



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2481

Appeal PA-040322-1

Ministry of Natural Resources



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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act), from the requester (through its solicitor) for information relating to the requester, a named corporation, and the application that it submitted for an Aggregate Permit at a specified location.

In the request, the requester's solicitor advised that it is his "understanding that [named corporation's] Application was made on February 26, 2003 along with a full 'Application and Site Plan for Category 11 Aggregate Permit under the Aggregate Resources Act' dated January 27, 2003". The solicitor also advised that his client also filed a "Final Report" dated May 27, 2003 with the Ministry.

The specific information that the requester sought was described in the request as follows:

1. All documentation in MNR's files relating to [named corporation's] Application and previous applications for an aggregate permit made by [named corporation], [and two named individuals] for the same property. Such documentation shall include, without limitation, all copies of reports, recommendations, approvals, memorandums (including memorandums to file, and memorandums of telephone conversations), as well as all correspondence, internal within the Ministry and externally to and from other ministries and other parties (including all e-mails whether archived or not), relating to [named corporation's] Application including but not limited to correspondence to and from:
 - (a) the Township of Stone Mills;
 - (b) the County of Lennox and Addington;
 - (c) the general public;
 - (d) the Ministry of Northern Development and Mines;
 - (e) the Minister and Deputy Minister of Natural Resources;
 - (f) the Minister and Deputy Minister of Natural Resources;
 - (g) the Premier's Office, and
 - (h) [Named individual], the MPP for the Constituency where the proposed quarry is located (including any communication from her constituency office).

The search should include all communication (including all emails) to and from the MNR Peterborough District Office, including the following persons (without limitation): [8 named individuals]

2. Copies of all aggregate permit applications that have been made by other parties and all permits that have been issued within either:
 - (a) a 20 mile radius of [named corporation's] proposed quarry within the last 2 years; or
 - (b) a forest reserve, protected area or otherwise an area designated with a status indicative of environmental sensitivity within the last five years;

including, that certain application made in respect of lot1, Concession 11 in Elzevir Township (in which James Leon Byer has an interest) and any permits that have been issued in respect thereto.

The requester's solicitor subsequently narrowed the request to delete the portion of the request described in part 2(b) as well as "any otherwise responsive records which are classified as 'objections' in the Aggregate Application Review Process".

The Ministry located 5371 records responsive to the request and granted partial access to them. Access was denied to records or parts of records pursuant to sections 13 (advice or recommendations), 17 (third party information), 19 (solicitor-client privilege), and 21 (invasion of privacy) of the *Act*. The Ministry provided the appellant with a 12-page Index of Records showing the following headings: Tiff Number, Page Number, Date, Document Type, Subject, Disclosure and Exemption. The Ministry also charged a fee of \$2,100.00 for providing copies of the records.

The requester's solicitor paid the fee and the Ministry provided him with a CD ROM containing copies of the records to which full or partial access was granted.

Through its solicitor, the requester (now the appellant), appealed the Ministry's decision.

During mediation, the appellant advised that he is not interested in obtaining access to personal information. Accordingly, section 21 of the *Act* is no longer at issue in the appeal. The appellant also advised that he is not interested in obtaining the information relating to three businesses for which the Ministry had claimed section 17. Accordingly, section 17 of the *Act* is no longer at issue in this appeal. In addition, the appellant advised that he accepts that some portions of the records were properly withheld as "not responsive" as a result of narrowing the request to delete records that fell under item 2(b) of the request, as well as records that relate to any objections that arose in the Aggregate Application Review Process. The appellant confirmed that "non-responsiveness" is not at issue in the appeal.

Also during mediation, the appellant advised that while he accepts that section 19 of the *Act* applies to exempt some of the records or parts of records from disclosure, he wishes to pursue access to those records for which, in his view, should not be withheld under section 19. The records or portions of records for which the Ministry has claimed section 19 to which the appellant continues to seek access in this appeal are outlined below.

The appellant also accepts that section 13(1) of the *Act* applies to exempt certain records or parts of records. Accordingly, those records have been removed from the scope of the appeal. With respect to the remaining records for which section 13(1) has been claimed, the appellant advised that he wishes to pursue access to those records. The records for which section 13(1) has been claimed and to which the appellant wishes to pursue access are outlined in the table below.

As no further issues were resolved during mediation, the file was transferred to me for adjudication.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry, initially, and received representations in return. I then sent a copy of the Notice of Inquiry along with a copy of the Ministry's representations to the appellant inviting submissions. The appellant provided representations in return which I believed raised issues to which the Ministry should be given an opportunity to reply. I therefore provided the representations to the Ministry, and the Ministry responded by way of reply representations.

RECORDS:

The following records or parts of records remain at issue in this appeal:

<u>Tiff</u>	<u>Page</u>	<u>Document Type</u>	<u>Subject</u>	<u>Exemption</u>
37 562	4076-82	Briefing note	Draft Aggregate Permit	s.13
37 599	4510-12	Briefing note		s.13
	4515-16	"		s.13
	4519-20	"		s.13
37 600	4530-31	e-mail	Issues Management	s.13
	4533-34	"	"	s.13
	4560-64	e-mail + draft letter		s.13
37 601	4587-88	questions & answers	Aggregate Permit Application	s.13
	4591-92	"	"	s.13
	4594	"	"	s.13
	4598	"	"	s.13
37 602	4611-14	Issue Note	Issues Management Strategy	s.13
	4617-25			s.13
37 603	4627-31	Correspondence	[named corporation]	s.13
37 606	4649-59	News Release		s.13
37 608	4674-76	Briefing note		s.13
	4680-82	"		s.13
37 610	4705-39	Issue note	Issues Management Strategy	s.13
37 611	4754-56	e-mail + draft letter		s.13 & s.19
	4783-85		Outstanding issues	s.13
37 612	4787-90	Report	Outstanding issues	s.13
	4792-94	"	"	s.13

37 613	4795-97	Permit	Aggregate Permit (not issued)	s.13
37 614	4798-99	Correspondence	[named corporation]	s.13
37 615	4801-03	Briefing note		s.13
37 620	4842-44	Briefing note	aggregate permit	s.13
	4846	“	“	s.13
	4847	“	“	s.13 & s.19
	4848-52	“	“	s.13
	4853	“	“	s.13 & s.19
	4855	“	“	s.13
	4857-58	“	“	s.13 & s.19
	4860-62	“	“	s.13
37 621	4864	e-mail		s.13
37,622	4889-92	Issue note	Issues management strategy	s.13
	4894	“	“	s.13
	4897	“	“	s.13
	4899-02	“	“	s.13
37 624	4907-09	News Release		s.13
37 627	4943-57	Briefing Note		s.13
37 628	4960-62	Presentation Slides	Aggregate Permit Application	s.13
	4964	“	“	s.13
	4966	“	“	s.13
37 629	4970-75	Issue Note	Issues Management Strategy	s.13
37 634	5007-09	Correspondence	[named corporation]	s.13
37 641	5128	Presentation slides	Permit Application	s.13 & s.19
	5139-40	“	“	s.13 & s.19
	5153-54	“	“	s.13 & s.19
37 644	5180		Issues forecast	s.13
37 645	5192-06	Presentation Notes	Communications Plan/ Aggregate Proposal	s.13 & s.19
	5208-26	“	Request/aggregate permit	s.13
37 648	5245-47	Briefing Note		s.13
	5250-53	“		s.13

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that TIF 37 611 pages 4754, 4755, 4756, TIF 37 641 pages 5128, 5139, 5140, 5153, 5154, TIF 37 644 pages 5192 to 5206, and portions of TIF 37 620 pages 4847, 4853, and 4857 are exempt from disclosure in their entirety under the discretionary exemption at section 19.

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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the version I have just quoted therefore applies in this appeal. In any event, the amendments, which address the addition of universities to the body of “institutions” subject to the *Act*, have no bearing in this case.

Section 19 contains two branches. For section 19 to apply, the Ministry must establish that one or the other (or both) branches apply.

Branch 1 applies to a record that is subject to “solicitor-client privilege” at common law.

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

The Ministry relies on the common law solicitor-client communication privilege in Branch 1 of section 19.

Common law 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.)].

Representations of the parties

The Ministry submits:

The records in question to which the solicitor client privilege (and thus section 19 of the *Act*) applies can be divided into two groups.

The exempted portions of emails are emails or communications to/from solicitors from [Ministry of Natural Resources – Legal Services Branch], such as [named individuals] to Ministry staff in which on-going legal advice with respect to the permit application or the associated EA process request for compensations. This material includes material which has been sent to counsel at the Ministry’s Legal Services Branch as background material necessary for the formulation of legal advice. As such, based on the above, these records are subject to solicitor client privilege under section 19 of the *Act*.

The remaining group of records is portions [sic] of briefing materials, such as PowerPoint presentations and emails which set out the advice of Legal Services Branch. Thus, the legal advice is being communicated through an intermediary and applying the above, falls within section 19 of the *Act*.

The appellant submits that in accordance with section 53, the Ministry must prove that exemption 19 applies to each individual document that it has refused to disclose. The appellant argues that “the Ministry’s general representations with respect to solicitor-client privilege without explanations for how it applies to the individual documents fail to meet the burden of proof with respect to each individual document.”

On reply, the Ministry argues that it has discharged the necessary burden of proof as their representations provide “sufficient detail” to show that the records fall within the exemption. It submits:

It is the position of the Ministry that each record speaks for itself. It is clear from an examination of each exempted record or portion of the record that it constitutes or contains advice or communication to or from counsel.

The Ministry submits that to provide detailed representations that discuss the contents of each record would provide the appellant with the information subject to the request defeating the purpose of the exemption and the scheme of the *Act*. The Ministry argues that more detailed representations would also amount to a waiver of solicitor-client privilege.

Analysis and findings

Having carefully reviewed the contents of the records, I find that while some of the records or the portions of records for which section 19 has been claimed qualify for exemption because they are subject to common law solicitor-client communication privilege, others do not.

Page 4754 is an email discussing the attached pages 4755 and 4856 which consist of a draft letter. It is not immediately clear why section 19 has been claimed for these pages as there are several other versions of the draft letter that are also at issue but for which section 19 has not been claimed. A close review of the email indicates that section 19 may have been claimed by the Ministry because in the email, a suggestion is made that a named individual have a look at the draft. A logical conclusion is that the named individual is a lawyer. There is no specific indication on the email as to what type of advice about the draft is being sought, nor is there any information in these pages indicating that such advice was indeed sought and ultimately provided. In the absence of specific representations regarding them, and based on my review of the records, I have concluded that pages 4754, 4755, and 4756 do not contain information that qualifies for solicitor-client communication privilege at common law. They are therefore not exempt under section 19. As the advice and recommendations exemption at section 13(1) has also been claimed for these pages, they will be included in my analysis of the application of that exemption below.

Pages 4847, 4853, 4857 and 4858 are pages within drafts of briefing notes that address the aggregate permit application. Each of those pages contain a paragraph that describes advice provided by Ministry counsel to Ministry staff with respect to legal considerations to be taken into account with respect to the Ministry's response to the aggregate permit application including potential legal implications of particular courses of action. In my view, each of the paragraphs describing the legal advice provided by Ministry counsel contains information that forms part of the "continuum of communications" as they reflect confidential communications between a solicitor and her client.

For pages 4853, 4857 and 4858 the Ministry has claimed section 19 only for the specific paragraphs that describe the legal advice provided by Ministry counsel. For page 4847 the Ministry has claimed section 19 applies to the entire page. In the absence of specific representations, and having reviewed the information contained on that page closely, other than the one paragraph that deals specifically with the legal advice provided by Ministry counsel, I find that the remaining information on page 4847 does not contain any information that could qualify as falling with the continuum of communications between a solicitor and his client. In these pages, therefore, I find that the paragraphs in pages 4847, 4853, 4857 and 4858 describing legal advice provided by Ministry counsel to Ministry staff in relation to the aggregate permit application are exempt under the common law solicitor-client communication component of section 19. The remaining information on those pages is not exempt under section 19.

Pages 5128, 5139-40, and 5153-54 are slides from a draft of a PowerPoint presentation dealing with the aggregate permit application. All five pages contain the heading "legal implications"

and, in my view, fall squarely within the parameters of common law solicitor-client privilege: they are communications between a solicitor and her client created for the purpose of giving legal advice and are exempt from disclosure under section 19 of the *Act*.

Finally, pages 5192 to 5206 consist of slides from a draft of a PowerPoint presentation dealing with the Communications Plan for the Aggregate Proposal. It is clear from the title page and the first page of the presentation that it was prepared by Ministry staff on behalf of the Minister for the purpose of seeking advice but it is not clear that such advice is being sought from Ministry counsel. From a review of the information contained on the slides, it appears that it consists of a description of the communication plan related to the aggregate permit application. The slides include a description of background information about the aggregate permit application, an outline of strategic considerations to be taken into account, information about how messages about the aggregate permit application should be communicated and other background information. Although some of this information, if not all, might be considered information prepared for the purpose of seeking advice of some sort, it is not clear what specific advice is being sought and from whom. Without further evidence, and in the absence of specific representations in this regard, I cannot conclude that this information was prepared for the purpose of requesting legal advice on the particular issue, and therefore, I do not accept that it falls within the parameters of the “continuum” concept of legal advice as set out in *Balabel v. Air India*. Accordingly, I find that pages 4192-5206 do not fall within the scope of the solicitor-client communication privilege and are not exempt under section 19 of the *Act*.

As I have found that pages 5128, 5139-40 and 5153-54 are exempt from disclosure in their entirety under section 19, and that portions of pages 4847, 4853, 4857 and 4858 are similarly exempt from disclosure under section 19, these pages and portions of pages are not to be disclosed to the appellant. Accordingly, I will not be addressing whether these pages and portions of pages are subject to the exemption at section 13(1).

As I have found that pages 4754, 4755, and 4756 as well as pages 5192-5206 do not qualify for exemption under section 19 as solicitor-client communication privileged information and the exemption at section 13(1) has also been claimed for these pages, these records will be included in my analysis of the application of that exemption below.

ADVICE TO GOVERNMENT

The Ministry submits that the discretionary exemption at section 13(1) applies to the remaining records or portions of records at issue in this appeal.

Section 13(1) of the *Act* 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.

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 [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.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563].

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.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563]

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order 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 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564].

Section 13(2)

Section 13(2) creates 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. Section 13(2)(a) is the only exception that appears to be relevant in the circumstances of this appeal. That section reads:

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

(a) factual material;

Representations of the parties

It is the Ministry's position that the records or portions of records for which it has claimed the section 13(1) exemption be considered advice or recommendations made to government. The Ministry submits:

The advice or recommendation contained in the record must provide more than mere information. It must suggest courses of action [see Orders 18, 135, 142, 160, 163 and 176]. The exemption is designed to protect the free flow of advice and recommendations within the deliberative process of government decision making and policy development [see Orders 94, 118, 135, 141, 142, 160, 163, 165 and 168]. Records are exempt if their disclosure would inhibit the free flow of advice and recommendations within the deliberative process of government decision making and policy development [see Order M-83].

Records or portions of records may be exempt if they reveal advice or recommendations by inference even though they are not advisory in nature [see Orders P-233, M-280, P-1085, P-1593]. In other words, where information is so interwoven with the advice and recommendations that it cannot reasonably be severed, then the exemption may apply to the document in its entirety [see Orders 24, 48, 92, 160, P-278, P-356, and M-69].

It is the position of the Ministry that records for which the Ministry has claimed the exemption fall within the ambit of subsection 13(1) when the principles outlined above are applied. The records are either portions of briefing notes, or briefing material such as PowerPoint presentations and communications plans, which are to be for discussions with senior Ministry officials in order to obtain directions relating to the matter and/or which contain recommendations or the records are emails or portions of emails between District, program and staff of

senior management which summarizes or set out recommendations for courses of action. Accordingly, it is the position of the Ministry that section 13 applies to these records and they are exempt from disclosure under the *Act*

Specifically addressing the application of the section 13(1) exemption dealing with advice to government, the appellant makes the following submits:

The records that the Ministry has withheld under the assertion that a section 13 exemption applies includes documents titled; Briefing note, emails, Mellon Lake Aggregate Permit, Issue Note, Questions and Answers, Correspondence with [appellant], Draft Letters, Unissued Permit, Report on Outstanding Issues, News Release, Presentations Slides and Presentation Notes. It is not clear from the documents themselves, the descriptions provided, or the submissions made by the Ministry, what the purpose was and who the recipients were of the individual documents.

With respect to the partially disclosed documents, in many cases there are portions redacted under such headings as; "Background". "Risks", "Additional Background Information", "Messages", "Issues Management", "History of Application", "Key Facts", "Background/Analysis", "Current Status", "Questions and Answers", and "Action taken to Date". In reviewing the information surrounding the redacted portions, it appears as though a substantial amount of the information redacted likely falls within the categories set out in the list [of examples of the types of information that have been found *not* to qualify as advice or recommendations set out above] and are not "advice or recommendations".

Over 125 pages have been withheld in their entirety making it difficult for the [appellant] to make submissions with respect to these documents other than to request that if the adjudicator finds that the documents contain advice or recommendations, these portions be severed and the remainder of the document be disclosed pursuant to section 10(2) of the *Act*.

In its submissions, the appellant specifically points to the exception at section 13(2)(b):

Furthermore, section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. This section explicitly prohibits a head from refusing to disclose records that contain factual material. [The appellant] submits that it appears as though a significant amount of the information withheld under such headings as, Background, Additional Background Information, Risks, History of Application, Key Facts, Current Status, Questions and Answers, and Action Taken to Date can be categorized as factual material and should be disclosed accordingly.

The appellant also argues, as it did with respect to the records or portions of records for which section 19 has been claimed, that the Ministry has not discharged its burden of proof because it

has not explained how section 13(1) applies to each record or portion of records for which section 13(1) has been claimed.

Analysis and findings

I will deal first with the “draft” nature of the records. The great majority of the records that remain at issue are pages or portions of pages of documents which appear to have been circulated amongst Ministry staff for their comments and/or changes. Many of the documents are draft documents that have been reworked many times but contain large portions of text that are identical to other portions of text that appear elsewhere. Some of the documents are different documents but contain portions of other documents that have been cut and pasted. There is significant duplication and overlap in the content of the documents. The Ministry has not expressly taken the position that because the records were prepared with the assistance of a variety of staff at the Ministry they therefore reveal the advice of all those who worked on the documents. However, if the Ministry intended to insinuate this position, I do not accept it.

Previous orders of this office have held that a record cannot be exempt under section 13(1) solely on the basis that it is in draft form. For example, in Order PO-1690, Adjudicator Holly Big Canoe stated:

A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.

I find these statements applicable here and have reviewed each record to determine whether or not the information for which the Ministry has claimed section 13(1) either consists of advice or recommendations or whether, if it is disclosed, permit one to accurately infer the advice or recommendations given.

Former Assistant Commissioner Tom Mitchinson reviewed the meaning of the “advice” for the purpose of section 13(1) in Order 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]. In that order, a provincial Ministry took the position that “advice” should be broadly defined to include “information, notifications, cautions, or views where these relate to a government decision-making process”. Assistant Commissioner Mitchinson did not agree, and stated:

[The institution’s position] flies in the face of a long line of jurisprudence from this office defining the term “advice and recommendations” that has been

endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word “advice” in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

As noted above, for information 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. Alternatively, the information in the record must *reveal* or *allow one to infer* that suggested course of action. These are the principles upon which my decision of whether section 13(1) applies to exempt the records or portions of records from disclosure will be founded.

I have carefully reviewed the information for which the Ministry has claimed the exemption at section 13(1) of the *Act*. The Ministry has been somewhat inconsistent with the severances that it has made. From my review of the records, it is clear that some of the information for which the Ministry has claimed section 13(1) has already been disclosed to the appellant in other parts of the records. In many of these circumstances, where the information is identical (or in some circumstances substantially similar with only minor editorial changes) in substance and context to information that has already been disclosed to the appellant in the records and is therefore already in the public realm I find that it does not warrant further consideration. For example, the identical information for which section 13(1) is claimed in TIFF 37 620, pages 4842-4844, has already been disclosed to the appellant in TIFF 37 562, pages 4076-4078. Another example, some of the information for which section 13(1) has been claimed in TIFF 37 600, page 4531 is substantially similar in context and in substance to information already disclosed in TIFF 37 599, page 4516 with only minor editorial changes that do not alter the way in which one might interpret the information. In these circumstances, I have not made a specific finding on whether section 13(1) applies but, because it would be absurd to continue to withhold it, I will order the Ministry to disclose the information. For clarity, along with this order I will be sending a copy of the records at issue to the Ministry in which I have identified the information that has already been disclosed by highlighting it in green.

In other circumstances the information although identical (or, again, substantially similar with editorial changes) to information already disclosed, either appears in a different context, such as a different document or under a different heading, or the change in wording, even if it is minor, significantly affects the way in which one might interpret the information. In these circumstances, in my view, despite the fact that the substance of the information or the information itself might have already been disclosed, the difference in the context in which it

appears or in the wording affects how the information is read or interpreted. Where this occurs, I find that the information warrants further consideration to determine whether, in the specific context or due to small changes in wording, disclosure of this information might allow one to accurately infer advice or recommendations given. Accordingly, I have reviewed this information to determine whether section 13(1) applies.

Therefore, apart from the portions of records noted above that I have highlighted in green on a copy of the records provided to the Ministry, I have reviewed all of the portions of records for which the Ministry has claimed section 13(1) to determine whether, in my view, the exemption applies. Although I accept that some of the information has been properly severed under section 13(1) as it contains advice or recommendations, or would allow one to accurately infer advice or recommendations, in my view the Ministry has been overly broad in its application of the exemption. Having considered the records, the representations of the parties, and all other relevant information, I make the following findings:

- In some circumstances, I agree with the Ministry's position that section 13(1) applies and find that disclosure of the record or portions of the record at issue would clearly reveal a suggested course of action made by Ministry staff to the Minister (or the delegated decision maker) who has the ultimate authority to make a decision regarding the acceptance or denial of an aggregate permit application. I also agree with the Ministry's position that in this particular appeal there are many circumstances where information that may be considered as factual, background or analytical in nature is either so closely interwoven with information that qualifies as advice or recommendations, or is phrased in such a manner that would allow a reader to accurately infer that advice or recommendation. Where, in my view, such circumstances have occurred, I find that the exemption at section 13(1) applies and the information should not be disclosed.

Examples of information that I have found subject to the exemption include clear statements describing a recommendation (for example, TIFF 37 602 page 4610), information contained in draft news releases that were not issued that reveals a recommendation (for example, TIFF 37 606 pages 4649-4659), descriptions of the Ministry's recommended position or decision as outlined in documents including briefing notes (for example, TIFF 37 599 page 4510, TIFF 37 600 page 4530), and descriptions of tactical or strategic considerations as outlined in Issue Management Plans or other documents (for example, TIFF 37 602 page 4620). I have also found that the information contained on approval sheets would allow one to infer advice or recommendations given (for example, TIFF 37 610 page 4705).

In these circumstances I find that section 13(1) applies as disclosure would allow one to accurately infer advice or recommendations and I uphold the Ministry's decision not to disclose these parts of the records to the appellant. For the Ministry's reference I have not highlighted these portions. However, it should be noted that they retain the Ministry shading in grey.

- In other circumstances I disagree with the Ministry and find that, in my view, some of the information that has been severed is factual, background or evaluative in nature and does not reveal or allow one to accurately infer advice or recommendations.

Examples of this include certain headings (for example, TIFF 37 645 pages 5192-5195) general contextual information about aggregate permit applications in general (for example, TIFF 37 645 pages 5210-5212), general background and contextual information about the application at issue as well as previous applications (for example, TIFF 37 645 page 5213-5218), maps that delineate in various detail the proposed quarry location (for example, TIFF 37 562 page 4079, TIFF 37 645 pages 5225-5226), information that is evaluative in nature (for example, TIFF 37 645 page 5221), and information that is taken from media publications and therefore already in the public realm (for example, TIFF 37 610 pages 4707-4708). Additionally, following Order PO-2028, I have found that in the context in which they appear in this appeal, revealing a number of listed “options” themselves would not reveal advice or recommendations as they do not include specific advisory language and I have removed any information with implicit or explicit recommendation (for example, TIFF 37 645 page 5222-5224). However, as some of the listed “pros and cons” under those options reveal advice or recommendations made by various departments in the Ministry I have protected those portions (for example, TIFF 37 645 page 5222).

In those circumstances where I have found that the information is factual, background or evaluative in nature, I find that section 13(1) does not apply to exempt the information from disclosure. For the Ministry’s reference, I have highlighted this information in blue.

As mentioned, I have provided the Ministry with a copy of the pages of the records that have been addressed by this order. The information that has already been disclosed to the appellant in other areas of the records has been highlighted in green. The information for which I find that the exemption at section 13(1) does not apply has been highlighted in blue. All information highlighted in green and blue should be disclosed to the appellant. The information identified in the records as being at issue but that has not been highlighted in colour is the information which I have found to have been properly withheld under section 13(1). This information should not be disclosed to the appellant. Please note that some of this information retains the original grey shading as prepared by the Ministry.

ORDER:

1. I uphold the decision of the Ministry not to disclose the information at issue that I have found to be exempt. For greater certainty, this is the information that is **not** highlighted in colour on a copy of the records provided to the Ministry with this order.

2. I order the Ministry to disclose to the appellant the information that has already been disclosed or that I have not found not to be exempt. For greater certainty, this is the information that **is** highlighted in colour on the copy of the records provided to the Ministry. The Ministry is ordered to disclose this information by sending a copy to the appellant before **August 4, 2006**, but not earlier than **July 31, 2006**.
3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed By: _____

Catherine Corban

Adjudicator

_____ June 30, 2006