

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3007

Appeal PA-050130-3

Ministry of Natural Resources

October 31, 2011

Summary: The appellant sought access to records relating to the decision making that resulted in the inclusion of 12 properties in the Greenbelt Area. The Ministry of Natural Resources disclosed a substantial number of records to the appellant. However, it denied access to 49 records, either in full or in part, under the exemptions in sections 12(1), 13(1), 17(1) and 21(1). Some withheld records and parts of records qualify for exemption but others do not. The ministry is ordered to disclose to the appellant those records and parts of records that do not qualify for exemption.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as am., ss. 2(3), 12(1), 13(1), 17(1) and 21(1).

Orders Considered: PO-2725, PO-2840 and PO-2857.

Cases Considered: *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3

OVERVIEW:

[1] From 2003 to 2005, the Ontario government undertook a policy-making and consultation process for developing a Greenbelt Plan to protect agricultural and environmentally sensitive land in the Golden Horseshoe region from urban development. This process culminated with the enactment of the *Greenbelt Act, 2005*,¹

¹ S.O. 2005, c. 1.

which provides the statutory authority for the establishment of the Greenbelt Plan and the creation of a specific Greenbelt Area.

[2] A lawyer representing several companies submitted a request to the Ministry of Natural Resources (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following:

... any and all records or documents of any kind relating to the decision making which took place and resulted in the inclusion of the following 12 properties in the Greenbelt Area:

[Chart listing the legal description of each property, the municipal address and the name of the company that owns the property.]

Further, we confirm that we are prepared to exclude from our request any records, documents, etc. which are already in the public domain and any draft legislation, draft regulations, draft Bills or Orders in Council. Also, we do not at this time, require production of all of the tiles on the mapping system; but rather only the distinct maps pertaining to the properties listed above.

[3] The ministry located 2,723 pages of responsive records and issued interim, final and revised access decisions that provided the appellant with a substantial number of these records. However, it denied access to some records, either in full or in part, under various exemptions in *FIPPA*. The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] This appeal was not resolved in mediation and was transferred to the adjudication stage of the appeal process for an inquiry. The ministry is denying access to most of the 49 records remaining at issue under the mandatory exemption in section 12(1) (cabinet records) and the discretionary exemption in section 13(1) (advice or recommendations) of *FIPPA*. In addition, it is denying access to a small amount of information in some records under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy).

[5] An adjudicator sought representations from the ministry, the appellant and two affected parties. In response, the ministry and the appellant submitted representations to the IPC. These representations were shared between the parties in accordance with the IPC's *Practice Direction 7*. The affected parties did not submit any representations. This appeal was then transferred to me to complete the inquiry.

[6] In this order, I find that some withheld records and parts of records qualify for exemption under *FIPPA* but others do not. I order the ministry to disclose to the appellant those records and parts of records that do not qualify for exemption.

RECORDS:

[7] There are 49 records remaining at issue in this appeal, which are set out in the revised index of records that the ministry provided to both the IPC and the appellant.

ISSUES:

- A. Does the mandatory exemption at section 12(1) apply to the records?
- B. Does the discretionary exemption at section 13(1) apply to the records?
- C. Does the mandatory exemption at section 17(1) apply to the records?
- D. Does the mandatory exemption at section 21(1) apply to the records?

DISCUSSION:

A. DOES THE MANDATORY EXEMPTION AT SECTION 12(1) APPLY TO THE RECORDS?

[8] The ministry has withheld the following records, some in full and others in part, under the mandatory exemption in section 12(1) of *FIPPA*: pages 1-48, 58-65, 120-125, 172-175, 192-215, 223, 232, 234-240, 349-373, 575-647, 648-665, 750-756, 808-824, 918-921, 942-944, 968-973, 975-977, 990-995, 996-999, 1005-1100 and 1104-1106.

[9] Section 12(1) reads:

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

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that

does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

[10] The term, "Executive Council" in section 12(1) refers to the Cabinet of the Government of Ontario, which is made up of the Premier and his ministers. Committees of Cabinet include Treasury Board/Management Board of Cabinet, Legislation and Regulations, Emergency Management, and Planning and Priorities.

[11] The confidentiality of Cabinet proceedings is a cornerstone of the Westminster system of government and is protected by convention, common law and legislative provisions.² In *Babcock v. Canada (Attorney General)*, the Supreme Court of Canada stated that Cabinet confidentiality is "essential to good government"³:

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny.... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or

² Government of Canada, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*, online: <www.justice.gc.ca/eng/dept-min/pub/atia-lai/atia-lai.pdf> at 8.

³ 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 15.

unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect.⁴

[12] In Ontario, the section 12(1) exemption in *FIPPA* codifies the principle of Cabinet confidentiality by protecting from disclosure those records that would reveal the substance of deliberations of Cabinet or its committees.

[13] Subparagraphs (a) to (f) of section 12(1) provide protection for specific types of records. However, the use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees, not just the types of records enumerated in the various subparagraphs, qualifies for exemption under section 12(1).⁵

Preliminary issue

[14] The ministry’s representations on each record subject to a section 12(1) exemption claim conclude with the following blanket statement: “In coming to this position, the ministry relies upon Order PO-[2725] and the evidence that was presented to the Commission with respect to the Greenbelt by the Ministry of Municipal Affairs and Housing.” Given that the Ministry makes this blanket statement several times, I have decided to address its applicability in this appeal as a preliminary issue.

[15] Under section 53 of *FIPPA*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in *FIPPA* lies upon the institution. Consequently, the burden of proof is on the ministry to show that the records and parts of records that it has withheld fall within section 12(1) of *FIPPA*.

[16] The IPC issued Order PO-2725 to resolve an appeal filed by the same appellant as in the current appeal. The appellant had filed a similar request for records with the Ministry of Municipal Affairs and Housing (MMAH). In that appeal, whether the section 12(1) exemption applied to specific records was also at issue.

[17] The ministry did not include a copy of MMAH’s representations but I have retrieved the appropriate file from storage and have reviewed them. In addition, I have reviewed Order PO-2725 and other orders of this office in which records relating to the proposed Greenbelt Plan were at issue.⁶

⁴ *Ibid.*, at para. 18.

⁵ Orders P-22, P-1570 and PO-2320.

⁶ Orders PO-2840 and PO-2857.

[18] MMAH's representations explain why it claimed that the specific records at issue in Order PO-2725 were exempt under section 12(1). In addition, those representations provide evidence about various deliberations of Cabinet and its committees that took place on specific dates relating to those records. However, those records are different than the ones at issue in the current appeal. Moreover, the ministry has not specified how the arguments and evidence in MMAH's representations would apply to each of the records at issue in the current appeal.

[19] In my view, the ministry has not provided sufficient evidence to establish a link between MMAH's representations and the specific records at issue in the current appeal. In such circumstances, I find that MMAH's representations are of minimal assistance in assessing whether the section 12(1) exemption applies to the specific records before me.

Section 12(1): introductory wording

[20] The introductory wording of section 12(1) requires an institution to refuse access to a record where disclosure would reveal the substance of deliberations of Cabinet or its committees.

[21] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.⁷

[22] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.⁸

[23] The ministry submits that the following records qualify for exemption under the introductory wording of section 12(1): pages 120-125, 223, 808-824 and 996-999.

Pages 120-125, 996-999 and 808-824 – slide decks

[24] Pages 120-125 are: (1) an email between public servants, dated January 6, 2005; and (2) an attached slide deck entitled, "MNR – Deputy Minister's Briefing / Golden Horseshoe Area / Greenbelt Plan / MNR issues." The ministry has disclosed the email and some slides to the appellant but has withheld other parts of the slides under section 12(1).

⁷ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁸ Order PO-2320.

[25] Pages 996-999 are a slide deck entitled, "MNR – Deputy Minister's Briefing / Golden Horseshoe / Greenbelt Plan," dated January 5, 2005. The ministry has disclosed some slides to the appellant but has withheld other parts of the slides under section 12(1).

[26] The ministry claims that the withheld parts of both slide decks would reveal information contained in another slide deck entitled "Greenbelt Cabinet Submission – MNR's Proposed Response," dated September 21, 2004 (pages 808-824), which it submits is also exempt under section 12(1). It further asserts that although both slide decks used to brief the deputy minister never went before Cabinet, the withheld information would reveal the substance of deliberations of Cabinet.

[27] The appellant submits that the ministry has failed to provide either evidence or argument sufficient to meet the standards required by section 12(1) and clarified in Order P-2320, with respect to records that have never gone before Cabinet.

[28] In my analysis under section 12(1)(b) below, I find that the "Greenbelt Cabinet Submission" slide deck (pages 808-824) qualifies for exemption under that provision because it contains policy options or recommendations that were prepared for submission to Cabinet in September, 2004. However, the two slide decks used to brief the deputy minister more than three months later do not contain any specific references to the exempt "Greenbelt Cabinet Submission" or to any related deliberations of Cabinet or its committees. In addition, although the ministry claims that disclosure of the withheld parts of these slide decks would reveal information contained in this cabinet submission, it does not identify or provide specific examples of such information.

[29] In my view, the ministry has failed to provide sufficient evidence to show that disclosure of the withheld parts of the two slide decks used to brief the deputy minister would reveal the substance of deliberations of Cabinet or its committees, or permit the drawing of accurate inferences with respect to these deliberations. I find, therefore, that these withheld parts do not qualify for exemption under the introductory wording of section 12(1).

Page 223 – E-mail

[30] Page 223 is part of a larger record (pp. 217-225) that the ministry has partly disclosed to the appellant. It is an email, dated February 21, 2005, between two public servants in the ministry relating to certain land in the proposed Greenbelt Area. The ministry claims that this entire e-mail qualifies for exemption under the introductory wording of section 12(1). The appellant submits that the ministry has failed to meet the burden of proof in showing that this record qualifies for exemption under section 12(1).

[31] This email addresses the need to obtain a decision with respect to a Greenbelt matter that was before the Legislation and Regulations Committee of Cabinet. I am satisfied that disclosing it would reveal the substance of deliberations of this committee or permit the drawing of accurate inferences with respect to these deliberations. I find, therefore, that it qualifies for exemption under the introductory wording of section 12(1).

Section 12(1)(a): agenda, minute or other record of deliberations

[32] Under section 12(1)(a), a record that would reveal the substance of deliberations of Cabinet or its committees includes, "an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees."

[33] The ministry submits that page 232 of the records qualifies for exemption under section 12(1)(a).

Page 232 – Email

[34] This record is an email between public servants, dated March 24, 2005, that provides a summary of a meeting between various public servants, political staff and Cabinet office staff. The ministry has withheld this entire email under sections 12(1)(a) and (d).

[35] The ministry states that this email is a record of the deliberations or decisions of Cabinet, as contemplated by section 12(1)(a). It submits that this record constitutes material that was needed for the proposed deliberations of Cabinet and cites Order P-131 to support its position. It further submits that the context of this email would permit the drawing of accurate inferences of the actual deliberations of a Cabinet meeting dealing with the Greenbelt and cites Order PO-1725 to support its position.

[36] The appellant submits that this email does not qualify for exemption under section 12(1)(a) and cites a passage from Order P-131 to support its position.

[37] I have reviewed this email and am not satisfied that it constitutes a record of the deliberations or decisions of Cabinet or its committees, as contemplated by section 12(1)(a). Nor am I satisfied that disclosing this record would permit the drawing of accurate inferences with respect to any deliberations of Cabinet or its committees.

[38] There is no reference in this record to any deliberations, decisions or meetings of Cabinet or its committees. Although political and cabinet office staff attended the meeting summarized in the email, this is not, on its own, sufficient to bring the record within the purview of the exemption. I find, therefore, that it does not qualify for exemption under section 12(1)(a).

Section 12(1)(b): policy options or recommendations

[39] Under section 12(1)(b), a record that would reveal the substance of deliberations of Cabinet or its committees includes, "a record containing policy options or recommendations submitted, or prepared for submission, to [Cabinet] or its committees."

[40] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.⁹

Pages 808-824 – slide deck

[41] As noted above, this record is a slide deck entitled "Greenbelt Cabinet Submission – MNR's Proposed Response," dated September 21, 2004. The ministry has withheld the entire slide deck under section 12(1)(b).

[42] The ministry submits that the slide deck contains specific "policy options or recommendations" that were submitted to Cabinet or its committees. The appellant submits that this slide deck only contains "suggestions or comments" and not "policy options or recommendations," as required by section 12(1)(b).

[43] I have reviewed this slide deck and am satisfied that it contains policy options or recommendations that were either submitted to Cabinet or at least prepared for that purpose. The information in the slide deck is not simply "suggestions or comments." I find, therefore, that this record qualifies for exemption under section 12(1)(b).

Section 12(1)(c): background explanations or analyses of problems

[44] Under section 12(1)(c), a record that would reveal the substance of deliberations of Cabinet or its committees includes, "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 [Cabinet] or its committees for their consideration in making decisions, before those decisions are made and implemented."

[45] Like section 12(1)(e), this section is prospective in its application. It will apply to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact.¹⁰

⁹ Orders PO-2320, PO-2554, PO-2677 and PO-2725.

¹⁰ Orders PO-2554 and PO-2677.

[46] The ministry submits that the following records qualify for exemption under section 12(1)(c): pages 192-215 and 349-373.

[47] Pages 192-215 are: (1) emails between public servants, dated February 25, 2005; (2) an accompanying document entitled, "Greenbelt Legislation and Plan – Qs and As and Key Messages"; and a table entitled, "Comparison of Mineral Aggregate Policies." Pages 349-373 are a similar email and an earlier draft of the same records. The ministry has withheld these records in full under section 12(1)(c).

[48] The ministry states that it sent these materials to MMAH and a "shorter version" to Cabinet office. It submits that in accordance with the requirements of section 12(1)(c), these records contain background explanations or analyses of problems submitted, or prepared for submission, to Cabinet or its committees for their consideration on communications issues, before those decisions relating to the Greenbelt were made or implemented.

[49] The appellant simply submits that these records do not qualify for exemption under section 12(1) because they do not reveal the substance of deliberations of Cabinet or its committees.

[50] I have reviewed these records and am not satisfied that they qualify for exemption under section 12(1)(c) for several reasons. For example, the records claimed to be exempt under section 12(1)(c) must contain "background explanations or analyses of problems." However, with the exception of the table comparing "mineral aggregate policies," most of the information in these records is proposed communications messages that would be directed at the public, not "background explanations or analyses of problems."

[51] In addition, the wording of section 12(1)(c) requires that the records themselves were submitted or prepared for submission to Cabinet or its committees for their consideration in making decisions. Although the ministry submits that a "shorter version" of these materials was sent to Cabinet office, it does not identify which parts of these draft materials were integrated into the "shorter version." In my view, the ministry's submissions fall short of the quality of evidence required to prove that section 12(1)(c) applies to these records.

[52] Moreover, section 12(1)(c) is prospective in its application. It cannot apply to records that have been dealt with by the Cabinet or its committees. Consequently, even if these draft materials went before Cabinet in 2005, any decisions with respect to these records have already been made and implemented. In short, I find that these records do not qualify for exemption under section 12(1)(c).

Section 12(1)(d): consultation among ministers

[53] Under section 12(1)(d), a record that would reveal the substance of deliberations of Cabinet or its committees includes, "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."

[54] Section 12(1)(d) does not apply if the record was used for consultations among civil servants employed in ministries.¹¹

[55] The ministry submits that the following records qualify for exemption under section 12(1)(d): pages 1-48, 58-65, 223, 232, 234-240, 575-647, 648-665, 750-756, 918-921, 975-977 and 1005-1100.

[56] The ministry states that a review of these records shows a "common thread" – they reflect or provide information to support discussions between the Minister of Natural Resources, the Premier, and/or the Minister of Municipal Affairs and Housing on the government's policy relating to the proposed Greenbelt. Consequently, it submits that all of these records qualify for exemption under section 12(1)(d).

[57] The appellant states that in order to fall within section 12(1)(d), the records must have been used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. It submits that the ministry's argument that the records reflect or provide information to support discussions between various ministers is not the test set out in the exemption.

[58] The appellant further submits that section 12(1)(d) is meant to reflect consultations between ministers, not the Premier. Consequently, any records that involve communications to or from the Premier would not qualify for exemption under section 12(1)(d). In addition, it cites Order P-920 and submits that section 12(1)(d) does not apply if the record was used for consultations among civil servants.

[59] I have reviewed all of the above records and find they do not qualify for exemption under section 12(1)(d), for the following reasons.

Pages 1-48, 575-647 and 1005-1100 – Emails and draft Greenbelt Plans

[60] Pages 1-48 are: (1) emails, dated September 15 and 16, 2004, between public servants; (2) an attached copy of "version 11" of the draft Greenbelt Plan, dated September 15, 2004. The ministry has withheld these records in full.

¹¹ Orders P-920 and PO-2554.

[61] Pages 575-647 are: (1) an email, dated January 27, 2005, between public servants; (2) an attached copy of the "final" draft of the Greenbelt Plan (no date); and (3) a chart entitled, "Major Policy Issues Raised in Consultation and Staff Recommended Changes to the Draft Greenbelt Plan." The ministry has withheld all of these records in full.

[62] Pages 1005-1100 are: (1) an email, dated January 11, 2005, between public servants; (2) two attached "working revised drafts" of the Greenbelt Plan (no date). The ministry has withheld all of these records in full.

[63] The cover emails for all three records were circulated among public servants employed in various ministries, not any ministers of the Crown. Consequently, they cannot qualify for exemption under section 12(1)(d), because they were not used for or do not reflect consultation among ministers on matters relating to the making of government decisions or the formulation of government policy.

[64] With respect to the attached draft Greenbelt plans and chart, the ministry has not, in my view, provided the quality of evidence required to prove that these records qualify for exemption under section 12(1)(d). It simply relies upon its general submission that a review of these records shows a "common thread" – they reflect or provide information to support discussions between the Minister of Natural Resources, the Premier, and/or the Minister of Municipal Affairs and Housing on the government's policy relating to the proposed Greenbelt.

[65] However, the ministry does not provide any corroborating evidence to support this submission, such as the dates of specific consultations among these Cabinet ministers. In addition, there is no reference in the records themselves to any consultations between ministers of the Crown. The email that is part of pages 575-647 does state that the attached draft Greenbelt Plan and chart were provided to the Minister of Municipal Affairs and Housing. However, it provides no indication that the attached records were then used for consultations between himself and other ministers of the Crown or that they reflect any such consultations.

[66] I note as well that the ministry has disclosed more than 20 draft Greenbelt Plans to the appellant, some of which appear to be substantially similar or even the same as at least one of the withheld plans. For example, the ministry has fully disclosed a draft 57-page Greenbelt Plan dated January 26, 2005 (pp. 1229-1288) but has withheld a draft 57-page Greenbelt Plan on pp. 576-635 that was attached to an email dated January 27, 2005. I have examined both draft Greenbelt Plans and in addition to being produced on or about the same date, their contents appear to be either the same or substantially similar. However, one has been fully disclosed to the appellant while the other has been completely withheld under section 12(1)(d). The ministry's representations do not shed any light on this inconsistency.

[67] For all of these reasons, I find that the ministry has not provided sufficient evidence to show that these records were used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. Consequently, they do not qualify for exemption under section 12(1)(d).

Pages 58-65, 223, 232, 234-240, 648-665, 750-756, 918-921 and 975-977 – Other records

[68] Pages 58-65 are: (1) an email, dated August 13, 2004 between public servants; and (2) an attached chart entitled "Greenbelt Mapping/Layering Options – Draft," dated August 11, 2004. The ministry has withheld these records in full under section 12(1)(d).

[69] Page 223 is an email between two public servants, dated February 21, 2005, relating to certain land in the proposed Greenbelt Area. I have already found that it qualifies for exemption under the introductory wording of section 12(1), so it is not necessary to determine if section 12(1)(d) also applies to this record.

[70] Page 232 is an email between public servants that provides a summary of a meeting between various ministry staff, political staff and Cabinet office staff. The ministry has withheld this entire email under sections 12(1)(a) and (d). I have already found that it does not qualify for exemption under section 12(1)(a) but will now determine whether it qualifies under section 12(1)(d).

[71] Pages 234-240 are: (1) an email, dated November 9, 2004, between public servants; and (2) attached Qs and As for the proposed Greenbelt legislation. The ministry has withheld these records in full under section 12(1)(d).

[72] Pages 648-665 are an email dated November 5, 2004 between public servants; and (2) attached Qs and As for the proposed Greenbelt Plan. The ministry has withheld these records in full under section 12(1)(d).

[73] Pages 750-756 are a document entitled, "Minister's Information Briefing Note," dated September 17, 2004. The ministry has disclosed most of this record, but has withheld parts of page 753 under sections 12(1)(d) and (e).

[74] Pages 918-921 and 975-977 are slide decks entitled, "MNR – Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan," dated January 17 and 19, 2005 respectively. The ministry has disclosed parts of these slide decks to the appellant but has withheld others. The ministry's revised index of record and the records themselves indicate that it is only relying on section 13(1) to deny access to these parts. However, the ministry appears to have added section 12(1)(d) as a late exemption claim in its representations for those withheld parts of the slides.

[75] As with other records, the ministry simply relies on its general submission that a review of these records show a “common thread” – they reflect or provide information to support discussions between the Minister of Natural Resources, the Premier, and/or the Minister of Municipal Affairs and Housing on the government’s policy relating to the proposed Greenbelt. However, it does not provide any corroborating evidence to support this submission, such as the dates of specific consultations among these Cabinet ministers. In addition, there is no reference in the records themselves to any consultations between these ministers.

[76] I find that the ministry has not provided sufficient evidence to show that these records were used for or reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy. Consequently, they do not qualify for exemption under section 12(1)(d).

Section 12(1)(e): record prepared to brief a minister

[77] Under section 12(1)(e), a record that would reveal the substance of deliberations of Cabinet or its committees includes, “a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.”

[78] This section contemplates the exemption of records prepared in advance of the types of meetings referred to in the section. Like section 12(1)(c), it has a prospective application. Section 12(1)(e) cannot apply to records that have been dealt with by the Cabinet or its committees, although such records may still be exempt under the introductory wording of the exemption.¹²

[79] The ministry submits that the following records qualify for exemption under section 12(1)(e): pages 172-175, 750-756, 942-944, 968-973, 990-995 and 1104-1106.

[80] Pages 172-175 are: (1) emails, dated January 19, 2005, between public servants; and (2) an attached slide deck entitled, “MNR Minister’s Briefing – Golden Horseshoe Area – Greenbelt Plan.” The ministry has withheld these records in full under section 12(1)(e).

[81] Pages 750-756 are a document entitled, “Minister’s Information Briefing Note,” dated September 17, 2004. The ministry has disclosed most of this record, but has withheld parts of page 753 under sections 12(1)(d) and (e). I have already found that this portion does not qualify for exemption under section 12(1)(d) but will now determine whether it qualifies under section 12(1)(e).

¹² Orders P-1182, PO-2554, PO-2677 and PO-2725.

[82] Pages 942-944 are: (1) emails, dated October 7, 2004, between public servants; and (2) an attached slide deck entitled, "Four Corners Briefing – The Linklands and Greenbelt and Niagara Escarpment Plan Review."

[83] Pages 968-973 are: (1) emails, dated January 19, 2005 between public servants; and (2) an attached slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan;" and (3) a chart entitled, "Comparison of Natural Heritage and Aggregate Policies." The ministry has partly disclosed these records to the appellant. It has withheld parts of the slides and the entire chart under section 12(1)(e).

[84] Pages 990-995 are: (1) emails, dated January 17, 2005, between public servants; and (2) an attached slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan." The ministry has withheld these records in full under section 12(1)(e).

[85] Pages 1104-1106 are a slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan," dated January 24, 2005. The ministry has partially disclosed these slides to the appellant. It has withheld parts of the slides under section 12(1)(e).

[86] The ministry refers to the wording of the exemption and cites several IPC orders on section 12(1)(e).¹³ It submits that the above records "were used to brief the Minister [of Natural Resources] on various issues relating to the Greenbelt which were before Cabinet as contemplated by subclause 12(1)(e)."

[87] The appellant states that the ministry's submissions lack detail about the content of these records. It cites Order P-901 and submits that any information in the records that a third party has provided to a minister is not covered by section 12(1)(e). In addition, it points to Order P-131 and submits that section 12(1)(e) does not apply if the records do not actually contain sufficient information to actually brief the minister.

[88] As noted above, the IPC has found in previous orders that section 12(1)(e) is prospective and cannot apply to records that have been dealt with by Cabinet or its committees.¹⁴ Consequently, even if these withheld records and parts of records relate to matters about the Greenbelt Plan that were before or proposed to be brought before Cabinet or its committees in 2005, any decisions by those bodies with respect to these matters have already been made and implemented. Consequently, the withheld records or parts of these records cannot qualify for exemption under section 12(1)(e).

[89] A record that does not qualify for exemption under section 12(1)(e) may still be exempt under the introductory wording of section 12(1). In general, the ministry has

¹³ Orders P-131, P-167, P-206, P-503, P-883 and P-946.

¹⁴ *Supra* note 12.

not provided me with sufficient evidence to support such a finding with respect to these records. However, the substance of the records themselves also serves as evidence as to whether they qualify for exemption under the introductory wording of section 12(1).

[90] I have reviewed the above records and find that they do not qualify for exemption under the introductory wording of section 12(1), except for parts of one record. In my view, disclosure of slides 4, 7 and 8 of the slide deck on pages 942-944 would permit the drawing of accurate inferences with respect to the deliberations of Cabinet. Consequently, those slides qualify for exemption under the introductory wording of section 12(1).

Section 12(1) – Summary of findings

[91] My findings with respect to whether the section 12(1) exemption applies to the records and parts of records at issue can be summarized as follows:

- the following withheld records qualify for exemption in full under section 12(1): pages 223 and 808-824;
- the following withheld record qualifies for exemption in part under section 12(1): pages 942-944;
- the following withheld records and parts of records do not qualify for exemption under section 12(1): pages 1-48, 58-65, 120-125, 172-175, 192-215, 232, 234-240, 349-373, 575-647, 648-665, 750-756, 918-921, 968-973, 975-977, 990-995, 996-999, 1005-1100 and 1104-1106.

[92] The ministry has not claimed any further exemptions for the following records and parts of records that I have found do not qualify for exemption under section 12(1): pages 1-48, 192-215, 234-240, 349-373, 648-665 and 1005-1100. For some of these records, it claimed the section 13(1) exemption in its original access decision but dropped this exemption claim when it issued a revised access decision. Consequently, these records must be disclosed to the appellant.

[93] However, the ministry has claimed that the discretionary exemption in section 13(1) applies to the following records or parts of records that I have found do not qualify for exemption under section 12(1): pages 58-65, 120-125, 172-175, 232, 575-647, 750-756, 918-921, 942-944, 968-973, 975-977, 990-995, 996-999, and 1104-1106. Consequently, I will now turn to considering whether these and other records identified by the ministry are exempt from disclosure under section 13(1).

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 13(1) APPLY TO THE RECORDS?

[94] The ministry has withheld the following records, some in full and others in part, under the discretionary exemption in section 13(1) of *FIPPA*: 58-65, 70-77, 83, 84, 85, 86, 120-125, 172-175, 216, 217-225, 232, 399-401, 433-437, 545-546, 575-647, 750-756, 757-770, 855, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 918-921, 930-932, 942-944, 960-967, 968-973, 975-977, 978-982, 990-995, 996-999, and 1104-1106.

[95] 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.

[96] 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.¹⁵

[97] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.¹⁶

[98] "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.¹⁷

[99] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or

¹⁵ 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.).

¹⁶ Order PO-2681.

¹⁷ 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.

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.¹⁸

[100] 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 investigation¹⁹

[101] In addition, 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 13.²⁰

Pages 83, 84, 85, 86, 855, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870 and 871 – Maps

[102] These records are maps of various parts of the proposed Greenbelt Area. The ministry has withheld these maps in full under section 13(1).

[103] The ministry states that the maps contain markings made by public servants that fall into four major categories: (1) digitized coloured lines and coloured circles; (2) fine-tuning changes – possible delineations and additions; (3) adjustments to the north Vaughan Area; and (4) 30-meter option (whether the Greenbelt Plan should include a 30-metre rather than a 60-metre buffer along valleys and watercourses).

[104] The ministry submits that these markings on the maps constitute the advice or recommendations of a public servant, as contemplated by section 13(1) or,

¹⁸ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

¹⁹ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

²⁰ None of the parties has claimed that the sections 13(2) or (3) exceptions apply to any of the records at issue in this appeal.

alternatively, the disclosure of these markings would reveal the contents of the advice or recommendations that have been provided.

[105] The appellant cites the wording of section 13(1) and previous IPC orders and submits that these records do not meet the requirements of this exemption.

[106] I find that disclosing the markings on the maps would reveal the advice or recommendations of public servants with respect to the boundaries of the Greenbelt or would permit one to accurately infer the advice or recommendations that these public servants have given. In my view, the remaining parts of the maps are interwoven with the markings to such an extent that they cannot be reasonably severed under section 10(2).²¹ Consequently, I find that these maps qualify for exemption in full under section 13(1).

Pages 58-65 and 70-77 – Email and charts

[107] Pages 58-65 are: (1) an email, dated August 13, 2004 between public servants; and (2) an attached chart entitled "Greenbelt Mapping/Layering Options – Draft," dated August 11, 2004. Pages 70-77 are a chart entitled "Greenbelt Mapping/Layering Options – Draft 2," dated August 13, 2004. The ministry has withheld the email in part and the charts in full under section 13(1).

[108] The ministry states that the charts contain options/rationalization and stakeholder reactions. It submits that these records contain "options and advice" and therefore qualify for exemption under section 13(1).

[109] The appellant submits that "options," "rationalizations," and "reactions" simply do not meet the well-established and well-defined test for what constitutes "advice or recommendations in section 13(1).

[110] I find that the withheld parts of the email contain factual information and do not reveal advice or recommendations of a public servant, as required by section 13(1).

[111] The two charts contain three categories of information: "Options," "Rationalization," and "Stakeholder Reaction" with respect to designating "layers" for the proposed Greenbelt, particularly agricultural and environmental layers.

²¹ Section 10(2) requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. The IPC has found in previous orders that that a record should not be severed where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed. See Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[112] The information that appears under the categories "Rationalization" and "Stakeholder Reaction" are explanatory and factual in nature and does not constitute advice or recommendations of a public servant, as required by section 13(1).

[113] With respect to the information in the charts that appears in the category, "Options," the IPC has found in previous orders that the "options" in a record may or may not include "advice or recommendations," depending on the circumstances of the case.²² In the circumstances of this particular appeal, the "options" in the charts set out an array of choices and do not suggest a particular course of action to a decision-maker with respect to these choices. In my view, these options do not constitute advice or recommendations of a public servant, as contemplated by section 13(1).

[114] In short, I find that these records do not qualify for exemption under section 13(1) and must be fully disclosed to the appellant.

Pages 120-125 and 996-999 – Slide decks

[115] Pages 120-125 are: (1) an email between public servants, dated January 6, 2005; and (2) an attached slide deck entitled, "MNR – Deputy Minister's Briefing / Golden Horseshoe Area / Greenbelt Plan / MNR issues." The ministry has disclosed the email and some slides to the appellant but has withheld other parts of the slides under section 13(1).

[116] Pages 996-999 is a slide deck entitled, "MNR – Deputy Minister's Briefing / Golden Horseshoe / Greenbelt Plan," dated January 5, 2005. The ministry has disclosed some slides to the appellant but has withheld other parts of the slides under section 13(1).

[117] The ministry states that the withheld parts of these records "contain recommendations of OMAF [Ontario Ministry of Agriculture and Food] and MNR staff recommendations and positions, options, implications and the recommended option ..." Consequently, it submits that the withheld parts of these records qualify for exemption under section 13(1).

[118] The appellant submits that rather than constitute "advice" or "recommendations," the withheld parts of these records more closely resembles "factual or background information," which the IPC has found does not fall within section 13(1). It further cites Order P-529 and submits that even if the withheld parts of the records discuss a number of issues, raise potential problems and provide options, they will not be caught by section 13(1) if there if no advice or recommendations on the approach that should be adopted.

²² Orders P-1363, P-1631, PO-2186-F, PO-2400 and PO-2432.

[119] I find that some withheld parts of these slide decks include recommendations made by public servants at the OMAF and the ministry relating to the Greenbelt Plan. These withheld parts clearly fall within the requirements of section 13(1), because their disclosure would reveal the advice or recommendations of a public servant. In my view, the remaining withheld parts of the slide decks also qualify for exemption under section 13(1) because their disclosure would permit one to accurately infer the advice or recommendations given.

[120] In short, I find that the withheld parts of the slide decks used to brief the deputy minister qualify for exemption under section 13(1).

Pages 575-647 – Email and draft Greenbelt Plan

[121] Pages 575-647 are: (1) an email, dated January 27, 2005, between public servants; (2) an attached copy of the “final” draft of the Greenbelt Plan (no date); and (3) a chart entitled, “Major Policy Issues Raised in Consultation and Staff Recommended Changes to the Draft Greenbelt Plan.” The ministry has fully withheld these records from the appellant.

[122] Neither the ministry nor the appellant have provided specific representations as to whether these records qualify for exemption under section 13(1).

[123] I find that the email and the “final” draft of the Greenbelt Plan cannot qualify for exemption under section 13(1) because their disclosure would not reveal the advice or recommendations of a public servant.

[124] With respect to the chart, I find that disclosure of the information that appears under the headings, “Staff Recommendation” would reveal the advice or recommendations of public servants, and disclosure of the information that appears under the heading “Rationale” would permit one to accurately infer the advice or recommendations given.²³ Consequently, these withheld parts of the chart qualify for exemption under section 13(1). However, the remaining information in the chart is factual or background information and cannot, therefore, qualify for exemption under section 13(1).

[125] In short, I find that pages 575-647 do not qualify for exemption under section 13(1), except for the withheld information in the chart that appears under the headings, “Staff Recommendation” and “Rationale.”

²³ The ministry has highlighted this information in the actual chart.

**Pages 172-175, 918-921, 968-973, 975-977, 990-995 and 1104-1106 –
Emails and slide decks for Minister**

[126] Pages 172-175 are: (1) emails, dated January 19, 2005, between public servants; and (2) an attached slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan." The ministry has withheld these records in full under section 13(1).

[127] Pages 918-921 are a slide deck entitled, "MNR – Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan," dated January 17, 2005. The ministry has withheld parts of these slides under section 13(1).

[128] Pages 968-973 are: (1) emails, dated January 19, 2005 between public servants; and (2) an attached slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan;" and (3) a chart entitled, "Comparison of Natural Heritage and Aggregate Policies." The ministry has withheld parts of the slides and the entire chart under section 13(1).

[129] Pages 975-977 are a slide deck entitled, "MNR – Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan," dated January 19, 2005. The ministry has withheld parts of these slides under section 13(1).

[130] Pages 990-995 are: (1) emails, dated January 17, 2005, between public servants; and (2) an attached slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan." The ministry has withheld these records in full under section 13(1).

[131] Pages 1104-1106 are a slide deck entitled, "MNR Minister's Briefing – Golden Horseshoe Area – Greenbelt Plan," dated January 24, 2005. The ministry has withheld parts of the slides under section 13(1).

[132] The ministry states that the withheld parts of these records "contain recommendations of OMAF and MNR staff recommendations and positions, options, implications and the recommended option ..." Consequently, it submits that the withheld parts of these records qualify for exemption under section 13(1). The appellant submits that rather than constitute "advice" or "recommendations," the withheld parts of these records more closely resembles "factual or background information," which the IPC has found does not fall within section 13(1).

[133] None of the withheld emails that accompany the slide decks qualify for exemption under section 13(1) because their disclosure would not reveal the advice or recommendations of a public servant.

[134] There are six versions of the slide deck that was ultimately used to brief the Minister on August 24, 2005. Five versions appear to be drafts and one appears to be the final version presented to the Minister. With the exception of some minor changes, the slides in each version are the same or substantially similar.

[135] I note, however, that the ministry has not taken a consistent approach with respect to these records. Even though these slide decks are the same or substantially similar, the ministry has withheld slides in some versions but disclosed the exact same slides in other versions. The ministry's representations do not shed any light on this inconsistency.

[136] I will first examine the withheld parts of the slide decks that the ministry has partly disclosed to the appellant and then examine the slide decks that it has fully withheld.

[137] The slide decks that the ministry has partly disclosed are on pages 918-921, 968-973, 975-977 and 1104-1106. The withheld parts of these records include recommendations made by public servants at the OMAF and the ministry relating to the Greenbelt Plan. These withheld parts clearly fall within the requirements of section 13(1), because their disclosure would reveal the advice or recommendations of a public servant. In my view, the remaining withheld parts of these slide decks also qualify for exemption under section 13(1) because their disclosure would permit one to accurately infer the advice or recommendations given.

[138] The slide decks that the ministry has fully withheld are on pages 172-175 and 990-995. As noted above, these slide decks are the same or substantially similar to those that the ministry has partly disclosed. I find that the same parts of these slide decks that I identified in the previous paragraph of this order qualify for exemption under section 13(1) because their disclosure would reveal the advice or recommendations of a public servant. However, those parts of these slide decks that the ministry has already disclosed to the appellant in the other versions identified above, cannot qualify for exemption under section 13(1) because they are already in the public domain.

[139] Finally, the ministry has also withheld a two-page chart that appears on pages 972-973. In my view, most of the information in this chart does not qualify for exemption under section 13(1) because it contains factual and background information, not advice or recommendations of a public servant. However, I find that the information that appears under the heading "Proposed Changes" in the chart would reveal the advice or recommendations of public servants. Consequently, this information qualifies for exemption under section 13(1).

[140] In short, I find that none of the withheld emails qualify for exemption under section 13(1) but parts of both the six slide decks and the chart meet the requirements of this exemption.

Pages 217-225 – Emails, house note and other documents

[141] Pages 217-225 are: (1) emails between public servants, dated March 7, 2005; (2) an attached house note entitled "Determining the Natural Heritage System in the Greenbelt"; (3) an email between public servants, dated February 21, 2005; and (4) documents entitled, "Greenbelt Plan – Protected Countryside Aggregate Policies" and "Stream Buffers."

[142] The ministry submits that the withheld parts of these records contain recommendations and options that were severed because they fall within section 13(1). The appellant submits that rather than constitute "advice" or "recommendations," the withheld parts of these records more closely resembles "factual or background information," which the IPC has found does not fall within section 13(1).

[143] The ministry has partly disclosed these records to the appellant. I have already found that the email between public servants, dated February 21, 2005, (page 223) qualifies for exemption under section 12(1).²⁴ I will now determine whether the other withheld parts of these records, which include policy options with respect to aggregate operations in the proposed Greenbelt and a "proposed approach," qualify for exemption under section 13(1).

[144] I find that the "proposed approach" recommended by ministry staff qualifies for exemption under section 13(1) because its disclosure would clearly reveal the advice or recommendations of public servants. In my view, the remaining withheld parts of these records also qualify for exemption under section 13(1) because their disclosure would permit one to accurately infer the advice or recommendations given.

Page 232 – Email

[145] This record is an email between public servants, dated March 24, 2005, that provides a summary of a meeting between various public servants, political staff and Cabinet office staff. The ministry has withheld this entire email under section 13(1).

[146] Neither the ministry nor the appellant have provided specific representations as to whether this record qualifies for exemption under section 13(1).

[147] I find that this record sets out factual information and decisions made by public servants with respect to how to proceed with a possible briefing. It does not reveal

²⁴ See paras. 30-31 of this order.

advice or recommendations of a public servant. Consequently, page 232 does not qualify for exemption under section 13(1).

Pages 399-401 and 433-437 – “Outstanding issues” documents

[148] Pages 399-401 are a document entitled, “Greenbelt’ and ‘Places to Grow’ Initiatives – Outstanding MNR Issues and Concerns,” dated November 19, 2004. The ministry has withheld one part of this record under section 13(1).

[149] Pages 433-437 are: (1) an email between public servants, dated December 21, 2004; and (2) a briefing document entitled, “The Golden Horseshoe Greenbelt Plan – Outstanding Issues and Concerns,” dated December 21, 2004. The ministry has disclosed most of these records to the appellant but has withheld parts of the briefing document under section 13(1).

[150] Neither the ministry nor the appellant have provided specific representations as to whether the withheld parts of these records qualify for exemption under section 13(1).

[151] The withheld part of pages 399-401 and some of the withheld parts of pages 433-437 include recommendations made by public servants at the OMAF and the ministry relating to the Greenbelt Plan. These withheld parts fall within the requirements of section 13(1), because their disclosure would reveal the advice or recommendations of a public servant. In my view, the remaining withheld parts of pages 433-437 also qualify for exemption under section 13(1) because their disclosure would permit one to accurately infer the advice or recommendations given.

Pages 216 and 545-546 – Emails

[152] Page 216 contains two emails between public servants with the subject line, “Greenbelt Vaughan Option B,” dated February 9, 2005. Pages 545-546 contain the same emails as on page 216, plus two additional emails between public servants, dated February 10, 2005. The ministry has fully withheld the two emails on page 216 under section 13(1), fully disclosed two emails on page 545, and withheld one email on page 546 under section 13(1).

[153] Neither the ministry nor the appellant have provided specific representations as to whether the withheld emails qualify for exemption under section 13(1).

[154] The same email appears on the bottom of page 216 and on page 546. This email reveals the decision that was made with respect to a particular option (Option B) for delineating the Greenbelt in Vaughan. However, it does not reveal the advice or recommendations of the public servants who presumably presented a decision maker with a variety of delineation options, including Option B.

[155] A different email appears on the top of page 216. In my view, this email contains factual information, not advice and recommendations of a public servant.

[156] In short, I find that the withheld emails on pages 216 and 545-546 do not qualify for exemption under section 13(1) and must be disclosed to the appellant.

Pages 750-756 – Briefing note

[157] Pages 750-756 are a document entitled, "Minister's Information Briefing Note," dated September 17, 2004. The ministry has disclosed most of this record, but has withheld parts of page 753 under section 13(1).

[158] The ministry submits that the withheld parts of this record contain recommendations and options that were severed because they fall within section 13(1). The appellant submits that rather than constitute "advice" or "recommendations," the withheld parts of this record more closely resembles "factual or background information," which the IPC has found does not fall within section 13(1).

[159] The withheld parts of page 753 contain an introduction and five points. I find that disclosure of points 2 and 3 would reveal the advice or recommendations of public servants from the OMAF and the ministry relating to the Greenbelt Plan. Consequently, these withheld parts qualify for exemption under section 13(1).

[160] However, the introduction and points 1, 4, and 5 contain factual information about unresolved issues relating to the Greenbelt Plan, not advice or recommendations of a public servant. Consequently, these withheld parts do not qualify for exemption under section 13(1) and must be disclosed to the appellant.

Pages 757-770 – Briefing note

[161] This record is entitled "Minister's Seeking Direction Briefing Note," dated September 2, 2004. The ministry has partly disclosed this record to the appellant.

[162] Neither the ministry nor the appellant have provided specific representations as to whether the withheld parts of this record qualify for exemption under section 13(1).

[163] The withheld parts of this briefing note include various options for addressing issues relating to the Greenbelt Plan and the options recommended by ministry staff.

[164] I find that the options recommended by ministry staff qualify for exemption under section 13(1) because their disclosure would clearly reveal the advice or recommendations of a public servant. In my view, the remaining withheld parts of this record, which include other options considered, also qualify for exemption under section

13(1) because their disclosure would permit one to accurately infer the advice or recommendations given.

[165] However, the ministry has also withheld a part of pages 769-770 (Approval Sheet) that lists enclosures to the briefing note. I find that this withheld part does not qualify for exemption under section 13(1) because disclosing a list of enclosures would not reveal the advice or recommendations of a public servant.

Pages 930-932 – Email and chart

[166] These records are: (1) an email between public servants, dated January 19, 2005; and (2) a chart entitled, "Comparison of Natural Heritage and Aggregate Policies." The ministry has disclosed the email and most of the chart, except for the information that appears under the heading, "Proposed Changes."

[167] Neither the ministry nor the appellant have provided specific representations as to whether these records qualify for exemption under section 13(1).

[168] A similar chart appears on pages 972-973 of the records. Earlier in this order, I found that disclosure of the information that appears under the heading "Proposed Changes" in that chart would reveal the advice or recommendations of public servants.²⁵ In my view, the same reasoning applies to the chart on pages 930-932. Consequently, I find that the withheld parts of this record qualify for exemption under section 13(1).

Pages 942-944 – Email and slide deck

[169] Pages 942-944 are: (1) emails, dated October 7, 2004, between public servants; and (2) an attached slide deck entitled, "Four Corners Briefing – The Linklands and Greenbelt and Niagara Escarpment Plan Review." The ministry has fully withheld these records under section 13(1).

[170] The parties' representations with respect to the slide decks on pages 120-125 and 996-999 (see above) also apply to these records.

[171] I find that the withheld emails that accompany the slide deck do not qualify for exemption under section 13(1) because they contain factual information, not the advice or recommendations of a public servant.

[172] With respect to the slide deck, I have found that slides 4, 7 and 8 qualify for exemption under the introductory wording of section 12(1) and therefore cannot be

²⁵ See para. 139 of this order.

disclosed.²⁶ Consequently, it must be determined whether the remaining slides qualify for exemption under section 13(1).

[173] In my view, the remaining slides contain factual and background information, not the advice or recommendations of a public servant. Consequently, I find that these slides do not qualify for exemption under section 13(1) and must be disclosed to the appellant.

Pages 960-967 and 978-982 – Emails and other records – delineation of Greenbelt

[174] Pages 960-967 are emails between public servants, dated January 18, 2005; and (2) an attached document entitled, “The Delineation of the proposed Golden Horseshoe Greenbelt.” The ministry has fully disclosed the emails to the appellant and partly disclosed the attached document.

[175] Pages 978-982 are an email between public servants, dated December 7, 2004, that summarizes a briefing the previous day to the Minister of MMAH on various matters, including boundary delineations of the Greenbelt. The Ministry has partly disclosed this record to the appellant.

[176] Neither the ministry nor the appellant have provided specific representations as to whether the withheld parts of these records qualify for exemption under section 13(1).

[177] The withheld parts of pages 960-967 contain the specific Greenbelt delineations recommended by public servants in early 2005. I find that disclosing them would reveal the advice or recommendations of a public servant. Consequently, these withheld parts qualify for exemption under section 13(1).

[178] However, the withheld parts of pages 978-982 summarize discussions that took place in 2004 with respect to the delineations for the Greenbelt. They contain factual, background and analytical information about the delineation issues, including some options under consideration, but do not reveal a recommended option or any other advice or recommendations of a public servant with respect to delineations. Consequently, I find that these withheld parts do not qualify for exemption under section 13(1) and must be disclosed to the appellant.

²⁶ See para. 90 of this order.

Exercise of discretion

[179] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[180] In this order, I have found that some records and parts of records qualify for exemption under section 13(1). Consequently, I will assess whether the ministry exercised its discretion properly in applying this exemption to those withheld records and parts of records.

[181] The IPC 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

[182] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ The IPC may not, however, substitute its own discretion for that of the institution.²⁸

[183] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- 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

²⁷ Order MO-1573.

²⁸ Section 43(2) of *FIPPA*.

- 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.²⁹

[184] The ministry submits that after carefully weighing the purposes of *FIPPA*, it exercised its discretion to exempt specific records and parts of records from disclosure under section 13(1). The appellant submits that the ministry has not provided any evidence to show that it considered the other relevant factors listed above in exercising its discretion to refuse disclosure of some records and parts of records under section 13(1).

[185] I agree with the appellant that the ministry's representations do not explicitly state whether it considered the other potential relevant factors listed above when it exercised its discretion to withhold some records and parts of records under section 13(1). However, many of those factors are clearly not relevant in the circumstances of this appeal. In addition, there is no evidence before me to suggest that the ministry took into account irrelevant considerations in applying section 13(1) or exercised its discretion in bad faith or for an improper purpose.

[186] In short, I find that the ministry properly exercised its discretion in withholding those records and parts of records that I have found qualify for exemption under section 13(1).

²⁹ Orders P-344 and MO-1573.

Section 13(1) – Summary of findings

[187] My findings with respect to whether the section 13(1) exemption applies to the records and parts of records at issue can be summarized as follows:

- the following withheld records qualify for exemption in full under section 13(1): pages 83, 84, 85, 86, 855, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870 and 871;
- the withheld parts of the following records qualify for exemption under section 13(1): pages 120-125, 217-225, 399-401, 433-437, 918-921, 930-932, 960-967, 975-977, 996-999 and 1104-1106;
- the following records, which have been withheld in full or in part, do not qualify for exemption under section 13(1): pages 58-65, 70-77, 216, 232, 545-546, 942-944 and 978-982;
- some withheld parts of the following records qualify for exemption under section 13(1) but other withheld parts do not: 172-175, 575-647, 750-756, 757-770, 968-973 and 990-995.

C. DOES THE MANDATORY EXEMPTION AT SECTION 17(1) APPLY TO THE RECORDS?

[188] Page 668 is an email between public servants, dated February 17, 2005, that discusses quarries within the proposed Greenbelt from which “aggregate” materials are extracted. The ministry has disclosed most of this email to the appellant but has withheld tonnage information under the mandatory exemption in section 17(1) of *FIPPA*. This tonnage information relates to the quarries operated by two aggregate companies, which are affected parties in this appeal.

[189] Section 17(1) states:

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
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[190] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³⁰ Although one of the central purposes of *FIPPA* 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.³¹

[191] For section 17(1) to apply, 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.

[192] The withheld tonnage information on page 668 is provided in metric tonnes and includes estimated reserve amounts, an average seven-year production level, and estimated supply amounts for the quarries operated by the two aggregate companies.

[193] With respect to parts one and two of the section 17(1) three-part test, the IPC has found in previous orders that tonnage information relates to the buying, selling or exchange of merchandise or services within the meaning of the term “commercial information,” and that aggregate producers supply this information in confidence to the

³⁰ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

³¹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

ministry.³² In my view, although the tonnage information in this appeal is qualitatively different in some respects from the information at issue in previous orders, this information also qualifies as “commercial information” and was supplied to the ministry in confidence. Consequently, I find that the first two parts of the section 17(1) test are met.

[194] The key issue, therefore, is the third part of the test – whether disclosure of the withheld tonnage information on page 668 could reasonably be expected to lead to one or more of the harms specified in paragraphs (a) to (d) of section 17(1). In previous orders, this determination has turned on whether the institution and/or the affected parties have submitted the detailed and convincing evidence required to show that the harms contemplated in section 17(1) could reasonably be expected to occur if the tonnage information is disclosed.³³

[195] The ministry states that the aggregate industry is “very competitive” and that aggregate companies consider it “crucial” to keep tonnage information confidential. It submits that disclosure of the withheld tonnage information on page 668 could reasonably be expected to prejudice significantly the competitive position of the two aggregate companies [section 17(1)(a)]. In particular, disclosing this information would place the two companies at a competitive disadvantage, because it would provide their competitors with details regarding current reserves, market share and market size.

[196] In addition, the ministry submits that disclosure of this information could reasonably be expected to result in undue loss for these companies and undue gains for their competitors [section 17(1)(c)]. Specifically, the two companies’ competitors could use this confidential tonnage information to enter their markets and target their customers.

[197] The ministry then provides several examples that further explain why disclosure of the withheld tonnage information could reasonably be expected to prejudice significantly the competitive position of the two aggregate companies or result in undue financial losses for them and undue gains for their competitors.

[198] The appellant cites previous IPC orders with respect to section 17(1) and submits that the ministry has failed to provide the detailed and convincing evidence required to prove that this exemption applies to the withheld tonnage information. However, it does not rebut any of the ministry’s specific arguments and examples about the harms that could reasonably be expected to occur if the tonnage information on page 668 is disclosed. The two aggregate companies did not submit any representations.

³² P-725, P-925, PO-2594, PO-2838 and PO-2839.

³³ *Ibid.*

[199] In my view, notwithstanding the lack of representations from the two companies, the ministry has provided the detailed and convincing evidence required to satisfy the third part of the section 17(1) test. I accept that if the specific tonnage information on page 668 is disclosed, it is reasonable to expect that the two companies' competitors could exploit this information for the purposes of entering their markets and targeting their customers.

[200] I find, therefore, that disclosure of the specific type of tonnage information at issue in this appeal could reasonably be expected to prejudice significantly the competitive position of the two aggregate companies [section 17(1)(a)] or result in undue financial losses for them and undue gains for their competitors [section 17(1)(c)]. Although the appellant does not appear to represent companies who operate in the same business as the two aggregate companies, disclosure would nevertheless place this information in the public domain and make it potentially accessible to the two aggregate companies' competitors.

[201] In short, I find that the withheld tonnage information on page 668 qualifies for exemption under section 17(1) of *FIPPA*.

D. DOES THE MANDATORY EXEMPTION AT SECTION 21(1) APPLY TO THE RECORDS?

[202] The ministry has withheld the names of two individuals on page 979 who were acting on behalf of a lobby group in its dealings with the Ontario government. In its revised decision letter, the ministry states that it is no longer relying on the section 21(1) exemption to withhold information on page 979. However, it appears to have nevertheless withheld these two names in the severed copy of pages 978-982 that it sent to the appellant with the revised decision letter. In addition, the section 21(1) exemption continues to appear on the ministry's revised index of records.

[203] The mandatory personal privacy exemption in section 21(1) of *FIPPA* prohibits the disclosure of personal information to any person other than the individual to whom the information relates unless certain exceptions apply. However, the section 21(1) exemption only applies to "personal information." Under section 2(3) of *FIPPA*, "personal information" does not include the name, title, contact information or designation of an individual that identifies him or her in a business, professional or official capacity.

[204] In its representations, the ministry does not specifically address whether section 21(1) applies to the two names, but it sent an email to the IPC which states that "upon further review," it acknowledges that the two names are not personal information because the referenced individuals are identified in a business capacity.

[205] I agree with the ministry and find that the two withheld names on page 979 do not constitute the "personal information" of the two individuals, because they are identified in the records in their business or official capacity as representatives of a lobby group, not in their personal capacity. Consequently, these names cannot be withheld under the personal privacy exemption in section 21(1) of *FIPPA*.

ORDER:

1. I order the ministry to disclose the following records in full to the appellant: pages 1-48, 58-65, 70-77, 192-215, 216, 232, 234-240, 349-373, 545-546, 648-665, 978-982 and 1005-1100.
2. I order the ministry to disclose parts of the following records to the appellant: pages 172-175, 575-647, 750-756, 757-770, 942-944, 968-973 and 990-995. I have provided the ministry with a copy of these records and identified the exempt and non-exempt parts of each record. The exempt parts, which must not be disclosed to the appellant, are highlighted in green. The non-exempt parts, which must be disclosed to the appellant, are not highlighted in green.
3. I order the ministry to disclose the records identified in order provisions 1 and 2 to the appellant by **December 1, 2011**.
4. I uphold the ministry's decision to withhold the remaining records and parts of records from the appellant.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the ministry to provide me with a copy of the records that it sends to the appellant.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ October 31, 2011