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

ORDER PO-2689

Appeal PA07-88-2

Ministry of the Environment

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BACKGROUND:

The Ministry of Environment (the Ministry) notes that there were two separate undertakings at the Ministry that gave rise to the request:

- An application for review under the *Environmental Bill of Rights* (the *EBR*) to consider the need to subject the Ministry of Education to the *EBR*; and

- A proposed amendment to the General Regulation under the *EBR* to subject the Ministry of Education to the statement of environmental values requirements of the *EBR*. The proposed amendment was the subject of a proposal notice on the Environmental Registry, which was posted on November 14, 2005.

The requester in the current appeal is the same person who asked for the review of the *EBR* posting with respect to the issue of requesting that the Ministry of Education be subject to the provisions of the *EBR*.

To date, the final decision has not been made by the Minister of Environment and the Executive Committee of Cabinet to make the Ministry of Education subject to the provisions of the *EBR*.

NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry received a request for:

> all documents (official documents or personal notes, hard copies or electronic ones) that might have originated from or passed through the Minister of Environment's office and the Ministry of Environment and other government departments and people for the following topic:
>
> Prescribing the Ontario Ministry of Education to the Ontario [*EBR*].
>
> This would involve the years 2004 – to the present. This would involve in particular (but not exclusively) communications in regard to this topic between Minister of Education Kennedy and Minister of Environment Broten and their offices as well as correspondence from and to Minister of Education Pupatello and Minister of Education Wynne and Minister of Environment Dombrowsky and their offices and other parties and correspondence from and to civil servants.

The Ministry issued a fee estimate in the amount of $545.00. The requester then narrowed the scope of his request, and the Ministry issued a revised fee estimate in the amount of $214.60. The Ministry also noted that it required a time extension of an additional 60 days to process the request. The requester (now the appellant) appealed this decision and file PA07-88 was opened.

During mediation on that file, the appellant agreed that he would not appeal the time extension. He submitted a request for a fee waiver to the Ministry, but this request was denied. He included the denial in the appeal.

The Ministry then issued their decision, providing a number of records to the appellant while denying access to a number, citing the exemptions at sections 13 (advice or recommendations), 19 (solicitor-client privilege), 21(1) (personal privacy) and 22(a) (publicly available). The fee estimate of $214.60 was reduced to $107.40. The appellant agreed to close that appeal and file PA07-88 was closed.

The appellant then appealed the decision to deny access, and file PA07-88-2 was opened.

During mediation, the Ministry provided an index of records which was shared with the appellant. The appellant indicated to the mediator that he believed that additional records should exist, particularly more internal correspondence after January 2006, and accordingly, reasonable search has been added as an issue in this appeal. The appellant is not appealing the section 21 and 22(a) exemptions, and has removed the non-responsive severances from the appeal.

No further mediation was possible and the file was moved to adjudication.

I initially sent a Notice of Inquiry to the Ministry which sets out the facts and issues on appeal. The Ministry provided representations in response.

I then sent a Notice to the appellant along with the non-confidential portions of the Ministry's representations. The appellant provided representations in response.

Finally, I provided the Ministry with a copy of the non-confidential portions of the appellant's representations and invited the Ministry to make representations in reply. The Ministry provided further representations.

RECORDS:

The following records remain at issue. The "named individual" referred to below is the Manager of the *EBR* Office.

- Page 2 – handwritten notes by [named individual] of meeting with Ministry of Education legal counsel and education officer

- Page 5 – handwritten notes by [named individual] of teleconference call with Ministry of Education legal counsel and the Ministry's legal staff

- Page 6 – handwritten notes by [named individual] of teleconference call with Ministry of Education legal counsel and education officer

- Page 7 – handwritten notes by [named individual] of teleconference call with Ministry of Education legal counsel

- Pages 14/15 – email to/from the Ministry's legal counsel from/to [named individual]
- Page 45 – the handwritten marginal note from [named individual] of the Ministry to [named individual]
- Page 55 – an email from the Ministry's legal counsel to [named individual
- Pages 63/64 – email to/from legal counsels for Education and the Environment from/to [named individual]
- Pages 65 to 122 – emails from legal counsel for Education to [named individual]
- Pages 126 to 133 – slide deck for meeting with legal counsel and other staff for Education including handwritten notes by [named individual] at the meeting
- Pages 145/146 – briefing note prepared by [named individual] which includes one bullet summarizing the legal advice she received from legal counsel at Education and the Ministry
- Page 147 – email to legal counsel for Education from [named individual]
- Pages 167/169 – emails to/from the Ministry's legal counsel to [named individual]
- Page 170 – email from the Ministry's legal counsel to [named individual]
- Pages 450/452 – emails to/from the Ministry's legal counsel from/to [named individual]
- Pages 457/460 – emails to/from the Ministry's legal counsel and legal counsel for Education from/to [named individual]
- Pages 481/486 – emails to/from the Ministry's legal counsel from/to [named individual]
- Pages 487/489 – emails to/from the Ministry's legal counsel and legal counsel for Education from/to [named individual]
- Pages 497/500 – email from legal counsel for Education to [named individual]

- Pages 501/505 – emails to/from the Ministry's legal counsel from/to [named individual]
- Pages 506/512 – email from legal counsel for Education to [named individual]
- Pages 552/557 – emails from legal counsel for Education to legal counsel for the Ministry and from [named individual] to the Ministry's legal counsel
- Pages 565/571 – emails to/from the Ministry's legal counsel from/to [named individual]
- Pages 577/578 – emails to/from the Ministry's legal counsel from/to [named individual]

PRELIMINARY MATTER:

RESPONSIVENESS OF THE RECORDS

At the end of mediation, it appeared that the appellant had removed the non-responsive severances from the appeal. I did not include this issue in either of the Notices I sent to the parties. However, in the appellant's representations, he raised the issue of whether the information in the records that the Ministry claimed to be non-responsive were actually non-responsive to his request. While I did not ask the Ministry to address this issue, I determined that I would address the appellant's concerns as a preliminary matter in this order.

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).

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].

The appellant's request is stated above and relates to the prescribing of the Ministry of Education to the *EBR*.

I have reviewed the information in the record that was claimed as non-responsive by the Ministry. Specifically, this is the handwritten information on page 6 of the handwritten notes by the Manager of the EBR office. From my review of this information, I find that it correctly has been identified as non-responsive. The information relates to a different Ministry and does not reasonably relate to the prescribing of the Ministry of Education to the *EBR*.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that all of the records, except the withheld comment on page 45 of the records, fall within the sections 19(a) and (b) exemptions. Section 19 of the *Act* states, in part, as follows:

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

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

Branch 1: common law 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.)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel 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 giving legal advice."

Representations

In this case, the Ministry argues that the records at issue were the subject of solicitor-client privilege and were prepared by or for Crown counsel for use in giving legal advice. The Ministry submits that the "client" for the purposes of section 19 was the Ministry of Environment as represented by the Manager of the Environmental Bill of Rights Office and her superior, the Director of the Information and Access Branch. The "solicitor" for the purposes of the exemption was three counsels employed by the Ministry of the Attorney General, and located

at the Ministry and one counsel, also employed by the Ministry of the Attorney General, and located at the Ministry of Education. The solicitors communicated with the Manager of the Environmental Bill of Rights Office about the issue of whether to make the Ministry of Education subject to the provisions of the *EBR*.

The Ministry submits that the records at issue demonstrate the nature of the legal discussions and advice and represent a continuum of communication between the client and its counsels. Further, the Ministry states:

> Although the counsel for the Ministry of Education is a different institution from the MOE for purposes of the *Act*, its counsel is Crown counsel. The legal advice was within her expertise and was given to a Ministry of the Crown. [Named counsel at Ministry of Education] provided legal advice to [Manager of EBR Office] as the client. Branches of government outside the MOE consult with legal counsel in other Ministries, including the Ministry of the Attorney General, of which [Named counsel at Ministry of Education] is an employee, on legal issues and request legal opinions on legislative/regulatory changes from time to time.
>
> With respect to the specific records at issue in this appeal, the [Ministry] is of the view that they squarely fall within both 19(a) and (b) of the *Act*. The information consists of legal advice, was provided as background information that was necessary to formulate the requested legal advice and opinion, was used by legal counsel to assist in formulating legal opinion, or form a continuum of communication between legal counsel and the client reflecting deliberations of the issues. Litigation is not anticipated with respect to the issue, therefore "in contemplation of litigation" is not being invoked.

The Ministry, in the confidential portions of its representations, goes on to specifically state the nature of the legal advice being sought and given. Because of its confidential nature, I am unable to provide further detail except to note that the legal advice relates to the issue of making the Ministry of Education subject to the provisions of the *EBR*.

The appellant's representations question whether legal advice was being sought for the purposes of litigation and whether litigation was being contemplated. As stated in the Ministry's representations, litigation was not being contemplated and the records relate to legal advice being sought or given.

Analysis and Finding

From my review of the records and the Ministry's representations I find that section 19 of the *Act* applies to all the records at issue, with the exception of pages 126 to 133 of the record. I agree with the Ministry's characterization of the "solicitor" and "client" relationship between the Manager of the Environmental Bill of Rights Office and counsel at either the Ministry or the

Ministry of Education. I also agree with the Ministry that these counsels are also "Crown" counsel for the purposes of section 19(b).

Pages 2, 5, 6 and 7 contain handwritten notes of the Manager of the Environmental Bill of Rights Office and detail the discussions between the Manager and legal counsel at a meeting and various teleconferences. These handwritten notes represent a recording of the confidential communication between the solicitor (Ministry of Education legal counsel) and the Manager of the Environmental Bill of Rights Office.

The remainder of the records, with exception to pages 126 to 133 of the record, are emails between the Manager of the Environmental Bill of Rights Office and either legal counsel at the Ministry and/or legal counsel at the Ministry of Education. The emailed discussions include legal discussion, request for legal advice and also represent a continuum of communication between the client and her counsels.

Pages 126 to 133 contain a slide deck for a meeting between the Manager of the EBR Office and various other individuals at the Ministry of Education including crown counsel for the Ministry of Education. Based on my review of these records and the confidential representations from the Ministry I am unable to find that these pages of the records were subject to solicitor-client privilege or that they were prepared by or for Crown counsel for use in giving legal advice. These pages of records cannot be characterized as a confidential communication between the solicitors (the Crown counsels) and their client (the Manager of the EBR Office or the Director). Instead, I find that the slide deck was prepared by the Manager of the EBR Office to inform the Ministry of Education as to the advice that was to be given to the Minister of the Environment in regard to the issue. I find that section 19 does not apply to these records and will consider the application of section 13(1) of the *Act* to these records in my discussion below.

I find that all of the records, with the exception of pages 126 to 133 of the records, subject to my discussion on the exercise of discretion below, are exempt under section 19 of the *Act*.

ADVICE TO GOVERNMENT

The Ministry submits that section 13(1) applies to pages 126 to 133 of the records and a handwritten notation made on page 45 of the record. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair

pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"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

[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]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development*

and Mines) v. Ontario (Assistant Information and Privacy Commissioner), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Analysis and Finding

The Ministry submits:

> The marginal comment on page 45 of the record is the advice or recommendation of [named individual] to [Manager of the Environmental Bill of Rights Office] with respect to the issues.
>
> [Named individual], at the time of writing the comment, was a public servant employed by the MOE as Senior Policy Advisor within the Minister's Office.
>
> [Named individual] provided her advice with respect to the Issues Management Plan which as been released in its entirety to the appellant.
>
> The purpose of the comment is to effectively provide direction to [Manager of EBR office] who was responsible for managing the issue for the government.
>
> Words such as recommendation or advice do not appear in the marginal comment; however, the test is whether it would reveal the direction [the Senior Policy Advisor] was providing as part of the deliberative process. If the Minister of Environment agreed that the Ministry of Education should be subject to the provisions of the EBR, the EBR General Regulation (Ontario Regulation 73/94) would have to be amended by Cabinet.
>
> The MOE exercised its discretion not to release the comment in order to maintain the integrity of advice or recommendations. For the purposes of the administration of the EBR, it is inappropriate for the entity involved with the issue of whether to make the Ministry of Education subject to the provisions of the EBR to know what the Minister's policy advisor was recommending.
>
> …The issue whether to make the Ministry of Education subject to the provisions of the EBR has not yet been decided.

I agree with the Ministry's representations. Considering that the appellant has received a copy of the Issues Management Plan in which the withheld information is written on; disclosure of the withheld marginal comment would disclose the Senior Policy Advisor's recommendation regarding the course of action on the issue. From my review of the withheld information on page 45 of the record, the Ministry's representations and the circumstances of this appeal, I find that this information is exempt under section 13(1). Disclosure of the withheld information would reveal a suggested course of action that was to ultimately be accepted or rejected by the person being advised (the Manager of the EBR office).

Regarding pages 126 to 133 of the records, the Ministry submitted the following:

> The slide deck found at pages 126 to 133 of the records at issue constitutes the advice and recommendations of [Manager of EBR office] and [Director, Information Management and Access Branch] with respect to the issues that will be the subject of deliberations of Cabinet.
>
> [Manager of EBR office] and [Director, Information Management and Access Branch], at the time of writing the slide deck, were public servants employed by the MOE within the Information Management and Access Branch. [Manager's] notes of the discussions that took place at the meeting on June 1, 2005 with [named counsel for the Ministry of Education] and [named education officer].
>
> [Manager] and [Director] provided their advice with respect to whether the Ministry of Education with respect to the recommendation that was going to be taken to the Minister of Environment in order that she could make a decision related to then issue.
>
> The purpose of the slide deck was to effectively provide advice to the Ministry of Education with respect to the recommendation that was going to be taken to the Minister of the Environment in order that she could make a decision related to then issue.
>
> …
>
> The MOE exercised its discretion not to release the comment in order to maintain the integrity of advice or recommendations. For the purposes of the administration of the EBR, it is inappropriate for the appellant who is the entity requesting that the Ministry of Education be subject to the provisions of the EBR to know what the MOE staffs were recommending to the Minister of the Environment as part of the deliberative process.

From my review of pages 126 to 133 of the records, I find that only part of these records is exempt under section 13(1), and the rest of the information on these records should be disclosed under the mandatory exception found in section 13(2)(a). Section 13(2)(a) of the *Act* states:

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

Pages 126 to 133 of the records are a slide deck of a presentation made by the Ministry for the Ministry of Education. The Ministry states that the purpose of the slide deck was to provide

advice to the Ministry of Education with respect to the recommendation that was going to be taken to the Minister of Environment in order that the Minister could make a decision relating to the issue of prescribing the Ministry of Education to the *EBR*. I find that pages 126 to 129 contain factual information about the issue. I find that these pages contain information about the request to review the need to subject the Ministry of Education to the *EBR* and then a summary of the *EBR* and the subsequent review. These pages do not contain the advice or recommendations of the Manager of the Environmental Bill of Rights Office or the Director and as such are subject to the mandatory exception in section 13(2)(a).

Parts of pages 130 to 133 of the slide deck including the handwritten notations by the Manager of the EBR office do include advice and recommendations. These three pages contain a list of options. Under the discussion of each option I find that only part of the information contained includes the advice and recommendation or would permit an accurate inference as to the advice and recommendation being given. Accordingly, I find that only part of the information on these pages is exempt from disclosure under section 13(1) and the rest of the information should be disclosed under the mandatory exception in section 13(2)(a).

In summary, I find that the entire handwritten notation on page 45 and part of the information found at pages 130 to 133 of the record qualify for exemption under section 13(1), subject to my discussion on the exercise of discretion below. Pages 126 to 129 of the record, and parts of pages 130 to 133 should be disclosed to the appellant.

EXERCISE OF DISCRETION

The sections 13 and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

I set out above the Ministry's representations on its exercise of discretion regarding section 13. The Ministry considered not releasing the advice or recommendations to protect the integrity of the advice within the review process. As the final decision has not yet been made to subject the Ministry of Education to the provisions of the *EBR*, the Ministry was sensitive to how the disclosure of the advice and/or recommendations could affect the decision-making process. The Ministry also considered the purposes of the *EBR* and the relationship of the appellant/requester to the review process in deciding whether to disclose the advice or recommendations at issue.

While the Ministry did not provide representations on its exercise of discretion regarding section 19, I can see from its application of the exemption that the Ministry took into account relevant considerations in its exercise of discretion. The Ministry considered the purposes of the *Act*, the nature of the legal advice, the relationship of the appellant/requester to the review process and also whether disclosure of this information would affect the decision to subject the Ministry of Education to the *EBR*.

From my review of the Ministry's representations and the records, I find that the Ministry properly exercised its discretion taking into account relevant considerations in the application of sections 13(1) and 19.

PUBLIC INTEREST OVERRIDE

The appellant submits that section 23 of the *Act* applies. 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]. 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]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations

The appellant submitted the following in support of his position that section 23 applies such that there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13(1) and 19 exemptions.

> There cannot be anything more compelling than the protection of the long-term health and safety of the people of Ontario as well as every global citizen due to the actions or inactions of the Ontario government. Currently, ecological degradation is at a crisis point…
>
> Thus, the Ontario Government must be answerable for their reneging on their commitment to do everything they can to promote ecological literacy and stop ecological degradation.
>
> My sympathetic and compelling need to receive the information is that my son and all children of Ontario need protection from ecological degradation now before it becomes even worse when they are adults. My son and all children require bold and decisive action from the Ontario Government to ensure that all citizens are ecologically literate and ecologically conscious. Someday in the future when these future adults study the history of the Government's inaction in this regard, they will want to know why the Government put up so much opposition to protecting their welfare; but children do not have a voice at this time. The documents I have requested may provide some of those answers for their understanding in the future. Perhaps they can use that history in order to not make the same mistakes!
>
> …

> On October 12, 2005, the Ministry of Environment and the Minister of Environment, in agreement with the Ministry of Education and the Minister of Education, made a commitment to prescribe the Ministry of Education to the *EBR*. I am guessing that sometime in 2006, a change of personnel in various positions lead someone to decide to renege on the commitment. An individual or individuals should not be allowed to change a Government commitment without explaining why to the Public. Government should not be allowed to hide behind exemptions to avoid being responsible to the electorate. Walking down the hall to speak to someone who has a law degree but is employed by the Ontario Government so that one can then claim client-solicitor privilege, should not be used as a pretext to thwart the public's right to know why bad decisions are made. This behaviour is not consistent with the intent of [the *Act*].
>
> …
>
> All we want to know is why the Ontario Government reneged on their commitment which may have the effect (in the long run) of possibly creating a more ecologically literate society which might have the effect of solving the very serious ecological degradation we are now faced with! My objective does not appear to be seditious but is rather in the public interest. Thus, I can not think of any good reason why these documents should be held back because anything we can do to motivate the Ontario government to get serious about reconceptualising how we interact with ecological systems, is ultimately in the public interest.
>
> …
>
> Thus, finding out why a decision has been made by the Government to renege on their public commitment would allow the public to refute these reasons and might also expose the indefensible nature of their decision.

The appellant also states the following:

> What I would suggest to the Adjudicator is that she transcend what any individuals are saying on either side and decide whether or not releasing these documents might with the slightest possibility result in daily ecological literacy in our schools (simply knowing the Government will be held accountable to the public if documents were released might persuade the Government to abide by its earlier commitment),…

In response to the appellant's representations, the Ministry provided the following:

> The final decision with respect to prescribing the Ontario Ministry of Education (EDU) under the EBR has not been requested of the Legislative and Regulations Committee of Cabinet.

> In the Environmental Commissioner's 2006-2007 Annual Report at page 185, he states that "In September 2005, the MOE recommended prescribing the Ministry of Education (EDU) for the purposes of consideration of a Statement of Environmental Values that the Ministry would create under EBR. In November 2005, MOE posed a proposal to amend O.Reg. 73/94, and MOE advised the ECO that a total of 59 comments were made. As of June 2007, a final decision had not been made and MOE was still reviewing options for addressing the comments that were received.
>
> The same still applies as of the date of these representations. Despite the delay, the Ministry has not abandoned its commitment to take this matter forward to Cabinet.

The Ministry requested that its reply representations to the appellant's section 23 argument not be shared due to confidentiality concerns. The Ministry submits that disclosure of its representations would reveal the information that was denied to the appellant. Despite the Ministry's confidentiality concerns, I have decided to include the following description of the records, provided by the Ministry, which does not disclose information I have found exempt under section 13(1) and 19.

> To determine whether a compelling public interest exists in disclosing the records, it is necessary to look at the actual records. Most of the records at issue are not whether [the Ministry of Education] should be subject to the provisions of the *EBR*; but, are: sketchy hand written notes; administrative matters; technical procedures to add [the Ministry of Education] to the regulation; comments on the review carried out by [the Ministry of Education] with respect to the appellant's request for a review under *EBR*; draft communication plans/issues; research conducted by counsel…
>
> The majority of the records in the Ministry's file have been released to the requester including records that outline the Ministry's position on the subject without revealing the actual communications from legal counsel.

The Ministry further submits that even if I find that there is a compelling public interest, that compelling public interest does not clearly outweigh the purposes of the section 13(1) and 19 exemptions.

Analysis and Finding

As noted above, to order disclosure of the information which I have found exempt under sections 13 and 19, I must be persuaded that there is a compelling public interest in the disclosure of the records and, if there is a compelling public interest, that the compelling public interest clearly

outweighs the purpose of those exemptions. In my view, in the current appeal, a compelling public interest does not exist and section 23 does not apply.

The appellant submits that there is a compelling public interest in the disclosure of these records because these records will shed light on why the Ontario government has not yet prescribed the Ministry of Education to the *EBR*. This is emphasized in the appellant's above quote that suggests that I must, "..decide whether or not releasing these documents might with the slightest possibility result in daily ecological literacy in our schools". I accept that there is a public interest in ecological issues being taught in our schools and the need for greater ecological literacy in Ontario. I also accept that this public interest is likely to be considered compelling.

That being said, I must agree with the position of the Ministry that the records at issue do not focus on the need to subject the Ministry of Education to the provisions of the *EBR*. The records are, instead, focused on the administrative and legal issues surrounding making such a move. The appellant himself surmises that it was perhaps a personnel change rather than a decision within the government itself that resulted in the Ministry of Education not being prescribed to the *EBR* in October 2005. The Ministry's representations further emphasize this point. From my review of the records, I find that there is nothing in these records that if disclosed would shed light on why there has been a delay in prescribing the Ministry of Education to the *EBR*. Nor is there anything in the records that would, in the appellant's words, result in "daily ecological literacy in our schools."

The appellant also suggests that if I order disclosure of the records at issue, then the government will be compelled to act and to fulfill its earlier commitment. I understand the appellant's frustration at the lack of action on the part of the government. However, there is no relationship between the records at issue in this appeal and the *Act's* central purpose of shedding light on the operations of the government. Disclosure of these records would not inform the appellant on inaction of the government. I find that section 23 of the *Act* does not apply to the records I have found exempt under sections 13(1) and 19.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Ministry was asked to provide a written summary of all steps taken in response to the request. The Ministry submitted the following:

> The [Ministry] did discuss the scope of the request with the appellant. The appellant asked that the MOE narrow the scope of the request after the first interim decision and fee estimate, but not in relation to internal correspondence after January 2006.
>
> [Named Manager of the EBR office] is the custodian of all of the records for the [Ministry] including to/from her personally and her office with respect to this issue and other staff of the [Ministry] and Education.
>
> [Named Manager of the EBR office] maintains both electronic records on her computer including emails and a paper file in her office credenza.

The Ministry provided the following submission that was written by the Manager of the EBR Office in regard to the search undertaken.

> The records requested pertain to two separate undertakings at the Ministry of the Environment.
>
> - An application for review under the Environmental Bill of Rights to consider the need to subject the Ministry of Education to the Environmental Bill of Rights; and,
>
> - A proposed amendment to the General Regulation under the Environmental Bill of Rights to subject the Ministry of Education to the statement of environmental values requirements of the Environmental Bill of Rights…
>
> Both of these undertakings were coordinated by [named Manager of EBR office]. As a result, [the Ministry] records related to these undertakings were in the care and control of one individual.
>
> Following receipt of the original request on December 21, 2006, a comprehensive search, including:
>
> - Project file for the application for review
> - Project file for the proposed regulatory amendment

- Emails
- Notebooks

resulted in identification of 1,400 pages of records that were determined to be responsive to this request.

This search involved physical review of all hard-copy materials (including all project files and staff notebooks covering the relevant timeframe), and an electronic search for emails related to the two undertakings.

Discussions were held between the requester and [the Ministry] staff to re-scope the original request. As a result of these discussions, it was determined that records related to:

- The final report of ministry findings following completion of its review of the need to subject the Ministry of Education to the Environmental Bill of Rights; and,
- Letters from members of the public in support of the application for review

would be excluded from the scope of the FOI request.

Following the re-scoping of the request, the responsive records were reviewed a second time to remove those records that were no longer part of the request.

The Ministry submits that it contacted the Manager of the EBR office to further confirm that no additional records existed. The Ministry also refers to pages 450/452 of the records (withheld from the appellant under section 19) as evidence that no additional records exist after the date of those e-mails which is April 13, 2006.

In support of his position that further records should exist, the appellant submits that each time he has appealed an access decision, additional records were located. The appellant states that this includes his appeal to the Ministry of Education. The appellant submits that he was told at each time that there were no records, only to find that each Ministry provided records which the other did not. The appellant explains that this lack of clarity on the part of the ministries raises the doubt that there are further records. In particular, the appellant submits that there should be more internal correspondence after January 2006.

Analysis and Finding

As stated above, the *Act* does not require that the Ministry prove with absolute certainty that no further records exist. The Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

The appellant asserts that further records exist because additional records were located by the Ministry of Education in the appellant's other appeal. The appellant believes that since the Ministry of Education and the Ministry worked together on the issue of this appeal, both ministries should have the same records.

Based on the representations of the parties, a review of the records and the circumstances in this appeal, I find that the Ministry's search for responsive records was reasonable. The records themselves and the Ministry's representations reveal to me that the Manager of the EBR office has been in charge of this issue from its inception and clearly the records related to the appellant's request would reside with her. I find her description of her search to be reasonable and I uphold the Ministry's search for the records.

ORDER:

1. I order the Ministry to disclose all of pages 126 to 129 of the records and portions of pages 130 to 133 by **August 1, 2008**. For the sake of clarity, I have highlighted the portions of pages 130 to 133 that should **not** be disclosed in the copy of records enclosed with this Order to the Ministry.

2. I uphold the Ministry's decision to withhold access to the remaining records that I found exempt under section 13(1) and 19 of the *Act*.

3. I uphold the Ministry's search for responsive records and dismiss the appeal relating to the search.

4. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1.

Original signed by: July 3, 2008
Stephanie Haly
Adjudicator