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

ORDER PO-2630

Appeal PA-050262-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> Re: The proposed new province-wide tobacco control legislation, please provide all legal opinions, analyses and reports prepared since Jan. 1 2003 and provided to the Government Ministers or their political staff, or the Deputy Attorney General, or Assistant Deputy Attorneys General or other officials regarding the Constitutional or other legal issues involved in:
>
> - Denying smokers the options of private clubs or other smoking facilities
> - Denying smoking facilities to those smokers confined to long-term care centers
> - Banning smoking on patios or outside public or workplace doors
> - Banning smoking in places where the right to smoke is guaranteed in union contracts
> - Enforcing smoking bans on aboriginal lands
> - Banning the display of tobacco products and related consumer information from smokers in places of business which sell these products
> - Any other constitutional or legal implications of the proposed bill
>
> And:
>
> - Any such opinions or reports dealing with potential government liability to provide compensation to those businesses that would be adversely affected by the proposed legislation.

After issuing fee estimate and time extension decisions, the Ministry issued a final decision granting the requester partial access to the information requested. The Ministry advised that access to the remaining records was denied under sections 12(1) (Cabinet records), 13(1) (advice and recommendations) and 19 (solicitor-client privilege) of the *Act*. The Ministry also advised that some information in the exempted record was not responsive to the request as it pertains to other issues unrelated to the subject matter of the request.

The requester (now the appellant) appealed the Ministry's decision.

During the course of mediation, the Ministry provided the appellant and the mediator with an Index of Records. Also during mediation, a teleconference was conducted that was attended by the mediator, the appellant, legal counsel for the Ministry, the Assistant FOI Co-ordinator and an FOI program analyst. During the teleconference, the Ministry agreed to issue a revised Index of Records containing greater detail about particular records at issue, as well as indicating duplicate records, where applicable. Upon receipt of the revised Index of Records, the appellant withdrew her appeal with respect to a number of records. In particular, the appellant advised the mediator that she did not wish to pursue access to any duplicate records, routing forms, or any records described in the revised index as Cabinet documents.

As a result of these discussions at mediation, the following records were removed from the scope of the appeal and are no longer at issue: 1-8, 11-13, 42, 48-73, 76-98, 166-257, 259-294, 419-442, 467-500, 503-506, 632-641, 643-653, 657, 679, 683, 686-707, 715, 720-735, 744, 804, 810, 815, 821, 829-830, 891-920, 936-953, 959-1024, and 1156-1271.

The appellant continued to pursue access to the remaining records to which the Ministry has claimed the exemptions in sections 12(1), 13(1) and 19, and also those records which were described in the Ministry's Index of Records as "non-responsive" to the request. Accordingly, the application of the exemptions and the responsiveness of records remain in dispute. Finally, the appellant advised the mediator that she believes there is a compelling public interest in the disclosure of the records at issue, bringing into play the possible application of the "public interest override" provision in section 23 of the *Act*.

Following the issuance of a mediator's report and after further mediation discussions, the appellant advised the mediator that she does not wish to pursue access to certain non-responsive information contained in Records 136, 138-139, 680-682, 859, 861 and 1111-1113. Other portions of these records remain at issue under the exemptions claimed by the Ministry, however. In addition, the appellant advised that she continued to pursue access to the information identified by the Ministry as non-responsive on Records 99-106 and 847. Accordingly, the responsiveness of those records remains at issue in this appeal.

Since the appeal was not resolved during mediation, the file was moved to the adjudication stage of the appeals process. The adjudicator assigned to conduct the inquiry sought and received the representations of the Ministry, initially. These representations were shared, in their entirety, with the appellant, who provided only brief submissions in response to the Notice of Inquiry. I assumed carriage of the appeal following the receipt of the parties' representations.

RECORDS:

The records remaining at issue consist of e-mails, briefing notes, memoranda, minutes of meetings, compendia, draft documents, commitments charts, case law, telephone-call notes, hand-written notes, a single information note, summary of a meeting, analysis document, briefing materials, an explanatory note and draft legislation. Due to the large number of records and the fact that several exemptions were claimed for them, I have grouped the records by exemption claim to assist in my determination of whether it applies.

The records remaining at issue and the exemptions claimed for them are:

- **Group A:** Records 37-39, 105, 107-122, 577-579, 582-583, 585, 642, 654-656, 681, 836-838, 840-841, 849-850, 880-890, 1025-1107, 1112, 1117-1155, 1272-1283 and 1296 - section 12(1) (Cabinet records);

- **Group B:** Records 9-10, 20-34, 43-46, 74-75, 105, 107-122, 141-165, 258, 302-329, 443-466, 502, 508, 563-564, 658-676, 681, 684-685, 708-712, 736-743, 745-746, 757, 795, 805-809, 811-814, 816-820, 826-828, 831-863, 877-879, 954-958, 1025-1110, 1112, 1114-1155 and 1284-1296 – section 13(1) (advice or recommendations);

- **Group C:** Records 9-10, 14-41, 43-47, 74-75, 105, 107-165, 258, 295-418, 443-466, 501-502, 507-631, 642, 654-656, 658-678, 680-681, 684-685, 708-714, 716-719, 736-743, 745-803, 805-809, 811-814, 816-820, 822-828, 840-849, 851-860, 862-876, 921-935, 954-958, 1108-1110, 1112, 1114-1118, 1284-1295 and 1297-1298 – section 19 (solicitor-client privilege);

- **Group D:** Records 99-106, 847 (responsiveness of records).

The appellant raised the possible application of section 23 (compelling public interest) as an issue for all of the records.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The appellant argues that the information identified by the Ministry as being non-responsive in Records 99 to 106 and 847 is, in fact, responsive to her request, as described above. The appellant has not, however, provided me with any representations in support of this contention.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Previous orders have established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Ministry argues that "the request pertains to tobacco control legislation and legal documents regarding constitutional and legal issues relating to various limitations placed on smoking." It quotes from the request itself which it argues limits the scope of the request to include only "legal opinions, analyses and reports . . . regarding the constitutional or other legal issues involved in [a number of specified issues around the proposed smoking ban legislation]." The Ministry submits that Records 99 to 106 are meeting minutes, which are not "legal opinions, analyses or reports" as specified in the request and they are not, accordingly, reasonably related to the request.

I have reviewed the contents of Records 99 to 106 and find that, with the exception of the information contained under heading 4 of Record 101(which has been disclosed to the appellant), the remainder of these documents contain information that is reasonably related to the request. They consist of the minutes of certain meetings pertaining to tobacco use and control as they relate to specific Aboriginal health issues. In my view, these issues fall within the ambit of the appellant's broadly-worded request as they are about tobacco control on Aboriginal lands, one of the specific issues identified by the appellant in her request. While these records are minutes, rather than legal opinions, analyses or reports as specified in the request, I find that they are reasonably related to the subject matter of the request and must be considered along with the other records identified by the Ministry as responsive. I will, therefore, order the Ministry to provide the appellant with a decision letter respecting access to these records.

Addressing Record 847, the Ministry submits that the first email which appears on this page is not reasonably related to the request, but concedes that the second is responsive. I have reviewed the contents of Record 847 and agree that the first email contained therein is not responsive to the appellant's request. Further, I find that the Ministry need not provide the appellant with a decision respecting access to the second email in Record 847, as it has already claimed the application of sections 13(1) and 19 to it.

CABINET RECORDS

General principles

The Ministry submits that the records classified as Group A records are exempt from disclosure under one or more of the following subsections of section 12(1); or as a result of the application of the introductory wording to the section, which 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.

I will address the application of the section 12(1) exemption to only some of the records which comprise Group A. Many of these records are more appropriately addressed under my discussion of section 19 below as they clearly qualify for exemption under that section. The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

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

By way of a general statement applicable to all the Group A records which it argues are exempt under section 12(1), the Ministry states:

> . . . the rationale for the exemption is clear in respect of the records at issue in this appeal. Legislation was drafted in response to Cabinet direction. Consequently, a number of the records were prepared for Cabinet's consideration. The Ministry received direction from Cabinet and Cabinet committees from time to time and provided legal advice. As such, the records reflect Cabinet's deliberations about various aspects of the legislative initiative and various legal issues.
>
> The records in Group A are all records that were utilized by staff, primarily legal counsel, to prepare Cabinet submissions, or reflect information previously considered by Cabinet, or obtain direction from Cabinet or a committee of Cabinet. In each case, the Ministry submits that information contained in the records would permit a reader to draw accurate inferences about the substance of the deliberations of the Cabinet or its committees. The Ministry therefore relies on the previous Orders of the IPC, cited above [Orders P-226, P-293, P-331, P-361, P-506, P-1742 and PO-1831], which have stated that where disclosure of a record would reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences with respect to those deliberations, the mandatory exemption in section 12(1) applies and access must be denied, whether or not the record has been placed before Cabinet.

Application of section 12(1) to specific records

Records 37 -39

These records represent an email chain of communications on June 22, 2004 between staff at the Ministry, Cabinet office and legal counsel with respect to a legal matter to be brought before Cabinet the next day. I find that the disclosure of the information contained in this record would reveal the substance of the deliberations of the Cabinet which took place on June 23, 2004. Accordingly, Records 37-39 are exempt from disclosure under the introductory wording to section 12(1).

Record 105

In my discussion above, I have ordered the Ministry to provide the appellant with a decision letter respecting access to certain portions of Record 105 (among others) on the basis that they contain responsive information. The Ministry has applied the mandatory exemption in section 12(1) to that portion of Record 105 which it does not dispute is responsive. It argues that this portion of Record 105 "includes express reference to the deliberations of Cabinet and committees of Cabinet." I have reviewed the contents of this portion of Record 105 and agree that it refers directly to subject matter whose disclosure would reveal the substance of the

deliberations of the Legislation and Regulation Committee of Cabinet at its meeting of September 20, 2004. This portion of Record 105 is, accordingly, exempt under the introductory wording of section 12(1).

Record 107-117(copied at Record 880 to 890)

This document is a 10-page compendium containing an explanation of and section-by-section breakdown of the proposed tobacco control legislation under consideration by the Government of Ontario at the time of its creation. I find that this document contains background explanations prepared for submission to the Cabinet prior to the actual decision being made by Cabinet about proceeding with the legislation under consideration. This document is, therefore, exempt from disclosure under section 12(1)(c).

Record 118-122

Record 118-122 is an email exchange containing draft wording for the proposed tobacco control legislation. The Ministry claims, and I concur, that the information contained in Record 118-120 falls within the ambit of section 12(1)(f). However, Record 121-122 refers only to the language of the enacted tobacco legislation in the province of Manitoba. I do not agree that this information falls within the ambit of the section 12(1)(f) exemption. I will discuss the application of section 19 to Record 121-122 below

Records 836-838, 840-841 and 849-850

These records are a series of email exchanges between staff of various Ministries in which they discuss various aspects of the tobacco strategy to be put before a Cabinet committee in May, June and July of 2004. I agree with the position taken by the Ministry that the disclosure of the information contained in these emails would reveal the contents of a record reflecting consultation among Ministers of the Crown on matters relating directly to the formulation of government policy, as contemplated by section 12(1)(d).

Record 1025-1107

The Ministry argues that this document, a lengthy "Analysis Document" is exempt under sections 12(1)(b), (d) and (e) as it forms part of a Cabinet submission and contains options and recommendations to be submitted to Cabinet. It goes on to repeat the language from the exemptions. Based on my review of this document, I find that it qualifies for exemption under section 12(1)(b) as it clearly contains policy options and recommendations submitted to Cabinet.

Records 1119-1155

The documents included in this package include the agendas and various materials provided for Cabinet's consideration prior to a meeting of the Health and Social Services Policy Committee of Cabinet on Monday, June 21, 2004. I conclude that this information falls within the ambit of the

introductory wording of section 12(1) as its disclosure would reveal the substance of the deliberations of this committee of Cabinet.

Records 1272-1283

The Ministry submits, and I concur, that these records are exempt under section 12(1)(f) as they represent draft legislation.

SOLICITOR-CLIENT PRIVILEGE

General Principles

The Ministry has applied the discretionary exemption in section 19 to the majority of records at issue in this appeal, which are described above as Group C, and include Records 9-10, 14-41, 43-47, 74-75, 105, 107-165, 258, 295-418, 443-466, 501-502, 507-631, 642, 654-656, 658-678, 680-681, 684-685, 708-714, 716-719, 736-743, 745-803, 805-809, 811-814, 816-820, 822-828, 840-849, 851-860, 862-876, 921-935, 954-958, 1108-1110, 1112, 1114-1118, 1284-1295 and 1297-1298.

Rather than providing specific representations regarding the application of the exemption to each of these records, it has lumped them into several categories and addressed how each of them fits within the ambit of the exemption. I will take a similar approach in making my findings with respect to these documents. In addition, where records have been found to be exempt under section 12(1) above, I will not address the possible application of the section 19 exemption to them.

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

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The institution 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. (4th) 257 (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 institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

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 begins its submissions on the application of this exemption by pointing out that, owing to the nature of the request itself, almost all of the records which are responsive will fall within the ambit of the section 19 exemption. It notes that the request sought access specifically to:

> . . . all legal opinions, analyses and reports prepared since January 1, 2003 and provided to the Government Ministers or their political staff, or the Deputy Attorney General, or Assistant Deputy Attorneys General or other officials regarding the Constitutional or other legal issues . . .

The Ministry goes on to submit that all of the records to which it has applied the section 19 exemption represent "communications made within the framework of the solicitor-client relationship" and are therefore privileged. It argues that the Group C records "involve the

provision of legal advice from counsel on legal issues or the seeking of legal advice from counsel on legal issues".

In addition, the Ministry submits that Records 14-16, 17-19, 20-22, 43-47, 509-522, 525-528, 708-714, 736-743, 747-803, 805-809, 811-814, 816-820, 822-825, 826, 827-828, 840-842, 954-958 and 1114-1116 are records which were prepared for the dominant purpose of litigation and, therefore, qualify for exemption under the litigation privilege component of both Branch 1 and Branch 2 of section 19. It points out that because these records are exempt under statutory litigation privilege in Branch 2, the privilege that exists in them continues regardless of the conclusion of the litigation to which they relate.

Finally, the Ministry takes the position that the information and advice contained in Records 142-165, 258, 295-418, 443-454, 501-502, 507-508, 523-524, 538-631, 658-678, 684-685, 716-719, 745-746, 1284-1295 and 1297-1298 relate to litigation which was contemplated at the time of their creation, if not yet underway. It submits that these records also qualify for exemption under the litigation privilege aspect of Branch 1 and Branch 2 of section 19.

The submissions received from the appellant at the initial intake stage, at mediation and again at the inquiry stage of the appeals process do not address the application of section 19 to the records.

Application of section 19

Solicitor-client communication privilege

I note that the legislation which ultimately followed the consultations and discussions reflected in the records at issue in this appeal was passed in June 2005 and came into effect on May 31, 2006. Prior to its enactment, the Ministry was involved in a broadly-based set of consultations with representatives from a variety of other provincial Ministries and other bodies with a view to canvassing a wide range of opinion on the subject. Much of the consultation that took place involved a discussion of the impact a smoking ban might have on Aboriginal communities, long-term residential care homes and the gaming industry throughout Ontario. Accordingly, many of the issues addressed pertained to complex legal problems relating to constitutional questions and matters involving criminal law. The records under consideration in this appeal relate directly to the involvement of Crown Counsel employed by the Ministry in the consultation and decision making process which led to the enactment of this legislation. It is in this context that the records were created and for that reason Crown Counsel was consulted throughout this lengthy and prolonged process on a regular basis to provide legal advice on a myriad of issues.

I have reviewed the contents of the Group C records that the Ministry claims to be exempt under section 19. Most of these records consist of emails and legal opinions. Based on the representations of the parties and my own review of the records, I am satisfied that most of them qualify for exemption on the basis that they are subject to solicitor-client communication privilege under Branch 1 of the exemption. The majority of the emails and legal opinions which

comprise the records are either directed to or originated with Crown Counsel employed by the Crown Law Office, Civil or Criminal, or legal counsel with other individual provincial Ministries. I am satisfied, having reviewed these particular records that they represent confidential communications pertaining to the seeking and giving of legal advice on matters that relate directly to legal issues. In addition, I am also satisfied that a number of the responsive email communications fall within the ambit of the "continuum of communications" between Ministry legal and non-legal staff circulated for the purpose of keeping each group informed as to the progress of the other, as contemplated in *Balabel*.

In a recent decision, Order PO-2624, Adjudicator Laurel Cropley addressed the application of the section 19 exemption to email communications passing between non-legal Ministry staff which contain legal advice obtained from Crown Counsel. She found that:

> Previous orders of this office (Orders PO-2087, PO-2223 and PO-2370) have found that e-mail communications passing between non-legal Ministry staff that refer directly to legal advice originally prepared by legal counsel to other Ministry staff would reveal privileged communications and were, therefore, exempt from disclosure under section 19. This is precisely the case in the current appeal. As I noted above, the records consist of e-mail chains. While some of the e-mails in the chains were not directly sent to legal counsel, they clearly address the subject matter for which legal counsel had been consulted, often refer to the need for the communications to be sent to legal and/or reveal the legal advice provided by counsel. In the end, these e-mails form part of the chain that was ultimately sent to legal counsel. In this context, these e-mails form part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client communication privilege.

I adopt the reasoning set out above for the purposes of determining the application of the section 19 exemption to many of the records at issue in this appeal, particularly those which represent "email chains". In my view, the principles expressed in Order PO-2624 are equally applicable to the circumstances present in this appeal.

The other records at issue for which section 19 has been claimed include various copies of draft documents which were circulated to Crown Counsel for the purpose of seeking their advice on the contents of these records. I find that these documents qualify as either privileged communications passing between solicitor and client or part of the "continuum of communications" which passed between them, as contemplated by Branch 1 of section 19. They are, accordingly, exempt from disclosure on that basis.

I further find that I have not been provided with any evidence to indicate that the Ministry has waived the privilege that exists in these records. In my view, the Ministry has consistently treated them as confidential and I am not aware of any public disclosure of the information contained in them.

Applying the principles expressed above to each of the records, I make the following findings:

> Records 9-10, 17-19, 20-22, 23-34, 35-36, 40-41, 74-75, 121-122, 123, 124, 125-127, 128-129, 130-131, 132, 133-135, 136-140, 141, 142-165, 258, 295-301, 302-316, 317-329, 330-406, 407-418, 443-454, 455-456, 457-459, 460-463, 464-466, 501-502, 507-508, 522-524, 529, 530-537, 538-547, 548-555, 556-558, 559-560, 561, 562, 563-564, 565, 566-567, 568, 569, 572-574, 575-576, 577-579, 580-581, 582-585, 586-588, 589-591, 597-599, 600-605, 606-609, 610, 611-631, 642, 654-656, 658-659, 660-676, 677-678, 684-685, 708-712, 713-714, 716-719, 736-743, 745-746, 747-771, 772-794, 772-803, 805-809, 811-814, 816-820, 822-825, 831-832, 842, 847-848, 851-858, 859-869, 870-876, 921-935, 954-958, 1108-1110, 1114-1116, 1117-1118, 1284-1295 and 1297-1298 are exempt under the solicitor-client communication privilege aspect of Branch 1.

Accordingly, I conclude that each of these documents is properly exempt under section 19.

Litigation Privilege

As indicated above, the Ministry takes the position that certain other records qualify for exemption under the litigation privilege aspect of Branch 1 of section 19 because they were prepared for the dominant purpose of litigation. I have reviewed the contents of each of these records and find that they were prepared for the purpose of litigation which was at that time either on-going or contemplated. The litigation involved the Government of Ontario either as a litigant or as an intervener. Accordingly, I conclude that Records 14-16, 43-46, 47, 509-516, 517, 518-522, 525-526, 527-528, 592, 593-596, 826-828 and 843-846 are exempt under the litigation privilege aspect of Branch 1.

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of the discretionary exemption in section 13(1) to Records 833, 834-835, 839, 877-879 and 1296, which are not exempt from disclosure under either section 12(1) or section 19. Section 13(1) provides:

> 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

Findings

I will address the application of the section 13(1) exemption to each of the remaining records individually.

Records 833, 834-835

I have carefully reviewed the contents of these records, which consist of overlapping email chains. In my view, they include the advice or recommendations of one civil servant to another regarding a specific course of action. The communications reveal both the advice provided and the follow-up clarification and elucidation of the problem under consideration. In addition, I find that none of the mandatory exceptions to the application of the exemption apply in the circumstances. These records are, accordingly, exempt under section 13(1).

Record 839

This record is a brief email communication in which one civil servant suggests that a briefing note be prepared on a particular subject. In my view, a document of this sort does not contain advice or a recommended course of action and does not, accordingly, qualify for exemption under section 13(1).

Record 877-879

This record consists of a lengthy email chain and refers to a specific course of action being recommended by one civil servant to another about a specific issue. Accordingly, I find that this record qualifies for exemption under section 13(1). I further find that none of the exceptions in section 13(2) are applicable in the circumstances.

Record 1296

This document, a short one-page briefing note prepared by a Senior Policy Advisor with the Ministry's Corporate Aboriginal Policy and Management Branch, was prepared with a view to setting out the response of the then-existing Ontario Native Affairs Secretariat to one very specific aspect of an initiative of the Ministry of Finance. I find that the briefing note in question describes only a single specific course of action to be followed regarding the identified issue. As a result, I find that the record qualifies for exemption under section 13(1), and that none of the exceptions in section 13(2) apply to it.

By way of conclusion, I find that Record 839 does not qualify for exemption under section 13(1), while Records 833, 834-835, 877-879 and 1296 are properly exempt under that section.

PUBLIC INTEREST IN DISCLOSURE

The appellant argued at the mediation stage of the appeal that there exists a public interest in the disclosure of the records at issue as contemplated by section 23, which reads:

> 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 filed, 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]. 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 has not provided any evidence to substantiate her position that there exists a public interest, compelling or otherwise, in the disclosure of the records found to be exempt under sections 13(1) and 19. Based on my review of the contents of these documents, I find that any interest that may exist in their disclosure is neither compelling nor public. The appellant represents an organization which appears to have some private interest in obtaining access to the information, but I am unable to determine, based on the information provided to me by the appellant, that there exists a public interest in their disclosure.

ORDER:

1. I order the Ministry to provide the appellant with a decision letter respecting access to Records 99 to 106, with the exception of paragraph 4 of Record 101, using the date of this order as the date of the request.

2. I order the Ministry to provide the appellant with access to Record 839 by **January 17, 2008.**

3. I uphold the Ministry's decision to deny access to the remaining records at issue in the appeal.

Original signed by: December 18, 2007
Donald Hale
Adjudicator