and section 12(1)(c) to PSB Records 14, 16, 163 and 173. It also argues that PSB Record 211 falls within the ambit of the section 12(1)(f) exemption.

Sections 12(1)(a), (b), (c) and (f) read:

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.

Section 12(1)(a)

The Ministry submits that PSB Records 65, 67, 146 and 218 are exempt under section 12(1)(a) because portions of them “contain Cabinet minutes”.

The last page of PSB Record 65 contains a recommendation made by Cabinet’s Priorities and Planning Board (the PPB, one of its committees) to the full Cabinet in the form of a Draft Minute. In my view, this portion of PSB Record 65 is exempt under section 12(1)(a) as it represents a minute of the PPB, a committee of Cabinet.

The Ministry has not provided me with any information respecting the origin of PSB Record 67, specifically, whether it was created by Cabinet or one of its committees. On its face, the last page of PSB Record 67 is a Proposed Minute of Cabinet. The Ministry has not described whether the contents of this portion of PSB Record 67 actually were incorporated into a finalized Cabinet minute. Without such information, I am unable to make a finding that section 12(1)(a) applies to this portion of PSB Record 67.

PSB Record 146 is an exchange of emails between Ministry officials incorporating certain changes into a proposed Cabinet minute. Again, I have not been provided with any evidence to indicate that this proposed amendment made its way into the actual final version of the minute in question. Accordingly, I find that section 12(1)(a) has no application to this document.

Finally, PSB Record 218 also contains a draft Cabinet committee minute, but again, the Ministry has failed to provide me with evidence to demonstrate that the draft version of this minute is substantially similar or identical to the final version that received Cabinet approval. Instead, the Ministry simply submits that “draft materials used in preparation of Cabinet submissions are exempt from disclosure in PO-1652 and 1914”. However, in both of those cases, former Assistant Commissioner Mitchinson was provided with evidence to demonstrate that the draft minutes bore some direct relationship to the final versions approved by Cabinet. As noted above, the Ministry has not provided me with similar evidence in this case. Accordingly, I find that section 12(1)(a) has no application to Record 218.

Section 12(1)(b)

The Ministry submits that PSB Records 43, 44, 45, 54, 57, 63, 65, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 109, 110 and 117 are exempt from disclosure under section 12(1)(b) as they “contain policy options and recommendations that were presented to Cabinet or Cabinet committees”, specifically the Health and Social Services Policy committee, the Statutory Business Committee and Management Board of Cabinet.

I have carefully reviewed the contents of each of these records and find that PSB Records 43, 44, 45, 67, 68, 69, 70, 71, 73, 74, 77, 78, 109 and 117 contain either policy options or recommendations submitted or prepared for submission to the Cabinet or one of its committees. However, I find that the Ministry has not provided me with sufficient evidence to uphold a

finding that Records 54, 57, 63, 72 and 110 were either submitted to or prepared for submission to Cabinet or one of its committees, as is required for the application of the section 12(1)(b) exemption. As the Ministry has applied the introductory wording in section 12(1) to each of these documents, I will review the possible application of that language to them below.

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 Ministry submits that PSB Records 14, 16, 163 and 173 are exempt from disclosure under section 12(1)(c) as they “contain background explanations and analyses of problems that were submitted to [Cabinet or one of its committees] prior to the making of the decision that the record refers to.” The Ministry urges me to take a different approach to the interpretation of section 12(1)(c) than that taken in Order P-1623, arguing that the insertion of commas in the wording of the section allows for an interpretation that is not, in fact, limited to records relating to matters that have already been considered by Cabinet or its committees. I do not agree with the interpretation placed on the section and instead choose to apply it in a manner consistent with the approach taken in previous decisions, such as Orders P-1623 and PO-2186-F.

PSB Records 14, 16, 163 and 173 relate to consideration by Cabinet as to whether it ought to amend the regulation governing the de-listing of physiotherapy [and other health-related] services in the period 1998 to 2004. I find that the subject matter of the records is not,

accordingly, under active consideration or scheduled to be considered by Cabinet, and that section 12(1)(c) cannot apply.

Section 12(1)(f)

The Ministry asserts that section 12(1)(f) applies to LSB Records 2, 5, 14, 15, 17, 18 and 19 and PSB Record 211. LSB Records 2, 5, pages 1 and 3 to 12 of LSB Record 14, and LSB Records 15, 17 and 18 are draft regulations whose disclosure would reveal the substance of deliberations of the Executive Council. Similarly, PSB Record 211 is a draft regulation made under the *Health Insurance Act*. Accordingly, I find that each of these records qualify for exemption under section 12(1)(f).

Section 12(1): introductory wording

The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

As noted above, the Ministry argues that the second and third e-mails contained in LSB Record 25 qualify for exemption under the introductory wording to section 12(1) as their disclosure would reveal the substance of deliberations of Management Board of Cabinet, a committee of the Executive Council. I have reviewed the excerpt referred to and agree that the disclosure of the second and third e-mail messages in LSB Record 25 would reveal the substance of the deliberations of MBC. As such, this information qualifies for exemption under the introductory wording to section 12(1).

The Ministry submits that PSB Records 16, 19, 21, 40, 42, 46, 47, 49, 55, 66, 76, 81, 96, 103, 116, 119, 120, 140, 141, 143, 145, 147, 164, 165, 166, 167, 186, 187, 188, 192, 207 and 220 are exempt from disclosure under the introductory wording of section 12(1). It argues that the information “was in some cases deliberated by Cabinet or committees prior to the creation of the specific record, while other records contain information that was subsequently presented to one of these entities.” It then sets out in detail its submissions respecting each individual record.

The Ministry’s representations attempt to make a connection between the information contained in each of these records and the contents of some unspecified documents that were submitted to Cabinet or one of its committees. In some cases, with the assistance of their submissions, I am able to link the information in the records to certain decisions or deliberations of Cabinet or its

committees. In other cases, however, the Ministry has not provided the necessary evidentiary link between the information in the record and other documents that reflect the deliberations of Cabinet or one of its committees. In the case of many of these records, while they may contain snippets of information that may have found their way into a submission made to Cabinet or a Cabinet committee, the Ministry has not provided me with sufficient evidence to establish that this information formed part of the “substance of its deliberations” for the purposes of section 12(1). Accordingly, I cannot agree that the exemption described in the introductory wording of section 12(1) can apply to such information.

Based on my review of the representations of the Ministry with respect to this issue, I make the following findings:

- PSB Records 16, 19, 21, 40, 42, 47, 49, 55, 66, 81, all of Record 96 except the figures listed in pages 4 and 5, 103, all of PSB Record 119 except pages 1 and 2, 120, 140, 143, 145, 147, 186, 187, 188, 207 and 220 do not qualify for exemption under the introductory wording to section 12(1);
- PSB Records 46, 76, the figure included in the last bullet point of page 3 of PSB Record 81, the figures listed in pages 4 and 5 of Record 96, PSB Record 116, pages 1 and 2 of PSB Record 119, the fourth paragraph of page two and second bullet point of the final page of PSB Record 140, 141, 164 to 167 and 192 are exempt from disclosure under the introductory wording to section 12(1) as the disclosure of the information which they contain would reveal the substance of deliberations of the Cabinet or one of its committees.

By way of summary, I find that the last page of PSB Record 65 is exempt under section 12(1)(a); PSB Records 43, 44, 45, 67, 68, 69, 71, 73, 74, 77, 78, 109 and 117 are exempt under section 12(1)(b); LSB Records 2, 5, pages 1 and 3 to 12 of Record 14, 15, 17 and 18 are exempt from disclosure under section 12(1)(f); and PSB Records 46, 76, the figures listed in pages 4 and 5 of Record 96, PSB Record 116, pages 1 and 2 of PSB Record 119, 141, 164 to 167 and 192 are exempt from disclosure under the introductory wording to section 12(1). In addition, I find that neither of the exceptions in sections 12(2)(a) or (b) apply in the circumstances of this appeal.

The remaining records to which the Ministry has applied the section 12(1) exemptions do not qualify under those sections. In many cases, however, the Ministry has applied other exemptions to these records, which I will examine below.

ADVICE OR RECOMMENDATIONS

The Ministry takes the position that portions of PSB Records 1, 58 and 192, along with all of PSB Record 68, are exempt from disclosure under the discretionary exemption in section 13(1), which reads:

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.

In my discussion of section 12(1) above, I found that PSB Records 68 and 192 are exempt under section 12(1)(b) and the introductory wording to the section respectively. As a result, it is not necessary for me to consider whether they are also exempt under section 13(1).

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 [Orders 24, 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.

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.), aff'd [2005] O.J. No. 4048 (C.A.); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.)]

The Ministry submits that portions of pages 7 to 10 of PSB Record 1 and page 2 of PSB Record 58 contain "advice or recommendations" within the meaning of section 13(1). It argues that, despite the fact that pages 7 to 10 of PSB Record 1 include "options", the "very wording of the options and the discussions that would follow would, if disclosed, lead to an accurate inference about the contents of the actual recommendation". Based on my review of the contents of this portion of the record, I agree that its disclosure would reveal the advice of a public servant and that pages 7 to 10 of PSB Record 1 fall within the ambit of section 13(1). Further, I find that none of the exceptions listed in sections 7(2) or (3) apply to this information.

However, in my view, the Ministry's representations on the application of section 13(1) to certain information contained in page 2 of PSB Record 58 falls short of the evidence required to establish the application of the exemption. The Ministry has not described how the information,

described as a “recommendation” came to be made or to whom it is directed. For this reason, I am unable to agree that the exemption in section 13(1) has any application to this information.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has applied the exemption in section 19 to LSB Records 1, 3, 4 to 13, page 2 of LSB Record 14, 16, 19, 20 to 28, 30, 31 to 39 and 42 to 52 in their entirety, as well as the attachments to LSB Records 7, 9 and 12. It argues that these records represent confidential communications between a solicitor and his or her client. In addition, it has also claimed the solicitor-client privilege exemption in section 19 to PSB Records 51, 53, 56, 59, 64, 80, 81, 115, 122, 124, pages 1, 14 and 16 of PSB Record 125, 126, 132, 136, 143, 169, 191, 198, 206, 209, 211, 212, 214, 215, page 5 of PSB Record 219 and 221, in whole or in part, on the same basis. Again, I note that in my discussion of section 12(1), I found that LSB Records 5, pages 1 and 3 to 12 of LSB Record 14, the second and third emails in LSB Record 25 and PSB Record 211 are exempt under section 12(1)(f) and the introductory wording to section 12(1). It is not necessary for me, accordingly, to consider whether this information also qualifies for exemption under section 19.

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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation 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 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.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

Representations under section 19 – LSB Records

The Ministry submits that LSB Records 1, 3, 5 to 13, 16, 19, 21, 23 to 28, 30, 32 to 35, 37, 38, 39, 44, 50, 51, 52 and 53 represent confidential communications between solicitor and client regarding the giving or seeking of legal advice, thereby qualifying for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19. It also argues that an

attachment to LSB Record 26 that appears to be a draft Agreement between the Ministry and the Schedule Five Physiotherapy Association is “still in the negotiation phase” and the document represents “a confidential communication between a lawyer and a client made for the purpose of providing advice on the negotiations towards reaching an agreement”. As such, it qualifies for exemption.

The Ministry also submits that LSB Records 4, 22 and 49 are notes prepared by counsel that “reflect and record telephone conversations and discussions at meetings, on issues requiring counsel’s advice”, thereby qualifying for exemption under section 19 on the basis that they fall within the ambit of the “continuum of communications”. The Ministry also submits that LSB Records 20, 31, 36, 42, 43, 45, 46, 47 and 48 are draft or final versions of legal opinions prepared by counsel for Ministry clients, thereby falling within solicitor-client communications privilege under section 19. Finally, the Ministry argues that page 2 of LSB Record 14 is a confidential communication between a solicitor and her client and that it qualifies for exemption under section 19 on that basis.

Findings – LSB Records

I have reviewed each of the LSB records to which the Ministry has applied the solicitor-client privilege exemption. I find that LSB Records 1, 3, 6 to 13, page 2 of LSB Record 14, 16, 19, 21, 23, 24, 25, the first email in LSB Record 25, the first page of LSB Record 26, 27, 28, 30, 32 to 35, 37, 38, 39, 44 and 50 to 53 qualify for exemption under the solicitor-client communications aspect of Branch 1 of section 19. These records are confidential communications passing between Ministry counsel and either Ministry staff or other Ministry counsel respecting legal issues and represent the seeking or provision of legal advice about a legal matter. As such, I am satisfied that all of these records qualify for exemption under section 19.

The Ministry argues that the attachment to LSB Record 26, which consists of a draft Agreement between the Ministry and the Schedule 5 Physiotherapy Facilities, qualifies for exemption under section 19 because it constitutes a “draft copy of an agreement still in the negotiation phase” and that it represents a confidential communication between a solicitor and his or her client made “for the purpose of providing advice on the negotiations”. It relies on the decision in Order PO-1864 in support of this contention. I have reviewed the draft agreement which comprises the attachment to LSB Record 26 and find that, since it represents a document forwarded to legal counsel for her comments, it falls within the ambit of a confidential communication. The client, in this case an official with the Ministry, sought the views of legal counsel on certain language contained in the draft agreement and forwarded a copy to her for her comments. In my view, this represents a communication in which legal advice is being sought by the client. As a result, this portion of LSB Record 26 qualifies for exemption under section 19 as well.

I have reviewed the contents of the notes which constitute LSB Records 4, 22 and 49 and find that they represent part of the solicitor’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]. I find that these records fall within the ambit of solicitor-client communication privilege and are exempt from disclosure under section 19 on that basis.

Similarly, LSB Records 20, 31, 36, 42, 43, 45, 46, 47 and 48, which are drafts or final versions of legal opinions prepared by various Ministry counsel for their clients, also qualify for exemption under section 19 as they fit squarely into the solicitor-client communication privilege aspect of Branch 1. The draft versions of the opinions may properly be characterized as part of the solicitor's "working papers" while the final versions that were provided to the clients represent confidential communications passing between a solicitor and her clients about a legal matter. These records are, accordingly, exempt under section 19.

By way of summary, I have found that section 19 operates to exempt from disclosure the following documents:

- LSB Records 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, page 2 of LSB Record 14, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 and 53.

Representations and Findings under section 19 – PSB Records

The Ministry argues that page 1 of PSB Record 53 is exempt as it is a solicitor-client privileged communication. I have reviewed this portion of the document and agree that it falls within the ambit of the solicitor-client communication aspect of Branch 1 of section 19.

The Ministry submits that PSB Record 56, which are notes taken during the course of a teleconference involving Ministry officials and legal counsel, qualifies for exemption as it includes the legal advice provided by counsel. I have reviewed the contents of Record 56 and agree that it refers to the legal advice provided by counsel to the participants in the teleconference. As such, this record contains a confidential communication between a solicitor and client for the provision of legal advice. PSB Record 56 is, accordingly, exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19.

The Ministry submits that the first boxed paragraph and the entire final page of PSB Record 59 represent confidential legal advice provided by legal counsel to Ministry officials, thereby qualifying for exemption under section 19. I agree with this analysis with respect to these two portions of PSB Record 59. I find that they are exempt under Branch 1 of section 19 on the basis that they contain confidential communication between a solicitor and her client.

PSB Records 64, 115, 122, 124, 126, 143, 198, 209, 212, 214, 215, 219 and 221 represent confidential communications passing between a Ministry solicitor and her clients, according to the Ministry. I have reviewed the contents of each of these documents, which are legal opinions or emails containing legal advice, and agree that they qualify for exemption under the solicitor-client communication aspect of Branch 1 of section 19.

Page 1 of PSB Record 80 is a legal opinion sent by email from Ministry counsel to an official with the Ministry's Provider Services Branch. I find that it qualifies for exemption under the solicitor-client communication privilege portion of Branch 1 of section 19. The remaining portions of PSB Record 80 represent part of the continuum of communications passing between the solicitor and her client as the client responds to a series of questions posed by the solicitor. This portion of PSB Record 80 is also exempt from disclosure under section 19.

The Ministry claims the application of section 19 to a portion of PSB Record 81 on the basis that it contains legal advice. In my view, this record cannot accurately be described as a solicitor-client communication, nor would its disclosure reveal the contents of any legal advice. Accordingly, I find that section 19 has no application to these excerpts from PSB Record 81.

The Ministry submits that pages 1, 14 and 16 of PSB Record 125 are also exempt under section 19 on the basis that they contain confidential legal advice provided by Ministry counsel. I note that the actual legal opinion referred to by the Ministry is included at page 6 of PSB Record 125, yet the Ministry has chosen not to claim the application of the exemption to this portion of the record. This information does not appear to be considered by the Ministry to be confidential at all, in light of the fact that it has not applied section 19 to it. Accordingly, I find that the other portions of PSB Record 125 which refer to that advice cannot qualify for exemption under section 19.

The Ministry argues that page 5 of PSB Record 132 (which is the same as PSB Record 51), which is also reflected in the last page of PSB Record 136, page 3 of PSB Record 169 and page 12 of PSB Record 191 contains legal advice obtained by Ministry staff from legal counsel and is included in a briefing note prepared for a meeting between the Minister and the Ontario Physiotherapy Association. I have reviewed page 5 of PSB Record 132 (identical to PSB Record 51) and the last page of PSB Record 136, page 3 of PSB Record 169 and page 12 of PSB Record 191 and I find that they refer to certain legal advice received from counsel and qualify for exemption under the solicitor-client component of Branch 1 of section 19.

The Ministry also submits that the portion of PSB Record 206 entitled "legal implications" is subject to exemption under the solicitor-client communication component of Branch 1 of section 19. I have reviewed this portion of the record and concur with this position.

To summarize, I find that section 19 applies to exempt from disclosure the following:

- PSB Records 51, page 1 of 53, 56, the first boxed paragraph and the entire final page of 59, 64, 80, 115, 122, 124, 126, page 5 of 132, the last page of 136, 143, page 3 of 169, page 12 of 191, 198, 206, 209, 212, 214, 215, 219 and 221.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The Ministry also claims the application of the discretionary exemption in section 18(1)(e) to all or parts of PSB Records 19, 20, 22, 40, 43, 44, 45, 46, 48, 49, 52, 55, 60, 62, 86, 94, 111, 117,

207, 216, 217 and 220. In my discussion above, I found that PSB Records 43, 44, 45, 46 and 117 are exempt under other exemptions. Accordingly, it is not necessary for me to consider whether they also qualify for exemption under section 18(1)(e).

Section 18(1)(e) states:

A head may refuse to disclose a record that contains,

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

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

In order for section 18(1)(e) to apply, the Ministry must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The Ministry argues that the Commissioner's office has taken an unduly restrictive approach in the manner in which it has interpreted section 18(1)(e). In particular, it argues that the language in the exemption does not limit its application to situations where "negotiations are being carried

on currently, or will be carried on in the future.” The Ministry urges me to import a more expansive definition of the language in the exemption to include records related to negotiations that have already been completed, since section 18(1)(e) refers to “any negotiations”, and that this would encompass past negotiations. In my view, the interpretation placed on the language contained in the section 18(1)(e) exemption by this office clearly reflects the legislative intent expressed above that institutions be afforded similar protections to those granted third parties under section 17(1) of the *Act*. The use of the words “to be applied” clearly addresses a situation where the application of the section is intended only to apply to negotiations that are either ongoing or to be undertaken in the future. The interest being protected is a commercial one which seeks to ensure that one party to a negotiation cannot garner some unfair advantage over an institution through the use of an access request under the *Act*. I cannot accept the interpretation put forward by the Ministry in this respect.

In the alternative, the Ministry argues that the positions and other information contained in the specific negotiations described in the records “are indicative of the general negotiating tactics of the Ministry” and are “indicative” of the approach the Ministry would take in “any negotiations” with other entities. The Ministry has not, however, provided any examples of future negotiations where similar strategies to those employed in the records at issue in this appeal may be applied, nor has the Ministry referred with any degree of specificity to the “general negotiating tactics” it refers to and where this information may be contained in the records. Without information of this sort, I am unable to accept the position put forward by the Ministry.

Accordingly, I find that section 18(1)(e) has no application to the records at issue in this appeal. The matters being negotiated or considered by the Ministry have been concluded, at least insofar as the physiotherapy facilities are concerned. In my view, these negotiations are now at an end and it cannot be said that the positions, plans and other information reflected in the records remain “to be applied”, as contemplated by the section 18(1)(e) exemption.

EXERCISE OF DISCRETION

The section 13(1), 18(1)(e) and 19 exemptions are discretionary, and permit 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)].

The Ministry provided me with submissions respecting the manner in which it exercised its discretion not to disclose the withheld information in the records to the appellant. In my view, the Ministry did so in an appropriate manner and did not rely on any improper considerations in exercising its discretion. I will not, accordingly, disturb it on appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the following records or parts of records under section 12(1):
 - the last page of PSB Record 65 is exempt under section 12(1)(a);
 - PSB Records 43, 44, 45, 67, 68, 69, 70, 71, 73, 74, 77, 78, 109 and 117 are exempt under section 12(1)(b);
 - LSB Records 2, 5, pages 1 and 3 to 12 of PSB Record 14, 15, 17, 18 and 211 point are exempt from disclosure under section 12(1)(f); and
 - PSB Records 46, 76, the dollar amount contained in the last bullet point on page 3 of Record 81, the figures listed in pages 4 and 5 of Record 96, PSB Record 116, pages 1 and 2 of PSB Record 119, the fourth paragraph of page two and the second bullet point of the final page of Record 140, 141, 164 to 167 and 192 are exempt from disclosure under the introductory wording to section 12(1).
2. I uphold the Ministry's decision to deny access to pages 7 to 10 of PSB Record 1 under section 13(1).
3. I uphold the Ministry's decision to deny access to the following records, or parts or records under section 19:
 - LSB Records 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, page 2 of LSB Record 14, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 and 53; and
 - PSB Records 51, page 1 of 53, 56, the first boxed paragraph and the entire final page of 59, 64, 80, 115, 122, 124, 126, page 5 of 132, the last page of 136, 143, page 3 of 169, page 12 of 191, 198, 206, 209, 212, 214, 215, 219 and 221.

4. I order the Ministry to disclose to the appellant all of the remaining records, or parts of records, which are responsive to the request by providing him with copies by **January 4, 2006**.
5. In order to verify compliance with the requirements of Order Provision 4, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: _____
Donald Hale
Adjudicator

_____ November 30, 2005