



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2553

Appeal PA-050321-2

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a 26-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to:

- a letter written by the Minister of Transportation dated June 2, 2005; and,
- Regulation 629 prescribed under the Highway Traffic Act, Vehicles for the Transportation of Physically Disabled Passengers. Ontario Regulation 49/05 was made on February 16, 2005 and filed on February 18, 2005, amending Regulation 629.

At the request stage, the Ministry clarified the request to include all records relating to Regulation 629 and its amendments from October 1, 2003 to the date of the request.

Due to the volume of the records involved in this request, the Ministry and the requesters agreed that the Ministry would provide its response in stages. Ultimately six decision letters were issued, each relating to a batch of records, which were described by the Ministry as Batches 1 through 6. The Ministry provided partial access to the records, citing the application of the exemptions in sections 12(1) (Cabinet records), 13(1) (advice to Government), 18(1) (economic and other interests), 19 (solicitor-client privilege), and 21(1) (invasion of personal privacy) of the *Act*. Some information was removed as being not responsive to the request.

The requesters, now the appellants, appealed this decision.

During mediation, the Ministry agreed to review the records and its decisions. A revised decision letter was issued on July 21, 2006, relating to Batches 1 through 6, and another revised decision letter was issued on July 28, 2006, relating to Batch 6/Fully Exempted Records. In both revised decisions, additional records or portions of records were disclosed to the appellants.

Also at mediation, the appellants agreed that those records or portions of records to which the Ministry had applied sections 18(1) and 21(1) and the non-responsive severances could be removed from the scope of the appeal.

As further mediation was not possible, the file moved on to the adjudication stage of the appeal process and was transferred to me to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues, and seeking the representations of the Ministry, initially. The Ministry provided representations in response. These representations, without the attached confidential Appendix "A", were sent to the appellants along with a Notice of Inquiry, seeking their representations. The appellants did not provide representations in response. At the same time that I sought representations from the appellants, the Ministry sent a further decision letter, dated November 1, 2006, to the appellants, enclosing a revised index of records, and disclosing additional records or portions of records.

RECORDS:

The records that remain at issue consist of emails, drafts of regulations, scheduling templates, policy proposals and handwritten notes, details of which are contained in the indices issued by the Ministry with its November 1, 2006 revised decision letter.

DISCUSSION:

CABINET RECORDS

The Ministry relies on the introductory wording of section 12(1) and paragraphs (b) and (f) of section 12(1) with respect to a number of responsive records. These sections state:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (f) draft legislation or regulations.

The appellants are seeking “all records relating to Regulation 629 and its amendments from October 1, 2003 to the date of the request”. The Ministry describes in its representations how the records in this appeal were originally created, as follows:

Regulation 629 under the *Highway Traffic Act* was originally amended in December 2002 ...so as to grant rear-entry taxis an exemption from emergency exit requirements. The amended regulation specifically provided that that amendment would apply only to taxis, and not to other physically disabled passenger vehicles (PDPVs) operated for compensation such as those used by group homes, nursing homes, etc...

In early 2003, two manufacturers of rear-entry accessible taxis ... approached the Ministry for further amendments that would exempt them from the ambulatory door height requirements set out in the standard.

Ministry staff prepared a number of options for consideration by the Minister under the previous government. The Minister instructed staff that he wanted an amendment made exempting the taxis from the ambulatory door height.

The amended regulation was approved by the Statutory Business Committee (SBC) of Cabinet on May 26, 2003, approved by Cabinet on August 20, 2003 and signed by the Lieutenant Governor August 21, 2003.

The amended regulation was scheduled for filing on September 8, 2003 but, due to calling of the provincial election at that time, the decision was made not to file the regulation and confirmed by the Deputy Minister's Office.

Once the election was over... [t]he now Minister asked to be briefed on the issue, and staff prepared briefing materials based on the information that had been submitted to Cabinet as part of the earlier approval process...

Submissions in respect of the amendment to Regulation 629 went to the Legislation and Regulations Committee of Cabinet (LRC) on February 7, 2005, approved by Cabinet on February 16, 2005 and filed on February 18, 2005.

The Ministry has sought to exempt all of the records or portions of the records for which section 12(1) has been claimed, under the introductory wording of section 12(1), which exempts from disclosure information where "disclosure would reveal the substance of deliberations of the Executive Council [*i.e.*, Cabinet] or its committees".

Section 12(1): introductory wording

The following represents a summary of the Ministry's position concerning the applicability of the introductory wording of section 12(1) to each record or portions of records for which that provision has been claimed. If I find that a record or a portion of a record is not exempt under the introductory wording of section 12(1), I will consider below whether it is exempt under sections 12(1)(b) or (f), where applicable.

Batch 3

Records 1 and 5 - The (email) attachments are drawn from a submission to the SBC and Cabinet made in the spring and summer of 2003 and were used to brief the new Minister. This is confirmed in the body of the email of Record 1.

Record 3 - The email portion indicates that the attachments were used to brief the Minister of Citizenship and Immigration (MCI) on June 18, 2003. This was prior to the meeting of Cabinet on August 20, 2003.

Batch 4

Record 82 and 83 - These records contain transcribed versions of a scheduling template for the LRC containing policy recommendations.

Batch 5

Record 6 - The attachment for which section 12(1) is claimed is a note prepared for the LRC meeting of February 7, 2005. It contains policy options and recommendations.

Record 8 - In this email a Ministry employee recounts her response to questions posed to her at the LRC meeting of February 7, 2005.

Record 11 - In this email Ministry counsel discusses a question posed to a Ministry employee at the LRC meeting of February 7, 2005.

Record 58 - The attachment to this email is a scheduling template for the LRC, containing policy recommendations.

Records 62, 63 and 64 - The attachments to these emails are drawn from a submission to the SBC and Cabinet made in the spring and summer of 2003 and were used to brief the new Minister. This is indicated in the body of the email of Batch 3, Record 1.

Record 68 - The attachment to this email is a Regulation Approval Form for the February 7, 2005 meeting of the LRC, containing policy recommendations.

Batch 6

Records 3, 12, 13, 14, 15, 16, and 32 - The attachments to these emails include slide presentations to brief the Minister, prior to bringing the matter to the LRC in February 2005.

Record 19 - The information on pages 283 through 285 of the email dated October 1, 2004 would reveal the substance of Cabinet deliberations in respect of legislation soon to be tabled in the Legislature by the Ministry of Citizenship and Immigration.

Record 22 - The attachment to this email contains a draft of the regulation to be submitted to the LRC in February 2005. The draft language differs from the language that was eventually approved for the regulation. The record has not been itself submitted to Cabinet for consideration.

Record 23 - The attachment to this email contains policy options presented to the LRC in February 2005.

Records 24, 69, 70 and 71 - These records contain communications from Ministry counsel to clients about the documents intended to be submitted to LRC in February 2005.

Records 29, 30 and 31 - The contents of these e-mails contain a reference to the deliberations of the LRC.

Records 34 and 35 - These forms contain policy options presented to the LRC.

Records 36, 38, 39 - The attachments to these emails are drawn from the submission to the SBC and Cabinet made in the spring and summer of 2003 and were used to brief the new Minister.

Record 37 - The first two emails contain references to and discussion about the attachments in Records 38.

Records 46, 47 and 48 - The attachments to these emails include slide presentations to brief the Minister, prior to bringing the matter to the LRC in February 2005.

Record 49 - This email contains the text of a draft recommendation to Cabinet, and was prepared prior to the LRC meeting in February 2005. Disclosure would allow the reader to accurately infer file information contained in a Cabinet policy submission.

Record 50 - The attachment to this email is a form containing policy options to be presented to the LRC in February 2005.

Record 51 - The contents of this email would reveal the substance of Cabinet deliberations.

Record 52 - The attachment to this email contains a draft of the regulation to be submitted to LRC in February 2005. The draft language differs from the language that was eventually approved for the regulation. The record has not been itself submitted to Cabinet for consideration.

Record 54 - The attachment to this email is a form containing policy options to be presented to the LRC in February 2005.

Records 58, 59, 60, 61, 62, 63, 67 and 73 - These records contain drafts of the regulation to be submitted to LRC in February 2005, and comments and edits by Ministry counsel, or communications with Ministry counsel. The draft language differs from the language that was eventually approved for the regulation. The record in question has not been itself submitted to Cabinet for consideration.

Records 64, 65, 66, 72 and 75 - These records contain policy options and other material which was either prepared for submission to the LRC in February 2005 or would reveal the contents of records containing policy options submitted to the LRC.

Records 74 and 76 - These e-mails reference the contents of the Regulation Approval Package.

Records 78, 80, 82, 83, 88, 89 and 90 - These records contain policy options and other material which was prepared for submission to the LRC in February 2005.

Records 91 to 97 - The lists provided in these emails set out the matters to be considered by Cabinet on February 16, 2005. There is also a comment on matters, which were discussed at the LRC.

Records 98 and 99 - These emails contain references to the deliberations of the LRC in February 2005

Analysis/Findings re: Introductory Words of Section 12(1)

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 an 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].

Based upon my review of the records and the submissions of the Ministry, along with the confidential attachment thereto, I am satisfied that the Ministry has established the necessary evidentiary linkage between the content of the records and the actual substance of the deliberations of two Committees of the Executive Council (the LRC and the SBC) and, ultimately, the Executive Council (*i.e.*, Cabinet). I am satisfied that disclosure of the above-noted records or portions of records would reveal the substance of deliberations of Cabinet or would permit the drawing of “accurate inferences regarding the substance of those deliberations”. Disclosure would reveal confidential information about the contents of these records. I find that the exemption applies even to those records or portion of records that were not placed before Cabinet [Orders PO-2495, PO-2422].

Accordingly, I find that the records or portions of records for which section 12(1) has been claimed are exempt from disclosure on the basis of the introductory wording of that section.

As I have found that these records qualify for exemption under the introductory wording of 12(1), it is not necessary for me to consider whether the specific provisions in sections 12(1)(b) and (f) also applies.

SOLICITOR-CLIENT PRIVILEGE

When the request in this matter was filed, section 19 stated as follows:

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 original version (reproduced above) applies in this appeal.

Section 19 contains two branches. The Ministry must establish that one or the other (or both) branches apply. The Ministry submits that branch 1 applies to all of the records for which section 19 has been claimed. The Ministry also submits that branch 2 applies to some of the records. If I find that branch 1 does not apply to a record or part of a record for which that branch has been claimed, I will go on to determine if branch 2 applies to that record or part, if the Ministry has claimed that branch

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]. In this appeal, the Ministry relies on the solicitor-client communication privilege aspect of branch 1.

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 Ministry

The records for which the solicitor client exemption at branch 1 of section 19 has been claimed consist of emails, attachment to emails and handwritten notes which contain communications between Ministry counsel and Ministry staff. The Ministry submits that:

[C]onfidentiality is an essential component of the communication, as the records are either emails between Ministry counsel and clients, or emails between clients that recount communications with Ministry counsel [Order MO-1454]... Legal advice consists of more than advising the client about the law; it includes advice as to what should prudently and sensibly be done in the relevant legal context [Order MO-1625]...

The specific records or portions of records for which section 19 has been claimed without section 12(1), are Batch 1, Records 17 and 55; Batch 3, Records 52, 54, 55, 56 and 63; Batch 4, Record 71; Batch 5, Records 4, 25, 26, 28, 65, 66, 73 and 76; Batch 6, Records 26, 40 - 43, 53, 55, 56, 57, 68, 77, 79, 84, 85, 86, 87 and 101.

Analysis/Findings

Based on my review of the Ministry's representations and the records and portions of records for which section 19 has been claimed, I find that they contain the details of direct communications of a confidential nature between a Ministry solicitor and Ministry staff made for the purpose of obtaining or giving professional legal advice. Accordingly, I find that the undisclosed information in these records or portions of records is exempt from disclosure under branch 1 of the solicitor-client communication privilege component of section 19.

As I have found that the undisclosed information in these records or portions of records is subject to solicitor-client privilege under branch 1 of section 19, there is no need for me to consider whether this information is also subject to statutory privilege under branch 2 of section 19.

ADVICE TO GOVERNMENT

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 [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.)].

Representations of the Ministry

The Ministry relies on Order PO-1925, where Adjudicator Dora Nipp found that:

[A]dvice or recommendations for the purpose of section 13(1) must contain more than mere information.” To qualify as “advice” or “recommendations, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Ministry also relies on Order P-1631, and states that:

[R]ecords containing "proposed options and courses of action" qualified as "advice or recommendations" for the purposes of section 13(1). Senior Adjudicator David Goodis relied on the fact that the options were accompanied by "pros and cons" that could be taken into account by the decision-makers and determined 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".

With respect to the remaining records or portions of records at issue, the Ministry's representations can be summarized as follows:

Batch 3

Record 42 - This email between Ministry staff contains a recommended response to an enquiry concerning PDPVs.

Batch 4

Records 38, 39, 45, 57 - These records contain options prepared for the consideration of the Minister, accompanied by "pros and cons". These options constitute more than mere information, and can be interpreted as revealing a suggested course of action.

Records 40, 42 and 43 - These records contain options prepared for the consideration of the Minister concerning PDPVs, accompanied by "pros and cons". These records also contain recommendations.

Record 66 - This record contains a recommended course of action made by a Senior Enforcement Policy Advisor to her Manager concerning the status of vehicles from other jurisdictions.

Batch 5

Records 41 and 42 - These records contain a recommended course of action made by a Senior Enforcement Policy Advisor to her Manager concerning the use of rear entry taxis as PDPVs.

Batch 6

Record 6 - This record contains options prepared for the consideration of the Minister, accompanied by "pros and cons" concerning the use of rear entry minivans. This record also contains recommendations.

Records 15 and 32 - This email contains a recommendation in respect of how to respond to stakeholders concerning the standards for rear entry accessible minivans as taxis.

Records 44 and 45 - These records contain options plus "pros and cons" concerning the regulation of PDPVs.

Analysis/Findings

“Advice” and “recommendations” have a similar meaning. As stated by the Ministry, 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 [2005] S.C.C.A. No. 564].

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)*, cited above.]

In order for me to find that the undisclosed information qualifies as “advice or recommendations”, I must therefore determine whether it reveals, either directly or by inference, a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

I adopt the following reasoning articulated by Adjudicator John Swaigen in Order PO-2400:

[F]or 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.

... 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.

Following my careful review, I find that the undisclosed portions of the remaining records (as described above) for which section 13(1) has been claimed, contain information that advises the decision-maker on a suggested course of action. I further find that the disclosure of this advice or recommendation could reasonably be expected to inhibit the free flow of advice or recommendation to the government.

Accordingly, I find that the undisclosed information in these records is exempt from disclosure. In addition, I have reviewed the exceptions in sections 13(2) or (3) and find that none of them apply.

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____
Diane Smith
Adjudicator

February 28, 2007 _____