



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2677**

**Appeal PA-050027-2**

**Ministry of Municipal Affairs and Housing**



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## NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the Ontario Realty Corporation's (the ORC) proposed acquisition of certain identified lands, together with the severance and sale or disposition of certain provincially owned lands (the "Lands Exchange"). The request read:

Pursuant to [the *Act*], we request copies of the following records, electronic or otherwise, in the files of [the Ministry] relevant to the environmental assessment of the Lands Exchange that are not otherwise currently publicly available as defined in [the *Act*]:

1. All studies, reports, documents, correspondence, meetings and telephone conversations regarding the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange during [certain identified time periods].
2. Without limiting the generality of the foregoing, we request that the records in item 1 above include all such records
  - (a) within the Ministry;
  - (b) between the Ministry and the ORC;
  - (c) between the Ministry and other ministries, departments and agencies of the Ontario government, including, but not limited to,
    - (i) the Office of the Premier of Ontario and Cabinet Office, including records generated during the current McGuinty government and the previous Harris government relevant to this request;
    - (ii) the Fairness Commissioner appointed in connection with Lands Exchange;
    - (iii) the Ministry of the Environment; and
    - (iv) the Ministry of Natural Resources.

Following telephone conversations between the requester and the Freedom of Information Co-ordinator of Management Board Secretariat, who was coordinating this and the requester's similar requests to three other institutions under the *Act* (collectively, including the Ministry, the "Institutions"), the requester wrote to the Freedom of Information Co-ordinator. In the letter, the requester confirmed the request was for access to, "...documents and other communications in the records of the Institutions that include information as to the decision-making that led to the

announcement of the Class Environmental Assessment of the Lands Exchange project...” The requester provided some additional information regarding the requested records, and also recommended that the Institutions search their files for records from June 1, 2003 onward.

The Ministry informed the requester that pursuant to section 27 of the *Act*, the Ministry was extending the time to respond to the request by 90 days beyond the 30 days prescribed in the *Act*. The requester (now the appellant) appealed the Ministry’s time extension. This office opened Appeal PA-050027-1, which was subsequently resolved through mediation.

During the processing of the request, in a letter to the Ministry dated April 5, 2005, the appellant further clarified the request as follows:

...we advise that the request for records as described in our [the original request] may be more narrowly described as a request for all documents in the Ministry’s possession [for an identified time period] that include information on the rationale for the decision to conduct the Class Environmental Assessment for the “Lands Exchange” (as defined in our January 6, 2005 letter) as a Category C Class EA.

The Ministry subsequently issued an access decision, in which it granted partial access to the records it identified as responsive to the request, and denied access to the remainder under sections 12(1) (cabinet records), 13(1) (advice or recommendations), 17(1) (third party information), 18(1)(c), (d) and (e) (economic and other interest), 19 (solicitor-client privilege), 21 (invasion of privacy) and 22 (information published or available) of the *Act*. Although not stated in the decision, the Ministry identified some information in the records as “non-responsive” to the request. This was based on the Ministry’s interpretation of the appellant’s clarification of the request.

The appellant appealed the Ministry’s denial of access to portions of the records. This office then opened Appeal PA-050027-2, the present appeal.

During mediation, issues relating to the possible application of section 17 were resolved. In addition, the Ministry disclosed those records to which section 22 of the *Act* had been applied (pages 1898-1938 and 2628-2630). Accordingly, sections 17 and 22 of the *Act* are no longer at issue in this appeal. In addition, the appellant confirmed that it is not seeking access to the portions of records to which section 21 has been applied. As a result, section 21(1) and the portions of the records to which it has been applied are no longer at issue in this appeal.

Also during mediation, the Ministry clarified that with respect to section 12(1) of the *Act*, it was relying on sections 12(1)(b), (c) and (e), and the introductory wording in section 12(1). In addition, the appellant confirmed that it was appealing the Ministry’s decision that certain records are not responsive to the request. Accordingly, the responsiveness of certain records is an issue in this appeal.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received lengthy representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the Ministry's representations, to the appellant, who also provided representations to me.

## **RECORDS:**

The records remaining at issue, and for which exemptions are claimed, total approximately 2050 pages. These records include e-mails, Decision Notes and decision documents, briefing notes, presentations, questions and answers, speaking notes, an open house document, opinions and tables, correspondence, memoranda, draft presentation notes, an EAA Primer and handwritten notes.

In addition, the Ministry has taken the position that a number of additional records are not responsive to the clarified request. There are approximately 1600 pages of records identified as non-responsive.

The records are contained in two files: the General file and the Legal Services Branch (LSB) file. The records in the General file are numbered from page 1 to page 2726. The records in the Legal Services Branch file are numbered from page 10000 to page 10926.

## **DISCUSSION:**

### **SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS**

The Ministry takes the position that the scope of the request, though originally fairly broad, was narrowed in the clarification provided by the appellant on April 5, 2005. The Ministry states:

It is the submission of [the Ministry] that the most salient document for determining the scope of the request is the letter dated April 5, 2005 from [the appellant] wherein the appellant stated:

... we advise that the request for records as described in ... [the original request] may be **more narrowly described** as a request for all documents in the Ministry's possession dating from June 2003 to January 6, 2005 that include information on the rationale for the decision to conduct the Class Environmental Assessment for the "Lands Exchange" (as defined in our [original request]) as a Category C Class EA.

On the basis of this clarification, the scope of the request in terms of a timeframe is abundantly clear. Any records created before June 1, 2003 or after January 6, 2005 are not responsive to the request. Records created at any period between (and including) those two dates may be responsive. This is one important element

that [the Ministry] has considered in determining what records are responsive to the request.

Given the wording of the April 5, 2005 letter, reference must obviously then still be had to the original request, in particular this portion of the request:

1. All studies, reports, documents, correspondence, meetings and telephone conversations regarding the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange...

The scope of the request in terms of the forms of records that were requested also seems quite clear. In the April 5, 2005 letter, the Appellant referred to “all documents” and in [the original request], the Appellant referred to “All studies, reports, documents, correspondence, meetings and telephone conversations.” It appears to the Ministry then that there is virtually no qualification of the request in terms of the forms of records sought. Accordingly [the Ministry] considered records of any form to be responsive to the request.

Finally, and most crucially, the scope of the request in terms of the substance of the records is perhaps a little complicated. In [the original request], the Appellant referred to records “regarding the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange.” The April 5, 2005 letter stated the request as being for records “that include information on the rationale for the decision to conduct the Class Environmental Assessment for the ‘Lands Exchange’ (as defined in [our original request]) as a Category ‘C’ Class EA.” The Ministry therefore submits that whereas all records concerning “policy strategies, deliberations, directives and decisions” relating to the environmental assessment were responsive to the Appellant’s initial request, in light of the April 5, 2005 letter, the substance of the records sought can now be “more narrowly described.” Therefore, it is [the Ministry’s] position that the April 5<sup>th</sup> letter substantially refines the scope of the request and provides greater precision as to what records the Appellant seeks. Under the initial request, records (assuming hypothetically that they existed) that concerned, for instance, the deliberations about retaining a consultant as part of the environmental assessment process would be responsive. However, such a record would not speak to the rationale to conduct the environmental assessment as a Category “C” Class EA and thus would be non-responsive to the April 5, 2005 request. Effectively then, while the second request was limited to a single decision about the environmental assessment (the appropriate category), the first request included any decisions relating to the environmental assessment. The difference between these requests accounts for the initial inclusion of certain records that were ultimately deemed to be non-responsive.

[Ministry] submits that the scope of the request in terms of the substance of the records is limited to those records containing information on the rationale for the decision to conduct the particular category of environmental assessment. This was the final critical element that [Ministry] considered in deeming records to be either responsive or non-responsive.

The appellant provided representations in response to the Ministry's position. In them, the appellant refers to the Ministry's interpretation of its April 5<sup>th</sup> letter, and states:

We submit that the basic scope of the request as described in [our original request, letters of January 25, 2005, and April 5, 2005] is essentially the same. Our [original request] requests records with respect to the environmental assessment of the Lands Exchange "leading up to the ORC's official announcement in April, 2004 of the ORC's class environmental assessment of the Land's Exchange". We further confirmed in our January 25, 2005 letter (which was copied to [the Ministry]) that our request is for "documents and other communications in the records of the Institutions that include information as to the decision-making that led to the announcement of the Class Environmental Assessment of the Lands Exchange project". The "announcement" referred to in both of these letters was that the ORC was conducting a "Category C" Class EA. It is our view that an experienced employee of the [Ministry] would be aware of that fact. Therefore, although we rephrased our request in our letter of April 5, 2005 ... in order to guide the [Ministry] to focus its records search on the categorization of the Class EA, the scope of the request had not, in fact, changed.

The appellant also notes that it is at a disadvantage, as it is unable to review the records. It asks that the request not be interpreted narrowly.

### ***Findings***

Previous orders of the Commissioner have established that to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request. (See also Order P-1051)

Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

I adopt this approach to the issue in the circumstances of this appeal.

The appellant's request in this case is set out above. In its initial request, the appellant asked for all records "regarding the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange" during certain identified time periods. However, in its later letter of April 5, 2005, the appellant specifically narrowed the request by stating:

...we advise that the request for records as described in our [the original request] may be *more narrowly described* as a request for all documents in the Ministry's possession dating from June 2003 to January 6, 2005 *that include information on the rationale for the decision to conduct the Class Environmental Assessment for the "Lands Exchange"* (as defined in our January 6, 2005 letter) as a Category C Class EA. [emphasis added]

On my review of the requests made by the appellant, and the representations of the parties, I am satisfied that the appellant did, in fact, narrow the request by its letter of April 5<sup>th</sup>. As set out in the above excerpt from that letter, the appellant specifically refers to the "more narrowly described" request, and I accept the Ministry's position that this second request was limited to a single decision about the appropriate category for the environmental assessment. Accordingly, the request is for all documents that include information on the rationale for the decision to conduct the class environmental assessment for the "lands Exchange" as a Category C Class EA.

With the above in mind, I have carefully reviewed the records the Ministry claims as "non-responsive" to determine whether or not these records are responsive to the request. I find that many of the records identified by the Ministry as non-responsive do not fall within the ambit of the narrowed request, as they do not relate to the rationale for the decision to conduct the class assessment for the "lands Exchange" as Category C Class EA. However, I find that some of the records which the Ministry claims are not responsive are, in fact, responsive to the request.

Specifically, I find that the following records, located in the Legal Services Branch file, are not responsive to the narrowed request:

- General cover memos and letters at pages 010000 - 010009 (and the duplicate copies at pages 010316 - 010325);
- background documents relating to the lands at pages 010136 - 010139;
- many documents relating to an alternate (including its process, requirements, etc.) at pages 010157 - 010159 (and the duplicate copies at pages 010450 - 010452), pages 010204 - 010252, pages 010516 - 010563 (including various drafts and some duplicates), and pages 010617 - 010670;
- documents that refer to the identified assessment, but do not relate to the rationale for the decision (pages 010361 - 010375).

I find that the following records, located in the General file, are not responsive to the narrowed request:

- records that deal generally with the Class EA process (review, issues, status, etc.) - pages 1, 30-32 (and duplicates 40-42), 239-240, 243-302, 1547 and 1555;
- a cover memo - page 50;
- records that contain reviews of process, meetings, e-mails, procurement documents, letters and earlier drafts, communications plans and messages, etc. - pages 101-146, 148-181, 198-208, 337, 364, 373, 858-877, 878-887, 901-933, 979-1000, 1001-1035, 1088-1092, 1100-1103, 1142-1156, 1171-1198, 1199-1207, 1218-1224A, 1228-1233, 1277-1281, 1288-1317, 1318-1339, 1340-1372, 1472-1510, 1536-1539, 1556-1557, 1561-1563, 1567, 1570-1602, 1622-1624, 1625-1642, 1664, 1733, 1767, 1768-1812, 1825-1830, 1840-1847, 1849-1890, 1983-2003, 2020-2021, 2026-2054, 2062-2066, 2078-2080, 2090-2094, 2136-2148, 2156-2171, 2226-2258, 2259-2266, 2273-2284, 2304-2309, 2328-2354, 2363-2370, 2379-2380, 2383-2404, 2480-2521, 2525-2619, 2633-2637, 2641-2665, 2688-2695 and 2702-2711;
- reports - pages 391-503 and 2004-2019;
- EA process and procedures documents - pages 504-665, 666-815 and 1067-1087;
- legislation - pages 816-857 and 1252-1259;
- agendas - pages 1093 and 1848;
- sample documents concerning unrelated land - pages 1104-1141 and 1282-1286;
- research material - pages 1157-1158;
- Maps - pages 1159 and 1260;
- Information relating to the lands - pages 1160-1170;
- an order and attachments - pages 1261-1264;
- notes - pages 1270 and 1287;
- an earlier document predating the timeframe of the request - pages 1373-1439;
- correspondence - pages 1823-1824; and
- minutes of meetings - pages 1831-1837.

In addition, in its representations the Ministry states that certain additional pages are not responsive to the request, and were inadvertently included. On my review of those records, I agree that some of them are not responsive to the request. Specifically, I find that the following records (which consist primarily of brief e-mails) are not responsive to the request: Pages 374,



375, 2059, 2060, 2067, 2074-2077, 2081, 2085, 2086, 2197, 2198, 2214, 2285, 2310-2311, 2357-2358, 2362, 2405, 2626, 2638, and portions of pages 1558-1560.

However, I find that other records, which the Ministry has stated are not responsive to the request, are in fact responsive to the narrowed request. In my view, these records relate to the rationale for the decision to conduct the class assessment for the “lands Exchange” as Category C Class EA, and are responsive. These records are:

- a draft document - pages 51-92;
- e-mails - pages 100, 237-238, 331, 1225-1227;
- a summary document - page 147;
- documents addressing issues - pages 310-319, 1248-1251, 2522-2524; and
- a memorandum - pages 1211-1217.

In summary, I find that many of the records which the Ministry has claimed are not responsive to the request are not responsive to the narrowed request, but that some of the records are, in fact, responsive. Accordingly, I will order the Ministry to issue access decisions regarding those records which I have found to be responsive to the request.

## **PRELIMINARY MATTERS**

### **Drafts or duplicate copies**

The Ministry has identified numerous records which it states are drafts or duplicate copies of other records at issue in this appeal. To the extent that there are drafts or duplicate copies of the records, it is not necessary for me to review the possible application of the exemptions to these drafts or duplicates. In addition, some of the drafts or duplicates also include a brief cover e-mail or notation. In most of these cases, these brief e-mails or notations are of insufficient significance to affect my finding that the copies are drafts or duplicates.

However, on my review of the records, I find that some of the records which the Ministry identified as drafts or duplicates are not drafts or duplicates, or contain significant notes or other information which make them distinct from the originals. Of the records which I find not to be drafts or duplicates (as identified below), I will review the application of the exemptions to those records later in this order.

I make the following findings regarding the records that the Ministry claims are drafts or duplicate copies of other records:

Pages 376-381, 382-387 and 2620-2624 are drafts or duplicates of pages 3-7.

Pages 344-346 and 2223-2225 are drafts or duplicates of pages 9-19.

Pages 93-99, 320-325, 326-330, 1448-1455, 1548-1554, 2174-2181, 2182-2189, 2190-2196, 2199-2205, 2206-2213 and 2215-2222 are drafts or duplicates of pages 20-26.

Pages 43-49, 888-893, 1891-1897 and 2149-2155 are either drafts or duplicates of pages 33-38.

Pages 1744-1764, 2286-2295, 2406 and 2714-2719 (with brief cover e-mail) are drafts or duplicates of pages 209-236.

Pages 2421-2458 contain drafts of portions of pages 209-236. However, these pages include comments and suggested changes made by staff. Accordingly, I will review these pages as separate records.

The Ministry submitted that pages 1657-1662 are duplicates of an appendix to pages 209-236; however, on my review, these are actually pages 1655-1662. Pages 1655-1662 contain various timelines for different options and I am not satisfied that these pages are drafts or duplicates of pages 209-236. Accordingly, I will review these pages as separate records.

However, pages 1234-1235, 1603-1604, 1612-1615, 2355-2356, 2407-2420 (with some brief cover e-mails and notations), 2631-2632, 2666-2679 (including some notations), 2686-2687, and 2712-2713 are drafts or duplicates of pages 1655-1662.

Pages 899-900 are duplicates of pages 214 -215.

Pages 347-352, 353-358, 1540-1546 (with cover sheet), 1605-1609, 2310-2317, 2318-2327, 2696-2701 and 2720-2726 (with brief cover e-mail) are drafts or duplicates of pages 303-309.

Pages 946-957, 959-970, 1036-1048, 1049-1061, 1514-1517, 1519-1521, 1523-1525, 1527-1529, 1533-1535, 1665-1674, 1685-1704, 1709-1721, 1722-1733, 1734-1743 (with handwritten notations), 2055-2058, 2068-2071, 2359-2361, 2371-2374 and 2375-2378 are drafts or duplicates of pages 332-334.

Pages 365-370, 1265-1269, 1271-1276 and 2680-2685 are either drafts or duplicates of pages 338-343.

Page 1062 is a duplication of pages 335-336. However, page 1062A contains notes made on the back of that document, reflecting comments on the document. This information is different from that contained on the front side of the page and I will review the back side of the page.

Pages 1446-1447 and 2072-2073 are drafts or duplicates of pages 941-942.

Pages 1706-1708 and 2082-2084 are drafts or duplicates of pages 943-945.

Pages 1236-1241, 1242-1247, 1440-1445 and 1616-1621 are duplicates of the record on pages 1094-1099.

Pages 1982 and 1063 are duplicates of the record on page 1063.

Pages 1814-1818 are drafts or duplicates of pages 1456-1459

Pages 1643-1644 and many of pages 2110-2135 are duplicates and copies of pages 1564-1565; however, page 2110 and part of page 2111 are not included in pages 1564-1565, and I will also review them. The portions of those two pages are also duplicated on pages 2111-2135.

Pages 1675-1684 (with handwritten notations) are drafts or duplicates of pages 1645-1654.

Pages 2088 and 2089 are duplicates of page 2087.

Pages 2095-2109 and 2172-2173 are duplicates and follow-ups to the e-mails contained on pages 2022-2025.

Pages 2267-2269 are duplicates of pages 1064-1066

Pages 2270-2272 are duplicates of page 934.

Pages 2299-2303 are duplicates of pages 2297-2298.

Page 2627 is a duplicate of page 2381.

### **Other matters**

Pages 183-197 contain an ORC open house document. I have not received any representations on the application of the exemptions to this record, and do not see how it would qualify for any of the mandatory exemptions. Accordingly, I will order that this record be disclosed.

In addition, the Ministry has claimed a number of exemptions for many of records at issue. Unless otherwise identified, in the event that one of the exemptions applies to the record, I will not review the possible application of the other exemptions claimed for that record.

Finally, pages 1939-1968 consist of a copy of a power point presentation. On my review of these pages, for which the Ministry has claimed various exemptions, it appears copies of only one side of these double-sided records were provided to me, and I am unable to make a final decision on these records. In the circumstances of this appeal, given the volume of records and the passage of time, and because I will be ordering the Ministry to issue an access decision on certain records which I have found to be responsive to the request, I will also order the Ministry to issue an access decision on pages 1939-1968 to the appellant.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

When the request in this matter was filed, section 19 read 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 version reproduced above applies in this appeal.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

#### **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. (4<sup>th</sup>) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

#### ***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 Ministry 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.)].

### ***Litigation privilege***

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. ...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

### **Branch 2: statutory privileges**

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

***Statutory solicitor-client communication privilege***

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

***Statutory litigation privilege***

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

**The Ministry’s representations**

The Ministry has provided extensive and detailed representations in support of its position that many of the records at issue qualify for exemption under section 19 of the *Act*.

The Ministry begins by reviewing section 19, and then provides specific representations in support of its position that specific records and pages qualify for exemption. The Ministry takes the position that certain identified records are exempt as they fit within the common law solicitor-client communication privilege in Branch 1, as set out above. The Ministry also submits that many of the records qualify for exemption under Branch 2, and states:

The following records meet both branch 1 and branch 2 of section 19 of the *Act*. The documents prepared on September 16, 2003 and thereafter were made by [the Ministry], are solicitor-client privileged and were made in contemplation of litigation, meeting the test enunciated in *Waugh* and subsequently refined in *Chrusz*. These records were made in confidence between Crown counsel and the client for the purpose of giving legal advice and are clearly privileged. The records relate specifically to the seeking or giving of an opinion(s) and/or instructions including, but not limited to, the consequences of the *Environmental Assessment Act* ("EAA") to the Land Exchange. Some records are telephone messages and handwritten notes of telephone conversations prepared in context of the ... Land Exchange. They can be characterized as Crown counsel's working papers directly related to the formulating of legal advice as per *Susan* and would meet the test of solicitor-client communications privilege. Several records are e-mails exchanged among various Crown counsel in the context of the ... Land Exchange. The e-mails contain information related to the ongoing relations between solicitor and client in the context of providing legal advice and would be part of the continuum of communications described in *Balabel* and would satisfy the test of the solicitor-client communications privilege component of section 19. Some documents are counsel's notes and drafts and comments thereon, which directly relate to the seeking, formulating and giving of legal advice and the notes constitute working papers. As a result, these records are exempt as they were prepared by Crown counsel for use in giving legal advice.

The Ministry then provides detailed representations describing the records at issue and identifying why it takes the position that the records qualify for exemption under section 19. I will review these details in my analysis, set out below.

### **Analysis and findings**

Based on the detailed representations provided to me, as well as on my review of each of the records at issue in this appeal, I find as follows:

#### ***Legal opinions (including drafts)***

Pages 10010-10024 – This is a draft legal opinion memorandum (with handwritten notes throughout) from one Ministry Counsel to another regarding the Land Exchange and legal Requirements, and was written in response to a request for an opinion.

Pages 10025-10055 – The first 12 pages consist of a draft legal opinion memorandum (including handwritten notations) from one Ministry Counsel to another regarding a potential court challenge, and contain a legal analysis of the challenge. The remaining pages (pages 10037 - 10055) consist of an attachment to the draft opinion, and include handwritten notations.

Pages 10389-10394 and 10395-10400 are two copies of a legal opinion prepared by outside legal counsel, provided to the ORC, and copied to two Ministry counsel.

Pages 10405-10411 is a copy of a legal memorandum to Ministry staff (the client) from Ministry counsel regarding the Land Exchange and providing a legal opinion.

Pages 10484-10498 is a copy of a legal opinion memorandum from Ministry counsel to another Ministry counsel, and is labelled “confidential and solicitor-client privileged.”

Pages 10671-10681, 10682-10690, 10691-10699, 10700-10711, 10712-10720, 10721-10736, 10737-10751, 10752-10766 and 10767-10782 are copies of drafts of legal memoranda from Crown counsel to Ministry counsel regarding certain identified issues.

Pages 10807-10813 and 10817-10822 are copies of two drafts of a memorandum to the client from Crown counsel regarding the Lands Exchange.

Pages 10814-10816 contain a copy of a memorandum to Crown counsel from Ministry counsel requesting a legal opinion with respect to the interpretation of the Class EA Document.

On my review of these pages of the records and the representations of the Ministry, I am satisfied that these records, which contain legal opinions or draft legal opinions, are confidential communications to or from counsel directly related to seeking or providing legal advice. Accordingly, I find that these records qualify for exemption under the solicitor-client communication privilege aspect of Branch 1 found in section 19 of the *Act*.

*E-mails and other communications*

Many of the records in the Legal Services Branch (LSB) file, and some of the records in the General file, are e-mail exchanges between Ministry counsel and Ministry employees, which contain legal advice or relate directly to the seeking or providing of legal advice. In some instances these e-mails also contain printed copies of attachments to them. The records which consist of e-mails and other communications are:

Pages 10056-10059: Pages 10056-10057 is e-mail correspondence from Ministry counsel and copied to two other Ministry counsel. The e-mail attaches different versions of a document, and requests input regarding the attachments. Pages 10058-10059 are the attachments to the request.

Pages 10071-10072: This record is an e-mail to parties including a Ministry counsel. Among the contents is reference to legal advice and a request for a further legal opinion.

Page 10073 - This record is an e-mail sent from one Ministry counsel to two other Ministry counsel regarding the Class EA, and includes the e-mails which comprise pages 10071-10072. Among the contents is reference to legal advice and a request for a further legal opinion.

Pages 10074 – 10079: Page 10074 (and the duplicate – page 10077) is an e-mail from Ministry staff and copied to Ministry counsel (among others) regarding an undertaking. Pages 10075-10076 and 10078-10079 are attachments to those two records, and contain the undertaking. One copy also includes handwritten notations in the margins.

Pages 10081-10082 are an e-mail from Ministry counsel to other Ministry counsel, forwarding an e-mail from the client. The e-mails, including those forwarded, are labelled confidential and relate to discussions and meetings dealing with identified issues.

Page 10083 is an e-mail from Ministry counsel to Ministry staff requesting a clarification. The e-mail, including those forwarded, is labelled confidential.

Pages 10084-10085 is an e-mail from Ministry counsel to two other Ministry counsel regarding the Land Exchange. The e-mail, including those forwarded, is labelled confidential. The e-mail attaches a set of slides.

Pages 10087-10088 - is an e-mail sent from one Ministry counsel to two other Ministry counsel regarding another Ministry's position on the Land Exchange. It includes references to positions taken and time frames.

Pages 10089-10090 - is an e-mail from a Ministry counsel to two other Ministry counsel and forwards comments made regarding asset of slides.



Page 10091 is an e-mail from one Ministry counsel to another Ministry counsel and copied to another Ministry counsel regarding a set of slides and identified issues. The e-mail forwards a draft set of slides.

Pages 10104-10135: Page 10104 is an e-mail from a Ministry counsel to two other Ministry counsel, attaching pages 10105-10135 (a final version of certain templates, a comparison chart and timelines).

Pages 10140-10145: Pages 10140 and 10143 are e-mails from a Ministry counsel to two other Ministry counsel commenting an identified timeline. Pages 10141-10142 and 10144-10145 are attachments to those records, and describe an approach to the timeline.

Pages 10146-10151: Page 10146 is an e-mail from a Ministry counsel to two other Ministry counsel and the client providing comments on a chart. Pages 10147-10151 contain an attachment to that record.

Pages 10152-10156: Page 10152 is an e-mail from a Ministry counsel to two other Ministry counsel and the client providing comments on a chart. Pages 10153-10156 contain an attachment to that record and describe two specific approaches.

Pages 10184-10203: Page 10184 is an e-mail from a Ministry counsel to two other Ministry counsel and the client providing comments on three charts. It is labelled confidential. Pages 10185-10203 are versions of the charts and contain comments and suggested changes which the Ministry states were provided by Ministry counsel to the client.

Pages 10238-10239 are e-mails from Ministry counsel to the client and copied to two Ministry counsel. The e-mails contain counsel's comments on a particular matter, and a request for legal advice.

Page 10254 is an e-mail from Ministry counsel to two other Ministry counsel. It forwards a question that was received from the client and was labelled confidential, and requests an answer from counsel.

Pages 10261-10262 is an e-mail from a Ministry counsel to another Ministry counsel. It contains legal opinions and comments, and the initial e-mail is labelled confidential.

Pages 10263-10266: Pages 10263-10264 is an e-mail from a Ministry counsel to the client and copied to two other Ministry counsel. It contains legal opinions and comments, and is labelled confidential. Pages 10265-10266 is an attachment to the e-mail and describes a specific approach.

Pages 10267-10269 are two e-mails from a Ministry counsel to the client and copied to two other Ministry counsel. They contain legal opinions and comments, and are labelled confidential.

Page 10270 is an e-mail from a Ministry counsel to another Ministry counsel and copied to another Ministry counsel. It contains legal opinions and comments.

Pages 10271-10272 is an e-mail from a Ministry counsel to the client and copied to another Ministry counsel. It contains legal opinions and comments, and is labelled confidential.

Pages 10273-10275: Page 10273 is an e-mail from a Ministry counsel to the client and forwards an e-mail from a Ministry counsel to two other Ministry counsel. Pages 10274-10275 consist of an attachment to the e-mail and contains various timelines.

Pages 10283-10287: Page 10283 is an e-mail from one Ministry counsel to another Ministry counsel, and also contains handwritten notes. The e-mail forwards an e-mail from the client to two Ministry counsel and other Ministry staff. Pages 10284-10287 are the attachments to the e-mail and contain briefing notes on the Land Exchange. The Ministry states that the handwritten comments are Ministry counsel notes made on the briefing notes, addressing the advantages and disadvantages of the various options.

Page 10288 is an e-mail from Ministry counsel to two Ministry counsel, and forwards a response to a question received from another Ministry counsel.

Pages 10292-10294: This record is an e-mail from Ministry counsel to another Ministry counsel, copied to another Ministry counsel, and contains legal advice.

Pages 10295-10315: Pages 10295 and 10296 are two e-mails from Ministry counsel to another Ministry counsel regarding a revised draft opinion and various planning issues, respectively. Pages 10297-10315 consist of a document that was attached to page 10296. The Ministry identifies that it was prepared with counsel's input and assistance.

Pages 10326-10328 is an e-mail from Ministry counsel to another Ministry counsel, and forwards another e-mail from counsel.

Pages 10329-10352 is an e-mail from Ministry counsel to the client regarding an identified resolution and a potential court challenge, and includes various attachments.

Page 10358 is an e-mail from Ministry counsel to two other Ministry counsel, discussing an identified briefing.

Page 10376 is an e-mail from Ministry counsel to the client and copied to two other Ministry counsel. It forwards another e-mail from the client and provides a response to the client's request for a legal opinion on an identified matter.

Pages 10377-10382: Page 10377 is an e-mail from Ministry counsel to the client. The e-mail refers to reviewing an identified document, refers to suggested comments and changes to the

document, and is marked "confidential." Pages 10378-10382 is the document referred to in the e-mail and contains the suggested comments and changes.

Pages 10383-10388: Page 10383 is an e-mail from the client to other Ministry staff, is copied to two Ministry counsel, and refers to an attached document and refers to legal advice. Pages 10384-10388 is the document referred to in the e-mail, and contains the comments and changes to the document suggested by Ministry counsel.

Pages 10401-10404 are four e-mails sent from Ministry counsel to the client and/or two other Ministry counsel. The first e-mail contains legal advice and legal opinions; the second was in response to a request for comments; the third provides a revised draft of an opinion; and the fourth comments on the opinion and contains comments and suggestions.

Pages 10425-10449: Page 10425 is an e-mail from Ministry counsel to the client and copied to two other Ministry counsel, and labelled "confidential." The e-mail refers to comments made on identified charts. Pages 10426-10449 are copies of the charts referred to in the e-mail and contain comments and suggestions provided by Ministry counsel to the client.

Pages 10453-10473: Page 10453 is an e-mail from Ministry counsel to two other Ministry counsel, and refers to a request for review and comments. Pages 10454-10473 are copies of certain charts referred to in the e-mail, and contains comments provided by Ministry counsel to the client.

Pages 10474-10476: Page 10474 is an e-mail from Ministry counsel to the client and copied to two other Ministry counsel. It refers to comments made on an identified document. Pages 10475-10476 is a version of the document referred to in the e-mail, and contains comments provided by Ministry counsel to the client.

Pages 10477-10478 are a series of e-mails from Ministry counsel to two other Ministry counsel, forwarding another e-mail that was labelled confidential and addresses a question asked by the client regarding the Land Exchange.

Pages 10479-10483: Page 10479 is an e-mail from the client to another party and copied to Crown counsel. The e-mail forwards another e-mail that attaches a copy of a briefing note and various options for how to proceed with an identified matter. Pages 10480-10483 is the briefing note referred to in the e-mail.

Pages 10499-10503: Page 10499 is an e-mail from Ministry counsel to two other Ministry counsel, requesting a review and response to an attached document received from the client. Pages 10500-10503 is the attachment referred to in the e-mail and contains Ministry counsel's comments.

Pages 10504-10506: Page 10504 is an e-mail from Ministry counsel to another Ministry counsel and copied to another Ministry counsel. It refers to a revision made to a document. Pages

10505-10506 is the attachment from the e-mail and contains Ministry counsel's comments and revisions to the document.

Pages 10507-10511: Page 10507 is an e-mail from the client and copied to several parties including Crown counsel and refers to a document. Pages 10508-10511 is the attachment to Record 10507, and is a legal review of certain issues.

Pages 10514-10515: this record is an e-mail from Crown counsel to two other Ministry counsel, and forwards another e-mail dealing with the Land Exchange and provides legal advice on the matter. The initial e-mail is labelled confidential and mentions questions that arose during an identified meeting.

Pages 10545-10551: Page 10545 is an e-mail from Crown counsel to another Ministry counsel and copied to another Ministry counsel. The e-mail relates to the commencement of the Class EA process. The e-mail requests comments regarding the attachments. Pages 10546-10551 is the attachment from page 10545 requesting any comments from legal.

Pages 10552-10553: This record is an e-mail from Crown counsel to two other Ministry counsel forwarding another e-mail regarding an identified issue. The e-mail refers to discussions that occurred with regards to the issue, and was forwarded to counsel for their information.

Pages 10588-10589: This record is an e-mail correspondence from Crown counsel to two other Ministry counsel forwarding another e-mail that summarized discussions pertaining to the Land Exchange. The e-mail is labelled confidential.

Pages 10590-10591: This record is an e-mail from Crown counsel to another Ministry counsel and copied to another Ministry counsel forwarding other e-mails regarding the positions on the EA for the land exchange.

Pages 10592-10593: Page 10592 is an e-mail from Crown counsel to the client and copied to another Ministry counsel regarding legal opinions and comments regarding a slide deck and *Planning Act* issues. Page 10593 is the attachment to page 10592, and contains recommendations from Crown counsel.

Pages 10606-10616: Page 10606 is a handwritten note from Crown counsel to two other Ministry counsel referring to a version of an identified Slide deck. Pages 10607-10616 is the attachment to page 10606, and contains comments made by the client, and discussed by the author of the note.

Pages 10823-10824 is a memorandum from Crown counsel requesting other counsel to provide a legal opinion with respect to an identified issue.

Page 2: This e-mail was sent by counsel to the client and concerns confidential legal advice regarding drafting.

Pages 8 and 9-19: Page 8 is an e-mail to counsel requesting legal advice on the attached slides. Pages 9-19 are the slides attached to the page 8 e-mail and were the subject of the request for advice.

Page 27: This page is a confidential e-mail from counsel to the client and relates to the formulation of legal advice.

Page 28: This e-mail, sent from a Ministry counsel to outside counsel, and copied to the client, relates to a request for legal advice.

Pages 359-361 contain an e-mail from counsel, providing a confidential legal analysis that was requested of the author.

Pages 362-363 contain an e-mail from counsel providing legal advice regarding certain legislation.

Pages 371-372: This record is an e-mail from Ministry counsel to outside counsel, copied to the client and is part of a request for legal advice.

Page 934 is a copy of an e-mail from Ministry counsel to the client, referring to matters discussed between them.

Pages 935-940: These records are a request by Ministry counsel to outside counsel for a legal opinion, and attaching a legal opinion from Ministry counsel.

Page 958: This record is an e-mail regarding attached slides, and refers in the body of the e-mail to specific advice received from counsel.

Pages 971 and 972-978: Page 971 is an e-mail from counsel to the client, attaching a revised draft of a legal opinion (which are pages 972-978).

Pages 1064-1066 consist of an e-mail from counsel to the client regarding issues discussed and referring to earlier conversations and communications. It includes legal advice relating to the issues.

Pages 1610-1611 consist of an e-mail from counsel to the client regarding a draft document, and it contains legal advice, as well as the client's notes of further legal questions (handwritten on the page).

Page 1813 is an e-mail received by Ministry counsel from the client regarding a meeting, and includes handwritten notations.

Pages 1819-1822 consist of e-mail exchanges between counsel and the client regarding issues discussed and referring to earlier conversations and communications. It includes legal advice relating to the issues.

Pages 1838-1839 consist of an e-mail string between counsel and the client regarding issues that were discussed between them.

Pages 2431, 2432-2438 and pages 2459, 2460-2479: Pages 2431 and 2459 are e-mails from a client to counsel requesting a review of the documents attached to the e-mails.

Pages 2625 is an internal e-mail referring to legal advice sought from Ministry counsel.

I am satisfied that the e-mails and other correspondence listed above are communications between Ministry counsel and their clients (Ministry employees) or other counsel, which contain legal advice or relate directly to the seeking or providing of legal advice.

Although a number of these e-mails or attachments (for example: Pages 10074-10079, Pages 10480-10483) do not contain the actual legal advice, but are part of the continuum of communication between the client and the solicitor, and privilege attaches to those records based on the rationale described above in *Balabel*.

A few of the records also contain handwritten notes (for example, Pages 10283-10287, 10607-10616) These records can be characterized as counsel's working papers directly related to the formulating of legal advice as per *Susan Hosiery*, and therefore meet the requirements of solicitor-client communications privilege. Accordingly, I find that these records also qualify for exemption under section 19.

### ***Handwritten Notes***

The following records contained in the Legal Services Branch files are lawyer's handwritten notes:

Page 10060 is a handwritten note based on a teleconference among parties including a Ministry counsel.

Pages 10061-10064 - these records are handwritten notes based on a meeting among parties regarding the *Environmental Assessment Act*.

Page 10065 is a handwritten note based on a telephone conversation.

Pages 10066-10070 – this record contains handwritten notes based on a telephone conversation, followed by notes based on proceedings at a Cabinet Office meeting. This record identifies issues and areas that Crown counsel must investigate to provide legal advice.

Page 10080 – is a handwritten note based on a conversation and references Cabinet issues.

Page 10086 - is a handwritten note by Ministry counsel regarding a Cabinet meeting.

Pages 10092-10093 – is handwritten notes (two brief notes) written by one Ministry counsel to another Ministry counsel regarding a Cabinet Office slide deck.

Page 10253 is Ministry counsel's handwritten notes based on a telephone conversation with counsel for the Ministry of the Environment, relating to various processes.

Pages 10255 – 10257 is a series of handwritten notes based on a meeting between the Ontario Realty Corporation (the ORC), Management Board Secretariat (MBS), the Land Exchange Team and the Legal Services Branch of the Ministry. The document includes references to items that are to be clarified with the client.

Pages 10276-10280 contain handwritten notes from a meeting between the ORC, MBS, the Ministry of the Environment (the MOE), the Land Exchange Team and the Legal Services Branch of the Ministry. The notes address the advantages and disadvantages of various options and courses of action. The Ministry states that this record constitutes counsel's working papers directly related to the formulating of legal advice.

Pages 10281-102182 contain handwritten notes based on telephone conversations with several MBS counsel relating to the Land Exchange.

Pages 10289 - 10291 contain handwritten notes of telephone conversations with several MBS counsel regarding processes, compliance approaches and severances.

Page 10353 is Ministry counsel's handwritten note based on a telephone conversation with ORC counsel, relating to legal advice.

Pages 10359-10360 contain handwritten notes regarding a deputy Minister's briefing, a meeting between the Ministry and the MOE, and other items.

All of these records, which are contained in the LSB files, can be characterized as Crown counsel's working papers directly related to the formulating of legal advice as per *Susan Hosiery*, and thereby meet the requirements of solicitor-client communications privilege under Branch 1 of section 19. Some of the records (ie: Pages 10092-10093) contain actual notes which were provided from one Ministry counsel to another Ministry counsel, and I find that they also qualify for exemption pursuant to *Descoteaux*, and the test enunciated in *Susan Hosiery*.

***Other Legal Services Branch records:***

Pages 10094-10103 consists of a copy of a slide deck that contains options for fulfilling the legal requirements for the Land Exchange. The Ministry states that the slide deck “was prepared with legal counsel's input and/or review,” and therefore qualifies for exemption under section 19.

On my review of this record, I note that it contains numerous handwritten notations. In the circumstances, I am satisfied that these notations reflect “legal counsel’s input or review,” and that this record qualifies for exemption under Branch 1 of section 19.

Pages 10160-10183 include four copies of charts for identified compliance approaches. Each of these copies contains handwritten notations and suggested changes to the documents. The Ministry states that these handwritten comments were made by Ministry counsel, communicated to the client, and are privileged.

In the circumstances, I am satisfied that these notations reflect “legal counsel’s input or review,” and that these records qualify for exemption under section 19.

Page 10240 is a draft timeline for various actions, including the Land Exchange. The Ministry states that this document was prepared by counsel and given to the client, and that it is related to giving legal advice. It includes a request to the client for further clarification. On my review of this record and the representations, I am satisfied that it contains “legal counsel’s input or review,” and qualifies for exemption under section 19.

Pages 10258-10260 is comprised of a planning and development approval sheet attached to a draft briefing note. It contains numerous handwritten notations which the Ministry identifies were made by legal counsel. One page also contains the request for legal advice. The Ministry states that counsel reviewed the document and a legal opinion was provided. On my review of these records, I am satisfied that they qualify for exemption under section 19.

Pages 10354-10357 consist of a briefing note/Ministry Position Paper. It is marked “confidential” and clearly identifies that it was reviewed by counsel. On my review of this record and the representations, I am satisfied that it contains “legal counsel’s input or review,” and qualifies for exemption under section 19.

Pages 10412-10424 consist of a Cabinet Office decision note which discusses the implications of taking an identified course of action. The Ministry states that it was reviewed by Legal Services Branch and therefore the document is exempt from release. On my review of this record and the representations, I am satisfied that it contains “legal counsel’s input or review,” and qualifies for exemption under section 19.

Pages 10512-10513 - The Ministry states that this record is a synopsis of the steps and/or decisions required to finalize the land exchange, and that pursuant to *Descoteaux* and the test enunciated in *Susan Hosiery*, this document is solicitor-client privileged and should be exempted



from release. On my review of this 2-page record, contained in the Legal Services Branch File, I am satisfied that it qualifies for exemption under section 19. It refers specifically and in detail to various statutory requirements and analysis, and I am satisfied that it contains “legal advice” for the purpose of section 19.

Pages 10564-10573 and 10574-10587:

The Ministry states:

These records are part of a slide deck used in two Cabinet Presentations .... The slide decks were prepared in consultation with legal. Therefore, pursuant to *Descoteaux* and the test enunciated in *Susan Hosiery*, this document is solicitor-client privileged and should be exempted from release.

Other than these representations, and the fact that these pages of records are located in the Legal Services Branch file, there is no additional material supporting the application of the section 19 exemption to these pages of records. On my review of these pages, which are slide decks of presentations, there is nothing on the face of them that supports a finding that they are exempt under section 19. In the circumstances I am not persuaded that these records qualify as either solicitor-client communication privilege or litigation privilege, and I find that section 19 does not apply to them. I will review the possible application of section 12 to these records, below.

Pages 10594-10605:

The Ministry states:

This record is the Cabinet Presentation ... that would have been prepared with Crown counsel input and comments. Therefore, pursuant to *Descoteaux* and the test enunciated in *Susan Hosiery*, this document is solicitor-client privileged and should be exempted from release.

Again, other than these representations, and the fact that these pages of records are located in the Legal Services Branch file, there is no additional material supporting the application of the section 19 exemption to these pages of records. On my review of these pages, which is a slide deck of a presentation, there is nothing on the face of them that supports the application of the section 19 exemption. Again, I am not persuaded that these records are either solicitor-client communication privileged documents or litigation privileged documents, and I find that section 19 does not apply to these records. I will also review the possible application of section 12 to these records, below.

Pages 10783-10785: The Ministry states that this record is a draft position paper with policy options, which was to be presented to Cabinet, and that this document is solicitor-client privileged and should be exempted from release. On my review of this record, contained in the Legal Services Branch file and containing various highlighting, corrections and notations, I am

satisfied that it contains “legal counsel’s input or review,” and that this record qualifies for exemption under section 19.

Pages 10786-10796 and Record 10797-10806: The Ministry states that these records:

... were prepared for the purpose of advising the Minister, Parliamentary Assistants and Deputy Minister. These records are marked as a “Confidentiality Notice” and are also subject to the oath/affirmation of secrecy taken by all OPS staff. Access to the information is a privilege intended to enable staff to provide accurate, consistent and timely information. These records are draft briefing notes regarding [an identified meeting].

The Ministry states that, on this basis, these documents are solicitor-client privileged and should be exempted from release.

On my review of these records, which are contained in the Legal Services Branch file and contain various highlighting, corrections and notations, I am satisfied that they contain “legal counsel’s input or review,” and that they qualify for exemption under section 19.

Pages 10825-10828 and 10829-10831: These records are draft briefing notes regarding a specific compliance approach compared to another approach under the EAA. On my review of these records, contained in the Legal Services Branch file and which include underlining, corrections and specific notations, I am satisfied that they contain “legal counsel’s input or review,” and that they qualify for exemption under section 19.

Pages 10832-10838: This record is a draft version of a chart. On my review of this record, contained in the Legal Services Branch file, and which includes underlining, corrections and specific notations, I am satisfied that it contains “legal counsel’s input or review,” and qualifies for exemption under section 19.

Pages 10839-10845: This record is a draft version of a chart for a specific compliance approach under identified legislation. Again, on my review of this record, contained in the Legal Services Branch file, and which includes underlining, corrections and specific notations, I am satisfied that it contains “legal counsel’s input or review,” and qualifies for exemption under section 19.

Pages 10846-10858, 10859-10869, 10870-10881, 10882-10894, 10895-10908 and 10909-10926: The Ministry states that these records are draft versions of a document which was prepared with Crown counsel input and/or comments. On my review of these draft documents, all of which are contained in the Legal Services Branch file, and which are various drafts of the document, I am satisfied that these drafts contain “legal counsel’s input or review,” and that they qualify for exemption under section 19.

## **CABINET RECORDS**

The Ministry has relied on the introductory wording of section 12(1), as well as the exemptions in sections 12(1)(b), (c) and (e) to deny access to numerous records. These sections 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,

- (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;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

Previous decisions of this office have established that the use of the word “including” in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [See Orders P-361, P-604, P-901, P-1678, PO-1725].

### **Representations**

The Ministry makes lengthy representations regarding how the section 12(1) exemption ought to be interpreted. After setting out the exemption, the Ministry states:

While only the introductory portion of subsection 12(1) and clauses 12(1)(b), (c) and (e) are at issue on this appeal, [the Ministry] believes it is important to set out

the whole section in order to properly interpret the relevant clauses in the appropriate context. Prior to making submissions in relation to particular documents, [the Ministry] feels it would assist the IPC for [the Ministry] to provide an overview of this section as a basis for the reasons why the documents detailed below are exempt from disclosure.

*Subsection 12(1): Introductory Wording*

Subsection 12(1) sets out a broad exemption in its opening words and then proceeds to set out, clauses (a) through (f), specific instances of this exemption. As stated in Order PO-2160:

It has been determined in a number of previous orders that the use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of 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-3311].

Order PO-2160 also notes that it is not required that a record itself has been before Cabinet for s. 12(1) to apply:

It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-5061].

*Clause 12(1)(b): Policy Options or Recommendations*

To qualify for the exemption under clause 12(1)(b), a record must meet two criteria: it must contain specific policy recommendations and these must have either actually come before Executive Council or have been prepared for that purpose (Order P-73).

*Clause 12(1)(c): Background Explanations or Analyses of Problems and*

*Clause 12(1)(e): Record Prepared to Brief a Minister*

There exist previous orders of the Commissioner which have held that clauses 12(1)(c) and 12(1)(e) are prospective in their application. This is to say that the

provisions do not apply in cases where decisions have already been made and implemented. Order P-604 analyzes this issue, stating:

Previous orders issued by the Commissioner's office have held that sections 12(1)(c) and (e) are intended to apply to records which either have been considered or are about to be considered by Executive Council or its committees in situations where final decisions respecting the subject of the deliberations have not yet been made or implemented. The exemptions are not meant to apply to documents which have already been acted upon by these bodies (Orders 60, 73 and P-323).

Order P-323, referenced in Order P-604 contains a single sentence in respect of this issue: "At the outset, I note that sections 12(1)(c) and (e) are prospective and not intended to apply once decisions have been made and implemented (Orders 60 and 73)."

Notably, Order 73, referenced in both Order P-604 and Order P-323 as support for the proposition that 12(1)(c) and (e) are prospective, actually concerns only clause 12(1)(b) and has *no* analysis relating to prospectivity.

Finally, Order 60, also referenced in both Order P-604 and Order P-323, considers *only* clause 12(1)(c), not clause 12(1)(e). Clause 12(1)(c) is interpreted in Order 60 as follows:

I share the concerns raised by the appellant regarding an institution possibly taking too broad an interpretation of the words "background explanations or analyses" used in subsection 12(1)(c) of the *Act*. In my view, to meet the requirements of this subsection, an institution must establish that a record contains background explanations or analyses, and that the record itself was submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions. The subsection does not properly apply, in my view, unless the matter at issue is actively under consideration or is clearly scheduled for consideration by Cabinet or one of its committees. Also, the protection provided by the subsection is not open-ended; the institution is precluded from relying on this exemption after the decision at issue has been made and implemented.

Clause 12(1)(e) has been the subject of an order which engaged in an analysis of the provision and found that it was not prospective. In Order 22, the IPC held:

I accept the appellant's argument, and find that the record at issue does not fall within the exemption provided by subsection 12(1)(e). The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

This analysis is also cited in Order P-1182.

While there are a number of orders which have held that these clauses are prospective in nature, they have merely cited previous decisions for this proposition, some of questionable relevance and only the earliest of which actually engaged in an analysis of the provision itself. Further the only basis for the conclusion that the clause 12(1)(e) is prospective is the "use of the present tense in the subsection." It is submitted that this refers to the phrase "are before or are proposed to be brought before" in clause 12(1)(e). No real rationale appears to be provided in any of the orders cited for the proposition that clause 12(1)(c) is prospective, but presumably this conclusion hinges on the use of the phrase "before those decisions are made and implemented" at the end of the clause.

Therefore, [the Ministry] respectfully requests that the Commissioner reconsider the issue of whether clauses 12(1)(c) and 12(1)(e) do operate prospectively. It is [the Ministry's] submission that the two provisions ought to apply in cases where decisions have already been made and implemented.

In interpreting a statute and its provisions, the Supreme Court of Canada has adopted the following principle from Driedger's *Construction of Statutes*, 2nd ed. (see para. 21 of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998]1 S.C.R. 27):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Also relevant to the issue of statutory interpretation is section 10 of the *Interpretation Act*, R.S.O. 1990, c. I.11 which states:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

With respect to clause 12(1)(c), the use of the phrase “before those decisions are made and implemented” could be interpreted as implying that the clause is meant to be prospective if it is read as referring to the phrase “to the Executive Council or its committees for their consideration in making decisions.” However, the “before” phrase could also be read as referring to the phrase “that does contain background explanations or analyses of problems submitted, or prepared for submission,” in which case clause 12(1)(c) would not be prospective in nature, rather it would apply even where a decision had been made and implemented, so long as the records in question were prepared before the decision was made and implemented.

[The Ministry] submits that the latter interpretation in the above paragraph is the more appropriate one. As a grammatical matter, the relevant portion of s. 12(1)(c) (that is to say the part after records captured by s. 12(l)(b) are excluded) contains three clauses. They are:

1. “(a record) that does contain background explanations or analyses of problems submitted, or prepared for submission”;
2. “to the Executive Council or its committees for their consideration in making decisions”; and
3. “before those decisions are made and implemented.”

Clause 1 is a dominant clause that could exist on its own (i.e., s. 12(1)(c) could end with the word submission and still make grammatical sense). Clauses 2 and 3 are subordinate clauses which make sense only in relation to another clause which they reference. Clearly, clause 2 describes clause 1 (i.e., to whom the record is or is to be submitted). Clause 3, coming after both clauses 1 and 2, could be read as describing either. [The Ministry] submits though that in an ambiguous situation such as this, the more appropriate approach would be to read a subordinate clause as modifying a dominant clause, rather than another subordinate clause.

The rules of statutory interpretation also mandate considering the context in which clause 12(1)(c) is located in interpreting that provision. In particular, [the Ministry] submits that reference must be had to subsection 12(1) as a whole. There is nothing in the opening words to subsection 12(1) that implies that a temporal restriction exists in respect of this exemption. Further, most of the specifically enumerated instances of the exemption apply with equal force before and after decisions have been made and implemented. For instance, clause 12(1)(a), “an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees,” would make no sense if it applied only before decisions had been made and implemented. Given that as a general proposition, there is no temporal restriction in subsection 12(1), one should not be read into any of the clauses (a) through (f) unless the wording of those clauses clearly indicates that the Legislature intended such a restriction to apply. In [the

Ministry's] submission, such an intention cannot be discerned on the face of the words in clause 12(1)(c).

The Ministry then refers to the purposes of the *Act* set out in section 1, and states:

While the objects of the *Act* then provide that "necessary exemptions" should be "limited and specific" this cannot, in [the Ministry's] submission, justify giving a meaning to a provision that is not favoured by its words or the context in which those words are used. Further, the exemption in subsection 12(1) is already "limited" by virtue of the internal limitation contained in clause 12(2)(a). As well, the interests of specificity are served best by interpreting clauses (a) through (f) in s. 12(1) broadly, so as to minimize the need to resort to the broad exemption in the introductory words to subsection 12(1). Finally, while not explicitly stated in the purposes section of the *Act*, in enacting the *Act*, it was clearly still a purpose of the Legislature to continue to protect government decision-making. In particular, it seems apparent that the Legislature intended to maintain the sanctity of the Executive Council and this is reflected in the fact that section 12 contains a mandatory exemption whereas the majority of the exemptions contained in the *Act* are discretionary. In this light it should be noted as well that subsection 1(a)(ii) of the *Act* refers to necessary exemptions as those which should be limited. It is [the Ministry's] submission that the use of "necessary" in this context relates to the fact that most of the exemptions in the *Act* are discretionary and it will not always be necessary that these be applied, even where a record might otherwise fit within an exemption in the *Act*.

With respect to clause 12(1)(e), [the Ministry] submits that the provision should not be interpreted so as to only apply prospectively. While clause 12(1)(e) does use the present tense verb "are" with reference to the matters in question, the provision also uses the past tense verb "prepared" to refer to the record in question. At the very least then, the tense of the clause alone cannot be relied upon to interpret the provision prospectively. The use of "are" could imply that the matter in question must be before Cabinet or the subject of consultations at the time the access request is made. However, the use of "are" could also mean that the matter in question must be before Cabinet or the subject of consultations at the time the record is prepared.

As with the submissions above in respect of clause 12(1)(c), [the Ministry] submits that clause 12(1)(e) should properly be interpreted so as to apply irrespective of whether decisions have already been made and implemented. While there is some ambiguity in the use of "are", given that clause 12(1)(e) refers to the preparation of the record and not the making of the access request, [the Ministry] submits that the provision should apply where the matter in question is before Cabinet or is the subject of consultations at the time the record is prepared.



The interpretation urged by [the Ministry] accords best with the principles of statutory interpretation outlined above. In an ordinary and grammatical sense, it is logical to read “are” in relation to the words that are in the provision, namely “prepared”, rather than words that are not there, namely any reference to the making of the request. This interpretation is also consistent with deriving the meaning of “are” from the entire context. This means not just the context of the use of the past tense “prepared”, but also the context of the entire subsection 12(1) which, as explained above in reference to clause 12(1)(c), contains no temporal restrictions.

In interpreting clause 12(1)(e) it is also useful to consider section 4 of the *Interpretation Act*. This section states, “The law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning.” As a result of this section, it is an error to rely exclusively on verb tense when interpreting a statute. Sullivan notes in *Driedger on the Construction of Statutes*, 3rd ed. that:

Another pitfall to avoid is attaching inappropriate significance to the tense of the verbs used in legislation. Generally, legislative drafters use the present tense. This is in keeping with the rule that a statute is always speaking and inferences concerning temporal application should not be drawn from the use of this tense.

Finally, in interpreting clause 12(1)(e) regard must again be had to the objects of the Act and the intention of the Legislature. [The Ministry] submits that its representations above in respect of the objects of the Act and the intention of the Legislature in respect of clause 12(1)(c) apply equally in respect of clause 12(1)(e).

On the basis of forgoing analysis, [the Ministry] respectfully requests that the Commissioner’s interpretation of clauses 12(1)(c) and 12(1)(e) be reconsidered. [The Ministry] submits that the conclusion of past orders that these provisions are prospective in their application and do not apply in cases where decisions have already been made and implemented should not be applied. [The Ministry’s] document-specific representations will be made on this basis.

The Ministry states that, even if I decide that clauses 12(1)(c) and 12(1)(e) are prospective in nature, these clauses are still applicable to the records at issue, on the basis that Cabinet’s deliberations have not been fully implemented. The Ministry submits that, while a decision has been made as to what category of environmental assessment is to apply to the lands, the assessment process is not yet complete, and there is still a possibility that a different level of assessment will be implemented. The Ministry also states that the Land Exchange itself has yet to be completed, and that the level of environmental assessment was an ancillary decision to the

land exchange. Because of that, the Ministry states that even if clauses 12(1)(c) and 12(1)(e) are prospective in nature, they still apply to the records at issue in this appeal.

The appellant's representations do not directly address this argument from the ORC.

### *Analysis/Findings*

In Order PO-2554 I addressed arguments that were very similar to those raised by the Ministry regarding the proper interpretation of section 12(1). In that order, the Ontario Realty Corporation (the ORC) also argued that section 12(1)(e) ought not to be read prospectively. Interestingly, in that order, the ORC referred to the specific prospective wording contained in section 12(1)(c), and argued that, because the wording in section 12(1)(c) was clearly prospective, section 12(1)(e) ought not to be interpreted as only applying prospectively. The ORC also referred to a number of the authorities relied on by the Ministry.

In Order PO-2554, I examined the arguments put forward by the ORC, and found as follows regarding the proper interpretations of section 12(1)(e):

In Order P-1182, former Assistant Commissioner Tom Mitchinson confirmed the approach taken by this office to the application of the exemption in [section 12(1)(e)], and stated:

In Order 131, former Commissioner Sidney B. Linden held that in order to qualify for exemption under this subsection, the record itself must have been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; or,
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

In Orders 22 and 40, Commissioner Linden, in addressing the proper interpretation to be placed on the wording of section 12(1)(e), held that:

The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

In my view, the use of the word “are” in that portion of the section which discusses consultations among ministers also precludes the application of section 12(1)(e) to a record which has been, but is no longer, the subject of consultations among ministers.

The former Assistant Commissioner then applied this approach to the records at issue in that appeal.

In Order P-1205, Former Assistant Commissioner Mitchinson again considered whether records, which in that appeal consisted of draft and final versions of an “Information Sheet” which accompanied draft regulations being considered by the Legislation Committee of Cabinet, were exempt under section 12(1)(e). The former Assistant Commissioner re-stated the requirements for this section as set out in Orders 22, 40 and 131, and found that the records did not qualify for exemption under section 12(1)(e), because “these records have either already been presented to and dealt with by Cabinet or are no longer the subject of ongoing consultations among Ministers.”

However, the Assistant Commissioner went on to determine that portions of the records qualified for exemption under the introductory wording of section 12(1), as their disclosure would reveal the contents of records which qualified for exemption under the introductory wording of that section. On that basis, he found that the records were properly exempt pursuant to the introductory wording of section 12(1) of the *Act*.

I choose to apply the approach to the section 12(1)(e) exemption established by the former Assistant Commissioner for the purposes of this appeal.

The thrust of the ORC’s position is that, as the wording of section 12(1)(c) specifically includes a temporal limit, and the wording of section 12(1)(e) does not, the ORC argues that, based on the principle that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of the enacting legislature, that section ought not to be read as containing a temporal limit. However, on my review of this section, in light of the wording of section 12(1) as a whole, and in keeping with previous orders of this office, I do not accept the position taken by the ORC.

Section 1 of the *Act* sets out the purposes of the *Act*, which includes: to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific,

In addition, in the context of this discussion, I find it helpful to review all of section 12(1) to place the various subsections referred to in context. Section 12(1) reads:

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;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

In my view, the specific records described in sections 12(1)(b) and (c), and the relationship between sections 12(1)(b) and (c), make them distinct from the records described in section 12(1)(e). Sections 12(1)(b) and (c) apply to actual records submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions. Furthermore, those sections state that the policy options or recommendations are exempt and remain exempt after a decision is made (section 12(1)(b)), but that the background

explanations or analyses of problems, although exempt before those decisions are made and implemented, are not exempt after that event occurs. In my view, it is significant that these sections apply directly to the actual records submitted, or prepared for submission, to the Executive Council or its committees. The section 12(1)(e) exemption describes a different type of record from the type of record identified in section 12(1)(b) and (c).

The exemption in section 12(1)(e) specifically refers to a record “prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers ...” This type of record is, by its nature, prepared in advance of the meetings referred to in section 12(1)(e). The premature disclosure of these sorts of records, although not necessarily caught by the introductory wording of section 12(1), would result in the disclosure of information before or proposed to be brought before Executive Council or its committees. In my view this is precisely the reason why subsection 12(1)(e) included these specific types of records within section 12(1). However, once a record has been presented to and dealt with by the Executive Council or its committees, it may or may not fall within the introductory wording of section 12(1). The necessity for the prospective language found in subsection 12(1)(e) is no longer required. Accordingly, the outcome of interpreting section 12(1)(e) in the manner in which it has been interpreted in previous orders is, in my view, consistent with a proper interpretation of this section read as a whole.

In particular, I find that the interpretation of section 12(1)(e) which has been applied in previous orders is one that accords with the modern rule of statutory interpretation as articulated by R. Sullivan in *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pp. 1 and 3:

... [I]n the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo and Rizzo Shoes Ltd.* [[1998] 1 S.C.R. 27 at 41].

...

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

*(a) Plausibility or Compliance with Legislative Text*

As identified by Senior Adjudicator John Higgins in his recent Order MO-2154, *Driedger* states (at p. 123) that to be a plausible interpretation it “must be one that the words of the text can reasonably bear.” In my view, for the reasons set out above identifying the context of section 12(1)(e) within section 12(1), the interpretation of section 12(1)(e) applied in previous orders as set out above is one that the words of the text can reasonably bear.

I also make this finding having regard to the specific wording of section 12(1)(e). In Order PO-1182 former Assistant Commissioner Mitchinson stated that the use of the present tense, namely the word “are” in that portion of the section which discusses consultations among ministers, precludes its application to a record which is no longer the subject of consultations among ministers. In my view, this approach appropriately interprets section 12(1)(e) to give meaning to the specific wording of that section and its inclusion of the word “are” in that portion of the section. It also distinguishes it from the wording in section 12(1)(b) and (c), which do not include that wording.

*(b) Promotion of Legislative Intent*

Section 1 of the *Act* provides some context for the interpretation of the language used in section 45(1)(c) and in the Regulations. Section 1 states:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and

- (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 1 makes it clear that the intent of the Legislature in enacting the *Act* is that government information should be available to the public, subject only to limited and specific exemptions.

The interpretation of section 12(1)(e) advanced in previous orders clearly accords with the purpose of the *Act* that “necessary exemptions from the right of access should be limited and specific.” This is particularly evident given the overall wording of section 12(1) in which, as identified in previous orders, the various subsections of section 12(1) are merely types of records to which section 12(1) applies. In that regard, whether or not the various subsections (including subsection 12(1)(e)) apply, if the disclosure of a record would reveal the substance of deliberations of the Executive Council or its committees, the record is exempt under the introductory wording of section 12(1).

*(c) Outcome must be Consistent with Legal Norms and Reasonable and Just*

In the *Driedger* text quoted above, Ruth Sullivan discusses the meaning of “legal norms” and indicates, at p. 2, that “[t]heir primary source ... is the common law.” As well as conforming with such norms, the outcome must be reasonable and just.

In my view, the interpretation of section 12(1)(e) advanced in previous orders is not inconsistent with legal norms, and the outcome of such an interpretation is, in my view, reasonable and just. As identified above, the exemption in section 12(1)(e) specifically refers to a record which is, by its nature, prepared in advance of the meetings referred to in section 12(1)(e). The premature disclosure of these sorts of records would result in the disclosure of information before or proposed to be brought before Executive Council or its committees. However, once a record has been presented to and dealt with by the Executive Council or its committees, the introductory wording of section 12(1) may apply to it, if in fact the disclosure of the record would reveal the substance of deliberations of the Executive Council or its committees. Again, the result of interpreting section 12(1)(e) in a prospective manner (as done in previous orders) is, in my view, consistent with legal norms, reasonable and just.

As a result, in my view the approach to the section 12(1)(e) exemption taken in previous orders correctly states that the use of the present tense in the section precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

I adopt the above approach to the interpretation of section 12 for the purposes of this appeal. In my view the approach to the section 12(1)(e) exemption taken in previous orders correctly states that the use of the present tense in the section precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees. In addition, for the reasons set out above, I reject the Ministry's position that section 12(1)(c) is not prospective. Applying the principles set out above, including those set out in *Driedger on the Construction of Statutes*, I am satisfied that, in order to qualify for exemption under section 12(1)(c), a record as described in that section can only qualify for exemption before the time that the referenced decisions by Executive Council or its committees are made and implemented.

Having come to this conclusion, I find that none of the records at issue fall within the exemptions in sections 12(1)(c) or (e), as all of these records were prepared and submitted prior to having been dealt with by the Executive Council or its committees. I also do not accept the Ministry's alternative argument that, although these records may have been dealt with by the Executive Council or its committees, the exemptions in sections 12(1)(c) and/or (e) still apply because the decisions made may not yet have been fully implemented.

However, I must still determine whether any portions of the records qualify for exemption under the introductory wording of section 12(1).

### ***Legal Services Branch Files***

Pages 010564-010573 and 010574-010587

The Ministry identifies that these records are part of a slide deck used in two Cabinet Presentations. On my review of these records, and noting that they were used in two Cabinet Presentations, I am satisfied that they qualify for exemption under the introductory wording of section 12(1), as their disclosure would reveal the substance of deliberations of the Executive Council at those Cabinet meetings.

Pages 10594-10605

The Ministry states that this record is a Cabinet Presentation made on a specified date. On my review of the record, and considering the fact that it consists of a Cabinet Presentation, I am satisfied that it qualifies for exemption under the introductory wording of section 12(1), as its disclosure would reveal the substance of deliberations of the Executive Council or its committees.



*General File*

Pages 3-7

The Ministry states:

... this record is a decision note, which, as noted on the cover, was requested by or for the Minister so as to brief him as to the next steps required in the land exchange and obtain direction as to how to proceed. The substance of the note provides an extensive analysis of issues before Cabinet with respect to the environmental assessment.

The Ministry therefore submits that the exemptions in clauses 12(1)(c) and 12(1)(e) attach to this record. In the alternative, the Ministry submits that this record is captured by the introductory wording of subsection 12(1) as it reveals the substance of the deliberations of Cabinet.

I find that this record contains detailed briefing points on the land exchange, including directions as to how to proceed. Based on the information provided by the Ministry and my review of its contents, I am satisfied that the introductory wording of section 12(1) applies to pages 3-7 because the disclosure of those pages would reveal the substance of the deliberations of Cabinet.

Pages 20-26

This record is an information note that was prepared to brief the Deputy Minister, who would in turn brief the Minister in relation to a matter which was the subject of deliberations amongst members of Cabinet. Further, parts of pages 22 and 23 of this record refer explicitly to, and summarize, earlier Cabinet deliberations and decisions. The Ministry submits that the disclosure of this note would substantially reveal the deliberations of Cabinet with respect to identified options, and that the opening words of section 12(1) apply to exempt it from disclosure.

On my review of this note, I am satisfied that it contains much information which was the subject of deliberations of Cabinet, as it contains a summary of various decisions made and the reasons for the decisions. Portions of this record also refer to legal advice received from counsel, as well as advice or recommendations made by staff. Accordingly, I am satisfied that the introductory wording of section 12(1) applies to pages 20-26 because their disclosure would reveal the substance of the deliberations of Cabinet.

Page 182

The Ministry submits that the introductory wording of subsection 12(1) applies to exempt this record, which consists of the speaking notes of a Minister to a Committee of Cabinet. On my review of this record and the Ministry's representations, I am satisfied that it qualifies for exemption under the introductory wording of section 12(1).

Pages 209-236

According to the Ministry, this record is a comprehensive examination of policy options which reveals in detail the substance of what was deliberated upon by Cabinet with respect to the environmental assessment issue. The Ministry submits that the introductory wording of subsection 12(1) applies to exempt this record.

I have carefully reviewed pages 209-236, which consist of a comprehensive examination of various options. However, on my review of these pages, I find that, with one exception, they do not qualify for exemption under section 12(1) of the *Act*. This record identifies the requirements, processes, and pros and cons for the various options, and also includes some questions and answers. In my view, none of this information would reveal the substance of the deliberations of Cabinet or its committees. Accordingly, I am not satisfied that these pages qualify for exemption under section 12(1).

The one exception is the information contained on page 232, which consists of a series of comments on a slide deck. In the circumstances and consistent with my findings on other similar records, I am satisfied that the introductory wording of section 12(1) applies to this page.

In addition, the Ministry submits that pages 1655-1662 are an appendix to the record at pages 209-236. The Ministry submits that the same analysis claimed for pages 209-236 also applies to this record. On my review of pages 1655-1662, I note that they contain various timelines for different options. In accordance with my finding on the application of section 12(1) to pages 209-236, I am not satisfied that pages 1655-1662 qualify for exemption under section 12(1).

Accordingly, I find that records 209-231, 233-236, and 1655-1662 do not qualify for exemption under section 12(1).

Pages 332-334

The Ministry states:

This record is a slide deck prepared by the Ministry of the Environment that states on its cover page that it was prepared for submission to Cabinet. The deck provides a background explanation and analysis of the land exchange and particularly of the environmental assessment issue. Ministry submits that clause 12(1)(c) therefore applies to exempt this record from release or in the alternative, the introductory wording of subsection 12(1) applies.

I have reviewed this record, which contains information relating to the land exchange, but little in the way of background analysis. Based on the contents of the record and the Ministry's representations, I am satisfied that it was prepared for submission to Cabinet, and that its disclosure would reveal the substance of deliberations of Cabinet. It therefore qualifies for exemption under the introductory wording of section 12(1) of the *Act*.

Pages 335-336

The Ministry indicates that this record is an e-mail prepared by Cabinet Office and that its disclosure would reveal the substance of Cabinet's deliberations. On my review of this record, I am satisfied that it reveals the substance of Cabinet's deliberations, and qualifies for exemption under the introductory wording of section 12(1).

As I noted above, the record at page 1062 is a duplication of the record at pages 335-336, and page 1062A are notes made on the back of that document, reflecting comments on the document. The Ministry submits that page 1062A is exempt from disclosure for the same reasons given above with respect to the record at pages 335-336. I accept that page 1062A also qualifies under section 12(1) for the same reasons as set out above.

Pages 388-390

The Ministry states:

This record is a slide deck concerning the land exchange. It contains a summary of a matter that was the subject of deliberations amongst Cabinet members and a policy recommendation. [The Ministry] therefore submits that clauses 12(1)(b) and 12(1)(e) and/or the introductory wording of subsection 12(1) apply to exempt the record from disclosure.

On my review of this record and the Ministry's representations, I am satisfied that it contains much information which was the subject of deliberations of Cabinet, as it contains a summary of various decisions made and the reasons for the decisions. Portions of this record also refer to advice or recommendations made by staff, and I am satisfied that the introductory wording of section 12(1) applies to these pages.

Pages 941-942

The Ministry states:

This record is a table providing a summary of policy options. The record would reveal the substance of the deliberations of Cabinet since evaluating the merits of each option before making a decision as to which type of environmental assessment to undertake was a significant part of the deliberations which occurred. [The Ministry] submits that the opening words of subsection 12(1) apply to exempt the record from release.

On my review of this record, it contains detailed analysis of the various options, including specific comments about the merits and drawbacks of the options. I am satisfied that it contains much information which was the subject of deliberations of Cabinet, and that the introductory wording of section 12(1) applies to these pages.

Pages 943-945

The Ministry states:

This record represents correspondence from an individual at the Ontario Realty Corporation to an individual with the Ministry of the Environment, commenting on a draft of the slide deck [the Ministry of the Environment] was preparing at the time for Cabinet (see record at pages 332-334). The release of this record would disclose some of the deliberations of Cabinet and thus [the Ministry] submits that this record should be protected by the introductory words of subsection 12(1).

I have found that the slide deck referred to (pages 332-334) qualifies for exemption under section 12(1). In the circumstances and based on the nature of the comments on pages 943-945, I am satisfied that these pages also qualify for exemption under section 12(1), as they specifically refer to much of the information contained on pages 332-334.

Pages 1460-1471 and 1970-1981

With respect to pages 1460-1471, the Ministry states:

This record is a slide deck which states on its covering page that it was prepared to brief the Chair of the Management Board Secretariat (a member of the Executive Council). This slide deck provides a list of policy options in relation to the land exchange that were the subject of consultations and deliberations between Cabinet members. On this basis, [the Ministry] submits that clauses 12(1)(b) and 12(1)(e) apply to exempt this record. In the alternative, [the Ministry] submits that the opening wording of subsection 12(1) applies to exempt this record, since its release would reveal the substance of the deliberations of Cabinet.

The Ministry's representations regarding pages 1970-1981 claim that:

This record is a slide deck which states on its covering page that it was prepared to brief the Chair of the Management Board Secretariat (a member of the Executive Council). Much of this deck contains background information which is not otherwise responsive to the request. Pages 1977 to 1981 pertain to the environmental assessment issue and provide a survey of some of the available options. It is explicit on the face of these pages that multiple members of the Executive Council were, at the time, consulting on the matter and that the options outlined were intended to be the subject of future deliberations of Executive Council. Therefore [the Ministry] submits that this record is exempt from disclosure through the application of clause 12(1)(e). Alternatively it is [the Ministry's] submission that the opening words of subsection 12(1) protect the record from release.

I have carefully reviewed these records, which are both slide decks but which also include some written notations on them. But for the handwritten notations, these records are identical to two records which I examined in Order PO-2554. In that Order, I made the following finding regarding these records, which were identified as Records 5 (identical to pages 1970-1981) and 6 (identical to pages 1460-1471):

On my careful review of Records 5 and 6, I find that Record 5, and pages 1 through 6 of Record 6, contain what I would describe as background information regarding the subject matter of these records. Pages 7 through 12 of Record 6, however, contain specific comparisons and recommendations regarding the subject of Record 6.

... On the basis of the information provided by the ORC in support of the application of the introductory wording in section 12(1) to Records 5 and 6, I am also satisfied that the introductory wording of section 12(1) applies to pages 7 through 12 of Record 6, because the disclosure of those pages would also reveal "the substance of the deliberations of the Executive Council or its committees".

However, regarding the remaining pages of Record 6 and the information contained in Record 5, I have not been provided with sufficient evidence to establish that these portions would "reveal the substance of the deliberations of the Executive Council or its committees". These pages appear to be more in the nature of background and factual information relating to the issues, and the ORC has not provided sufficient evidence to satisfy me that these pages qualify for exemption under section 12(1).

In this appeal, the Ministry has claimed that the exemptions in section 12(1)(b), 12(1)(e) and the introductory wording apply. On my review of these records and the representations of the Ministry, I find that my analysis in Order PO-2554 similarly applies. Pages 1970-1981 and 1460-1465 contain information that is more in the nature of background and factual information relating to the issues, and an identification of the options. Pages 1466-1471 contain an analysis and specific comparison of the options. Due to the nature of these latter pages, I find that they would reveal "the substance of the deliberations of the Executive Council or its committees." I am not satisfied, however, that pages 1460-1465 and 1970-1981 would reveal that sort of information, given the nature of the information which they contain.

Accordingly, I find that pages 1460-1465 and 1970-1981 do not qualify for exemption under section 12(1).

Pages 1558-1560

As identified above, much of this record is non-responsive to the request. The Ministry takes the position that one portion of this record (one sentence on page 1559) is exempt from disclosure under section 12(1) as it would reveal the substance of the deliberations of Cabinet. On my review

of this sentence, I am satisfied that it contains information which was the subject of deliberations of Cabinet, and that the introductory wording of section 12(1) applies to it.

Pages 2296-2298

This record is comprised of a series of e-mails that are all part of the same conversation. The Ministry claims that if disclosed, this e-mail conversation would reveal the substance of Cabinet's deliberations regarding the environmental assessment issue, and therefore submits that the introductory wording of subsection 12(1) applies to it.

I do not entirely agree. Page 2296 and the first three e-mails on page 2297 simply reflect administrative and scheduling details of Ministry staff. Disclosure of this information would not reveal information that is the subject of the deliberations of Cabinet or its committees. The fourth e-mail is somewhat different in character and, in my view, its disclosure would reveal information that is the subject of the deliberations of Cabinet. The final e-mail on pages 2297 and 2298 seeks clarification on a direction which has been given, but its disclosure would not reveal information that is the subject of the deliberations of Cabinet or its committees. Accordingly, I find that only portions of page 2297 and the top of page 2298 are exempt under the introductory wording of section 12(1).

### **Summary**

Accordingly, I find that Records 209-231, 233-236, 1460-1465, 1655-1662, 1970-1981 and portions of pages 2296-2298 do not qualify for exemption under section 12(1).

## **ADVICE OR RECOMMENDATIONS**

### **Introduction**

The Ministry takes the position that many of the records or portions of records remaining at issue qualify for exemption under section 13(1) of the *Act*, 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.

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 [2005] 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 [2005] 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

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, 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.)]

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

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

### **Representations**

The Ministry refers to the purpose of the section 13(1) exemption, and to some of the previous orders which have applied this exemption. The Ministry also takes the position that none of the exceptions to the exemption found in section 13(2) apply in the circumstances. The Ministry also states:

For the purpose of this appeal, an important decision had to be made concerning the appropriate category of environmental assessment for the lands.... The

records for which [the Ministry] relies on subsection 13(1) disclose the views, advice and recommendations of various stakeholders and interested ministries within the government leading up to the making of that decision.

[The Ministry] submits that the records [for which the exemption is claimed] are within the ambit of section 13. They are the key documents containing the various options, advice and recommendations, advantages and disadvantages that were put before government decision-makers at a critical decision-making time. If the records created by public servants were not protected from release in the context of this very sensitive transaction, public service employees would not be able to freely and fulsomely communicate their analysis and advice in the future, which would greatly diminish the effectiveness of an independent public service.

The Ministry then provides specific, detailed representations regarding the application of this exemption to each of the records for which it is claimed. I will review these records in light of the representations of the parties, and the approach to the section 13(1) exemption taken in previous decisions of this office, as set out above.

### *Analysis and findings*

Pages 33-38

The Ministry takes the position that this record includes “Key Messages” and “Questions and Answers” regarding the environmental assessment process which was not made public. It submits that pages 33-38 were prepared by public servants to provide the Minister with an understanding of staff recommendations and also to provide advice in the form of proposed answers to hypothetical questions. The Ministry states that the record contains “more than mere information or facts,” and that disclosure would disclose or permit the drawing of accurate inferences as to the nature of the recommendations of public servants.

On my review of this record, including the cover letters which deal with it, I am not persuaded that it qualifies for exemption under section 13(1). This record was not created as part of a deliberative process of government decision-making and policy-making and does not suggest a course of action. Rather, this record appears to have been prepared for public dissemination and contains factual or background information for the Minister relating to decisions already made (see Order PO-2344). Accordingly, I am not satisfied that it contains information which qualifies for exemption under section 13(1).

Page 39

This Record is an e-mail between various public servants attaching a copy of the Q and A (see pages 33-38). The Ministry states that the record reveals a public servant’s suggested course of action in preparation of advice for the Minister. On my review of this record, I am satisfied that it discloses a suggested course of action that could be accepted or rejected during a deliberative



process, and that it contains “advice or recommendations” for the purpose of section 13(1). It is, accordingly, exempt under that section.

Pages 209-236

These Records, which include Tables of Options Analysis, “Questions and Answers” and Minister’s Briefing Material deal with the environmental assessment issue. I found above that page 232 is exempt under section 12(1) and I will not consider this page further.

According to the Ministry, pages 209-213, 216-225, 227-230 and 234 consist of Tables which contain suggestions about particular approaches to take and courses of action to follow with respect to the environmental assessment process. The Ministry states that the Tables were created to provide the Minister with advice during the deliberative process regarding the appropriate environmental assessment process. The Ministry notes that these charts were prepared when the decision about the approach towards environmental assessment was being considered. Thus, the Ministry submits that the information contained in these pages constitutes advice and recommendations. Pages 209-213, 216-225, 227-230 and 234 identify the various requirements, processes, and pros and cons for the various options. Page 234 provides a comparative look at two of the options. I find that none of these pages include any advice or recommendations regarding a particular option; rather, I find that the information is factual in nature, or simply sets out the various options. Accordingly, I find that these pages do not qualify for exemption under section 13(1).

Pages 214-215, 226 and 231 consist of “Questions and Answers.” The Ministry states that these pages were prepared by public servants to provide the Minister with an understanding of staff recommendations and provide advice in the form of proposed answers to hypothetical questions. The Ministry’s position is that these pages contain more than mere information or facts and disclosure of them would disclose or permit the drawing of accurate inferences as to the nature of the recommendations. However, I find that, similar to my findings for pages 33-38 above, I am not persuaded that these pages qualify for exemption under section 13(1).

According to the Ministry:

Page 233 consists of a public servant’s advice to the Minister regarding a specific EA approach versus another specific EA approach, interwoven with factual information. The information was used by the Minister within the deliberative process of government decision making to determine a course of action. Further, Orders P-24, P-48, P-92, P-160, P-278, P-356, M-69 and P-920 have held that where factual 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. [The Ministry] submits that the information cannot reasonably be severed without permitting the drawing of accurate inferences as to the nature of the advice.

On my review of page 233, I am not persuaded that it contains advice or recommendations. The information on page 233 does not indicate the intended recipient, nor does it contain any advice or recommendations. Rather, it simply provides a recitation of the factual information contained in pages 209-225. Accordingly, I find that section 13(1) does not apply to this page.

The Ministry states that pages 235-236 consist of briefing material that combines factual information and advice regarding the environmental assessment process. It notes that the “options” portion of these pages contain information such as possible advantages and disadvantages, and submits that this constitutes advice and recommendations of public servants. The Ministry submits further that the format of the options and language used, if disclosed, would permit the drawing of accurate inferences as to the nature of the option favoured by the Ministry staff. Further, the Ministry takes the position that the factual information on these pages is so interwoven with the advice and recommendations that they cannot reasonably be severed. On my review of these pages, I am not persuaded that these two pages contain advice or recommendations, nor would their disclosure reveal such information. They simply outline the various options without assessment or recommendations. Accordingly, I find that section 13(1) does not apply to these two pages.

Pages 2421-2458 are drafts of portions of pages 209-236, including comments and suggestions from staff, cover e-mails containing suggested changes, and marked draft copies with handwritten notations, etc. In my view, the disclosure of the drafts would reveal advice or recommendations given by staff, and these early drafts qualify for exemption under section 13(1).

Pages 1655-1662

As noted above, the Ministry has only identified pages 1657-1662 in its discussion of this exemption. However, I found above that the record actually contains two additional pages (pages 1655-1656). The Ministry claims that this record is a summary appendix of the record on pages 209 to 236, and submits that, in substance, it is similar. Therefore, the Ministry submits that the representations made above in respect of pages 209-236 also apply to exempt this document. As I noted above, there are a number of drafts or duplicates of pages 1655-1662. The Ministry has made additional representations on the application of section 13(1) to the duplicates at pages 1234-1235 as well, stating:

This Record, entitled, “Class EA Process for land Acquisition and Disposition” was prepared by ORC personnel. This Record provides the time periods needed to complete the environmental assessment and planning process, with numerous interim dates for completion of various steps along the way, assuming one possible Category of environmental assessment. This record, which was prepared by ORC, constitutes ORC’s advice on that timing issue. It should be noted that this chart was prepared in a particular context - when the decision about the approach towards environment assessment was being considered. Thus, the

information on this chart constitutes part of the advice and recommendations made by ORC in connection with that issue...

I am not satisfied that pages 1655-1662 contain information that qualifies as “advice or recommendations,” or that their disclosure would reveal any such information. These records seem to simply contain identified timelines for the various options, and I find that they do not qualify for exemption under section 13(1). As there are no other exemption claims made for these pages, I will order that they be disclosed.

Pages 241-242

The Ministry states:

This Record, which is a Power Point slide deck (printed in “handout” format) entitled “Key Decisions for [Land Exchange]” was prepared to brief the Minister on a matter before Cabinet. The slides contain a number of recommendations prepared by public servants as part of the governmental policy-making process and advice regarding particular [approaches] to take depending on the course of action. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record

On my review of Pages 241-242, I find that these pages do contain specific advice or recommendations provided by staff to the Minister, and that they qualify for exemption under section 13(1).

Pages 303-309

The Ministry states:

This Record entitled “Environmental Assessment and the [land exchange]” was prepared as a Decision note within the deliberative process of government decision-making. Pages 303-308 were prepared by public servants and contain a number of recommendations about courses of actions which are specific in nature. The format of the options and in particular the varying number of possible advantages and disadvantages under each option, if disclosed would permit the drawing of accurate inferences as to the nature of the recommendations. Page 309 of the record contains “Key Messages” for the Minister which ... contains advice as to how to respond, and do not simply describe decisions that the Ministry had already made. This position has been accepted by the Commission in Orders P-92, P-188, P-278, P-508 and P-1115. The “Background” portion of this page contains factual information so interwoven with the advice and recommendations that it cannot reasonably be severed without permitting the drawing of accurate inferences as to the nature of the recommendations.

On my review of Pages 303-309 (note 303 is merely a cover page, identifying confidentiality concerns, and 308 is effectively blank), I find that the disclosure of these pages would reveal the specific advice or recommendations provided by staff, and that it qualifies for exemption under section 13(1).

Pages 338-343

The Ministry states:

This Record entitled “Environmental Assessment Options for Disposal/Exchange of Lands” was prepared within the deliberative process of government decision making. Pages 338-340 were prepared by public servants and contain a number of options for the disposal [of] the ... Lands and include suggested recommendations, which may be accepted or rejected in the course of deliberations. The language utilized would permit the drawing of accurate inferences as to the nature of the recommendations by Ministry staff if disclosed. Pages 340-343 contain factual information so interwoven with the advice and recommendations that it cannot reasonably be severed without the drawing of accurate inferences as to the nature of the recommendations. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record.

I have reviewed these pages and accept that portions of them contain advice or recommendations for the purpose of section 13(1). Specifically, I find that the information contained in the “Assessment of Options” portions on page 339, and the information under the heading “Recommendation” on 339-340, constitutes advice or recommendations for the purpose of section 13(1).

In my view, however, the remaining portions of this record do not contain “advice or recommendations,” nor do I find that their disclosure would reveal any such advice or recommendations.

Pages 894-898

The Ministry states:

This record consists of “Questions and Answers”, in relation to [the land exchange]. Many of the pages are unresponsive to the request as they do not contain information regarding the environmental assessment process decision. The information that is responsive was prepared by public servants for the Minister of [the Ministry] to provide the Minister with an understanding of staff recommendations and provide advice in the form of proposed answers to hypothetical questions. The record contains more than mere information or facts and disclosure of these portions of this Record would therefore, disclose or permit

the drawing of accurate inferences as to the nature of the recommendations of public servants.

On my review of this record, I am not satisfied that it qualifies for exemption under section 13(1). It consists largely of proposed answers to questions and, in my view, does not contain "advice or recommendations" as this office has defined those terms. In addition, it does not contain a suggested course of action that will ultimately be accepted or rejected by the person being advised, and I find that it does not qualify for exemption under section 13(1).

Page 1063

The Ministry states:

This Record entitled, "Considerations for Class EA for [the land exchange] was prepared by ORC personnel. The first bullet point identifies the requirements of the Category "C" process in ORC's Class EA, and the remainder of the document consists of recommendations to satisfy the requirements. The author indicates what "ORC may consider" and provides advice as to possible courses of action to satisfy the requirements of the Class EA. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record.

On my review of this record and the representations of the Ministry, I am satisfied that it contains advice or recommendations of Ministry staff, and qualifies for exemption under section 13(1)

Pages 1094-1099

The Ministry states:

This Record is a copy of a Power Point presentation prepared by a public servant of ORC entitled "Environmental Assessment Overview". [The Ministry] relies on section 13(1) in respect of the last slide on page 1099 of this Record. The slide is clearly entitled "Opinion and Recommendations" and contains the suggestions of the public servant regarding the environmental assessment of the ... Lands.

On my review of the last slide on page 1099, I am satisfied that it clearly contains "advice or recommendations" for the purpose of section 13(1), and qualifies for exemption. The Ministry has not provided representations supporting the position that the other slides qualify for exemption, and I will order that they be disclosed.

Pages 1456-1459

The Ministry states that this record was prepared to provide advice to the Premier, with the document clearly stating "Confidential Advice to the Premier." The Ministry proceeds to

identify the information contained under specific headings, and how it contains advice, or would reveal such advice.

On my review of this record, which is a document in point form identifying the author's position on a number of matters, I am satisfied that it contains advice or recommendations for the purpose of section 13(1).

Pages 1460-1471 and 1970-1981

With respect to pages 1460-1471, the Ministry states:

This Record is a copy of Power Point presentation ... prepared by ORC for the ... Chair of Management Board Secretariat. The slide deck also contains the handwritten notes of a [Ministry] staff member who was present at the presentation. The intent of the presentation was to provide the Minister with advice on the options for an environmental assessment. Pages 1463-1465 provide background as to the options available, however the format and layout of the information ... would permit the drawing of accurate inferences as to the nature of the recommendations. Alternatively, the handwritten marks on these pages provide an insight into the mind of the audience with certain key points underlined or circled. If disclosed, the information and markings would permit the drawing of accurate inferences as to the preferred recommendation of the public servant. Pages 1466-1470 contain comparisons of the options with regards to specific criteria. At the bottom of each page is a declaration of which option is preferable for that specific criteria. Even without the declaration, the format of the pages ... in combination with the handwritten marks would permit the inference as to the recommended option. Page 1470 provides a "Comparison Summary" of the options. The options are associated with certain priorities and values which [the Ministry] submits places a bias on the options and could, if disclosed, indicate whether the option is recommended or not. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record.

The Ministry indicates that pages 1970-1981 contain:

...a copy of PowerPoint presentation ... for the ... Chair of Management Board Secretariat (MBS). The slide deck also contains the handwritten notes of [Ministry] staff present at the presentation. The intent of the presentation was to provide the Minister with advice with regard to the options for the Land Exchange. Pages 1970-1977 are unresponsive to the request. The slide on page 1978, entitled "Approach to Environmental Assessment (EA) Requirements" contains language which reveals that MBS/ORC "advised" [the Ministry] about particular courses of action, as well as matters [the Ministry/the Ministry of the Environment] are "proposing". The first bullet point on page 1979 ... reveals

ORC advice as to what it “would expect”. The second bullet point implicitly reveals the recommendations of ORC staff since it speaks to what “ORC [is] likely to undertake”. It necessarily follows that the previous slides contain information that reveals advice and recommendations. The final slide on page 1981 contains a diagram showing the time periods needed to complete the environmental assessment and planning process, with numerous interim dates for completion of various steps along the way. This chart, which was prepared by ORC, constitutes ORC’s advice on that timing issue. It should be noted that this chart was prepared in a particular context - when the decision about the approach towards environmental assessment was being considered. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record.

As I indicated above, but for the handwritten notations, these records are identical to the two records I examined in Order PO-2554 (Records 5 and 6). In that Order, I addressed the application of section 13(1) to Record 5 only, as the Ministry did not claim it for Record 6. Record 5 is the same as pages 1970-1981. I dealt with this record in Order PO-2554 as follows:

*Record 5*

The ORC submits:

Pages 9 and 10 of this [Record 5], in respect of which section 13(1) is relied on, set out advice and recommendations on the part of those at ORC concerning the type of environmental assessment required and their possible concerns about other potential options. The word "advised" is found on page 9 and page 10 and clearly constitutes ORC's recommended method of proceeding.

Accordingly, section 13(1) applies to these two pages of Record 5.

On my review of this record, I find that page 9 of the record contains information relating to advice and recommendations made by the ORC, and qualifies for exemption under section 13(1). However, page 10 of the record contains information which simply identifies a number of issues and options. In my view, this page does not contain advice or recommendations of the purpose of section 13(1).

In addition, I have not received representations concerning the application of the section 13(1) exemption to the remaining pages of this record, and I will order that it be disclosed.

On my review of pages 1970-1981 and the Ministry’s representations, I find that my analysis in Order PO-2554 remains relevant and should not be varied insofar as it pertains to the typewritten portions of pages 1970-1980 of this record. Accordingly, I find that page 1978 is exempt under

section 13(1) as its disclosure would reveal the advice or recommendations made by the ORC. However, page 1979 of the record contains information which simply identifies a number of issues and options. In my view, this page does not contain advice or recommendations of the purpose of section 13(1). Similarly, pages 1970-1977 and 1980 comprise either background or factual information, which does not contain, nor would its disclosure reveal, any advice or recommendations of a public servant. Page 1981 seems to simply contain identified timelines for an option, and I find that it does not qualify for exemption under section 13(1). As I noted above, pages 1970-1981 also contain the handwritten notes of staff. I am satisfied that disclosure of these notes would reveal the advice and recommendations of a public servant and thus qualify for exemption under section 13(1).

I found above that pages 1466-1471 are exempt under section 12(1), accordingly, I will only consider the application of section 13(1) to the remaining six pages (pages 1460-1465). After reviewing the content of pages 1460-1465 and considering the Ministry's submissions, I am not persuaded that their character is substantially different from pages 1970-1981, and similar reasoning applies in my analysis of these earlier pages. Accordingly, I find that pages 1460-1465 contain background information and their disclosure would not reveal any advice or recommendations that are set out in the exempt portions. I note that pages 1460-1465 have sections that are underlined. Although the underlining might reflect an interest in these portions of the record, I find that they do not express or reveal any kind of advice or recommendations. Pages 1460-1465 are, therefore, not exempt under section 13(1).

Pages 1511-1513, 1518, 1522, 1526 and 1530-1532

The Ministry states:

This Record is a string of e-mails with a Subject Line of "URGENT: Slide Deck – [land exchange]". The messages contain the comments of various [Ministry] staff members on the draft slide presentation (pages 388-390) ... then being prepared. The record indicates that a draft presentation had been sent to various [Ministry] staff for their review and comments before it was finalized. The comments contain advice as to whether to proceed with the slide deck or whether further revisions are needed. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record.

Page 1518, page 1522, page 1526, page 1530 and page 1531 are earlier e-mail strings with regard to the record on pages 1511-1513, and are either unresponsive to the request (but for the attached presentation) or in substance similar. Therefore, [the Ministry] submits that the representations made above in respect of that record also apply to exempt these records.

On my review of these pages, which are brief cover e-mails, I am satisfied that portions of them qualify for exemption under section 13(1), as they contain advice or recommendations about matters contained in the attachments to them. A few of the e-mails are innocuous, simply



referring to the attachment. In the circumstances, I find that no useful purpose would be served in severing and disclosing these snippets of information.

Pages 1558-1560

I found above that one sentence on page 1559 is exempt under section 12(1). The Ministry takes the position that much of this record is non-responsive to the request, but that three points on page 1558 contain advice or recommendations for the purpose of section 13(1). On my review of those portions, however, I find that they contain information which is either factual, or in the nature of background information, and do not contain advice or recommendations for the purpose of section 13(1). Accordingly, I find that these three points do not qualify for exemption under section 13(1).

Pages 1564-1566, 2110 and a portion of 2111

With respect to pages 1564-1566, the Ministry states:

This Record is a string of e-mails .... The first message on page 1564 is unresponsive but for the fact that it forwarded the responsive string of e-mails. The second message on page 1564 is from [a Ministry staff member] to various other [Ministry] staff. The message clearly reveals a recommendation made by ORC staff and then goes on to provide advice on how to proceed on a particular course of action. Further, the record then indicates that the advice should be communicated to decision makers. The third e-mail from an ORC staff member ... contains advice and reveals recommendations. The staff member writes "we understand that [the Ministry] proposes". This reveals or permits the inference as to a recommended course of action. The ORC staff member goes on to provide advice to [Ministry] staff regarding how "to complete" a course of action and how "to ensure compliance" to particular approaches. This type of free-flow of advice and recommendations is precisely the type of information that section 13(1) was intended to protect ...

The Ministry did not make specific representations regarding page 2110 and the top portion of page 2111. Rather, noting that the information in these pages was, in substance, identical and/or similar to the information in pages 1564-1566, it relies on the above submissions for these two pages.

Given the circumstances of this appeal and the nature of the issues and information discussed, I am satisfied that portions of pages 1564-1566 contain advice or recommendations, or would reveal such advice or recommendations, and qualify for exemption under section 13(1). However, other portions of these pages contain what I would describe as background or factual information, which is not "advice or recommendations." I will, accordingly, order that this information be disclosed. It should be noted that portions of pages 1564-1566 are identical to two records that I considered in Order PO-2554 (Records 1 and 2 in that appeal) and my decision in the current appeal is consistent with my findings in the earlier order, wherein I concluded:

Records 1 and 2 are similar copies of an email sent from an ORC employee. The portions of these records for which section 13(1) is claimed (which does not include the “background” information” discussed under scope of the appeal, above) contain information which clearly sets out a number of specific recommendations made by the ORC, and I find that these portions of Records 1 and 2 qualify for exemption under section 13(1).

In addition, I have found that page 2110 and the top part of page 2111 are not duplicates of other records. On my review of these two records, I am satisfied that they contain advice or recommendations for the purpose of section 13(1), as they contain discussions between staff that would reveal advice or recommendations. Accordingly, I am satisfied that they qualify for exemption under section 13(1).

Pages 1568-1569

The Ministry states:

This Record is a string of two e-mails. The first message on page 1568 is unresponsive but for the fact that it is a response to the originating e-mail. The originating e-mail message on page 1568 is from [a Ministry] staff member to various [Ministry] staff. The first point in the message contains specific information that if disclosed, would permit the drawing of accurate inferences as to the nature of the recommendations made by public servants regarding a specific course of action. The third message on page 1569 is a duplicate of the second e-mail and therefore [the Ministry] submits that the representations made above in respect of that e-mail also applies to exempt this e-mail.

On my review of these two pages, I am satisfied that they contain advice or recommendation for the purpose of section 13(1), and that they qualify for exemption under that section.

Pages 1645-1654

The Ministry states that this record is a power point presentation addressing various options. It then states:

The intent of the presentation was to provide Cabinet with advice regarding options for the environmental assessment of the Land Exchange. Pages 1647-1650 provide background to the options available as well as the possible advantages and disadvantages of each option which cumulatively have the effect of providing advice. In the alternative, the format and layout of the information ... would permit the drawing of accurate inferences as to the nature of the recommendations if disclosed. Page 1651 contains the “Recommended Option” and advice as to the next steps regarding that particular course of action.

On my review of this power point presentation, I am satisfied that the later pages contain “advice or recommendations:” for the purpose of section 13(1). The earlier pages of this document simply identify various options, and information of this nature would not ordinarily qualify for exemption under section 13(1); however, due to the specific nature of the information contained in the representations set out above regarding this record, I find that the disclosure of the earlier pages would now reveal the advice or recommendations, and that this document qualifies for exemption under section 13(1).

Page 1663

The Ministry states that this record was prepared by Ministry personnel and contains a recommendation and identified actions to follow. On my review of the responsive portions of this record, I am satisfied that they contain “advice or recommendations” for the purpose of section 13(1).

Page 1705

The Ministry indicates that this record is an e-mail regarding a staff-level meeting and includes hand-written notes. The Ministry states:

The author of the e-mail asks the recipients to consider a number of decision points and “nail down ... where each ministry sits”. The author is clearly asking the Ministry to prepare recommendations that will be put before Cabinet. However, in some instances, the author discloses recommendations that he believes [have] unanimous support. In other instances, the handwritten notes indicate the answers to the questions, thus revealing the recommended course of action. For these reasons, [the Ministry] submits that the exemption in subsection 13(1) attaches to this record.

On my review of this record, and the specific handwritten notations, I am satisfied that its disclosure would reveal advice or recommendations for the purpose of section 13(1).

Page 1765-1766

The Ministry submits:

This Record consists of a string of e-mails with the originating Subject Line marked “[land exchange]”, along with the handwritten notes of [Ministry] staff. The author of the e-mail asks the recipient to respond to a number of specific questions relating to the ... exchange. However, the specificity of the questions would permit the drawing of accurate inferences as to the nature of the recommendations regarding the environmental assessment if it were disclosed.

On my review of this e-mail string (including the handwritten notes), I accept the Ministry's position that its disclosure would reveal the advice or recommendations, and that it qualifies for exemption under section 13(1).

Pages 2022-2025

The Ministry states that this record, which is a string of e-mails containing a "Summary of Requirements," contains staff discussions about the findings of certain studies, interwoven with discussions of advice on how to proceed. The Ministry states that the factual information is so interwoven with the advice and recommendations that it cannot reasonably be severed without making the record meaningless or allowing for an accurate inference regarding the advice given.

On my review of this record, which contains detailed discussion regarding various requirements, I am satisfied that its disclosure would reveal advice or recommendations for the purpose of section 13(1).

Page 2061

The Ministry states that this record is an attachment to an e-mail, and that it contains advice and recommendations from a public servant and qualifies for exemption under section 13(1). On my review, I am satisfied that this record contains advice or recommendations for the purpose of section 13(1).

Page 2296

The Ministry states that this string of two e-mails consists of two public servants discussing and advising each other as to the processes and steps requiring completion. On my review of this record, I am not satisfied that it contains "advice or recommendations" for the purpose of section 13(1). It does not suggest a course of action that will ultimately be accepted or rejected by the person being advised, and I find that it does not qualify for exemption under section 13(1).

Pages 2297-2303

The Ministry states:

This Record is a string of e-mails and duplicates ... [which] consist of a number of public servants discussing certain findings interwoven with discussions and advice on how to proceed. The factual information is so interwoven with the advice and recommendations that it cannot reasonably be severed, without making the information in the severed portion of the record meaningless or allowing for an accurate inference regarding the advice given. For these reasons, [the Ministry] submits that the exemptions in subsection 13(1) attach to this record and applies to the entire document.

I have reviewed this record, which is an e-mail string sent between Ministry staff, and I find that portions of these e-mails simply relate to matters such as meeting times, and are not responsive to the narrowed request. I find further that the remaining portions of this record do contain advice or recommendations regarding proposed wording, etc, and qualify for exemption under section 13(1).

Pages 2381-2382

The Ministry states:

This Record is a string of e-mails ... [which] consist of public servants advising each other as to the status of recommendations and sharing of advice regarding how to proceed with a particular approach. The e-mails also contain mere facts but the factual information is so interwoven with the advice and recommendations that it cannot reasonably be severed, without making it meaningless or allowing for an accurate inference regarding the advice given. For these reasons, the Ministry submits that the exemption in subsection 13(1) attach to this record and may apply to the document in its entirety.

This record is an e-mail string sent between Ministry staff and other staff at other institutions. On my review of this record, I find that the staff is simply providing an update regarding the status of the issues being discussed. Although there is some reference to possible decisions which may be made, in my view, the information contained in this record does not contain "advice or recommendations" for the purpose of section 13(1), nor would its disclosure reveal any such information. Accordingly, I find that this record does not qualify for exemption under section 13(1).

Pages 2639-2640

The Ministry states that this record is a copy of a Power Point presentation prepared by Ministry staff for a Minister, and that this presentation provided the Minister with information about an identified plan. The Ministry also states that the record contains information which, if disclosed, would reveal staff recommendations, or would permit the drawing of accurate inferences as to the nature of the public servant recommendations and advice. On my review of this record, I am satisfied that its disclosure would reveal advice or recommendations, and that it qualifies for exemption under section 13(1).

### **Miscellaneous Records**

Page 29

The Ministry has included this page as a record with the e-mail exchange regarding the transmittal of the record at pages 33-38, but has made no representations on the application of any exemption to it. On my review of this record, I find that it is administrative in nature and does not contain advice or recommendations. Moreover, its disclosure would not reveal any

advice or recommendations. As a result, I find that it does not qualify for exemption under section 13(1).

Page 2087

This record consists of an e-mail string containing comments about a slide deck. Although I have not received specific representations on the application of section 13(1) to this record, I find that it refers to information in other records which I have found constitutes advice or recommendations. In the circumstances, I am satisfied that this record also contains advice or recommendations for the purpose of section 13(1).

## **ECONOMIC AND OTHER INTERESTS**

The Ministry has claimed that three of the records (pages 3-7, 241-242 and 303-309) also qualify for exemption under section 18 of the *Act*. As I have found that these three records qualify for exemption under other sections of the *Act*, it is not necessary for me to review the possible application of section 18 to these records.

## **PUBLIC INTEREST OVERRIDE**

### **General principles**

Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. ... I would read the words "14 and 19" into s. 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

### Compelling public interest

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Nevertheless, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province’s ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant claims that there exists a compelling public interest in disclosure of the records that outweighs the exemptions claimed by the Ministry. Referring to a letter it wrote to the Minister of the Environment in 2006, attached to its representations as “Schedule A,” the appellant states:

...it is our client’s view that the Lands Exchange does not qualify for the class methodology. As a result, it is our client’s view that the ORC has improperly categorized the Lands Exchange. It is in the public interest to understand how and why the ORC completed such categorization. There is also a public interest in having access to the records in order to permit (i) a better informed public discussion with respect to the Lands Exchange and (ii) an opportunity for the public to assess the adequacy of the ORC’s environmental assessment process. In our view, given the environmental significance of the lands involved in the Lands Exchange, there is clearly a compelling public interest in the discussion of these issues. Accordingly, this information by its very nature, should be publicly available.

...Given the environmental sensitivity and significance of the lands involved in the Lands Exchange, the compelling public interest in this case is the (i) integrity of the ORC’s Class EA process, (ii) ORC’s compliance with the EAA and (iii) protection of the environment.

In the attached Schedule A, the appellant indicates that it represents parties who believe their interests will be adversely affected by the land exchange. The appellant outlines the nature and basis for its disagreement with the methodology used by the ORC and the public process. For example, the appellant stated in its letter to the Minister that, “it appeared to many at the ORC’s second public open house that there had been absolutely no meaningful evaluation of alternatives conducted by the ORC.”



I accept that the land exchange issues relating to the subject lands have consumed a considerable amount of public attention. It is also apparent from the information contained in Schedule A of the appellant's representations that there has been a public consultation process and that considerable information has been provided to the public as part of that process. Apart from its letter to the Ministry outlining its clients' position, the appellant has not provided any other evidence to support its contention that there is a "compelling" public interest in this issue. While there may be a public interest in the issues to which the records relate, I am not persuaded that this interest is compelling.

Moreover, in my view, the appellant's interest in this matter is essentially a private one, as the representative of parties objecting to the process due to personal interests. In Order MO-1564, former Assistant Commissioner Tom Mitchinson considered whether a public interest may be found to exist where the matter raises a primarily private interest. In that case, the appellant was seeking access to information concerning his own property for the purpose of assessing whether the valuation system had produced an equitable result, and the records all related to MPAC's market models. The former Assistant Commissioner stated:

...there is a compelling public interest in obtaining basic information about the way in which a property is assessed and therefore the way in which the taxation is calculated. *This public interest is both inherent to the whole concept of property taxation, and also evident from the number of requesters, including the appellant in this case, who have sought access to information about their properties from MPAC under the Act.* [emphasis added]

I am not persuaded that the appellant's private interest in this matter raises issues of more general application. While environmental issues are of general public interest, the matters surrounding the land exchanges themselves, and the records at issue in this appeal, appear to be more limited to the parties with specific private interests and not the population generally.

Accordingly, I find that there does not exist a compelling public interest in disclosure of the records that outweighs the purpose of the exemptions claimed.

## **ORDER:**

1. I order the Ministry to issue access decisions to the appellant for pages 51-92, 100, 147, 237-238, 310-319, 331, 1211-1217, 1225-1227, 1248-1251, 2522-2524 and 1939-1968.
2. I find that the following pages or portions of pages of the records do not qualify for exemption under section 12 or 13(1) of the *Act*: pages 29, 33-38, 183-197, 209-231, 233-236, 338-343 (except for the information contained in the "Assessment of Options" portions on page 339, and the information under the heading "Recommendation" on 339-340), 894-898, 1094-1099 (except for the last slide on page 1099), 1460-1465 (not including handwritten notations), 1655-1662, 1979-1981, 1970-1977 (not including handwritten notations) 2296, 2381-2382, and portions of pages 1558, and 1564-1566.

For greater certainty, I have highlighted in yellow the portions of pages 1558 and 1564-1566 which are not to be disclosed on the copies of those pages sent to the Ministry along with this order.

3. I order the Ministry to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by **June 25, 2008**.
4. I uphold the Ministry's decision to deny access to the remaining records at issue.
5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ May 26, 2008