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

ORDER PO-2840

Appeal PA-060063-2

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to "the Greenbelt Area, Greenbelt Plan, *Greenbelt Protection Act, 2004* and any regulations thereto, the *Greenbelt Act, 2005* and any regulations thereto, the Order in Council OIC 208/2005, Bill 135, or the Greenbelt Task Force and any of [13 specified properties]." The requester also identified numerous departments within the Ministry he believed should have responsive records.

The requester subsequently clarified this request with Management Board Secretariat (MBS), who forwarded the clarification to the Ministry, advising that the request as for:

> "… all items pertaining to the Greenbelt Area, Greenbelt Protection Act, etc. relating to any land in the Province of Ontario, including the 13 properties we have identified....the focus of our request is items pertaining to any Greenbelt issues.... The time frame for the request is therefore October 2, 2003 to April 7, 2005."[emphasis in the original]

INTERIM ACCESS DECISION:

The Ministry issued an interim access decision respecting the request as clarified through MBS. As a result of further clarification, the interim decision states that the "request was specifically to exclude Ministry of the Environment records related to the 13 properties where the issue of the Greenbelt was not connected."

The interim decision states that access to records or parts of records may be denied pursuant to sections 12(1), 12(1)(c), (d), (e) and (f) (cabinet records), 13(1) (advice and recommendations), 19 (solicitor-client privilege), and 21(1) (invasion of privacy) of the *Act*. The Ministry also advised that searches were conducted for responsive records in the following areas of the Ministry:

> Offices of the Minister and Deputy Minister
> Legal Services Branch
> Communications Branch
> Assistant Deputy Minister of Operations Division,
> Assistant Deputy Minister of the Integrated Environmental Planning Division
> Land Use Policy Branch
> Environmental Assessment and Approvals Branch
> West Central Region and Central Region.

The Ministry also advised that, "[b]ased on our experience, no responsive records would be located in any of the other areas of the Ministry that were listed in your initial request."

In addition, the Ministry advised the appellant that, "[a]ny records located that were generated by the Ministry of Municipal Affairs and Housing (MMAH) are being referred back to that Ministry as the institution of greatest interest in accordance with section 25 of the *Act*."

The Ministry also set out the fee estimate for the records, and the requester paid the required deposit.

FINAL DECISION:

The Ministry subsequently issued its final access decision. Partial access was granted to the records responsive to the clarified request. Access was denied to the remainder of the records, or parts of records, pursuant to sections 12(1), 12(1)(c), (d), (e) and (f), 13(1), 19, and 21(1) of the *Act*.

The Ministry also advised that Bills, Acts and Regulations of the Greenbelt Draft Plan of October, 2004 are publicly available from Publications Ontario.

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

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. This office sent a Notice of Inquiry to the Ministry, initially. The Ministry submitted representations in response. The file was subsequently transferred to me to complete the adjudication process. I sought the appellant's representations on the issues in this appeal.

In its representations, the Ministry requests that its representations be read jointly with the representations submitted by the MMAH, dated October 17, 2006 (Appeal PA-050144-3, which resulted in order PO-2725). In making this request, the Ministry notes that the appellant made an identical request to MMAH, and that MMAH was the lead institution for the Greenbelt issue. I also note that in responding to the request, the Ministry forwarded all MMAH generated records that it had in its custody relating to this issue to that institution to be dealt with by it in response to any request by the appellant.

As the appellant is the same in both appeals and the issues and records are similar, I attached a copy of the representations submitted by MMAH along with the Ministry's severed representations to the copy of the Notice that I sent to the appellant. In doing so, I noted that the records are not the same in these two appeals and the representations submitted by MMAH do not address the records at issue in the current appeal.

The appellant submitted representations in response. I decided to seek representations in reply from the Ministry and attached the appellant's representations, in their entirety, to the Reply Notice that I sent to the Ministry.

The Ministry submitted representations in reply.

RECORDS:

There are 63 records or parts of records at issue in this appeal. They consist of correspondence to and from the Minister, e-mails, memoranda, handwritten notes, comments from the public, a

house note, briefing notes, consultation documents, comments, and updates. The Ministry describes the records at issue as follows:

- Records #1 to 29, 31, 37, 56 and 62 have been released except for the personal information of private citizens who provided comment to the Ministry with respect to the Greenbelt Plan, Area or Act.

- Record #30 is the handwritten notes of [a named individual] who at the time (March 10, 2005) was the senior policy analyst at the Land Use Planning Branch responsible for coordinating the Ministry's comments to MMAH [the policy analyst]. The notes were of an MMAH seminar presented by [a named individual] for Ministry counsel. Only the portion related to issues to be addressed was removed.

- Records # 32, 33, 34, 35 36, 38, 39, 40, 41, 42, 43, 45, 46, represent the comments of staff consulted by [the policy analyst] as part of the Ministry's comprehensive response to MMAH.

- Records # 44, 48, 49, 50, 51, 57, 58, 59, 60, 61 and 63 are comments made by the Ministry to MMAH in either draft or final format.

- Record #47 is a briefing note summarizing the Greenbelt Protection Act and was disclosed except for the key issues for Ministry staff to emphasize in its formal comments to MMAH.

- Records #52, 53 are [the policy analyst's] handwritten notes which were taken while attending the Greenbelt Task Force and Greenbelt Meeting (inter-ministry) designed to review issues raised by various ministries.

- Records #54, 55 are staff updates for the Minister's Office with respect to next steps and issues to be addressed during the deliberations of Cabinet and its Committees when discussing the matter.

PRELIMINARY MATTERS:

CONSIDERATION OF REPRESENTATIONS SUBMITTED BY MMAH

As I indicated above, the Ministry requests that its representations be read jointly with the representations submitted by MMAH, dated October 17, 2006 (Appeal PA-050144-3), as MMAH was the lead institution for the Greenbelt issue, and the appellant made an identical request to MMAH. Although I provided the appellant with a copy of the submissions made by MMAH in appeal PA-050144-3, I noted that the records are not the same in these two appeals and the representations submitted by MMAH do not address the records at issue in the current appeal.

More particularly, except for the general representations made regarding the Greenbelt issue and the general application of the exemptions, the submissions made by MMAH deal directly and specifically with the records that were at issue in that appeal. I do not find these submissions to be particularly useful in considering the application of the exemptions claimed for the records at issue in the current appeal.

Accordingly, I will only refer to MMAH's representations where they provide some additional insight to those submitted by the Ministry.

RECORD 30

As I noted above, Record 30 is described in the Ministry's representations as:

> …the handwritten notes of [a named individual] who at the time (March 10, 2005) was the senior policy analyst at the Land Use Planning Branch responsible for coordinating the Ministry's comments to MMAH [the policy analyst]. The notes were of an MMAH seminar presented by [a named individual] for Ministry counsel. Only the portion related to issues to be addressed was removed.

In the Index of Records provided by the Ministry, Record 30 is described as a "Covering memo and House Note". The Index of Records indicates further, that a portion of this record was withheld pursuant to sections 18(1)(a), (c), (d), (e) and 19, although section 18 was not mentioned as a ground for withholding this record in its decision letter. Nor did the Ministry make submissions on the possible application of section 18(1) to this record. Neither the Ministry's initial representations, nor its reply representations refer to Record 30, other than to describe it as a record at issue.

Since section 18(1) of the *Act* is a discretionary exemption, and the Ministry has not provided submissions regarding its application, I will not consider this exemption further. Section 12(1) of the *Act* is a mandatory exemption, however, and I will consider its application with respect to Record 30. Although the Ministry did not specifically refer to Record 30 in its section 19 discussions, I note that its representations on this exemption were very general in respect of all of the records for which it has been claimed. Accordingly, I will also address the possible application of section 19 to it.

On a further note, after reviewing Record 30, I find that the description of this record, as set out in the Ministry's representations, appears to be more accurate than the description in the Index.

DISCUSSION:

PERSONAL INFORMATION

General principles

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. To qualify as personal information, the information

must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Nevertheless, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R- 980015, PO-2225].

Representations

The Ministry states that Records 1 to 29, 31, 37, 56 and 62 contain comments made by private citizens. The Ministry notes that it has released the comments portions of these records and has withheld only the names and other identifying information of the individuals who contacted the Ministry. The Ministry submits that the comments represent the personal views of these individuals in accordance with the definition of personal information in section 2(1) of the *Act*. The Ministry states further that in order to disclose as much information as possible, it chose to disclose the comments without identifying the individuals who made them.

The appellant appears to accept that these records contain the personal information of individuals who made comments to the Ministry regarding the Greenbelt.

Findings

Record 1 contains a list of individuals who wrote to the Ministry along with a short summary of their comments. Records 2 to 29 are letters or e-mails sent to the Ministry from named individuals. Record 31 is an e-mail chain regarding a named individual who sent a letter to the Premier. Record 37 is an e-mail chain containing comments made by an individual on behalf of a community organization, and a copy of a letter from this individual reiterating the comments. Records 56 and 62 contain handwritten notes from two meetings at which members of the public were identified and made comments. As the Ministry noted in its representations, only the information that identifies these individuals has been withheld from disclosure.

In some cases, the individuals identified in these records have made comments in their personal capacity, simply as interested citizens. In other cases, individuals have identified themselves in the record as representing community groups or other organizations, including political party affiliations. In some cases, it is not clear whether the individual has commented in a personal capacity or official capacity.

Effective April 1, 2007, the *Act* was amended by adding sections 2.1 and 2.2. These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2.1 modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2.2 further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

The request in the current appeal was made prior to April 1, 2007, and these amendments do not apply to it. However, previous decisions of this office (issued prior to April 1, 2007) have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P-257, P-427, P-1412 and P-1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015).

I agree with these previous orders, and find that in all cases where an individual is clearly identified as a representative or member of a community group or other organization, and/or is commenting in their official capacity, that person's name and other identifying information are not "about the individual" within the meaning of the definition of "personal information" in section 2(1) of the *Act*. Since this information does not qualify as "personal information", the mandatory exemption in section 21(1) cannot apply to it. As no other exemptions have been claimed for these portions of the records, I will order the Ministry to disclose them to the appellant.

The remaining portions of the records, which include identifying information about individuals who have clearly commented in their personal capacity, or where it is not clear whether the individual has commented in a personal capacity or official capacity, contain the personal information of the individuals identified in them. Linking an identifiable individual to the comments that person made falls within the definition of "personal information" as it reveals information "about" the individual.

In addition, although not claimed by the Ministry, I find that one small portion of the second sentence in the e-mail which comprises Record 42 contains information which falls within the definition of "personal information", as it reveals information about the sender of the e-mail.

None of the records contain the appellant's personal information. Accordingly, I will consider whether the mandatory exemption in section 21(1) applies to the personal information in the records.

PERSONAL PRIVACY

Having determined that some of the information contained in the records is the personal information of individuals other than the appellant, the mandatory exemption at section 21(1) requires that the Ministry refuse to disclose the information unless one of the exceptions to the exemption at sections 21(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 21(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of section 21(1)(f). Section 21(2) provides criteria to consider in making this determination, section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

Representations

The Ministry initially stated only that disclosure of the personal information in the records would constitute an unjustified invasion of privacy.

The appellant takes the position that the personal information in the records "has none of the flavour of the types of information that section 21 seeks to protect." The appellant refers to some of the factors and presumptions in sections 21(2) and (3), such as those sections that focus on sensitive and other matters that are typically private, and states:

> In contrast, the personal information provided by the citizens in this case has none of this character to it. Instead, the citizens have simply provided comment on the Greenbelt Plan, and may have incidentally provided some information of a personal nature as part of that input…this is clearly a case where the exceptions to non-disclosure of personal information found in sections 21(2) and (3) should apply.

In Reply, the Ministry takes issue with the appellant's position:

> To require that personal information be "highly sensitive" fails to appreciate the privacy protection contained in section 21 of the Act and the numerous orders issued by the IPC.
>
> While the Ministry agrees that the personal information is not highly sensitive, the IPC has consistently held that a person's name along with any personal

> information including the personal opinions about such topics as the Greenbelt Act is the personal information of the authors.
>
> The test is whether the personal information, if disclosed, would be an unjustified invasion of personal privacy, not only of highly sensitive or not.

The Ministry reiterates that it chose to disclose the comments without identifying the individual who made the comments for to do so would be an unjustified invasion of their personal privacy. The Ministry also submits that no useful purpose would be gained by releasing the identity of the individuals to the appellants as their comments have already been disclosed.

Findings

I agree with the Ministry in its characterization of the personal privacy provisions of the *Act*. In this case, the Ministry has, rightly so, provided as much information on the topic of the Greenbelt as it could while protecting the privacy of the individuals who made such comments. I am not persuaded by the appellant's submissions that the authors of these comments have no privacy interests in remaining anonymous. Private citizens may wish to be heard in matters of significant public importance, such as the issues raised regarding the Greenbelt. That does not mean, however, that they also wish to be contacted. Disclosure of their identities, particularly to an interested party in this matter, exposes the authors of the comments to further contact, unwanted or not. The Ministry submits that no useful purpose would be gained by releasing the identities of these individuals. That may not be the case, with respect to the appellant's interests in obtaining this information. However, I am satisfied that disclosure of the information at issue in these records would constitute an unjustified invasion of personal privacy, and is therefore, exempt under section 21(1)(f) of the *Act*.

In addition, I find that disclosure of the small portion of personal information contained on Record 42 would constitute an unjustified invasion of personal privacy, and is therefore, exempt under section 21(1)(f) of the *Act*.

For greater certainty, I have highlighted in yellow, the information that is to be disclosed to the appellant on the copies of Records 1 to 29, 31, 37, 56 and 62 that I am attaching to the Ministry's copy of this order. I have highlighted in blue, the information in Record 42 that should not be disclosed to the appellant.

CABINET RECORDS

The Ministry relies on the introductory wording in section 12(1) as well as sections 12(1)(b), (c) and (d) to deny access to Records 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61 and 63. These sections read:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

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

Representations

The Ministry provides some background on its involvement in the development of the *Greenbelt Act*, *2005* and the Greenbelt Plan. The Ministry notes that the Greenbelt Plan builds upon the existing policy framework established in a Provincial Policy Statement issued under section 3 of the *Planning Act*. The Ministry states that MMAH was responsible for the identification or delineation of the area to be included in the Greenbelt, and although the Ministry was not involved in the specific identification or delineation of the boundaries of the Greenbelt area, it "did provide general policy guidance to ensure the protection and enhancement of the environment and sensitive eco system features within the Greenbelt."

The Ministry submits that disclosure of the records at issue in this discussion would reveal the substance of deliberations of Executive Council or its committees, "as the substance of the records reflect the same issues facing Cabinet." The Ministry provides a brief outline of the history of the Greenbelt issue as follows:

- the issue was first discussed at the Federal Inter-provincial Relations Committee on December 1 and 3, 2003;

- Bill 135 was tabled in the House January 31, 2005; Cabinet considered and approved the *Greenbelt Act, 2005* (Legislation and Regulations Committee) as well as the Greenbelt Area Regulation and Greenbelt Plan;

- the *Greenbelt Act, 2005* received Royal Assent on February 24, 2005 and the Greenbelt Plan was approved by Cabinet in March 2005.

The Ministry submits that the records at issue reveal the suggested wording as well as the issues that needed to be addressed before final approval, and that its decision to withhold the information contained in the records is consistent with MMAH's position regarding disclosure of draft versions of the Greenbelt Plan, Regulation and *Greenbelt Act*. Moreover, the Ministry states that during the deliberations of Cabinet, Ministry issues and the implications of including or excluding them as well as its recommendations were discussed.

The Ministry's initial representations did not address the specific subsections of section 12(1). Nor did it make any specific submissions on the individual records at issue in this discussion. Similarly, the Ministry did not draw attention to any of the submissions made by MMAH insofar as they might apply in the current appeal.

The appellant states:

> Although the confidentiality of Cabinet discussions is a "necessary feature of a freedom of information scheme compatible with parliamentary traditions of the Government of Ontario" [Order P-2417], there remains a prevailing principle that there should be a public right of access to government information. [Order P-2417].

The appellant notes that the burden of proof that the record or part of it falls within one of the *Act*'s specified exemptions lies with the head. In addition to the comments noted above regarding the interpretation of the introductory wording of section 12(1), the appellant adds:

> The term "substance", as it is used in subsection 12(1), means "essence; the material or essential' part of a thing, as distinguished from 'form' or 'essential nature'; essence or most, important part of anything". [Order P-72]
>
> The term "deliberation" means "the act or process of deliberating the act of weighing and examining the reasons for and against contemplated act or course of conduct or a choice of acts or means". [Order P-721 …
>
> Records which reveal merely the *process* by which consultation occurred and legislation was prepared is insufficient to meet the exemption criteria established by subsection 12(1). It cannot be said that the disclosure of such information alone will reveal the substance of Cabinets deliberations. [Order P-1570]
>
> There may also be a distinction between the substance of *contents* (e.g. policy recommendations, etc,) contained in a record or report, and the substance of the

> *deliberations* actually made by the Executive Council or its committees. In some cases, the contents may be distinct from the deliberations for the purposes of exemption under s. 12(1). [Order P-2241]

The appellant also submits that placing a record before Cabinet or a committee is strong, but not necessarily determinative, evidence that disclosing its content could reveal the substance of deliberations. The appellant submits further that where a record was not actually placed before Cabinet, "the Ministry must provide evidence and argument sufficient to establish a 'Link' between the content of the record, and the actual substance of Cabinet deliberations." [Order P-2320]."

After noting the paucity of evidence in the Ministry's submissions, the appellant states that "the Ministry has wholly failed to establish that any of the listed comments, notes, briefing notes: 1) were submitted or prepared for submission to the Executive Council or its committees; or 2) would reveal the substance of deliberations of Cabinet or its committees. The appellant also provides submissions on the specific subsections of section 12(1) claimed by the Ministry. I will address these arguments below under my discussion of the records at issue.

In its reply representations in response, the Ministry reviews the various subsections of section 12(1), and states that its position is that access to the records should be denied under the introductory wording of subsection 12(1) because the substance of deliberations of Cabinet or its committees would be revealed by disclosure of the records. It then briefly reviews how this introductory wording has been interpreted by this office in past orders (similar to the information set out above). The Ministry also submits that sections 12(1)(b), 12(1)(c) and 12(1)(d) also apply to the records, as disclosure of the records at issue would reveal the substance of deliberations of Executive Council or its committees as the substance of the records reflect the same issues facing Cabinet; namely, where urbanization should not occur in order to protect the agricultural land base, natural heritage and water resource systems that sustain ecological and human health.

The Ministry also states:

> The Ministry's records upon plain reading reveal the suggested wording used by MMAH staff in preparing the issues for Cabinet.
>
> In many cases, the wording does not appear in the Cabinet Submission; however, disclosure of the information would by inference, reveal the substance of the deliberations of Cabinet which had asked for input from the Ministry because of its expertise in the area of land use planning.

The Ministry also identifies the individual in the Land Use Planning Branch at the Ministry (the policy analyst) who provided the comments and advice, and then categorizes the records into records drafted by the policy analyst and provided to the MMAH, records containing comments of staff who were consulted by the policy analyst prior to his making his response to the MMAH, and other records, including a briefing note, handwritten notations and updates. I will review the specific categories of records as identified by the Ministry below.

Findings

I have carefully reviewed the records at issue which the Ministry claims fall within the section 12(1) exemption. As the Ministry notes, many of these records contain the comments of the identified policy analyst to the MMAH relating to specific recommendations and/or changes to the draft Greenbelt Plan and/or Act. In addition, a number of records contain specific comments provided by Ministry staff to the policy analyst who then incorporated those comments into his comments to the MMAH. A number of these documents include direct references to specific sections of the Plan and/or Act, and the wording of those sections, and make recommendations or comments on the wording, including suggested changes to the wording of specific sections.

Generally, I am satisfied that, in this appeal, records which contain specific wording contained in the draft Greenbelt Plan and/or Act, which was placed before Cabinet or a committee, would reveal the substance of deliberations of Cabinet or its committees. I am satisfied that many of these records, which contain this specific information, would reveal material before Cabinet or its committees, as they specifically identify earlier drafts of material before Cabinet and suggested changes to those drafts. In many cases, the disclosure of this information (given the fact that the final copy of the Plan is public) would reveal information which qualifies for exemption under the introductory wording in section 12(1).

However, in some cases the records at issue do not contain specific references to identified portions of the Greenbelt Plan, but contain more general information about the process of receiving comments, or general comments relating to other concerns. In addition, some records contain information relating to the earlier stages of the process of developing the Plan, including comments on earlier papers and discussions about the work of the Task Force in the early stages of preparing the framework of the Plan. In these cases, and in the absence of specific representations regarding how this information would reveal Cabinet confidences, I find that a number of these records do not qualify for exemption under section 12(1).

Specifically, I make the following findings:

Policy Analyst's comments and communications

The Ministry states:

> Records 44, 48, 49, 50, 51, 57, 58, 59, 60, 61 and 63 represent the Ministry's communication as drafted by [the policy analyst] to MMAH related to wording for the Greenbelt Plan and Act. Disclosure of these records would by inference, reveal the substance of the deliberations of Cabinet which included input from the Ministry because of its expertise in land use planning.

The appellant states:

> These records reflect the comments made by the Ministry to MMAH in either draft or final format.

> [The appellant contends] that these records simply do not qualify for exemption under section 12(1)(b). The comments were made from one Ministry to another; there is no evidence to suggest that they were submitted or prepared for submission to Executive Council or would reveal the substance of deliberations of that body or its committees.

Findings

Records 58, 59, 60, 61 and 63 are communications from the policy analyst to the MMAH related to the wording for the Greenbelt Plan and Act. These records, which are for the most part dated in late 2004 or early 2005, all contain specific references to the wording and the section numbers of the draft Act/Plan and, based on the information set out above, I am satisfied that disclosure of these records would reveal the substance of the deliberations of Cabinet. These records qualify for exemption under the introductory wording in section 12(1).

Record 57 - This document, dated earlier in 2004, contains what I consider to be general comments and observations relating to the Greenbelt task Force, and relates to public consultation and questions. In the absence of additional representations on how the information in this document would qualify for exemption under section 12(1), I find that it does not contain information which would reveal the substance of deliberations of the Executive Council or its committees. Accordingly, I find that it is not exempt under section 12(1).

Records 44, 48, 49, 50 and 51 are also communications from the policy analyst to the MMAH related to the Greenbelt Plan and Act. These records are dated in the earlier part of 2004. Although the subject matter of these records is the GreenBelt Plan/Act, these records contain comments and considerations that do not relate to specific sections or wording of the Act or Plan, but contain comments relating to other documents including earlier papers and task force materials. In my view, in the absence of detailed representations concerning the connection between these records and cabinet or committee meetings, I find that the connection between these records and any such meetings is too remote. The Ministry has simply not provided sufficiently detailed linkage between these records and any such meetings, and I find that they do not qualify for exemption under section 12(1).

Staff communications to the policy analyst

The Ministry states:

> Records 32, 33, 34, 35 36, 38, 39, 40, 41, 42, 43, 45, and 46 represent the comments of Ministry staff who were consulted by [the policy analyst] prior to making a comprehensive response to MMAH for inclusion into the Cabinet Submissions and legislation.
>
> Disclosure of the staff input would by inference reveal policy options, background explanations and analysis of problems submitted to Cabinet.

The appellant states that these records, which contain the comments provided by Ministry staff, do not amount to "policy options" or "recommendations" within the meaning of section 12(1)(b), and should therefore not be exempt from disclosure. The appellant also states:

> … the comments were not "submitted or prepared for submission to Executive Council or one of its committees" as required in order to trigger section 12(l)(b); rather, the comments were prepared as part of a comprehensive response to a MMAH request for input from another ministry. The Ministry has failed to meet its onus with respect to meeting the legislative criteria in this regard.
>
> As such, the records containing these comments simply do not meet any of the needed requirements set out in section 12(1)(b) nor, in the appellants' view, do they meet the more general requirement in section 12(1) that they reveal the substance of the deliberations of Executive Council or its committees.

Findings

Records 32, 33, 34, 38, 39, 40, 43 and 45 are all communications containing comments from Ministry staff to the policy analyst related to the wording for the Greenbelt Plan and Act. Again, these records, which are dated in late 2004 or early 2005, all contain specific references to the wording and the section numbers of the draft Act/Plan and, based on the information set out above, I am satisfied that disclosure of these records would reveal the substance of the deliberations of Cabinet. These records qualify for exemption under the introductory wording in section 12(1).

Record 35 is a record dated in December of 2004 and relates to a specific category of land in the Plan. Although the wording of this record is somewhat general in nature, it contains comments from referring to the specific wording in the draft plan. Based on the information set out above, I am satisfied that disclosure of this record would reveal the substance of the deliberations of Cabinet, and that it qualifies for exemption under the introductory wording in section 12(1).

Record 36, which is also dated in late 2004, differs from the other records in this category. This record appears to contain comments from the public, and evidence from the record suggests that some information was shared with public to provide public input. Based on my review of this record, and in the absence of other evidence from the Ministry, I am not satisfied that this record qualifies for exemption under section 12(1).

Record 41 is an actual page of a portion of the draft plan and, for the same reasons as those relating to the other records, I am satisfied that its disclosure would reveal the substance of the deliberations of Cabinet.

Record 42 is a brief email between Ministry staff. Although it contains a reference to Cabinet, in the absence of additional representations I am not satisfied that its disclosure would reveal the substance of the deliberations of Cabinet. Accordingly, I find that it does not qualify for exemption under section 12(1).

Record 46 also consists of correspondence from Ministry staff to the policy analyst. On my review of this record, I am satisfied that portions of it contain information which qualifies for exemption under section 12(1). Specifically, I find that part of the first paragraph and all of the second paragraph contained in the earlier email on this page would reveal specific information contained in the draft Act and Plan, and that disclosure of these portions of this record would reveal the substance of the deliberations of Cabinet. However, in my view the remaining portions of this correspondence are general in nature and do not qualify for exemption under section 12(1).

Briefing Note

The Ministry states:

> Record 47 is a briefing note summarizing the Greenbelt Protection Act and was disclosed except for the key issues that the Ministry highlighted in its formal submissions to MMAH.

The appellant takes the position that this briefing note does not qualify for exemption under section 12(1), and submits that it does not contain "background explanations or analysis of the problems submitted" of the type for which the section 12(1)(c) protection is aimed, and does not reveal the substance of deliberations to Executive Council or its committees. The appellant states:

> … this briefing note was intended as an aid to Ministry staff who were expected to provide formal comments to the MMAH, at its request. In the appellants' submission, this is not the type of record to which section 12(1)(c) is intended to apply.
>
> The appellants also submit that in any event, the briefing note does not reveal the substance of deliberations of Executive Council or its committees, as required by the introductory wording of section 12(1).

On my review of the undisclosed portion of this record, I find that it contains comments of a general nature made early in 2004 relating to various issues addressed at that time. In my view this record is general in nature, and does not qualify for exemption under section 12(1).

Note and Updates of meetings

Records 52 and 53

The Ministry states:

> Records 52 and 53 are [the policy analyst's] handwritten notes which were taken while attending the Greenbelt Task Force and Greenbelt Meeting (inter-ministry) designed to review issues raised by various ministries.

The appellant states:

> … these handwritten notes do not qualify for exemption under section l2(1)(c). In addition to the requirement that they not provide policy options or recommendations, records exempted under this section must contain "background explanations or analysis or problems" submitted to Executive Council or its committees. No evidence to this effect has been provided.
>
> In any case, the appellants again submit these handwritten notes do not reveal the substance of deliberations of Executive Council or its committees, as required by the introductory wording of section 12(l).

Records 52 and 53 consist of handwritten notes taken by the policy analyst in early 2004 (April and June) recording the discussions at two meetings. On my review of these records and in the absence of additional information supporting the Ministry's position that the disclosure would reveal the substance of deliberations of the Executive Council or its committees, I find that these records do not qualify for exemption under section 12(1).

Records 54 and 55

The Ministry states:

> Records 54 and 55 are staff updates for the Minister's Office with respect to next steps and issues to be addressed during the deliberations of Cabinet and its Committees when discussing the matter.

The Ministry also provides confidential representations in support of its position that these records qualify for exemption under section 12(1).

The appellant states:

> These records consist of staff updates for the Minister's Office, with respect to the steps and issues to be addressed during the deliberations of Cabinet and its committees.
>
> The appellants submit that this record does not reflect consultation between Ministers within the meaning of section 12(1)(d). Nor, in the appellants' contention, has the Ministry established that it was used to make government decisions or formulate government policy.
>
> Instead, this was merely a document used for consultation by civil servants employed by Ministries: such records do not trigger the exemption provided for in section 12(1)(d). [Order P-920].

In its reply representations, the Ministry states:

> Records 54 and 55 are staff updates for the Minister's Office with respect to the recommended next steps and issues to be addressed by the Ministry in its dealings with MMAH and preparation of the Cabinet submission.

Records 54 and 55 are staff updates for the Minister's Office dated in the middle of 2004 outlining in a general way the discussions of the Greenbelt Task Force. On my review of these records and the circumstances of their creation, as well as based on the information provided by the Ministry (which suggest that further information will be added to them), I find that I have not been provided with sufficient evidence to satisfy me that the disclosure would reveal the substance of deliberations of the Executive Council or its committees, I find that these records do not qualify for exemption under section 12(1).

Record 30

This record contains portions of handwritten notes by a named individual, who was responsible for co-ordinating the Ministry's comments to MMAH (which had sought its input) and who held the position of senior policy analyst at the Land Use planning Branch of the Ministry. This partial record consists of handwritten notes taken at an MMAH seminar. The record is dated March 2005.

As I indicated above, the Ministry did not make specific representations regarding this record. The appellant's representations address whether it qualifies for exemption under section 13(1) of the *Act*. Since section 13(1) was not claimed for Record 30, I will not address these comments.

In the absence of specific representations on this record, I have reviewed it in the context of the Ministry's and MMAH's more general section 12(1) discussions. Based on my review, I am not persuaded that disclosure of Record 30 would reveal the substance of deliberations of the Executive Council or its committees. Accordingly, I find that this record does not qualify for exemption under section 12(1).

Having found that all or parts of Records 36, 42, 44, 46-55 and 57 do not qualify for exemption under section 12(1), I will now determine whether section 13(1) applies to these records or portions of records.

ADVICE OR RECOMMENDATIONS

Introduction

The Ministry takes the position that Records 36, 42, 44, 46-55 and 57 qualify for exemption under section 13(1) of the *Act*, which reads:

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

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

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

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

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

[Order P-434; Order PO-1993, Order PO-2115, Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)]

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

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

Representations

The Ministry states that the information in the records qualifies for exemption under section 13(1), and states:

> The advice includes issues to be included in the Greenbelt Plan or suggested wording to ensure accuracy and clarity. The advice was contained in communications from [Ministry] staff who were consulted by [the policy analyst] or the advice was the actual comments/recommendations made by [the policy analyst] to the MMAH.
>
> All of the comments, in our opinion, are the advice or recommendation of the Ministry reviewers. The recommended course of action was to include issues in the Greenbelt Plan or suggested wording for the Greenbelt Plan.
>
> All of the staff who reviewed the MMAH proposals and provided their advice were public servants employed by [the Ministry] ….
>
> Staff communicated their recommendation or advice to [the policy analyst], a public servant at the Land Use Planning Branch.
>
> The staff either presented [the policy analyst] with the suggested wording of changes to the Greenbelt Plan or issues to be included.
>
> [The policy analyst], as Ministry lead, compiled the advice from various Ministry staff and presented the Ministry's position to MMAH staff.
>
> The purpose of these comments is to effectively provide the appropriate terminology as well as conditions necessary to protect the environment.
>
> It is the Ministry's position that the comments of staff reveal their advice or recommendations.
>
> Words such as recommendation or advice do not appear in all of the records; however, in Order 320 which is similar to this case, the IPC indicated that draft papers prepared by a public servant meet the requirements of subsection 13(1).
>
> Staff use the words "we have the following comments" which is interpreted to be - I would recommend the following changes.
>
> Staff comments are the advice or recommendation to [the policy analyst] who in turn provided advice and recommendations to MMAH. His comments are entitled "Ministry of the Environment Comments on the (draft) Greenbelt Plan."

> The MMAH had the authority to accept or reject the advice as part of the deliberative process. It was up to the MMAH to issue the final version of the Greenbelt Plan that was ultimately approved by Cabinet. The Greenbelt Plan found on the MMAH's website includes the notation that the Plan was "approved by the Lieutenant Governor in Council, Order-in-Council No 208/2005 and had retroactive application to December 16, 2004 (see MMAH website for full copy of the Greenbelt Plan) ….
>
> In the circumstances, staff offered their advice based on their expertise in their area of study and/or land use planning.
>
> Release of this advice would inhibit staff from making full and frank recommendations relating to the protection of the environment and would foster a climate where staff will no longer make such recommendations.

With respect to Records 54 and 55, the Ministry states:

> Records 54 [and] 55 are staff updates for the Minister's Office with respect to next steps and issues to be addressed during the deliberations of Cabinet and its Committees when discussing the matter.

The appellant's representations on section 13(1) begin by reviewing the requirements for a record to qualify for exemption under section 13(1), re-stating much of what is set out above. The appellant also provides specific representations on the application section 13(1) to specific records, which are set out below under the record categories.

In reply, the Ministry also provides some general representations and then also specific representations, which are also set out below. The Ministry's general reply representations state:

> The Ministry maintains the position that disclosure of these records would reveal advice or recommendations of public servants, and it is submitted the discretionary exemption applies.
>
> In Order P-363, the IPC held that to qualify as advice or recommendations, the information contained in the record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipients during the deliberative process. This decision was upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994, Toronto Doc. 721/92 (Ont. Div. Ct.).
>
> Furthermore, the test according to Order P-233 is whether accurate inferences can be made about the advice or recommendations provided. Former Commissioner Wright stated that "information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*".

> [The policy analyst's] recommendations to MMAH were for the purpose of informing that Ministry about land use planning issues that needed to be incorporated into the Greenbelt Plan, Area and Act. It was Cabinet that was ultimately responsible for deciding on what issues to incorporate into the Greenbelt Plan and Act.
>
> In order to provide MMAH with the best advice and recommendations, [the policy analyst] consulted with other staff of the Ministry who provided their advice for inclusion into the Ministry that was forwarded to MMAH.

I will now review the application of section 13(1) to the specific records remaining at issue, according to the categories set out above. I will also be reviewing the appellant's representations and the Ministry's reply representations as they relate to these specific records.

Staff communications to the policy analyst

Records 36, 42 and 46 (in part)

The appellant states:

> These records reflect the comments of Ministry staff who were consulted by [the policy analyst] as part of the Ministry's comprehensive response to the MMAH request for its input. Some of the records contain suggestions by Ministry staff relating to issues in the Greenbelt Plan, or relating to suggested wording for the Plan.
>
> The Ministry claims that each of these documents amounts to "advice or recommendations" of Ministry staff, and observes that all of the staff who reviewed the MMAH proposals and provided their advice were public servants employed by the Ministry.
>
> However, the appellants submit that the requirements of section 13(1) have not been met. Even if the comments of Ministry staff consist of a discussion of the various issues, and even if they raise potential problems, they will not fall within the wording of the section if they fail to provide specific "advice" or "recommendations". [Order P-529]
>
> Indeed, the Ministry concedes that the words "recommendation" or "advice" do not appear in all of the records.
>
> Instead, it relies on the fact that the input by Ministry staff takes the form of the words "we have the following comments" and draws the conclusion that this is equivalent to the phrase "I would recommend the following changes", such that it is a "recommendation" within the wording of section 13(1).

The appellants submit that such an extrapolation is unreasonable in the circumstances.

Next, the Ministry relies on Order 320 for the proposition that draft papers prepared by a public servant meet the requirements of section 13(1). However, the appellants counter by pointing out that:

- Draft papers do not necessarily amount to "advice" or "recommendations" simply by their nature alone. [Order PO-1690; PO-1709].

- Rather, Draft documents containing "advice and recommendations" within the meaning of section 13(1) can be exempted if they meet the relevant test. [Order PO-1690]

Overall, in the appellants' submission, rather than constitute "advice" or "recommendations" pursuant to the wording of section 13(1), these comments more closely resemble "views", which have been found not to fall within the exemption. (Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 561; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Hunan Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto, Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] 01 No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226].

Finally, the Ministry submits that "release of this [Ministry staff] advice would inhibit staff from making full and frank recommendations relating to the protection of the environment and would foster a climate where staff would no longer make such recommendations."

With all due respect to position taken by the Ministry, such considerations are wholly extraneous to the determination of whether the requirements of section 13(1) of the *Act* have been met, in order to warrant exemption. In justifying its seeking to refuse to disclose the requested documents, the Ministry must simply establish that it has brought itself within the requirements set out in that provision. In the appellants' view, it has not done so.

The Ministry states in reply:

> [These records] represent the advice and recommendations of Ministry staff who were consulted by [the policy analyst] as the person who communicated the Ministry's official position.
>
> [The policy analyst] had the authority, as part of the deliberative process, to accept or reject the advice in communicating with MMAH.
>
> [The policy analyst] provided the Ministry's advice in the document entitled "Ministry of the Environment Comments on the (draft) Greenbelt Plan." Earlier versions of this record were sent to select staff for their review and recommended improvements.
>
> The MMAH had the authority to accept or reject the advice as part of its deliberative process. It was up to the MMAH to issue the final version of the Greenbelt Act that was ultimately approved by Cabinet.

Findings

I have carefully reviewed Records 36 and 42 and the portion of Record 46 which the Ministry claims fall within the section 13(1) exemption.

Record 36 is an email from staff to the policy analyst relating a comment made by another individual. The email refers to the comment, and also provides the author's advice regarding a possible response to the comment. In my view, the advice provided by staff to the policy analyst, contained in the third paragraph of this record, contains a recommended course of action for the purpose of section 13(1), and this paragraph qualifies for exemption. However, the remaining portions of this email simply relate a comment, and do not contain advice or recommendations for the purpose of this section. Nor would disclosure of this information reveal the recommendation made or permit one to accurately infer the recommended course of action.

Record 42 is a brief email from staff to the policy analyst. I have found that a small portion of this email contains the personal information of the author of the email. The remaining portion of this email refers to the timing of various matters. Consequently, I find that this record does not contain any advice or recommendations for the purpose of section 13(1).

Record 46 consists of correspondence between Ministry staff and the policy analyst. I have found that portions of this record contain information which is exempt under section 12(1). On my review of the remaining portions of this record, I find that they relate to the timing of meetings and other events. In my view, the remaining portions of this record do not contain any advice or recommendations for the purpose of section 13(1).

Policy Analyst's comments and communications

Records 44, 48, 49, 50, 51 and 57

The appellant states:

> These records reflect the comments made by the Ministry to MMAH in either draft or final format.
>
> While the records may discuss a number of issues, raise potential problems and provide options, there is no advice or recommendation provided on the approach which should be adopted. [Order P-529] As such, in the appellants' view, these records do not fall within the section 13(1) exemption.

The Ministry states in reply:

> [The policy analyst's] draft and final versions of the advice and recommendations provided to MMAH are found at records 44, 48, 49, 50, 51 [and] 57…. Disclosure of the draft versions would reveal the advice and recommendations made by [the policy analyst].

Findings

Records 44, 48, 49, 50 and 51 - As noted above, these records are communications from the policy analyst to the MMAH related to the Greenbelt Plan and Act, and are dated in the earlier part of 2004. The subject matter of these records is the GreenBelt Plan/Act. These records contain comments, factors and considerations which the policy analyst is drawing to the attention of the MMAH regarding the specific areas of expertise the policy analyst (and the Ministry) has. On my review of these records, I am satisfied that they contain the actual advice and recommendations made by the policy analyst to the MMAH. These records relate to the deliberative process of decision making relating to the Greenbelt. The nature of the relationship between the Ministry and the MMAH in this deliberative process involved the Ministry providing its expertise and advice in certain areas. As stated by the Ministry, the recommended course of action was to include issues in the Greenbelt Plan or suggested wording for the Greenbelt Plan, and, given the nature of the relationship between the Ministry and the MMAH in the circumstances of this appeal, I am satisfied that these records contain advice or recommendations for the purpose of section 13(1) of the *Act*.

Record 57 – as indicated above, this document refers to general comments and observations relating to the Greenbelt task Force, and relates to public consultation and questions. The information in this record consists of comments on how matters may be presented at public consultation. In my view, this record does not contain, nor would its disclosure reveal, information which qualifies as advice or recommendations given in the deliberative process, and I find that it does not qualify under section 13(1).

Briefing Note

Record 47 (in part)

The appellant states:

> This record is a briefing note, summarizing the Greenbelt Protection Act, and containing, key issues for Ministry staff to emphasize in its formal comments to MMAH.
>
> In the appellants' view, this record does not meet any of the criteria required for exemption under section 13(1). Again, while it may raise issues and potential problems, it must provide specific, concrete advice or recommendations as to the specific approach to be adopted. [Order P-529] The mere fact that it may *identify* a specific policy does not automatically render it to be "advice or recommendations" within the meaning of that section [Order P-56]. Moreover, any portions reciting the "topic" or "background" would resemble a recitation of fact which is likewise not caught by the section. [P-188]

The Ministry's reply reps state:

> The exempt portion of record 47 is a recommendation to staff of the Strategic Policy Branch (SPB) and Water Policy Branch (WPB) so that the Ministry's key issues will be presented to the Greenbelt Task Force in relation to water policies.

Finding

After reviewing Record 47 and the portion that the Ministry wishes to exempt, I conclude that the subject portion must be viewed in the context of the document as a whole. This record generally provides factual information about the activities of the Greenbelt Task Force, established, in part, to facilitate public consultation. The withheld portion of this record sets out in general terms the Ministry's position in the event that it attends consultation sessions. In my view, it is clear from a contextual reading of this record, as a whole, that the information was intended for public dissemination. I am not persuaded that the withheld portion of Record 47 qualifies as advice or recommendations within the deliberative process of government decision-making and section 13(1) does not apply to it.

Note and Updates of meetings (Records 52- 55)

Records 52 and 53

The appellant states:

> These records consist of [the policy analyst's] handwritten notes, taken while he attended the Greenbelt Task Force and Greenbelt Meeting (inter-ministry), which was aimed at reviewing issues raised by various ministries.

> Again, the appellants submit that these handwritten notes may amount to the identification of a specific policy [Order P-56], factual material in the form of background information [Orders P-278, P-1881, or perhaps "views" [Order P-434]. But absent the inclusion of specific advice or recommendations, these records should not be exempted on the basis of section 13(1).

The Ministry does not provide reply representations on these records.

Records 54 and 55

The appellant states:

> These records consist of staff updates for the Minister's Office, with respect to the steps and issues to be addressed during the deliberations of Cabinet and its committees.
>
> In the appellants' submission, these staff updates merely amount to the identification of a specific policy [Order P-56], or alternatively to factual material in the form of background information [Order P-278, P-188]. They do not fall within the purview of section 13(1).

The Ministry's reply representations state:

> Records 54 and 55 are staff updates for the Minister's Office with respect to the recommended next steps and issues to be addressed by the Ministry in its dealings with MMAH and preparation of the Cabinet Submission.
>
> As with all policy initiatives, policy staff of the Minister's Office who consult with the Minister of the Environment asked for a briefing on discussions of the Greenbelt Task Force.
>
> The Minister's Office staff ensure that political direction is incorporated into the Ministry's advice and recommendations to MMAH.

Findings

As described above, Records 52 and 53 consist of handwritten notes taken by the policy analyst in early 2004 (April and June), recording the discussions at two meetings. Records 54 and 55 are staff updates for the Minister's Office dated in the middle of 2004 outlining in a general way the discussions of the Greenbelt Task Force. In my view, all of these records simply pass on information about meetings which were held, and do not contain advice or recommendations for the purpose of section 13(1) of the *Act*. After reviewing them in the context of the other records at issue in this appeal, I find that their disclosure would neither reveal advice or recommendations nor permit the drawing of accurate inferences regarding any advice or recommendations given.

Having found that Records 30, 42, 52–55, 57 and portions of Records 36, 46 and 47 do not qualify for exemption under section 12(1) or 13(1), I will now review whether section 19 applies to these records or portions of records.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims solicitor-client privilege for Records or portions of Records 30, 36, 42, 46, 47, 52-55 and 57. When the request in this matter was filed, section 19 stated as follows:

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

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

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

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the Ministry must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

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

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

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. …
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

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

Statutory litigation privilege

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

Representations

The Ministry states that prior to the named Senior Policy Analyst providing the Ministry's comments to the MMAH, he consulted with Ministry legal counsel. The Ministry indicates that the client in this case is the Ministry, as represented by several staff including the Senior Policy Analyst. The Ministry states further:

> The IPC has ruled that common law privilege applies to a continuum of communications between a lawyer and client. The fact that the communication does not set out fact and issues and legal principles does not remove it from the scope of solicitor-client privilege, as long as the communication was made for the dominant purpose of obtaining legal advice. (Order PO-1663)
>
> It is the Ministry's view that the comments provided to MMAH after legal review and comments were included satisfies the test for section 19 of the *Act*.

In response to the Ministry's representations, the appellant provides representations which take issue with the Ministry's view that the records, which consist of comments made by the Policy Analyst to the MMAH (and which seem to be the only ones the Ministry makes representations on), do not qualify under section 19. The appellant takes the position that the Policy Analyst is not the "client" of the Ministry's legal counsel, and that in any event the communications were not made in confidence, as they were shared with others. In addition, the appellant states:

> … even if these other elements have been satisfied, the communications lack the requisite component relating to what must be their dominant purpose- to provide legal advice or aid in the conduct of litigation. Indeed, in its representations, the Ministry concedes that the communications do not set out facts and legal issues, which would be the normal or customary format for the provision of legal advice by [Ministry counsel].
>
> Simply put, the comments by [Ministry counsel] to [the policy analyst] may have a legal character to them, and may even touch upon some of the legal issues that are inherent in the provision of staff comments to the MMAH (the submission of which comments [the policy analyst] was asked to co-ordinate). However the comments - whether viewed in terms of substance or form - do not amount to legal advice within the wording off section 19.

In reply, the Ministry states:

> Prior to [the policy analyst] providing the Ministry's response to MMAH, he consulted with [identified] Ministry counsel employed by the Ministry of the Attorney General located at the Ministry of the Environment.
>
> Despite the appellant's claim, the Ministry asserts that [the policy analyst] is the client.
>
> The fact that [the policy analyst] recorded the legal advice received from [identified Ministry counsel] to writing, does not negate the solicitor-client privilege. The disclosure of [the policy analyst's] comments would reveal the very legal advice that was received.
>
> [Identified Ministry counsel] provided his legal advice prior to the information being submitted to MMAH.
>
> It is the Ministry's view that the comments provided to MMAH which incorporated the legal advice presented by [identified Ministry counsel] satisfy the test for section 19 of the *Act*.

Findings

I accept the Ministry's general position that confidential legal advice provided by Ministry counsel to the Policy Analyst would qualify for exemption under section 19 of the *Act*, and that this would extend to written notations of the legal advice as well as references to the legal advice shared internally with others working on the same project.

However, on my review of the records and the representations of the Ministry, I am not satisfied that the records at issue qualify for exemption under section 19 for the following reasons.

The Ministry's representations on section 19 cover all of the records for which the Ministry has also claimed the section 12(1) and 13(1) exemptions. It is clear from my review of many of these records that they contain comments or advice and recommendations made by staff who are not lawyers, or made by the Policy Analyst who provided the information to the MMAH. There is nothing on the face of these records, or as identified by the Ministry, to show that these records were sent to, reviewed by, or contain legal advice.

I have reviewed the records referred to above, as well as the Ministry's representations. I note that the Ministry's representations on this issue only deal with the comments made by the Policy Analyst to the MMAH. In the circumstances, I have not been provided with sufficient evidence to satisfy me that the disclosure of any of the records or portions of records remaining at issue would reveal solicitor-client privileged material. It is simply unclear from the representations or the records what information (if any) was provided by Ministry counsel to the Policy Analyst.

As a result, I find that Records or portions of Records 30, 36, 42, 46, 47, 52-55 and 57 do not qualify for exemption under section 19 of the *Act*.

EXERCISE OF DISCRETION

Section 13 is a discretionary exemption. I have found that Records 44, 48, 49, 50, 51 and a portion of Record 36 qualify for exemption under section 13(1) of the *Act*. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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 43(2)].

In response to the issue of whether the Ministry properly exercised its discretion in the circumstances of this appeal, the Ministry provided representations explaining why it chose to exercise its discretion to apply the exemptions. Regarding the application of the section 13(1) exemption, the Ministry stated that it applied this exemption because it believed that the records are covered by the Cabinet confidentiality provision, that disclosure would inhibit the free exchange of information in the future, and that the release of individual comments made to the Policy Analyst would "lead to confusion by MMAH" which was looking for the Ministry's "official response and comments", not those of individual staff members. The appellant takes the position that the Ministry improperly exercised its discretion, and particularly focuses on the Ministry's position that disclosure would "lead to confusion" as a position which has no merit, and does not amount to a ground on which the decision to exercise discretion to refuse to disclose documents should be based.

Much of the Ministry's discussion regarding its exercise of discretion refers to records that I have found not exempt under section 13(1), or which are exempt under section 12(1). However, referring back to my findings that Records 44, 48, 49, 50, 51 and a portion of Record 36 qualify for exemption under section 13(1), as they contain the actual advice or recommendations provided to the MMAH by the Policy Analyst for the Ministry, I am satisfied that the Ministry properly exercised its discretion to apply the section 13(1) exemption to them. I find that it considered relevant considerations and did not take into account irrelevant considerations. Accordingly, I uphold the Ministry's exercise of discretion to apply section 13(1) to the records or portions of the records which I have found qualify for exemption under that section.

ORDER:

1. I uphold the Ministry's decision to withhold Records 32, 33, 34, 35, 38, 39, 40, 41, 43, 44, 45, 48, 49, 50, 51, 58, 59, 60, 61 and 63, the portions of Records 36 and 46 that I have **highlighted in green**, the portions of Records 1, 2-29, 31, 37, 56 and 62 that are **not highlighted** and the portion of Record 42 that I have **highlighted in blue** on the copies of the Records that I am sending to the Ministry with the copy of this order.

2. I order the Ministry to disclose Records 30, 47, 52, 53, 54, 55, 57, the portion of Record 42 that is **not highlighted in blue**, the portions of Records 36 and 46 that are **not highlighted in green**, and the portions of Records 1, 2-29, 31, 37, 56 and 62 that are **highlighted in yellow** on the copies of these records that I am sending to the Ministry by providing copies of these records to the appellant by **November 23, 2009.**

3. 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.

October 30, 2009

Laurel Cropley
Adjudicator