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

ORDER PO-2707

Appeal PA07-11-2

Ministry of Education

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BACKGROUND:

The Ontario *Environmental Bill of Rights* (*EBR*) was enacted in 1994. The stated intention of the *EBR* was to promote public participation in, and enhance the transparency and accountability of, government decision-making on issues that may affect the environment. The purposes of the *EBR* outlined in section 2(1) are:

- To protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in [the *EBR*];
- To provide sustainability of the environment by the means provided in [the *EBR*]; and
- To protect the right to a healthful environment by the means provided in [the *EBR*].

The *EBR* provides procedural requirements and legal mechanisms, which give citizens the following rights:

- The right to review and comment upon proposed policies, acts, regulations and instruments, and to appeal certain decisions;
- The right to make an application for review to have existing policies, acts or regulations reviewed or changed;
- The right to make an application for an investigation into possible contravention of environmental statutes; and
- The right to sue where harm to a public resource has occurred.

The *EBR* applies to certain provincial ministries and legislation that have been prescribed under Ontario Regulation 73/94. There are different levels of prescription under the *EBR*, with the very basic level being prescribed only for the purposes of the requirements in section 7. Under this provision, prescribed ministries must create Statements of Environmental Values (SEV), or public mission statements, which outline that ministry's commitment to environmental protection through the decisions it makes.

The *EBR*'s requirement that the fully prescribed ministries inform, and consult with, the public regarding proposed legislation and policy is effected through an on-line database called the Environmental Registry. The Environmental Registry contains information about environmental proposals, decisions, court cases and other related information. Citizens and environmental groups make submissions to the government in response to items posted on the Environmental Registry, either individually or through issue-based alliances.

In addition, the Environmental Commissioner of Ontario (ECO) is appointed as an independent officer by the Legislative Assembly to monitor and report on government compliance with the *EBR*.

HISTORY OF THE APPEAL:

The requester in this appeal comes from an academic background, and is a longtime advocate of a more prominent role for environmental education in the Ontario school curriculum. The requester believes that fostering greater ecological literacy in students is critical to meaningfully

addressing environmental degradation and other global challenges. Part of the requester's approach to this issue has been to pursue amendments to Ontario Regulation 73/94 in order to have the Ministry of Education added to the list of ministries prescribed under the *EBR*. In the event that the Ministry of Education was fully prescribed to the *EBR* for the purposes of the right to review provisions, the Minister could be asked to review the current school curriculum to ensure that it sufficiently addresses the protection of the environment. The appellant has been closely involved in two applications for this purpose, the most recent of which he submitted in May 2004.

In November 2005, a notice of a proposed amendment to Ontario Regulation 73/94 to subject the Ministry of Education to the SEV (section 7) requirements of the *EBR* was posted on the Environmental Registry. However, as of the date of this order, no final decision had been made by Cabinet about prescribing the Ministry of Education to any or all of the provisions of the *EBR*.

NATURE OF THE APPEAL:

In October 2006, the Ministry of Education (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (*the *Act*) for access to the following information:

> … all documents (official documents or personal notes, hard copies or electronic ones) that might have originated from or passed through the Ministry of Education, Ministry of the Environment or other government departments and people for the following topic:
>
> Prescribing the Ontario Ministry of Education to the Ontario Environmental Bill of Rights.
>
> This would involve the years 2004 to present. This would involve in particular (but not exclusively), correspondence in regard to this topic between Minister of Education Kennedy and Minister of the Environment Broten and their offices as well as correspondence from and to the 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.

Appeal PA07-11

The Ministry identified records responsive to the request and granted partial access. Access to the remaining information was denied pursuant to the exemption in section 21(1) (personal privacy) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to this office. He advised that although he was not appealing the Ministry's denial of access to personal information under section 21(1), he believed additional records should exist that were responsive to the request.

Accordingly, Appeal PA07-11 was opened to deal with the adequacy of the Ministry's search for responsive records.

In the course of processing that appeal, the Ministry located additional records responsive to the request. The Ministry issued a new decision to the appellant on April 2, 2007, granting partial access to the records, but citing a number of exemptions to deny access to the remainder. The Ministry also claimed that portions of the records are not responsive to the appellant's request.

The appellant agreed to close Appeal PA07-11, with the understanding that a new appeal would be opened to deal with the Ministry's new decision.

Appeal PA07-11-2

The appellant appealed the Ministry's decision to deny access to the records in whole, or in part, under sections 12 (cabinet records), 13(1) (advice and recommendations) and 19 (solicitor–client privilege). He also appealed the Ministry's claim that portions of the records are non-responsive to the request. Finally, the appellant also raised the possible application of the public interest override at section 23 of the *Act*.

It was not possible to resolve this appeal through mediation. Consequently, it was transferred to the adjudication stage of the appeal process where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the facts and issues to the Ministry, initially, to seek representations, which I received. I then sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the Ministry, inviting submissions from him, which I received.

In the period of time leading up to the preparation of this order, several conversations took place between staff from this office and the Ministry at my request, in order to clarify certain severances applied to the records, as well as other matters. These discussions resulted in two records (Records 103 and 119) being disclosed to the appellant.

Appeal PA07-88-2 – Order PO-2689

A similarly worded request by the appellant to the Ministry of the Environment resulted in the opening of Appeal PA07-88-2 with this office. That appeal was closed by the issuing of Order PO-2689 by Adjudicator Stephanie Haly on July 3, 2008.

RECORDS:

The records at issue in this appeal number approximately 128 and consist of internal memoranda, briefing notes, e-mails, slide show presentations, draft documents, correspondence and other related documents. These records were described more specifically in the Ministry's (September 2007) revised index.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

The Ministry claimed that Records 95, 96, 112, 116–119 and 128-129, or portions of them, are non-responsive to the appellant's request. However, although the Ministry's representations refer to Record 119, this record is no longer at issue in this appeal because it was disclosed to the appellant during adjudication.

General Principles

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).

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. Furthermore, previous orders of this office have established that to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Background

During the mediation stage of this appeal, the Ministry identified portions of Records 95, 96, and 116-118 as non-responsive to the appellant's request. However, the Ministry advised in its representations that it was no longer relying on section 13(1) to withhold Records 112 (and its duplicate, Record 128) and 129, but submitted instead that those records are non-responsive.

Representations

The Ministry submits that Records 95 and 96 consist of the "Daily Issues Alert", which is a daily e-mail service intended to inform staff about issues in the news media that may require response. The Ministry states:

> The portion of the "Daily Issues Alert" email that was released to the appellant dealt with "Outdoor/Environmental Education", and was thus related to his request. The portion that was severed dealt with another issue entirely, and was clearly outside the purview of the request.

Records 116-118 are "Current Issues" charts, which summarize the status of Ministry matters. The Ministry notes that the Records 116 and 117 are Ministry-wide, while Record 118 relates to the Corporate Coordination Office. The Ministry submits:

> In each case, the entry on the chart that dealt with the substance of the request was released to the Appellant (subject to small severances pursuant to section 19 on Record 117…). The other entries on the chart deal with different issues entirely, and were thus clearly non-responsive as well.

With respect to the records more recently designated to be non-responsive, the Ministry submits:

> Records 112/128 and 129 are House Notes dealing with the topic of "Environmental Education in Ontario." They do not deal with the issue of the [*EBR*], or the possibility of prescribing the Ministry of Education under that legislation.

Echoing the principles enunciated in the Notice of Inquiry, the appellant emphasizes the point that a liberal interpretation of each request by the institution best serves the purposes and spirit of the *Act*. With specific reference to the Ministry's position on Records 95 and 95 (the Daily Issues Alerts) and Records 116-118 (the Current Issues charts), the appellant states:

> [These records] appear to be of minor import which then causes me to wonder why would the Ministry even bother to oppose [their disclosure]? I received many blank and nearly blank pages … so I cannot understand the Ministry's concern that they might possibly be sending me items not pertinent to my request? … I leave it to the discretion of the Adjudicator to determine if they are responsive.

Regarding the records more recently claimed by the Ministry to be non-responsive, the appellant simply takes the position that it is "necessary for [him] to receive" Records 112/128 and 129. His representations do not address the issue of responsiveness.

Analysis and Findings

In order to ascertain the responsiveness of information, the scope of the request must be established first. This early step taken by an institution upon receipt of an access request provides essential guidance to an institution in identifying possibly relevant sources and locations for its search for the requested information. It also informs the task of determining if the records located through the search fall within, or outside of, the scope of the request. Information determined by an institution not to be "reasonably related" to the request is said to fall outside the scope of the request and need not be provided to the requester.

Turning to the wording of the appellant's request as excerpted on page two, above, I find that it includes all records reasonably related to "Prescribing the Ontario Ministry of Education to the Ontario Environmental Bill of Rights."

In the context of the *EBR*, the term "prescribing" in relation to the Ministry has a very specific meaning, as described in the Background section of this order, and this meaning plays an important role in my finding regarding the scope of the appellant's request. Although the appellant's interest in environmental education is addressed in his representations, the request itself is linked to the appellant's application to have the Ministry of Education prescribed under the *EBR* and his desire to ascertain what has happened with that application. I find, therefore, that responsive records would be those that relate to the *EBR* application and process.

I have reviewed the records carefully. Having done so, I find that the information withheld as non-responsive from Records 116 to 118 is not responsive to the appellant's request. The exemption claim of section 19 to a brief responsive portion of Record 117 will be addressed later in this order.

However, I will address what appears to be an inconsistency in the Ministry's position with respect to the responsiveness of Records 95, 96, 112/128 and 129. The Ministry states in its representations that it disclosed information (a news article) related to "Outdoor/Environmental Education" in Records 95 and 96 (the Daily Issues Alert) as it was "related to his request." However, it then claims that Records 112/128 and 129, over which it had previously claimed section 13(1) (advice or recommendations), which "[deal] with the topic of 'Environmental Education in Ontario'," are not responsive. In addition, although the Ministry disclosed one portion of Records 95 and 96 consisting of a news article related to environmental education, another portion of each of those records was withheld as non-responsive, even though it identifies the need to address the "issue" (of the press coverage of environmental education). No exemption is claimed for this severance.

The Ministry cannot have it both ways. Either the information regarding environmental education is "reasonably related to" the request in this appeal or it is not.

In my view, the portions of Records 95 and 96 already disclosed, which relate to environmental education, were not reasonably related to this request. The subject may be connected to the

appellant's broader area of interest, but it does not reasonably relate to the prescribing of the Ministry of Education under the *EBR*. My finding in this regard does not have any practical or remedial effect on the information previously disclosed. Consequently, however, I find that the remaining portions of Records 95 and 96, as well as Records 112/128 and 129, have been correctly identified by the Ministry as non-responsive to the request.

Accordingly, I uphold the Ministry's decision to sever portions of Records 95, 96, and 116 to 118, and withhold all of Records 112/128 and 129, as non-responsive to the request.

PRELIMINARY MATTER

Draft or duplicate copies

In the revised index submitted to this office, the Ministry identified a number of records as duplicate copies of other records at issue in this appeal. My own review has identified other instances of duplicate or draft records. In the circumstances, it is not necessary for me to review the possible application of the exemptions to each of these drafts or duplicates.

In addition, some of the drafts or duplicates also include a brief cover e-mail or notation. In most of these cases, these brief e-mails or notations are not sufficiently significant to affect my findings as to whether the copies are drafts or duplicates. Any exceptions to these findings are noted in the following list of records.

I make the following findings regarding the draft or duplicate records, and the review of the Ministry's exemption claims:

- Records 3, 9, 12, 15, and 28 are draft copies of Record 99. I have carefully considered these records and I am satisfied that they represent progressive versions of the same document. The Ministry has claimed the application of sections 12 and 19 in relation to several of the drafts, and only section 12 in relation to others. In the circumstances, and based on my findings below, I am satisfied that it is appropriate to review the possible application of both sections 12 and 19 to Records 3, 9, 12, 15 and 28. For reasons described under the next heading, it will not be necessary for me to review the possible application of the exemptions to Record 99.

- Record 44, pages 12 & 13 of Record 77, pages 3 & 4 of Record 100, Record 108, and Record 114 are all duplicate copies of the same record. I will only consider the possible application of the exemptions in relation to it as it appears in Record 77.

- Record 47, page 11 of Record 77, page 1 of Record 100, Record 107 and Record 113 are also duplicate copies of the same record. I will only consider the possible application of the exemptions in relation to it as it appears in Record 77.

- Record 123, which was disclosed to the appellant in part, is a duplicate copy of Record 54, which was withheld in its entirety. In both cases, the Ministry claimed that the record, or portion of it, was exempt under section 19. I will consider the possible application of section 19 only in relation to the withheld portion of Record 123.

- Record 58 is a duplicate copy of Record 56 even though the two copies of this e-mail were printed from different user's e-mail accounts.

- Records 102 and 111 (pages 1-4) are duplicate copies of pages 2 – 5 of Record 77. Record 102 has a one page attachment that I am satisfied does not change my findings with regard to the record. I will consider the possible application of sections 12 and 19 to the record as it appears in Record 77. Moreover, pages 2-4 of Record 65 and pages 2-6 of Record 66 appear to be earlier drafts of this same briefing note and I will consider these as separate records under sections 12 and 19 of the *Act*.

- Record 103 was disclosed to the appellant during adjudication. This record is described in the Ministry's revised index as "Report of [2005-2006] Environmental Commissioner of Ontario Annual Report & Ministry of Education response" (7 pages). On my review, portions of Record 103 appear to be an early draft of an appendix to several other records: i.e., 65, 102 and 111 (pages 5-9 of each), and Record 66 (pages 8-12). I will consider the possible application of sections 12 and 19 to the record as it appears in Record 66. Records 57 and 77 (pages 6-10) are also duplicates of this record but contain handwritten notations. The notations are sufficiently significant that I must review these versions of the record separately from the others.

- Record 110, Record 130 (pages 1-3), and Record 131 (pages 2-4) are duplicate copies of Record 106. Record 130 has a one page attachment, but I am satisfied that it is not significant enough to affect my finding that it is a duplicate. As there is a cover e-mail with significant content attached to the copy of this record that is identified as Record 131, I will review the possible application of sections 12 and 19 to that copy.

I acknowledge that this approach necessitates the review of certain pages or components of records that the Ministry decided to bundle together as one record when processing this request. However, in my view, this approach is supportable in light of the definition of the term "record" contained in section 2(1) of the *Act* since it contemplates that a record will typically constitute a single document. Accordingly, those records listed above will be considered as discrete documents, even though they will still be referred to by their position (page number) within the record number assigned by the Ministry.

In my consideration and findings above, I have not included records which consist of e-mail strings, notwithstanding the fact that parts of each may duplicate the content of previous e-mails. Each will be considered as a separate record based on the exemption claims noted in the Ministry's revised index.

Other matters – indexing or administrative discrepancies

Record 102 is described in the Ministry's revised index as "House Note – Application of the [*EBR*] to Ministry of Education with attachments (same attachments as in #30) & Document Review Form (*10 pages*)". However, in the version of records sent to this office, Record 30 consists solely of a one-page e-mail. For this reason, I will review Record 30 separately from Record 102, and under section 19, as claimed by the Ministry.

Record 99 is described in the revised index as "September 26/05, Memorandum to Honourable G. Kennedy from K. French, ADM, re Prescribing the Ministry of Education under [*EBR*], with attachments (*19 pages*)." The exemption claimed to deny access to this record is section 12(1). On my review of this record, however, it appears that the covering memorandum refers to a document that is not, in fact, attached. Instead, the 18 page document attached to Record 99 appears to be the final draft of the series comprised of Records 3, 9, 12, 15 and 28. In the circumstances of this appeal, and in view of what appears to be an administrative oversight, I will order the Ministry to issue a new access decision to the appellant on the 19 pages identified as Record 99 in the revised index.

ADVICE TO GOVERNMENT

Section 13(1) states:

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

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

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].

Background and Representations

Although the section 13 exemption was originally relied upon to withhold a number of records, over time that number was reduced. In the Ministry's September 2007 index, aside from Records 112/128 and 129 (which were addressed in a previous section of this order), only portions of Records 7 and 106 were noted as being withheld under section 13(1).

In the representations provided to me during the inquiry, the Ministry clarified its position on Record 7 as follows:

> The Ministry previously identified Record 7, a draft letter to [the appellant] from the Deputy Minister, as a record to which section 13 (and section 12) applied. The Ministry has now reconsidered this decision and is now recommending that a severed version of the record be provided to the appellant. The severed portions would be the handwritten notes at the top and bottom of the document, including those on a yellow sticky note.

It was also necessary to seek clarification regarding the withheld portion of Record 106 as section 13 appeared to have been claimed simply in relation to the Word file icon which represented a briefing note. The briefing note should have, but was not, attached to the one page e-mail. The Ministry confirmed that the exemption was claimed for the attachment and sent a copy of the record for my review. I was, therefore, able to confirm that it is a briefing, or house, note similar in format and content to other records at issue in this appeal (Records 110, 130 and 131), as outlined in the previous section of this order.

The Ministry addressed this type of record in its representations prior to submitting a copy of the briefing note attached to Record 106 to this office. The Ministry concedes that past orders of this office, including Order P-1006 and PO-1678, have held that house notes were not considered eligible for exemption under section 13(1) since they generally contain only factual information and

> … [do] not contain an element of advice or a recommendation that could be accepted or rejected as part of the deliberative process.
>
> Likewise, in Order PO-1678, Assistant Commissioner Mitchinson found that the information provided in the "Response" sections of the House Books notes was not advice or recommendations within the meaning of section 13. He found that the "information was provided to Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate."

Based in part on that analysis, the Ministry changed its view about Records 112/128 and 129 and withdrew the claim of section 13 as regards those records. As previously addressed in this order, the Ministry instead claimed that those particular records were non-responsive. The Ministry did not offer any representations in support of the claim of section 13(1) to exempt the briefing, or house, note attached to the e-mail identified as Record 106.

Analysis and Findings

As previously noted in this order, my review of the briefing note attached to Record 106 determined that it is identical to Records 110 and 130, and substantially similar to Record 131, which are claimed to be exempt under sections 12 and 19. Moreover, as noted, the Ministry did not provide representations to support the exemption of this record under section 13(1). Even in the absence of representations on the issue, my review of Record 106 under section 13(1) leads me to adopt the reasoning of former Assistant Commissioner Mitchinson in Order PO-1678. Accordingly, I find that the record does not contain advice or recommendations that qualify for exemption under section 13(1). However, I will be reviewing this record under sections 12 and 19.

On the version of Record 7 this office possesses, the only handwritten items consist of an empty bullet list, seven words that identify the purpose of the draft letter, and the name of the appellant. On my review of the record, the argument that this particular information "suggests a course of action that will ultimately be accepted or rejected by the person being advised" strains common sense. Accordingly, I find that this information does not constitute advice or recommendations or suggest a course of action that may be accepted or rejected for the purpose of section 13(1). Record 7 does not qualify for exemption, and I will order the Ministry to disclose the remaining portions of this record to the appellant.

CABINET RECORDS

The Ministry is relying upon the introductory wording of the mandatory exemption in section 12(1) to deny access to the records, as outlined in the attached appendix. These records consist of e-mails, memoranda, summary reviews, slide show presentations and other documents from the time period May 2004 to October 2006.

General principles

The introductory part of section 12 states:

> 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 … [followed by a list of six categories of records]

Section 12(1): introductory wording

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].

Representations

In support of its claim that the introductory wording of section 12(1) applies to exempt many of the records at issue, the Ministry submits:

> Section 12 is a mandatory exemption, the purpose of which is to preserve the integrity of the Cabinet decision-making process and to ensure the confidentiality of Cabinet's deliberations. Consequently, records that would reveal the substance of those deliberations and decision-making process, or that would allow the drawing of accurate inferences about same, such as the records at issue in this appeal, cannot be disclosed [emphasis in original]. …
>
> In Order PO-2362, the IPC found that records that would "reveal the subject matter of records that are currently being prepared for submission to the Executive Council or its committees" were subject to the section 12 exemption. The IPC made this finding notwithstanding the fact that the appellant in that case argued vehemently that there was no evidence that there would be a Cabinet decision required at the time of the request, when the exemption was claimed. …
>
> It is the Ministry's respectful submission that records in this situation, which will form the basis for a submission for Cabinet consideration, are also subject to the exemption from disclosure in section 12(1).
>
> Orders PO-2091-I, PO-2122, and PO-2562 recognize that the language of subsection 12(1) does not require that a decision has already been made by Cabinet. Indeed, the clauses that follow make it clear that materials *prepared for*, but not submitted to, Cabinet will qualify for the exemption; as well, clause 12(1)(d) recognizes that consultation documents between Ministers relating to making government decisions or formulating government policy will be exempt from disclosure. It is the Ministry's respectful submission that, by analogy to clause (d), information that would reveal the consultations that took place

> between the Ministries, and which will form the basis for the Cabinet submission seeking approval of the recommended course of action, are also exempt under subsection 12(1).

Regarding the possible application of the exception in section 12(2) relating to asking for Cabinet's consent to disclose the records, the Ministry submits that it did not "seek Cabinet approval to release records that had not yet been considered or deliberated upon."

The appellant's representations do not directly address the possible application of the mandatory exemption in section 12. However, the appellant states that:

> Anything that went to Cabinet is of course critical to understanding why nothing has been done in regard to my EBR appeal.

During the preparation of this appeal for order, I asked staff from this office to contact the Ministry regarding the status of this matter before Cabinet. Ministry staff advised this office that no submission has been made to Cabinet for deliberation or decision on the issue of prescribing the Ministry under the *EBR*.

Analysis and Findings

To establish that the introductory wording of the section 12 exemption applies, the Ministry was required to provide sufficient evidence to satisfy me that disclosure of the records at issue would either reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences regarding the substance of any deliberations, on the issue of prescribing the Ministry of Education to the *Environmental Bill of Rights*. In my view, the evidence fails to establish any such link. For the reasons that follow, I find that none of these records for which this exemption is claimed are eligible for protection under section 12.

The interpretation given to several key terms in the introductory wording of section 12(1) has informed my findings. Past orders of this office have held that the word "deliberations" means discussions with a view to making a decision [Order M-184]. In addition, the term "Executive Council" means Cabinet. For a body to be considered as a Cabinet "committee" for the purposes of this section, it "must be composed of Ministers where some tradition of collective ministerial responsibility and Cabinet prerogative can be invoked to justify the application of this exemption." It does not include a committee comprised of staff from a Ministry [Order P-604]. I agree with the interpretations articulated in these orders and have applied them in the following analysis.

As I understand the circumstances surrounding the Ministry being prescribed under the *EBR*, the timing of a submission to Cabinet on the subject remains entirely uncertain. In fact, in its representations on the exception in section 12(2)(b), the Ministry refers to the prematurity of asking for consent to disclosure of records that have "not yet been considered or deliberated upon."

I accept that there may be an intention to submit the matter to Cabinet. However, the Ministry did not provide evidence of a more specific or detailed plan to do so and, in my view, intention alone is not sufficient to establish the exemption. Moreover, while the introductory wording of section 12 contemplates the possibility of a prospective application, it does not permit an institution to deny access to records which may - at some indeterminate point in the future - inform the deliberations of Cabinet, or one of its committees.

The Ministry relies on Order PO-2362 in support of the submission that records not yet submitted to Cabinet may be exempt under section 12. In my view, however, that order does not assist the Ministry in the circumstances of the present appeal. In that appeal, one record contained a briefing note prepared for the Chair of the Management Board of Cabinet, only one portion of which was severed in accordance with section 12 of the *Act* because it identified the subject matter of a policy initiative that was to be submitted to the Management Board of Cabinet, (a committee of the Executive Council), and Cabinet. Part of one sentence in the second record that identified the same policy initiative described in the first record was severed. Moreover, in that order, Adjudicator Steven Faughnan found the records exempt under section 12(1)(e), and did not even review the application of the introductory wording of section 12(1), or the other clauses of section 12(1) relied on by the institution. Simply put, the Adjudicator accepted the evidence before him that the policy initiative was *currently* being prepared for submission and found the information specifically related to that initiative exempt under section 12(1)(e). In the present appeal, there is no evidence of imminence, or a direct linkage between aspects of the more general Ministry review of the appellant's *EBR* application, and a specific Cabinet submission.

Moreover, I note that in Order 72, former Commissioner Sidney Linden held that a record never placed before Cabinet or its committees would be protected by section 12 only in rare and exceptional circumstances. The Ministry has not established that rare or exceptional circumstances are present in this appeal, and I find that there are none.

It is also noteworthy that these records cover a time period from May 2005 to October 2006. In my view, the preparation of a submission to Cabinet for the purpose of informing future discussions and deliberation on the issue of prescribing the Ministry to the *EBR* would require new and updated information to reflect current reality.

Since the representations provided by the Ministry are not sufficient to establish a connection between the contents of these records and the substance of any Cabinet deliberations, or by extension, the possibility of inference of such deliberations. I find that section 12(1) of the *Act* does not apply. Since the Ministry did not claim any other exemptions in relation to Records 18, 27, 41, 45, 59, 67, 72, 90, and 93, and no other mandatory exemptions apply, I will order these records disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The discretionary exemption in section 19 contains two branches. The Ministry is relying upon both branches of the exemption to deny access to many of the records, as outlined in the attached appendix and complemented by my findings regarding duplicate or draft copies of the records. Accordingly, the Ministry must establish that one or the other (or both) branches apply.

The relevant parts of section 19 of the *Act* state 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;

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

The Ministry submits that both branches of the solicitor-client privilege exemption apply to the records in the present appeal. In support of the statutory solicitor-client communication privilege, the Ministry refers to past orders of this office which have held that in-house counsel or members of the private bar can be considered "Crown Counsel" if the lawyer is "acting in the capacity of legal advisor to the institution."

The Ministry seeks to emphasize that the scope of the exemption is not limited to a narrow construction of the term "legal advice" in view of cases such as *Balabel v. Air India* [*supra*] and previous orders of this office, which have provided exemption for a broader range of communications between client and counsel under the "continuum of communications" principle.

The Ministry describes three categories of records for which the solicitor-client exemption is claimed:

1. Emails or other communications between counsel of the Ministry's Legal Services Branch and Ministry staff, (eg, clients), for the purpose of seeking, formulating and/or providing legal advice;

2. Emails or other communications including drafts prepared by a client, with regard to which legal advice is sought from counsel of the Ministry's Legal Services Branch; and

3. Emails or other communications among Ministry of Education staff and counsel, and staff at the Ministry of the Environment, which were provided to Ministry of Education counsel as part of the "continuum of communications."

In the Ministry's submission, all of the records at issue constitute "communications in which one party is counsel acting on behalf of the Ministry." Echoing an earlier excerpt provided from the reasons in *Balabel, supra*, the Ministry asserts that although legal advice, *per se*, is not evident in all records, some of these communications served to pass information between counsel and the clients for the purpose of "keeping both informed so that advice may be sought and given as required." When viewed as a whole, the Ministry contends, the records "do comprise a 'continuum of communications' between counsel of the Ministry of Education's legal services branch and the clients." The Ministry states:

> While the records may not refer to particular statutory provision or case law, they do connect the issues raised in the circumstances with the requirements contained in the various provisions of the applicable legislative framework. Moreover, the advice, at times, was not confined to a strict analysis of the application of the law, but included what measures 'should prudently and sensibly be done' [*Balabel, supra*] in the legal context of naming the Ministry of Education in the regulation under the [*EBR*].

The Ministry prefaces its submissions on the application of section 19 to issue or briefing notes by acknowledging that there have been differing findings on the application of the exemption in past orders of this office [see Orders PO-1855 and PO-2186-F). However, the Ministry submits that the circumstances addressed by Adjudicator Diane Smith in Order PO-2509 most closely resemble those present in this appeal. In that order, Adjudicator Smith considered the application of section 19 to a draft briefing note with a covering e-mail. The Ministry submits:

> Adjudicator Diane Smith held that, while the covering email requesting the legal advice was exempt from disclosure under s.19, the briefing note itself was not since it had been previously released to the appellant. In the present case, it can be seen from the records in question [which include 65-70, 77, 102, 110, 111, 130, and 131] that legal advice was sought and provided in connection with revisions to the briefing note. One purpose of the briefing notes is to provide strategic and legal advice to the Minister's Office and, as such, briefing notes form part of the continuum of communication between counsel and his/her client. The various drafts or versions of the briefing notes created during this period of time relevant for the request were not released to the appellant, nor have any briefing notes been released to him subsequently.

As I understand the Ministry's argument, the distinction between the records at issue in Order PO-2509 and those at issue in the present appeal lies in the maintained state of confidentiality in the records described.

The Ministry did not specifically address the application of section 19 to the *EBR* Review Summary that is known, in different draft versions, as Records 3, 9, 12, 15, 28 and 99. Record 99 will not be addressed further in this section as it is subject to my order of a new decision. However, the Ministry submits the following related argument:

> It is fairly well established that draft records prepared by counsel for a client attract solicitor-client privilege and therefore qualify for an exemption under s.19, (see Orders PO-1864, PO-2162, and PO-2432). In Order PO-1855, draft letters were also found to form part of counsel's "working papers" and qualify for exemption under s.19 also for that reason. In the present case, there are numerous records that consist of drafts prepared by the client with regard to which counsel has been asked to provide legal advice and has done so. It is the Ministry's position that these records qualify for exemption under s.19, in that they are solicitor-client privileged and form part of the "continuum of communications" between counsel and their Ministry clients. Such records from the client are clearly prepared and provided to counsel for the purpose of obtaining legal advice.

The Ministry acknowledges that certain records do not fit easily within the categories listed in the representations, but submits that for these records, the "continuum of communications" remains the key relevant principle.

> In these records, a request for legal advice may not [be] specifically made, but is obvious nonetheless, or the client passed information on to counsel, or vice-versa, for the purpose of keeping both client and counsel informed so that legal advice can be readily accessed as the situation developed.

In the remainder of its representations, the Ministry addresses the issue of waiver of privilege. However, in view of my findings, it is unnecessary for me to canvas these representations at any length.

The appellant's representations do not specifically address the issue of the solicitor-client privilege exemption.

Analysis and Findings

Having considered the circumstances of the creation of these records, I find that the lawyers for the Ministry are in a solicitor-client relationship with policy and program staff from the Ministry's Corporate Coordination Office. In some instances, counsel for the Ministry of the Environment are included in the communications, and in the circumstances of this appeal, I am satisfied that there exists a common purpose between them. Furthermore, I accept the Ministry's submission and find that the lawyers in question are also "Crown" counsel for the purposes of section 19(b).

The remainder of the analysis requires a determination of whether the records reflect a written record of communication between a solicitor and his or her client, and then whether each record is subject to privilege because of the giving or seeking of confidential legal advice.

Based on the Ministry's representations, and my review of the records, I am upholding the Ministry's section 19 exemption claim in part. My findings and reasons appear below.

Record 1 is a copy of the appellant's Application for Review under the *EBR*, with a cover letter from the Executive Assistant to the Minister of the Environment to the then-Assistant Manager of the *EBR* Office. The Ministry offered no representations in support of withholding this particular record, which was (apart from the correspondence attached) authored by the appellant himself. I find that it does not reflect written communication between a solicitor and client, nor can it be said that it contains legal advice subject to privilege. I will order the record disclosed in its entirety.

Records 3, 9, 12, 15 and 28 represent progressive versions of an internal working document referred to as a Review Summary of the *EBR* Application. This record was prepared by a policy advisor of the Ministry with key input by legal counsel. On review of Records 3, 9, 12, 15 and 28, I note that each contains a watermark to signify that it is a draft, as well as notations that the record is "Confidential" and "For Discussion Purposes Only." Based on my review of this series of records, I am satisfied that each contains confidential legal advice that would be evident, or readily deduced, by disclosure. In addition, the versions of the Review Summary found at Records 9, 12 and 28 each have a cover e-mail directed to, or from, the lawyer at the Ministry who appears to have been primarily responsible for providing legal support on this matter. I find that these e-mails form part of the continuum of communications between solicitor and client for the purpose of revising the attached document with the advice of counsel. I uphold the Ministry's claim for exemption under section 19 in relation to these five records.

Records 5, 6, 8, 13, 14, 20, 21, 22, 32, 34, 36, 37, 38, 39, 40, 46, 48, 49, 55, 56, 57 (in part), 58, 60, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 89, 91, 92, 121 and 123 are all e-mails exchanged either between counsel or between counsel and other staff at the Ministry or the *EBR* Office. They are part of a continuum of communications between various counsel and their clients on the legal issues related to the prescribing of the Ministry of Education to the *EBR*. I find that these records are confidential solicitor-client communications directly related to the seeking or giving of legal advice about prescribing the Ministry of Education to the *EBR*. Accordingly, I find that they are subject to common law solicitor-client communication privilege and are therefore exempt under branch 1.

I have not reached the same conclusion regarding Records 10, 11, 26, 29, 30, 31, 33, 51, 83, and 88 which consist of e-mails between Ministry staff, including legal counsel. Based on the contents of these e-mails, I am not satisfied that they reveal confidential legal advice or that they otherwise form part of the continuum of communications on the legal issues related to prescribing the Ministry of Education to the *EBR*. On my review of these records, I find that the e-mails are not exempt under branch 1. Furthermore, I find that the e-mails were not prepared "by or for" counsel for the Ministry for use in giving or seeking legal advice and, therefore, branch 2 also does not apply. I will order these records disclosed to the appellant.

Record 25 is an eight-page document comprised of handwritten notes prepared by Ministry legal counsel in attendance at a meeting with other Ministry staff, with a seven-page slide show presentation prepared by staff members who were present at the same meeting. I have carefully reviewed this record and I find that the first page records the impressions of legal counsel with respect to the subject matter of the slide show presentation, and qualifies under section 19. However, the Ministry's representations do not address the slide show or, in my view, provide support for withholding it under section 19. I therefore find that the portion of Record 25 consisting of the handwritten notes of Ministry counsel in attendance at this meeting with other Ministry staff, is subject to common law solicitor-client privilege and is exempt under branch 1 of section 19, while the attached slide show presentation does not qualify for exemption.

Records 16, 17, 24, 35, 42, 43, 52 (including a covering e-mail), 57 (also with a covering e-mail), 77 (pages 6-10), 80 and 100 (pages 9-11) are draft versions of several different briefing notes prepared by legal counsel for the Deputy Minister, or senior Ministry staff. Many of these drafts feature handwritten notations by various legal counsel for the Ministry. Several later versions of the briefing note to the Deputy Minister are labelled "Confidential Legal Advice". Based on my review of the contents of these particular briefing notes, I accept the Ministry's submission that legal advice was sought and provided in connection with revisions to the briefing note. Accordingly, I find that these records form part of the solicitor-client continuum of communications for the purposes of branch 1 of section 19 of the *Act*. Moreover, in my view, the notes written by legal counsel onto these records render the records part of the solicitor's "working papers" that are directly related to seeking, formulating or giving legal advice, and I find that these records are also exempt on that basis [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Record 100 consists of 12 pages stapled together, but portions of it are duplicates of other records at issue. Pages 1, 3 and 4 of this bundle are records that I have already found to be identical duplicate copies of others (Records 44 and 47), and I will address these later in these reasons. In addition, I have already found above that a copy of a draft briefing note to the Deputy Minister (at pages 9-11) is exempt under section 19. However, pages 2, 5-8 and 12 consist of typewritten and handwritten notes and e-mails that I am satisfied constitute confidential communications between various legal counsel and senior staff at the Ministry. I find that these parts of Record 100 qualify for exemption under the solicitor-client communication aspect of branch 1 of section 19.

With one minor exception, I have reached a different conclusion with regard to the exemption of several other briefing or issue notes pursuant to section 19. These particular issue or briefing notes are contained on pages 2-5 of Record 77, pages 2-4 of Record 65, pages 2-6 of Record 66, and pages 2-4 of Record 131. Pages 2-5 of Record 77 (102/111) is the July 20, 2006 (final) version of a briefing note titled "Application of the *Environmental Bill of Rights* to the Ministry of Education." Page 2-4 of Record 65 and pages 2-6 of Record 66 are earlier drafts of the same briefing note, with covering e-mails dated July 7 and July 10, 2006, respectively. Pages 2-4 of Record 131 (106/110/130) is an October 3, 2006 issue note titled "Environmental Commissioner of Ontario 2005-06 Annual Report."

The Ministry takes the position with respect to the issue or briefing notes that legal advice was sought and provided regarding revisions to them. Moreover, the Ministry argues, because the purpose of such records is to align a strategic and legal response to issues, these different versions of briefing notes form part of the continuum of communications eligible for exemption under branch 1 of section 19.

Based on my review of Record 65, and pages 2-5 of Record 77 (102/111), and the Ministry's representations, however, I am not satisfied that their disclosure would reveal confidential legal advice. I accept that Ministry legal counsel may have provided direction to the policy advisor responsible for their preparation. In my view, however, these records are primarily factual and informative in tone. I find that they were prepared to provide Ministry officials with background information on the issue of prescribing the Ministry under the *EBR* and to enable Ministry officials to respond to questions on the subject which could be posed to them [see Order P-1038]. Accordingly, I find that these issue or briefing notes do not qualify for exemption under section 19.

The exception to this finding is a portion of the text comprising the bottom half of page 4 of Record 66. Based on my reading of this information, it contains information regarding legal implications of a certain option that I find constitutes confidential legal advice for the purposes of branch 1 of section 19. Accordingly, I will uphold the Ministry's claim of section 19 to withhold Record 66, in part.

In my view, the primary purpose of the October 3, 2006 issue note at pages 2-4 of Record 131 (106/110/130) was to inform and communicate the Ministry's position in response to the Environmental Commissioner of Ontario's annual report for 2005-2006. In Order P-1038, former Assistant Commissioner Tom Mitchinson found that the act of reviewing and suggesting revisions by a lawyer does not "transform a standard type of record produced by an operating area of the Ministry into a piece of legal advice" [see also Order P-227]. I agree. Based on my reading of the issue note in question, I find that it does not contain confidential legal advice nor was it prepared by or for Crown Counsel for use in legal advice. Accordingly, I find that neither the cover e-mail nor the issue note that comprises Record 131 is eligible for exemption under section 19.

The transcription of the Environmental Commissioner of Ontario's 2005-2006 Annual Report by a policy advisor of the Ministry appears as an appendix to a number of different records at issue in this appeal. As described on page eight of this order, for the purpose of my section 19 analysis, I am considering the version of the transcription appearing in Record 66. As indicated previously, Record 103, which is described in the Ministry's revised index as "Report of [2005-2006] Environmental Commissioner of Ontario Annual Report & Ministry of Education response," has been disclosed to the appellant. In my view, disclosure of later drafts of the transcribed report, which was itself prepared by the Environmental Commissioner's Office, could not disclose confidential legal advice. Moreover, the Ministry's recent disclosure of an earlier version of the transcription may be considered evidence of an intention to waive privilege over this particular document even if I had found that solicitor-client privilege applied. I find,

therefore, that section 19 does not apply to exempt Record 66 and its duplicates, with the exception of my finding regarding part of page 4, above, the records discussed in the next paragraph.

The copies of the transcription of the same Environmental Commissioner of Ontario report found at Records 57 and 77 (pages 6-10) contain handwritten notations. Based on my review of Records 57 and 77, I am satisfied that the notations were made by Ministry legal counsel. In my view, the notations reflect the input or review by Ministry legal counsel and are sufficiently significant to bring these additional copies of the report under the "working papers" aspect of branch 1. Record 57 and pages 6-10 of Record 77 are, therefore, exempt under section 19.

Pages 12 and 13 of Record 77 and its duplicates consist of a two-page August 4, 2005 memorandum to the Deputy Minister of Education from the Deputy Minister of the Environment conveying the recommendation regarding the form of the Ministry of Education's prescription under the *EBR*. Although the memorandum alludes to the input of legal counsel regarding review application, *EBR* materials and other matters, the details are said to be included in an "enclosed report," which is not attached to the record. Based on the author, recipient and contents of this two-page memorandum, I am not satisfied that its disclosure would reveal confidential legal advice for the purposes of either branch of section 19, and I find the exemption does not apply.

Page 11 of Record 77 and its duplicates consist of a one-page September 14, 2005 memorandum to the Deputy Minister of Education from the Director of the Planning and Expenditure Management Branch of the Ministry regarding the prescribing of the Ministry to the *EBR*. On my review of this record, I note that it resembles the record found at pages 12 and 13 of Record 77 in that neither party is acting as Ministry solicitor, or Crown Counsel. Furthermore, based on its contents, I find that it does not qualify for exemption under section 19 because it is not directly related to seeking or providing legal advice, nor do I accept that it is to be used by Crown Counsel for legal advice.

Finally, the Ministry withheld information from one column of the entry related to the *EBR* from Record 117, which is a Current Issues chart maintained by the Ministry. Based on my review of the severed information, I am satisfied that it represents communication of confidential legal advice passing between a Ministry solicitor and her clients. Accordingly, I find that this portion of Record 117 is exempt under branch 1 of section 19.

EXERCISE OF DISCRETION

After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 13 and 19 exemptions are discretionary, which means that the Ministry could choose to disclose information, despite the fact that it could withhold it. The Ministry was required to exercise its discretion under these exemptions.

On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether the Ministry failed to do so. In addition, the Commissioner or her delegate may find that the Ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the Ministry [section 54(2)].

I have upheld the Ministry's decision to apply section 19 to deny access to certain records, or portions of records. I have not upheld the Ministry's section 13 exemption claim. Accordingly, I need only review the Ministry's exercise of discretion under section 19.

Representations

The Ministry submits that it properly exercised its discretion in applying the exemptions to the records at issue. The Ministry refers to Order MO-1573 and lists certain factors that it considered to be relevant in the decision made in the present appeal:

- the goal of the *Act* in terms of providing access to government records;
- the interests the exemption seeks to protect;
- whether the appellant's request could be satisfied by severing the records and releasing as much information as possible; and
- the age of the records.

The Ministry notes that it released 30 records in full and nine records in part (as of the date it submitted the representations). The Ministry also points out that some of the records released were e-mails between legal counsel and Ministry staff, which, in the Ministry's view, demonstrates that the solicitor-client privilege exemption was not applied without consideration of content, and simply because a lawyer's name appeared in the record. The Ministry concludes by stating that the records at issue are no more than three years old, and relate to a decision "yet to be finalized."

The appellant expresses the view that the Ministry has shown bad faith in several aspects of the access appeal and lists several examples, including delays in sending documents and referring to the subject matter of the appeal as his "personal passion" under its representations regarding the public interest override. The appellant's submissions under this heading also address the issue of taking action to promote ecological education and literacy and will be reviewed in more detail in the next section of this order. However, the following comments can be viewed from the perspective of the Ministry's exercise of discretion

> 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. … 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 in protecting their long term welfare; … The documents I have requested may provide some of those answers for their understanding in the future.

Analysis and Findings

I have considered the Ministry's submissions on the factors it took into consideration in exercising its discretion to not disclose the records, or portions of records, for which it had claimed section 19. I have also considered the circumstances of this appeal, including the Ministry's decision to disclose several additional records to the appellant during the adjudication stage.

To be clear, the scope of my authority in reviewing the Ministry's exercise of discretion, and its exemption claims more generally, does not extend to a review of the government's decision with respect to prescribing the Ministry of Education to the *EBR*. My jurisdiction relates solely to a review of the Ministry's decision with respect to access to records in its custody or control that are responsive to the appellant's request. In my view, the evidence before me does not support a finding that the Ministry exercised its discretion regarding disclosure of records responsive to the appellant's access request in bad faith.

I am satisfied that the Ministry has exercised its discretion within generally accepted parameters, and that it considered relevant factors in doing so. I take note of the fact that the Ministry did not claim section 19 for all records originating with Ministry legal counsel, simply based on that origin. I find that the Ministry properly exercised its discretion in this appeal. I uphold the Ministry's exercise of discretion.

PUBLIC INTEREST OVERRIDE

The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by the Ministry. Section 23 of the *Act* 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] O.J. No. 2038, 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.

In the present appeal, then, section 23 could be applied to override the solicitor-client privilege exemption in section 19 if the following two requirements are satisfied. 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 disclosure

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].

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 of the appeal.

Representations

The Ministry was asked to provide representations on the possible application of the public interest override before the appellant had been provided the opportunity to state his case on this issue. Accordingly, in its representations, the Ministry states:

> It is difficult to respond to the public interest override in the absence of the appellant's submissions … These submissions will, therefore, use information provided to it by the appellant to make logical assumptions regarding the arguments likely to be made by the appellant.

The Ministry refers to Adjudicator Holly Big Canoe's statement in Order P-984 that the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government.

The Ministry takes the position that the appellant's interest in environmental education is the appellant's "personal passion," and states that it is unaware of any evidence of a compelling public interest in the issue. The Ministry adds:

> Although the environment in general may be achieving status as a "compelling public interest" such that information about environmental hazards might be subject to a section 23 override, these [matters], it is respectfully submitted, [have] not reached this tipping point of "rousing strong interest or attention."

The thrust of the Ministry's argument on the first requirement is that the release of the records at issue in this appeal will not shed light on the operations of government or, more specifically, on curriculum design or program delivery in the area of environmental education, and in relation to the effect on those items of having the Ministry prescribed to the *EBR*..

Although the Ministry submits that the first requirement of the test under section 23 is not met in the circumstances of this appeal, the Ministry also provided representations on the second part relating to outweighing the purpose of the exemption. The Ministry states:

> … there must be a very careful balancing of the competing factors of compelling public interest and the reason for the exemption when it comes to section 19. This is because the public also has a compelling interest in solicitor-client privilege itself. Every individual in this society who consults with a lawyer depends on that privilege.

To support his submissions about the public nature of the interest at stake, the appellant urges me to contact or interview other individuals, particularly the Environmental Commissioner of Ontario. The appellant also provided further details about the ECO's position in favour of prescribing the Ministry to the *EBR*.

The appellant responds to the Ministry's submission that his interest in environmental education is a "personal passion" by stating, in part:

> The Ministry says it is "not aware of a 'compelling public interest', 'rousing strong interest or attention' in environmental education per se" … Again, how sad to hear this spoken by the primary institution charged with public education!

The appellant's submissions on section 23 are premised on the belief that there was a public commitment to prescribe the Ministry of Education to the *EBR* and that, subsequently, there was a decision within government to renege on that commitment. The appellant provided a copy of an October 12, 2005 letter he received from the Assistant Deputy Minister of the Environment which states, in part:

> As a result of its review, the Ministry [of the Environment] will be recommending that the EBR General Regulation (Ontario Regulation 73/94) be amended to subject the Ministry of Education to the requirements related to statements of environmental values. …

In further regard to this letter, the appellant submits:

> Since this time, nothing has been done in regard to this public commitment. Two years later, the Ontario Government will neither move forward to pass the legislation required to make this commitment official … nor will they explain to

> anyone in the public why they have refused to do so. They have treated the public with contempt. We don't know why they have done nothing. …
>
> All we want to know is why the Ontario government reneged on their commitment which might 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! … 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. …

The appellant submits that the protection of the long-term health and safety of the citizens of Ontario and the world presents the most compelling imperative imaginable for access to the information since it is necessary to understand and challenge government inaction.

A number of letters in support of prescribing the Ministry to the *EBR* accompanied the appellant's representations. The letters describe and highlight the importance of ecological awareness through early education and curriculum inclusiveness. One of the authors writes:

> Students need to learn about preservation and conservation of our precious natural resources as they are the ones who are going to be stuck with the world that is being left to them that is degraded and in jeopardy. … With these problems there is not only a greater need to be educated on how we are connected to the natural [world] but also what can be done to save our natural environment from further degradation and crisis.
>
> How is this achieved? This is done through education and through incorporating ecological literacy into the Ontario Curriculum. …
>
> By prescribing the Ministry of Education to the *EBR*, there is a better chance that an ecological curriculum will be developed and incorporated into the overall curriculum in Ontario. ... The Ministry of the Environment and the Ontario Government promised this prescription in October of 2005 but it has yet to become a reality and they have gone back on their promise. Due to this lack of action, it is important for all documents that are currently being withheld to be given over to the public.

The authors of the support letters also consistently express concern about the government not having met the commitment conveyed by the October 12, 2005 letter to the appellant from the Assistant Deputy Minister of the Environment. One of the authors, a teaching candidate, states:

> Due to the government's illogical reluctance to prescribe Education to the EBR, I am appealing that government releases all the documents they are withholding in regards to the issue. The public has to hold the government accountable for their

> actions and to understand why they would be withholding the documents and consequently why they are not prescribing the Ministry of Education to the Bill of Rights.

Alluding to the Ministry's claim of the solicitor-client privilege exemption, the appellant states:

> … 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 with 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.

The appellant quotes a statement of accountability from the *EBR* which contains an acknowledgement that citizens must be informed of proposed decisions if they are to contribute or participate meaningfully in "environmental decision-making." As I understand the appellant's argument, the fulfilment of the *EBR* demands that he participate by seeking access to the records at issue and also justify a more unobstructed right of access so as to hold the government accountable. As part of his concluding submissions, the appellant states:

> 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), a lessening of ecological degradation as a consequence, a reduction in stress and ill-health for citizens of tomorrow and a positive future for the human species.

Analysis and Findings

For the sake of clarity, I will underline that in order for me to find that section 23 of the *Act* applies to override the exemption of the records I have found qualify under section 19, I must be satisfied that there is a *compelling* public interest in the *disclosure of those particular records* that *clearly outweighs* the purpose of the solicitor-client exemption.

The appellant has provided persuasive representations and supporting documentation from colleagues, students, and the office of the Environmental Commissioner of Ontario regarding the need for greater ecological literacy for our children and youth, and the desirability of prescribing the Ministry of Education under the *EBR*. I accept that there is a public interest in this subject. Moreover, I am prepared to accept that the public interest is a compelling one.

However, my intention in emphasizing certain words of the test for the application of section 23 in the first paragraph above is to underscore the fact that my determination of this issue does not

end with a finding that a compelling public interest exists. That finding represents the first threshold to be met. Indeed, although I may be persuaded that there is a compelling public interest in environmental or ecological education, and in prescribing the Ministry of Education under the *EBR*, the question to be asked is whether that compelling public interest would be served by the disclosure of the specific records withheld under section 19.

The appellant and the authors of the letters of support express a desire to hold the government accountable for its failure to fulfil the commitment conveyed in the October 12, 2005 letter to the appellant from the Assistant Deputy Minister of the Environment: to recommend amendments to Ontario Regulation 73/94 to have the Ministry of Education prescribed to the *EBR* for the purposes of the statement of environmental values requirements. Would disclosure of the records for which I have upheld the solicitor-client privilege exemption shed light on the government's actions, or lack thereof, with respect to this stated area of interest? Having carefully reviewed the exempt records once again for this purpose, I must answer the question in the negative. In my view, disclosure of the information contained in these records does not carry with it the potential to enhance ecological literacy in schools, or any of the other hoped-for consequences expressed by the appellant. More to the point, however, I find that the various memoranda, briefing notes, working papers, e-mails and other documents subject to the solicitor-client privilege exemption would not explain why Ontario Regulation 73/94 has not been amended, as recommended.

The appellant's frustration with the lack of action taken by the government with respect to the commitment conveyed to him in October 2005 is palpable, and I am not unsympathetic to it. However, in my view, there is no relationship between the exempt records and informing the citizenry or equipping them to participate more effectively in the process in question. Since both components of the first part of the test for the application of the public interest override are not met, it is unnecessary for me to review the second part of the test. I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Ministry to issue an access decision to the appellant for the 19 pages referred to as Record 99 in the revised index.

2. I find that the following records, or portions of records, do not qualify for exemption under section 12, 13(1), or 19 of the *Act*:
   1, 7, 10, 11, 18, 25 [except page 1], 26, 27, 29, 30, 31, 33, 41, 44, 45, 47, 51, 59, 65, 66 [except highlighted portion of page 4], 67, 72, 77 [except pages 6-10], 83, 88, 90, 93, 100 [except pages 2, 5-12], 102, 106, 107, 108, 110, 111, 113, 114, 130 and 131.

3. I order the Ministry to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by **September 15, 2008** but not before **September 10, 2008**.

4. I uphold the Ministry's decision to deny access to the remaining records, or portions of records, under section 19 or as non-responsive, as the case may be.

5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: August 11, 2008
Daphne Loukidelis
Adjudicator