



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

# **INTERIM ORDER PO-2895-I**

**Appeal PA08-200**

**Financial Services Commission of Ontario**



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## NATURE OF THE APPEAL:

The Financial Services Commission of Ontario (FSCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "... any and all information pertaining to me in the care and/or control of the Financial Services Commission of Ontario."

FSCO located 1,132 responsive records totaling 2,668 pages in the following branches:

- CEO's Office (CEO records)
- Auto Insurance Division (AID records)
- Legal Services Branch (LSB records)
- Licensing and Marketing Conduct Division (LMCD records)

and granted the requester partial access to them, waiving the applicable fee for providing copies of the records on the basis that payment would cause the requester financial hardship. Access was denied to the remaining records pursuant to the discretionary exemptions in sections 13(1) (advice and recommendations), 14(1)(a), (b) and (c) (law enforcement) and 19 (solicitor-client privilege), as well as the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

The requester, now the appellant, appealed FSCO's decision to this office.

During mediation, the appellant confirmed that she is not pursuing access to the identities of individuals contained on pages 1060, 1221, 1262, 1281, 1282, 1297, 1376 and 1378 found in the batch of records located in the LMCD. This information was withheld under the personal privacy provisions in section 21(1) of the *Act* and is, accordingly, no longer at issue in this appeal. However, the appellant confirmed that she continues to seek access to the identities of the individuals withheld in Record 443 (pages 1043-1044), found in the same batch of records.

No further mediation of the issues was possible and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The assigned adjudicator commenced her inquiry by seeking the representations of FSCO and the appellant's insurance company (the third party), initially. She received representations from both these parties.

The representations of the third party which is resisting disclosure indicate that it is prepared to consent to the release of pages 183, 301-308, 327-336, 446-449, 468-471 and 1273 of the LMCD records. As no other exemptions have been claimed for these records and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

In its representations, FSCO indicates that section 17(1) was inadvertently claimed to withhold Record 116 (pages 337-338) of the LMCD records. As no other exemption was claimed for this record, FSCO advises that this record can be released to the appellant. FSCO also indicates that it no longer relies on the discretionary exemption at section 13(1) to withhold access to the portions of certain records it previously claimed contained advice and recommendations. These records, some in severed form, consist of:

- AID Records 88, 106, 117, 118 and 129 (pages 406-407, 409, 410, 439, 457-460, 479 and 480);
- LMCD Records 290, 315, 498, 536, 581 and 717 (pages 801, 863, 1124-1125, 1184, 1264 and 1424).

As no other exemptions were claimed for them and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

In its representations, FSCO also indicated that it was no longer relying on the section 14(1) exemptions claimed for pages 819 and 820. As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that it be disclosed. Complete copies of the representations received from FSCO and the third party were then provided to the appellant, along with a Notice of Inquiry.

The appellant also provided the adjudicator with representations. In her submissions, the appellant listed the records she was seeking and advised that she was no longer interested in obtaining access to the information which was subject to the exemption claim under section 21(1). The third party and FSCO were then invited by the adjudicator to submit additional representations by way of reply. Only FSCO chose to do so, and a copy of its representations were shared with the appellant for information purposes in order to clarify which records remain at issue in the appeal. Following the conclusion of the exchange of representations, the appeal was transferred to me to complete the inquiry.

## **RECORDS:**

The records remaining at issue consist of various correspondence, notes, reports, tables and other documents which are described in the index of records provided to the parties.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

While not addressed by the adjudicator who conducted the inquiry in this appeal or any of the parties in their representations, based on my review of the records, I am of the view that they contain the personal information of the appellant. All of the records relate to FSCO's reaction to certain complaints and inquiries made by the appellant that relate to her dispute over the payment of accident benefits by her insurer. As such, I find that this information, which includes the appellant's name and other information pertaining to the dispute in which she is involved, qualifies as her personal information as that term is defined in paragraph (h) of the definition in section 2(1). In addition, the records also include confidential correspondence passing between FSCO and the appellant [paragraph (f)] and the personal opinions or views of the appellant [paragraph (e)].

Previous orders have clearly identified that the proper approach to take in dealing with records that contain the personal information of a requester is to take a record-by-record approach. This approach was clearly articulated by Senior Adjudicator Higgins in Order M-352, where he stated as follows regarding the *Municipal Freedom of Information and Protection of Privacy Act*:

The Commissioner's office has taken the view that, because Part II of the *Act* (in particular, sections 36, 37 and 38) sets out a complete procedure to deal with requests for an individual's own personal information, the provisions of Part I do not apply to records which contain the requester's own personal information.

This position is based on the scheme of the *Act* as a whole, and gives effect to the intent of Part II of the *Act*, which is to confer a higher right of access on an individual seeking his or her own personal information. ...

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the *Act* applies. In that approach, the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.

This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of IPC Practices entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal *Act* oblige[s] institutions to consider whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the *Act*. For records which do not contain the requester's own personal information, the decision would be under Part I.

The possible application of Part III of the *Act* has not been identified as an issue in this appeal, but since the request on its face is for the appellant's own personal information, I find that the request ought to have been processed under Part III of the *Act*. In this order, however, I find that certain records are not exempt from disclosure under any of the exemption claimed, and I order them to be disclosed. I find that other records do qualify for exemption under certain exemptions. For those records, I will be inviting the parties to provide representations on the fact that FSCO's decision ought to have been made under Part III of the *Act*, and, in particular, the exemption in section 49(a) of the *Act*.

As a result, this order will be an interim order, requiring disclosure of records which do not qualify for exemption under the *Act*, but requiring FSCO to provide further information regarding the exercise of its discretion not to disclose records which are subject to Part III of the *Act*.

### **THIRD PARTY INFORMATION**

The third party objects to the release of pages 418-419, 1227, 1243-1244, 1252, 1309, 1379-1380, 1387 and 1447 of the LCMD records to the appellant on the basis that these records qualify for exemption under sections 17(1)(a), (b) and (c), which state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply to the above-referenced records, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

The third party claims that the information contained in pages 418-419, 1227, 1243-1244, 1252, 1309, 1379-1380, 1387 and 1447 of the LCMD records contain its commercial information. This type of information has been defined in prior orders as follows:

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

These records represent communications between the third party and FSCO's Ombudsman's office respecting certain issues raised by the appellant. I have carefully reviewed the contents of each of these documents and find that they do not contain information that qualifies as "commercial information" within the meaning of section 17(1). The subject matter of these communications between the third party and the FSCO Ombudsman's office relate to complaints raised by the appellant about the manner in which the third party addressed her claims for statutory accident benefits and the third party's attempts to address these concerns outside the usual dispute resolution process at FSCO.

In my view, these records do not contain "information that relates solely to the buying, selling or exchange of merchandise or services." Rather they outline the third party's efforts to answer the appellant's concerns about the management of specific aspects of her claim for accident benefits. As such, I find that they do not qualify as information that falls within the ambit of the exemption in section 17(1).

Because of the manner in which I have addressed the first part of the test under section 17(1), it is not necessary for me to consider whether the information contained in pages 418-419, 1227, 1243-1244, 1252, 1309, 1379-1380, 1387 and 1447 of the LCMD records was supplied in confidence or whether their disclosure could reasonably be expected to give rise to the kind of harms outlined in that exemption. As all three parts of the test under section 17(1) must be satisfied, I find that this exemption has no application to pages 418-419, 1227, 1243-1244, 1252, 1309, 1379-1380, 1387 and 1447 of the LCMD records. As no other exemptions have been claimed for these records and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

In the Index provided to this office and the appellant in this matter, FSCO has claimed the application of section 17(1) to a number of other records but has not provided any submissions in support of the application of the exemption to them. Because section 17(1) is a mandatory exemption, I have reviewed these records to determine if the exemption properly applies. Based on my review of the records to which section 17(1) was originally claimed, I find that it does not. I will, accordingly, order that pages 418-419, 1227, 1243-1244, 1252, 1309, 1379-1380, 1387 and 1447 of the LCMD records be disclosed to the appellant.

## **SOLICITOR-CLIENT PRIVILEGE**

FSCO has claimed the application of the solicitor-client exemption in section 19 for a number of responsive records, as outlined in the index of records which was provided to the parties. Section 19 states 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; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

### **Branch 1: common law privilege**

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 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 [Orders PO-2441, MO-2166 and MO-1925].

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, or counsel for an educational institution, "for use in giving legal advice."

## **CEO Records**

FSCO submits that Records 73, 129, 130 and 160, pages 166-171, 300-305, 306-312 and 411 respectively, are exempt under section 19(a) as they represent draft documents that were reviewed and commented upon by FSCO's internal legal counsel. FSCO also submits that the edits contained in the records constitute legal advice given to FSCO by legal counsel.

The appellant relies on a recent decision of this office, Order PO-2765 in which Adjudicator Frank DeVries determined that certain records which were reviewed by legal counsel on behalf of an institution did not qualify for exemption under section 19 as they did not contain or refer to legal advice. He held that:

Previous orders have clearly stated that a record does not qualify for exemption under this section simply because it has been reviewed by a lawyer or because legal counsel has suggested that it should be revised in a particular manner (PO-1038), notwithstanding that particular suggestions to amend a document in a specific way might be privileged.

Furthermore, in PO-2115, former Assistant Commissioner Mitchinson reviewed the Ministry of the Environment's position that certain records were exempt under section 19 of the *Act*, and stated:

It is clear from the representations and the content of Record 2 that the Ministry's Legal Services Branch was consulted in the context

of preparing the record. However, it does not necessarily follow that the record qualifies for exemption under section 19 for that reason. Merely having a lawyer review or comment on a document does not cloak that document with solicitor-client communication privilege.

...

In my view, a similar approach is appropriate in considering the application of section 19 to the withheld portions of [the Record] in this appeal.

In support of its position, the Ministry relies on references in the record that a particular position was taken “in consultation with the Ministry’s Legal Services Branch”. However, the Ministry does not identify what the specific legal advice was or whether it was accepted or rejected by the author, nor does it provide any supporting or separate documentation to confirm the nature of any legal advice requested or given. In my view, the representations themselves are not sufficient to support the section 19 exemption claim for the final three of the four withheld paragraphs on page 6.

As far as the first withheld paragraph on page 6 is concerned, following the phrase “in consultation with the Ministry’s Legal Services Branch” the author of Record 2 proceeds to identify the specific advice given by that Branch for one aspect of the information covered in the memorandum. In my view, this paragraph qualifies for exemption under section 19 for the same reasons as the withheld portions of page 2 of Record 1 outlined above.

I adopt the approach taken to this issue in these previous orders. On my review of the records and the information provided by the Ministry, the mere fact that these records were reviewed by counsel and that counsel may have provided input and suggested changes to the records, does not bring them within the ambit of section 19 of the *Act*. However, if information contained in the records would reveal solicitor-client privileged information, such as confidential advice provided by legal counsel, that information would qualify for exemption under section 19 of the *Act*.

I too will apply the principles expressed in these previous orders in making my determination as to whether the information claimed to be exempt under section 19(a) in the CEO records in fact qualifies.

Record 73 (pages 166-171) includes detailed editing made by counsel which is clearly of a legal nature. The edits suggested by counsel relate to the legal issues being addressed in a draft letter and represent the provision of legal advice between a solicitor, who is FSCO counsel, and her client, who is the recipient of the advice. I conclude that Record 73 qualifies for exemption under section 19(a).

On the contrary, Record 129 (pages 300-305) is a briefing note which was prepared by a FSCO staff person who is not a lawyer. The document was vetted and approved by FSCO counsel, as verified by the inclusion of this individual's initials on the top of page 300. However, I find that the mere fact that the record was vetted by counsel does not render it subject to solicitor-client communication privilege under either branch of section 19(a). I have not been provided with evidence to enable me to make a finding that the briefing note included information that is subject to solicitor-client privilege and I find that the exemption has no application to this record. As no other exemptions have been claimed for this record and no mandatory exemptions apply, I will order that it be disclosed to the appellant.

Record 130 (pages 306-312) is a draft response to a complaint to the Ontario Human Rights Commission (the OHRC) against FSCO initiated by the appellant. It was drafted by FSCO counsel at the request of her client to enable it to make representations to the Commission concerning FSCO's legal obligations to the appellant under the *Ontario Human Rights Code* (the *Code*). I find that Record 130 is clearly subject to solicitor-client communication privilege as it represents a confidential communication between a solicitor and her client about a legal issue. This record is, therefore, exempt under section 19(a).

Record 160 (page 411) is an email exchange between FSCO's Director of Market Conduct and FSCO counsel in which counsel is requested to review a draft document. The second email was FSCO counsel's response in which he makes a suggestion for a change to the wording of the document. However, I find that the response given by counsel does not make reference to the provision of legal advice or to a legal issue. The suggested amendment is purely grammatical in nature. As such, I find that it does not qualify as a privileged communication under section 19(a). No other exemptions have been applied to this portion of Record 160 and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

### **AID Records**

Records 69A and 70 (pages 279 and 280) are email communications and a brief memorandum passing between FSCO legal counsel and the office of the Superintendent of Insurance pertaining to FSCO's response to the appellant's complaint under the *Code*. I find that each of these records represent part of the continuum of communications passing between a solicitor and her client. These records fall within the ambit of section 19(a), accordingly.

Record 71 (pages 281 to 285) is identical to CEO Record 129, which I found above is not exempt from disclosure under section 19(a). Record 73 (pages 301 to 307) is identical to CEO Record 130, which I found above to be exempt under section 19(a). Record 83 (pages 358 to 371) consists of a one page which is identical to Record 70 (page 280), which I have found to be exempt under section 19(a), and yet another copy of Record 83 (pages 359 to 364), which is not

exempt, and another copy of Record 73 (pages 365 to 371), which qualifies for exemption under section 19(a).

Records 135 and 137 (pages 491 and 493) consist of an email addressed from FSCO's Director of Market Conduct to FSCO legal counsel with an attached draft letter, seeking her legal advice on the issues addressed in the letter. I find these records represent confidential communications between a solicitor and his client seeking legal advice. These records qualify for exemption under section 19(a).

Similarly, the undisclosed portion of Record 145 (pages 507 to 509) and Record 146 (page 510) also represent confidential communications between a solicitor and his client with respect to a legal issue. I find that these records are also exempt from disclosure under section 19(a).

### **Legal Services Branch Records**

The records addressed in this portion of the order originated in the files of FSCO legal counsel and pertain directly to the provision of legal advice by the solicitor to his client, a staff person with FSCO's Market Conduct Branch. This individual responsible for responding on FSCO's behalf to the complaints brought by the appellant against her insurer and its agents.

Records 1, 2, 17 and 51 represent the file opening documents created when the file was assigned to the solicitor. The documents contain the instructions received by the solicitor respecting the legal services to be provided. I find that these records constitute confidential communications between a solicitor and his client respecting the provision of legal advice. As such, they are properly exempt from disclosure under the solicitor-client communication aspect of Branch 1 of section 19.

FSCO argues that Records 3, 9, 20, 22, 24, 26, 27, 29, 31, 35, 37, 44, 51, 56, 58 and 59 are communications passing between its solicitors and various FSCO staff or other internal counsel in response to requests for legal advice. It argues that these communications qualify as confidential solicitor-client communications made for the purpose of seeking or providing legal advice, thereby qualifying for exemption under section 19(a). I have reviewed the contents of each of these records and agree that they meet the requirements of section 19(a) as they represent confidential communications between a solicitor and his client regarding the seeking or provision of legal advice. In addition, some of the documents may be described as part of the continuum of communications passing between counsel and client. I find that all of these documents are exempt from disclosure under section 19(a).

Record 49 is a hand-written note made by FSCO counsel at a meeting which he attended with FSCO staff on February 5, 2008. The purpose of the meeting was to discuss a legal issue arising out of the appellant's complaints against her insurer. I find that Record 49 documents a meeting where legal counsel attended and gave advice to his clients. As such, the record is exempt from disclosure under section 19(a) since it contains references to the legal advice sought and provided.

Records 52 and 53 are tables which describe various actions taken by and in response to the appellant over a two-year period from January 2006 to January 2008. These documents were prepared for Crown counsel to assist in giving legal advice to his or her clients. I find that these records qualify for exemption under section 19(b).

Records 8, 15, 18, 19, 21, 23, 25, 30, 34, 36, 55 and 57 are draft versions of correspondence between FSCO staff and the appellant. In each case, legal counsel was requested to provide advice to the staff person signing the letter about its contents from a legal perspective. In my view, each of these records represents a written communication between a solicitor and his or her client that relates directly to the seeking or obtaining of legal advice from counsel. As such, these records qualify for exemption under section 19(a).

Records 16, 48 and 50 are email communications passing between FSCO counsel and staff. I find that these documents are part of the continuum of communications that took place during the time of the solicitor's involvement in the matters under discussion. I find that they are properly characterized as solicitor-client communications of a confidential nature with respect to a legal issue and are, accordingly, exempt from disclosure under section 19(a).

#### **Licensing and Market Conduct Division (LMCD) Records**

Record 183 (page 518) was addressed above in my discussion of LSD Record 51. As I found the identical record exempt under section 19(a) above, I find that this copy of the document is also exempt.

Records 333, 334 and 335 (pages 887, 888 and 889) are comprised of an email chain passing between FSCO counsel and various staff. Record 341 (page 895) is another email chain between the same counsel and client. Records 363 (page 926 and duplicated at Record 631, page 1317), 364 (page 927 and duplicated at Record 632, page 1323 and Record 636, page 1329) and 366 (page 930) are similar email communications between a FSCO staff person and legal counsel. I find that these emails represent part of the continuum of communications passing between solicitor and client as part of the seeking and giving of legal advice. They are, accordingly, exempt under the solicitor-client communication component of branch 1 of section 19(a).

Records 346 (page 901), 351 (pages 907-909), 352 (page 910), 359 (page 921), 360 (page 922), 390 (page 960) and 626 (page 1317) are duplicates of Legal Services Branch Records 27, 23, 22, 59, 59 (repeated), 9 and 59, respectively. I have found all of these to be exempt in my discussion above and will not, accordingly, address them further in this order.

Records 391 (page 961), 399 (page 969), 400 (page 970) and 419 (pages 1001-1002) are also email exchanges passing between FSCO staff and its legal counsel in which legal advice was sought and provided by counsel. Record 478 (page 1098) is an email communication between another FSCO staff person and his counsel in which the writer seeks legal advice about a specific legal question. I find that these records qualify for exemption under the solicitor-client communication component of branch 1 of section 19(a).

Record 560 (page 1236) is a request made to counsel by a FSCO staff person for legal advice on legal matter. This record clearly qualifies for exemption as a privileged communication under branch 1 of section 19(a).

Records 637 (page 1330), 638 (page 1331), 639 (page 1332), 641 (page 1334), 683 (page 1382) are also email communications passing between FSCO legal counsel and his clients within FSCO which I find to be communications directly related to the seeking or giving of legal advice. As such, these records also qualify for exemption under section 19(a).

By way of summary, I have upheld FSCO's decision to deny access to the vast majority of the records which it claims to be exempt under section 19(a). I have, however, found that Record CEO 129 (which is duplicated at Record AID 71) does not qualify for exemption under that section. As no other exemptions have been claimed to apply to these records, I will order that they be disclosed to the appellant.

## **ADVICE OR RECOMMENDATIONS**

### **General principles**

FSCO claims the application of the discretionary exemption in section 13(1) for a large number of records which are responsive to the request. 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.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

“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 Order PO-1993, upheld on judicial review in *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].

In Order PO-2861, Adjudicator Colin Bhattacharjee made the following observations about the analysis that takes place when evaluating the application of the section 13(1) exemption:

At the outset, it is important to bear in mind the public accountability purpose of the *Act*, which is set out in section 1(a). This provision states, in part, that one purpose of the *Act* is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

In Order 94, former Assistant Commissioner Sidney Linden emphasised that the section 13(1) exemption should be interpreted in a limited and specific manner, in accordance with the purposes of the *Act*:

[In] my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the *Act* stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the *Act*. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

I will rely on these principles in making my decision regarding the application of section 13(1) the many records for which it has been claimed.

### **FSCO's position**

FSCO provides both general and record-specific representations for each of the records which it claims are exempt under section 13(1). Its general submissions focus on an early decision, Order 92, in which former Commissioner Sidney Linden upheld an institution's decision to deny access to certain draft letters. In that decision, the former Commissioner quotes from the institution's representations which indicate that the records at issue in that appeal were "drafts of correspondence that were prepared by a Ministry official or for the Minister, by a Ministry employee." The decision goes on to quote from the institution's representations as follows:

The draft constitutes the employee's advice as to the appropriate response. Thus the official accepts the advice by accepting the draft and rejects the advice by changing the letter. Based on the foregoing, it is submitted that these drafts constitute the advice of a public servant.

Without any further analysis or comment, the former Commissioner then goes on to make a finding that the draft letters at issue in that appeal qualify as advice under section 13(1) and are exempt on that basis.

FSCO goes on to list a number of other cases where various types of records and information have been found to be exempt under section 13(1). It concludes the general portion of its representations by stating:

Many of the records evidence the development of FSCO's approach and strategy for dealing with the insurance industry in addressing and responding to the complaints made by the Appellant. It is submitted that section 13 affords a zone of confidentiality that permits an institution to properly develop its approach and strategy by obtaining collaborative and candid input from appropriate staff, synthesizing that input, and coming to a decision regarding a lawful and appropriate response. It is submitted that section 13 is intended to protect and encourage this process.

### **The appellant's position**

The appellant argues that several of the exceptions to the section 13(1) exemption, specifically sections 13(2)(a), (k) and (l) apply to some or all of the records which are subject to the advice or recommendations exemption. The exceptions claimed to apply read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
  - (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
  - (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.



The appellant also relies on the decision in Order MO-2337 in which Assistant Commissioner Brian Beamish made the following comments respecting the application of section 7(1), the equivalent provision to section 13(1) in *MFIPPA*:

Previous orders of this office have held that a record cannot be exempt under section 7(1) solely on the basis that it is in draft form. For example, in Order PO-1690, Adjudicator Holly Big Canoe stated:

A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under [section 7], the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section [7(1)] does not apply.

I adopt the approach taken in these previous orders to my analysis of the records at issue here. As noted above, for information 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. Alternatively, the information in the record must *reveal* or *allow one to infer* that suggested course of action.

## **Analysis and Findings**

### **CEO Records**

#### ***Record 90***

Record 90 (page 203) is a memorandum from the Director of FSCO’s Market Conduct Branch to its CEO/Superintendent which includes a recommendation as to a specific course of action to take with respect to a response to the appellant’s complaints. In my view, this record clearly qualifies for exemption under section 13(1) and none of the exceptions in section 13(2) apply to it.

#### ***Records 93, 105, 106, 149 and 161***

Records 93 (page 211), 105 (pages 236-238), 106 (pages 239-240), 149 (page 375) and 161 (page 412) are draft letters prepared for the CEO’s signature and include certain notations made by his Executive Assistant or the CEO/Superintendent himself. I have reviewed the draft letters and find that they do not qualify for exemption under section 13(1), as they do not contain a recommended course of action to be accepted or rejected by the decision maker.

I prefer the approach outlined in Order MO-2337 to that in Order 92 to the analysis of draft correspondence or other documents. In the case of each of these records, neither the letter itself nor the notations made on it contain any recommended course of action for the CEO/Superintendent. For this reason, I find that the exemption does not apply to any of these draft letters.

***Records 107, 108 and 109***

Records 107 (page 241), 108 (page 242) and 109 (page 243) are emails exchanged between FSCO staff on the subject of the contents of the letters which constitute Records 105 and 106. Records 107-109 contain several very specific recommended courses of action with respect to the content of the letter, as well as other aspects of its drafting. I find that these records qualify for exemption under section 13(1) and they are not subject to any of the exceptions in section 13(2).

***Records 110, 144 and 160***

Record 110 (page 244-245) is a memorandum to the Superintendent from FSCO staff setting out strategies for addressing the appellant's complaints. Record 144 (page 268) is an email containing suggestions for information to be included in a letter being drafted for the appellant. Record 160 (page 411) is a similar email containing suggestions for wording to be included in a letter to the appellant. I find that the undisclosed portion of Record 110, all of Record 144 and the second paragraph of Record 160 qualifies for exemption under section 13(1) as it refers to a recommended course of action to be accepted or rejected by its recipient. In addition, I find that the exceptions in section 13(2) do not apply.

**Auto Insurance Division Records**

***Records 1, 14, 24, 54, 88, 89, 91, 92, 94, 96, 98, 99, 100,103, 105, 196, 109, 113, 126, 129, 131, 137, 141, 142, 148 and 158***

These records are draft letters addressed to the appellant for the signature of the Minister of Finance, CEO/Superintendent, the Director and an Analyst from the Market Conduct Branch or the Manager of Auto Insurance Compliance. For the reasons outlined in my discussion of CEO Records 93, 105, 106, 149 and 161 above, I find that these records are not exempt under section 13(1).

***Record 58***

Record 58 (pages 219-220) is the same document as CEO Record 110, which I have found above to be partially exempt under section 13(1). I will not, accordingly, be addressing the possible application of the exemption to these portions of Record 58 further in this order.

### ***Records 102 and 104***

Record 102 (page 433) is an email between FSCO staff which contains a “query” on a particular issue relating to a draft letter to be sent to the appellant. Record 104 (page 436) is the reply to that query. I find that the posing of this question and the subsequent response to it do not constitute advice or recommendations within the meaning of section 13(1). Asking a question and providing comments on an issue do not, in the circumstances of these communications, qualify the records for exemption under section 13(1).

### ***Records 107 and 108***

The emails that constitute Records 107 and 109 (pages 440 and 441) include specific advice being provided from one FSCO staff person to another about a particular course of action. In my view, the information in these records differs significantly from that in Records 102 and 104 because the author of the emails provide advice to the recipient on how to proceed on a particular issue. Accordingly, I find that these records are exempt under section 13(1).

### ***Records 139 and 161***

The undisclosed portions of Records 139 (page 495) and 161 (page 538) are email communications between FSCO staff in which one person is providing strategic advice about how to respond to certain questions posed by the appellant. I find that these severed parts of the records qualify for exemption under section 13(1).

## **Licensing and Market Conduct Division Records**

### ***Records 28 and 550***

Records 28 (page 63) and 550 (page 1223) are identical to AID Record 139, which is addressed immediately above. For the same reasons, I find that these copies of this record are also exempt under section 13(1).

### ***Record 117***

Record 117 (page 339) is a memorandum from FSCO’s Market Conduct Branch Director to the CEO and Superintendent of Financial Services outlining a recommended response to a particular issue then before the Director. I find that this record qualifies for exemption under section 13(1) as it contains a recommended course of action to be either accepted or rejected by the Director. Further, I find that none of the exceptions in section 13(2) apply to this information.

### ***Records 123, 281, 290, 311, 312, 313, 343, 345, 348, 349, 353, 362, 365, 377, 380, 423, 425, 429, 468, 470, 471, 481, 483, 484, 488, 489, 491 and 533***

Records 123 (page 353), 281 (page 785), 290 (pages 799-800), 311 (pages 837-838), 312 (page 859), 313 (pages 860-861), 343 (page 897), 345 (pages 899-900), 348 (page 903), 349 (pages 904-905), 353 (pages 911-913), 362 (pages 924-925), 365 (pages 928-929), 377 (page 942), 380

(pages 945-946), 423 (pages 1006-1011), 425 (pages 1013-1018), 429 (pages 1023-1028), 468 (pages 1071-1072), 470 (pages 1074-1075), 471 (pages 1076-1077), 481 (pages 1101-1103), 483 (pages 1104-1105), 484 (pages 1106-1107), 488 (pages 1111-1112), 489 (pages 1113-1115), 491 (pages 1116-1117) and 533 (pages 1176-1181) are draft letters to be sent to the appellant by the Minister of Finance or FSCO staff. I have found above that draft correspondence does not *per se* qualify for exemption under section 13(1) unless it contains advice or recommendations. In this case, I find that these records contain no such information and are not, accordingly, exempt under that section.

### ***Records 225, 383 and 385***

Records 225 (page 604), 383 (page 949) and 385 (page 952) are identical to AID Record 495, which I found to be exempt, in part, under section 13(1). I make the same findings with respect to Records 225 and 383.

### ***Record 288***

Record 288 (page 797) is identical to Record 399 (page 969) and was found to be exempt under section 19(a). It is not, therefore, necessary for me to consider whether it also qualifies for exemption under section 13(1).

### ***Records 378, 379, 467 and 469***

Record 378 (page 943) consists of an email and a response; the original email comprises Record 379 (page 944). Records 467 and 469 are a similar request for comments and a very brief response. I find that the top two thirds of Record 378, the response to the email, contain information that qualifies as advice or recommendations within the meaning of section 13(1). This consists of specific advice regarding the approach to take with respect to a particular issue. The remaining part of Record 378 and all of Records 379, 467 and 469, contain no such information and are not, accordingly, exempt under that section.

### ***Records 384, 386, 388 and 389***

The undisclosed portion of Record 384 (page 950), duplicated at Record 386 (pages 953-954), Record 388 (pages 956-957) and Record 389 (pages 958-959) is identical to AID Record 161 and is exempt for the reasons discussed above.

### ***Records 403 and 404***

Records 403 and 404 (pages 978 and 979) are emails from FSCO staff responding to a request from another regarding a draft letter to be sent to the appellant. In Record 403, the individual responding does not offer any suggestions regarding the contents of the letter. For this reason, Record 403 cannot qualify for exemption under section 13(1). However, in Record 404, the individual responding offers concrete, specific suggestions about the appropriate information to include in the letter to the appellant. I find that this email qualifies for exemption under section 13(1) on that basis.

***Records 420, 421, 422 and 424***

Records 420 (page 1003), 421 (page 1004), 422 (page 1005) and 424 (page 1012) are parts of an email chain which, taken together, represent a series of communications between FSCO staff about certain issues to be addressed in a letter being drafted at the time to the appellant. In my view, the emails contain information that qualifies for exemption under section 13(1) as they specifically provide advice to the author of the letter on various issues to be addressed therein. I conclude that this information qualifies as “advice or recommendations” for the purposes of section 13(1).

***Records 427 and 428***

Records 427 (page 1021) and 428 (page 1022) are a response and an original email from one FSCO staff person to another seeking comments on a draft letter to be sent to the appellant. Neither letter contains advice or recommendations within the meaning of section 13(1). I find that they are not, therefore, exempt under that section.

***Records 443, 712, 479 and 480***

The undisclosed portion of Record 443 (pages 1043-1044), which is duplicated at Record 712 (pages 1418-1419) and all of Records 479 (page 1099) and 480 (page 1100) consist of a series of very specific suggestions made by one FSCO staff person to another respecting the manner in which the recipient ought to respond in a letter to the appellant. I find that this information is properly characterized as “advice or recommendations” for the purposes of section 13(1) and is exempt under that section. The appellant indicated in her representations that she was also seeking access to any personal information which might be found in Record 443. As I have found this record to be exempt under section 13(1), it is not necessary for me to also consider whether it contains personal information and qualifies for exemption under section 21(1).

***Record 554***

Record 554 (pages 1229-1230) is identical to AID Record 161 which I found to be exempt in my discussion above.

***Records 577 and 601***

The undisclosed portions of Records 577 (page 1260) and 601 (page 1289) include a suggested course of action respecting the response to be provided to the appellant by the recipient of the email. I find that this severed information is exempt under section 13(1).

***Record 625***

Record 625 (page 1316) is identical to CEO Record 160, paragraph two of which I found was exempt under section 13(1). The remainder of the record does not contain advice or recommendations and I will order that it be disclosed.

***Records 367, 642 and 650***

The undisclosed portion of Records 367 (page 931), 642 (page 1335) and 650 (pages 1344) is simply a statement by a FSCO staff person of his intentions with respect to an approach to take in writing a letter and, in Record 650, a statement of the writer's prior actions. They do not contain advice or recommendations and do not qualify for exemption under section 13(1).

***Records 689, 695 and 706***

The undisclosed portions of Record 689 (page 1390), Record 695 (page 1396) and Record 706 (page 1412) do not contain information that could be considered to be advice or recommendations within the meaning of section 13(1). They are not, accordingly, exempt under that section.

**Application of the exceptions in sections 13(2)(a), (k) and (l)**

I have carefully examined all of the records which I have found to be exempt under section 13(1) with a view to determining whether they contain information that may fall within the mandatory exception to the exemptions set out in section 13(2). As noted above, the appellant contends that the records include factual material (section 13(2)(a)), as well as a report of a body established to undertake inquiries (section 13(2)(k)) and the reasons for a final decision, order or ruling of an officer of the institution (section 13(2)(l)).

None of the information contained in the records found to be exempt under section 13(1) contain anything that could be remotely be characterized as the type of information captured by sections 13(2)(k) and (l). I find that while the other records which are exempt under section 13(1) contain all types of information about the subject matter addressed in them, they do not generally include what could be described as "factual material". The records which I found to be subject to section 13(1) are mainly concerned with the preparation of responses to the appellant's multifaceted demands. On my review of the records, it is obvious that the parties to these communications were very familiar with the circumstances surrounding the appellant's complaints and required little in the way of briefing or explanation. The communications tend to be brief and perfunctory, aimed at responding to the appellant's queries in a thorough and accurate manner. I find that the exception in section 13(2)(a) has no application to the information subject to the section 13(1) exemption in this case.

**EXERCISE OF DISCRETION**

**General principles**

The section 13(1) 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**

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.

### **Representations of the parties**

FSCO submits that the records at issue in this appeal were created in response to a series of complaints to it by the appellant against her insurer and various individuals acting on its behalf. Generally, the appellant took issue with the actions of the insurer and made complaints about the manner in which her accident benefits claim was processed and the medical examination process she was required to undergo. The usual route taken by accident victims is to pursue remedies through the dispute resolution process set forth in the statutory accident benefit provisions of the *Insurance Act*. The appellant chose not to take this course of action and instead made a number of complaints directly to FSCO in its capacity as the regulator of Ontario's insurance industry, seeking various remedies outside the usual dispute resolution process. The records span a period of several years and involve four branches of FSCO's organization and are voluminous in nature.

FSCO submits that it exercised its discretion not to disclose exempt records because it felt there was a legitimate public interest in withholding them. It takes the position that it would be contrary to the purposes of the section 13(1) and 19 exemptions to disclose information which meets the criteria for non-disclosure. It posits that there exists a need within the regulation of the automobile insurance industry for the provision of confidential and candid advice from its civil servants and counsel. It indicates that its position regarding the exercise of discretion was taken in good faith, considering only relevant and not irrelevant factors.

The appellant suggests, without attribution or further elucidation, that FSCO "did not justly exercise its discretion" as it "took into account irrelevant considerations and it failed to take in account relevant considerations." The appellant also appears to take issue with the fact that as a result of the disclosure of various records, it has become clear that some inconsistent severing of records may have occurred through the processing of this request and subsequent appeal.

### **Finding**

In my view, FSCO exercised its discretion in an appropriate manner, given the large number of records and the purpose of the exemptions found to apply to some of them. Specifically, I find that it considered appropriate and relevant factors in exercising its discretion to not disclose the records which it claimed to be exempt to the appellant. I further find that FSCO did not consider improper or irrelevant factors in exercising its discretion in this case. Accordingly, I will not disturb its exercise of discretion on appeal.



Given the large number of records and the fact that many of them were maintained in several locations, I do not ascribe any malice, nor do I find any evidence of ill will on the part of FSCO as a result of its handling of the request and the disclosure it made throughout the processing of the appeal. In my view, discrepancies in severing such a large number of records are inevitable and I will not be drawing any negative inferences from FSCO's actions in doing so by.

**INTERIM ORDER:**

1. I uphold FSCO's decision to deny access to the following records or parts of records:
  - CEO Records 73, 90, 107, 108, 109, 110, 144 and 160;
  - AID Records 58, 69A, 70, 73, pages 358 and 365-371 of Record 83, 107, 108, 135, 137, 139, 145, 146 and 161;
  - LSB Records 1, 2, 3, 8, 9, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 44, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58 and 59; and
  - LMCD Records 28, 117, 183, 225, 288, 333, 334, 335, 341, 346, 351, 352, 359, 360, 363, 364, 366, 378, 383, 384, 385, 386, 388, 389, 390, 391, 399, 400, 404, 419, 420, 421, 422, 424, 443, 478, 479, 480, 550, 554, 560, 1260, 601, paragraph 2 of Record 625, 626, 631, 632, 636, 637, 638, 639, 641, 683 and 712.
2. I order FSCO to disclose all of the remaining records or parts of records to the appellant by **July 26, 2010** but not before **July 20, 2010**.
3. I order FSCO to exercise its discretion regarding the application of section 49(a) to the records that I have found to be exempt under that exemption and to provide both the appellant and I with representations respecting the manner in which it has done so by **July 20, 2010**.
4. I remain seized of this matter to address all of the outstanding issues still extant in this appeal.
5. In order to verify compliance with order provision 2, I reserve the right to require FSCO to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ June 18, 2010