Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3111

Appeal PA10-10-3

Ministry of Health and Long-Term Care

September 26, 2012

Summary: The appellant requested records relating to the scope of eligibility for In Vitro Fertilization as an insured service in Ontario. The ministry granted partial access to the responsive records, withholding some in full or in part pursuant to sections 12 (Cabinet records), 13 (advice or recommendations) and 19 (solicitor-client privilege). During mediation, the appellant raised the public interest override in section 23. Except for portions of two records, the records at issue are exempt under sections 12, 13 or 19. The public interest override does not apply in the circumstances.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12, 13(1), 13(2)(a), (f), (g), (i) and (k), 19, 23.

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> For the Timeframe 2003-2009: any policy analyses, briefing notes, deliberations, correspondence, responses or other documents held by the ministry in relation to the scope of eligibility for In Vitro Fertilization as an insured service in Ontario.

[2] The ministry issued an access decision, in which it disclosed the records in part, citing sections 12 (Cabinet records), 13 (advice or recommendations), 19 (solicitor-client privilege) and/or 21 (invasion of privacy) of the *Act* to deny access to the remaining information. The ministry also advised that non-responsive information would be severed from the records. The ministry included three indices of records with its decision, which indicate that records were located in the Health Services Branch (HSB), the Legal Services Branch (LSB), and the Health Systems Strategy Branch (HSSB).

[3] The index of records for the Legal Services Branch also cited section 8(1) of the *Personal Health Information Protection Act* (*PHIPA*) to sever, in part, some of the records.

[4] The appellant appealed the ministry's access decision.[1]

[5] During mediation, the appellant confirmed that he does not take issue with the ministry's decision to withhold records either in total or in part pursuant to section 21 of the *Act*, nor with its decision that certain information is non-responsive. Accordingly, the records or portions of records containing this information are no longer at issue in this appeal.

[6] The appellant confirmed, however, that he does take issue with the application of sections 12, 13 and 19 of the *Act*, and the application of section 8(1) of *PHIPA* to the records at issue. The appellant also raised section 23 (compelling public interest) as an issue in the appeal.

[7] During the inquiry into the appeal, I sought and received representations from the ministry and from the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In its representations, the ministry withdrew its reliance on section 12 with respect to HSSB record 10, and agrees to disclose this record to the appellant. In addition, the ministry has withdrawn its application of section 19 to page 5 of HSB record 27. As no other exemptions have been claimed for this portion of record 27, it should be disclosed to the appellant. Further, although the ministry continues to rely on the application of sections 13(1) and 19(a) for portions of HSB record 169, it no longer relies on section 13(1) for the remainder of the record. The remaining portions of HSB record 169 comprise pages 1, 2, all but the third paragraph of page 3, 4, first two paragraphs of page 5, and pages 7, 8, 9, 10 and 11. As no other exemptions have

[1] Note: the appellant appealed an earlier fee and interim access decision (PA10-10-1), which was resolved when the ministry agreed to waive the fees. The appellant later filed a "Deemed Refusal Appeal" (PA10-10-2), which was resolved by the issuance of the decision letter at issue in the current appeal.

been claimed for these remaining portions of HSB record 169, they should be disclosed to the appellant.

[9] In this order I uphold the exemptions in sections 12(1) and 19(a) for the records for which these sections were claimed. I also uphold the section 13(1) exemption for all of the records considered under that section, with the exception of portions of HSB records 207 and 219. As a preliminary matter, I determine that it is not necessary to consider the possible application of section 8(1) of *PHIPA* as the portions of the records for which this section had been claimed are exempt under section 19(a). Finally, I find that the public interest override in section 23 does not apply in the circumstances.

RECORDS:

[10] The records at issue comprise the following records, in whole or in part and consist of e-mails, briefing notes and other communications and internal ministry documents:

HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99, 100, 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 173, 175, 181, 201, 202, 207, 212, 217, and 219.

LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54

HSSB records: 3, 4, 8, 9, 11, 25.

ISSUES:

Issue A: Does the mandatory exemption at section 12 apply to HSSB records: 9, 11 and 25?

Issue B: Does the discretionary exemption at section 19 apply to HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99 - 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 175, 181, 201, 202, 212, 217, LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54, and HSSB records: 3, 4?

Issue C: Does the discretionary exemption at section 13(1) apply to HSB records: 29, 169, 173, 207, 219, LSB records: 46, and HSSB records: 4, 8?

Issue D: Did the institution exercise its discretion under sections 13 and 19? If so, should this office uphold the exercise of discretion?

Issue E: Is there a compelling public interest in disclosure of HSB records: 29, 169,

173, 207, 219, LSB record: 46, and HSSB records: 4, 8 that clearly outweighs the purpose of the section 13 exemption?

PRELIMINARY MATTER:

Are LSB records: 29, 34, 36, 39, 41, 42, 47 excluded from the *Act* due to the application of section 8(1) of *PHIPA?*

[11] The ministry claims that portions of records 29, 34, 36, 39, 41, 42 and 47 contain personal health information and are, therefore, excluded from the *Act* pursuant to section 8(1) of *PHIPA*. The ministry also claims the discretionary exemption at section 19 for these records in their entirety.

[12] It should be noted that the appellant is not seeking his own personal health information. I find below that LSB records 29, 34, 36, 39, 41, 42 and 47 are exempt in their entirety under section 19 of the *Act*. In light of this finding, it would serve no useful purpose to engage in a discussion of *PHIPA* in the circumstances of this appeal.

DISCUSSION:

A: Does the mandatory exemption at section 12 apply to HSSB records: 9, 11 and 25?

[13] The ministry claims that HSSB records 9 and 11 are exempt in their entirety pursuant to section 12(1)(e) and the introductory wording of section 12(1). In addition, the ministry claims that HSSB record 25 falls within section 12(1)(b) and the introductory wording of section 12(1).

[14] As I indicated above, the ministry no longer relies on section 12(1) to exempt HSSB record 10 and indicates that this record may be disclosed to the appellant.

[15] The relevant portions of section 12 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;

> (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

Section 12(1): introductory wording

[16] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees, not just the types of records enumerated in the various subparagraphs of section 12(1), qualifies for exemption under section 12(1).[2]

[17] 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.[3]

[18] 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.[4]

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

[19] 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.[5]

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

[20] 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.[6]

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[2] Orders P-22, P-1570, PO-2320.
[3] Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725.
[4] Order PO-2320.
[5] Order PO-2320, PO-2554, PO-2677 and PO-2725.
[6] Orders P-1182, PO-2554, PO-2677, and PO-2725.

Representations

[21] The ministry claims that HSSB records 9 and 11 are exempt under section 12(1)(e) and the introductory wording of section 12(1). The ministry submits that it is clear, on the face of the records, that they were prepared "with the clear and specific intention to brief a minister of the Crown in relation to matters that are proposed to be brought before Cabinet or its committees."

[22] The ministry notes that "a submission currently being prepared for Cabinet's consideration (on the issues referred to in records 9 and 11) contains some of the very same information and analysis that can be found in records 9 and 11." The ministry takes the position that disclosure of these records would reveal the substance of Cabinet's intended deliberations. The ministry indicates that the Cabinet submission is being prepared for Cabinet's consideration "in the near future."

[23] With respect to HSSB record 25, the ministry submits that it "falls squarely within s. 12(1)(b) because it contains recommendations prepared for submission to Cabinet or its committees." The ministry submits further that "record 25 will, in its current form, be included in a Cabinet submission that is being prepared for Cabinet."

[24] The ministry indicates that since the record will form part of a submission that is being prepared for Cabinet's consideration, its disclosure will effectively reveal the substance of Cabinet's decisions on the issues.

[25] The appellant takes issue with the ministry's position on the basis that "there have been no actual[7] deliberations by Cabinet or its committee" regarding "the scope of eligibility for In Vitro fertilization as an insured service in Ontario." The appellant states further:

> While it may be too obvious to state, a strict condition precedent to engage s. 12 is that Cabinet or its committees must actually have deliberated at some time in the past. If Cabinet or its committees never deliberated, then it is impossible for a record to contain the 'substance of deliberations of the Executive Council [ie. Cabinet] or its committees', which are the opening words of s.12. [emphasis in the original]

[26] Noting that the ministry refers to "intended" deliberations, the appellant submits that it has produced no evidence that the records have been placed before Cabinet or its committees or that the topic has been deliberated on.

[27] The appellant argues that section 12 is not meant to exempt from disclosure records that concern an issue that Cabinet has never considered. He continues:

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[7] Emphasis in the orginal.

> Government would need only make the speculative, arbitrary argument that '*Although Cabinet has never considered, much less deliberated, the issues in the record, someday Cabinet might just change its mind and start deliberating, so the record must remain secret just in case.*'

[28] The appellant submits that to take such an approach would set a precedent that could be abused by government. The appellant relies on the decision of former Assistant Commissioner Tom Mitchinson in Order PO-2320 in support of his position. In that decision, the former Assistant Commissioner found:

> …in order to meet the requirements of the introductory wording of section 12(1) the Ministry must provide evidence and argument sufficient to establish a linkage between the content of Record 5 and the actual substance of Cabinet deliberations…

[29] The appellant does not address the possible application of sections 12(1)(b) and (e) in his submissions.

Cabinet consent

[30] The ministry indicates that it determined that this was not an appropriate case for seeking Cabinet's consent to disclosure as the matters "will be going to Cabinet or one of its committees in the very near future." The ministry submits that it would be premature to seek Cabinet's consent. The ministry points out that the records were created "relatively recently" and deal with "live" issues.

Analysis and findings

[31] The records at issue in this discussion date from 2008 and, according to the appellant (and alluded to by the ministry), this matter has not yet gone before Cabinet or its committees. However, as noted by former Assistant Commissioner Mitchinson in Order PO-2320, "[t]hat information could be prepared long in advance or immediately preceding a Cabinet meeting; the timing has no bearing on the issue." Moreover, the ministry describes the subject of the request as a "live issue" and states that a submission is "currently" being prepared for Cabinet's consideration.

[32] I do not agree with the appellant's position that a condition precedent to engage section 12 is that Cabinet or its committees "must actually have deliberated at some time in the past." Such an interpretation would, in my view, lead to an absurdity where, for example, a request is made for a submission that is scheduled to go before Cabinet a short time in the future. Applying the appellant's reasoning, the section 12 exemption would be lost simply because of the timing of the request.

[33] In Order PO-2417, Assistant Commissioner Brian Beamish considered a similar argument:

> As a final matter, the appellant states that his request for the record was made before the record was submitted to Cabinet. He takes the position that section 12 should not apply to a record "if the record was submitted to Cabinet or a Committee of Cabinet after a request was made". He states:
>
> > I submit that if the record was appended to the submission to Management Board after [the date of the request] then section 12(1) does not apply. Clearly, the record cannot reveal the substance of deliberations if those deliberations had not yet occurred.
>
> I do not accept the appellant's position on this matter. The wording of section 12(1) is clear. Many of its subsections plainly refer to the exemption of items that may not yet have been submitted to Cabinet or a committee (e.g. sections 12(1)(b), (c) and (e)). In addition, in my view, the appellant's position would frustrate the purpose of that section. *The Williams Commission* noted that the confidentiality of Cabinet discussions is a "necessary feature of a freedom of information scheme compatible with the parliamentary traditions of the Government of Ontario". If accepted, the appellant's position would force Cabinet to expedite meetings unfairly in order to protect expert advice from being released before they can consider it confidentially. This type of action would not benefit the public and I find it illogical not to exempt requested reports and advice, which is often extensive and costly, simply because the Cabinet meeting had not taken place before the request was made, but subsequently was in fact discussed by Cabinet.
>
> I agree with the appellant's submission that it would be improper for an institution to submit a record to Cabinet after receiving an access request for that document for the sole purpose of frustrating the request. However, on reviewing the record at issue and the representations of the Ministry, I am satisfied that this is not the case in this appeal. The report was prepared as part of an evaluation of services delivered by the Office of the Registrar General and to provide policy options and recommendations. I am satisfied that it was the intention of the Ministry to use the report as part of the Cabinet submission process regardless of the timing of the appellant's request.

[34] I agree with and adopt the Assistant Commissioner's reasoning in the case before me. I do not accept the appellant's argument that protecting "intended"

deliberations is "speculative" or "arbitrary" or that it would result in an abuse by the government. Each case must be decided on its own facts. In a specific situation, it may be arguable that the passage of time between the work done and any future Cabinet interest renders the likelihood of a link to be remote and unsubstantiated. However, in this case, the ministry has made it clear that the matter remains current even though approximately four years have passed since the creation of the documents. Based on the ministry's clearly stated intention to bring this matter forward to Cabinet "in the near future", I accept that it remains a live issue.

[35] Moreover, as noted by Assistant Commissioner Beamish in Order PO-2417, "[m]any of its subsections plainly refer to the exemption of items that may not yet have been submitted to Cabinet or a committee [e.g. sections 12(1)(b), (c) and (e)]." Section 12(1)(b) does not require that the document be placed before Cabinet; only that it was intended for that purpose. Section 12(1)(e), as I noted above, is prospective and can only apply prior to the types of meetings referred to. I note that the appellant did not consider the application of these two sections in his submissions.

[36] I agree with the ministry that HSSB records 9 and 11 were clearly intended to brief a minister of the Crown in relation to matters that are proposed to be brought before Cabinet or its committees. As noted above, the matter has not yet gone before Cabinet or its committees and section 12(1)(e) still applies despite the timing of the record.

[37] Moreover, I accept the ministry's submission that much of the information contained in these two records will or is currently being used in drafting the submission to go before Cabinet, and upon which Cabinet will deliberate. Accordingly, I am satisfied that HSSB records 9 and 11 are exempt under section 12(1)(e) and the introductory wording of section 12(1).

[38] I find further that HSSB record 25, which is a chart containing specific recommendations, was created with the intention that it be placed before Cabinet or its committees. I am satisfied that its disclosure would reveal the substance of the deliberations Cabinet will have on receiving it and addressing its contents. Accordingly, I find that HSSB record 25 is exempt under section 12(1)(b) and the introductory wording of section 12(1).

[39] I have considered the ministry's position regarding seeking the consent of Cabinet and am satisfied that it has turned its mind to the issue and has reasonably decided not to seek consent due to the timing of future Cabinet consideration of the matter.

[40] Accordingly HSSB records 9, 11 and 25 are exempt pursuant to the mandatory exemption at section 12(1).

B: Does the discretionary exemption at section 19 apply to HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99 - 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 175, 181, 201, 202, 212, 217, LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54, and HSSB records: 3, 4?

[41] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies. The ministry submits that all of the above records are exempt pursuant to the common law solicitor-client privilege and section 19(a).

[42] This section states:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;

Branch 1: common law privilege

[43] 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.[8]

[44] The ministry submits that all of the above-noted records are exempt under the common-law solicitor-client communication privilege.

Solicitor-client communication privilege

[45] 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.[9]

[46] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[10]

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[8] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) [also reported at [2006] S.C.J. No. 39)].
[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.

[47] 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[11]

[48] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[12]

[49] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[13]

The ministry's representations

[50] In its submissions, which were shared with the appellant in their entirety, the ministry discusses the basis for its claim that section 19 applies to each individual record. In this order, I will make only general reference to the records in outlining the ministry's core arguments, unless a particular record requires additional discussion.

HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99 - 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 175, 181, 201, 202, 212, 217

[51] The ministry indicates that a number of the HSB records are e-mails to and from counsel in which counsel either provides advice, or requests and receives instructions from ministry clients. The ministry submits that these records contain confidential legal advice or they fall within the "continuum of communications" between counsel and their instructing clients, and that they are implicitly confidential in nature.[14]

[52] With respect to HSB record 81, the ministry acknowledges that this record is not a communication between counsel and a client. It takes the position, however, that it is an internal e-mail amongst ministry clients in which references to a legal opinion provided by counsel are communicated for the purpose of sharing confidential legal advice amongst the client group. Additionally, the ministry indicates that pages 1 and 2 of this record were reviewed by counsel. The ministry submits that this record, in its entirety, falls within the "continuum of communications" as it contains "confidential communications made for the 'dominant purpose of giving or receiving legal advice'."[15]

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[11] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[12] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[13] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[14] See: Order MO-1454.
[15] Order MO-1258.

[53] The ministry indicates that other records or portions of the records are briefing notes that were either prepared by clients or by legal counsel and contain or reflect legal advice that had been given.[16]

[54] The ministry also notes that legal opinions are exempt in their entirety,[17] and draft opinions have been found to fall within the solicitor's working papers.[18]

LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54

[55] The ministry submits that these LSB records contain communications between counsel and their clients in which legal advice is given or sought. In addition, some of these records contain background information or materials sought by or given to legal counsel to assist them in the formulation of a legal opinion. The ministry submits that certain records fall into the category of working papers relied on by counsel in providing legal advice or are attachments to e-mails sent to counsel for legal review.

[56] The ministry submits that all of the records are either: direct communications between counsel and the client relating to the giving of legal advice, which include the actual legal advice given; the requests for legal advice and instructions from ministry clients; or form part of the continuum of communications between counsel and client.

HSSB Records: Records 3 and 4

[57] The ministry describes HSSB record 3 as a policy paper. Only the third full paragraph on page 3 of the record has been withheld. The ministry submits that this paragraph "reflects the opinion of legal counsel in relation to a file that was litigated."

[58] According to the ministry, HSSB record 4 was created by legal counsel and reflects counsel's opinion and advice to ministry staff regarding the legal implications arising from the issues identified in the document. The ministry submits further that this record falls within the exemption at section 19(1)(a) in its entirety.

The appellant's representations

[59] Recognizing that he does not know the actual content of the records at issue in this discussion, the appellant has asked that I take the following principles into consideration in determining this issue:

- Referring to *Chrusz*,[19] the appellant submits that solicitor-client privilege "extends to [legal advice] communications in whatever form, but does not

[16] Order PO-2054-I.
[17] *MOF V IPC* (1997), 102 A.C. 71.
[18] Order PO-2432.
[19] See: footnote 12.

extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant." The appellant notes that some of the records are briefing documents which, he submits, "have the primary purpose of communicating facts."

- Where a lawyer is one of a number of recipients of an e-mail, solicitor-client privilege "attaches only to communications with lawyers for the purpose of legal advice, and does not attach to communications with lawyers more generally, unless it can be proved by the party asserting the privilege that the lawyer performed some additional work on the communication.[20]

- Referring to the records at issue in which "non-lawyers forward legal advice prepared by a lawyer" the appellant agrees that if the forwarding of the legal advice is "strictly for the purpose of processing that legal advice," it would be privileged. However, the appellant argues that if the legal advice is forwarded "for a purpose other than processing that legal advice – for example, for the wider purpose of vetting or briefing public policy options," it would not be privileged. The appellant relies on comments made in *Canadian Pacific Ltd. V. Canada (Director of Investigation and Research)*[21] as the basis for this argument:

> Documentation exchanged internally which transmit or comment on privileged communication with counsel would be covered provided that the exchange is in the context of processing the legal advice aspect and not otherwise…

- Based on the decision in *Canadian Pacific*, the appellant argues that Order PO-2054-I, which is relied on by the ministry in withholding portions of briefing notes on the basis of section 19, was wrongly decided because "it failed to consider the reason for referring to the lawyer's advice…if the reason is anything wider than [digesting the legal advice], then the privilege terminates in the non-lawyer's version. [all emphases in the original representations]

Analysis and findings

[60] In reviewing the records to determine whether they fall within the exemption at section 19(a), I have taken into consideration the arguments put forth by the appellant, as well as the detailed representations made by the ministry. As a preliminary observation of the records at issue in this discussion I note that it is clear from the content of the records at issue that several ministry legal counsel have been actively

[20] *Mutual Life Assurance Co. of Canada (Deputy Attorney General)*, [1988] O.J. No. 1090.
[21] *Canadian Pacific Ltd. V. Canada (Director of Investigation and Research)*, [1995] O.J. No. 1867.

involved in the issues relating to the "eligibility for In Vitro Fertilization as an insured service in Ontario." In general, the records either contain requests for legal advice, the legal advice given, the working papers of the lawyers involved in preparation of the legal advice given or they form part of the "continuum of communications" aimed at keeping both the client and counsel informed so that advice may be sought and given as required.

[61] I am satisfied that the primary purpose of the creation of or the inclusion of certain information in the records is to communicate or seek the legal advice of counsel as part of the preparation and decision-making processes reflected in the records.

[62] With respect to my review of each individual record, I note that a number of them are duplicates or that portions of one record are duplicated in other records, particularly in the case of the briefing notes and e-mail chains. For example, HSB record 4: one paragraph on page three of this record was withheld pursuant to section 19(a). This paragraph contains specific legal advice regarding an issue put before the Minister in the briefing note. HSB record 78 is a duplicate. HSB record 118 duplicates this paragraph and adds another sentence relating to the legal issue. HSB records 133 and 168 contain similar information, simply worded differently. In another case, HSB record 29 contains a legal opinion which is a duplicate of the legal opinion in HSB record 27. A number of other records within each department and between departments contain duplicate information. However, for complete clarity and consistency, I will address each record in the following discussion.

[63] The particulars of my findings are as follows:

HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99 - 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 175, 181, 201, 202, 212, 217

Briefing notes

[64] The withheld portions of the following briefing notes contain specific legal advice relating to a legal issue (either prepared by a legal counsel directly in drafting the note or as provided to ministry staff and subsequently communicated to the minister): HSB records 4, 11, 78, 84, 101, 118, 133, 168 and 175. I am satisfied that the withheld portions of these records contain 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.

[65] In addition, although drafted as briefing notes, the withheld portions of HSB records 27 and 29 contain legal opinions. HSB record 117 was prepared by legal counsel regarding a legal issue. I find that these three records contain 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. In addition, I find that HSB record 117 also contains information that would fall within the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required.

[66] I note that these three records contain both factual background information and legal analysis; in the case of HSB record 117, the legal opinion is in draft form. However, applying the reasoning in *MOF v. IPC* [22] I find that the information is not severable as it all pertains to the legal issue being addressed by counsel. In that case, the court stated (at paragraph 17):

> Once it is established that a record constitutes a communication to legal counsel for advice… the communication in its entirety is subject to privilege.

[67] Finally, I find that HSB record 181, which is a draft briefing note with review comments made by legal counsel, is in the nature of legal advice regarding the content of the briefing note to be provided to the Minister. The withheld portion of HSB record 217, contains similar information reflecting the changes made to HSB record 181. I am satisfied that these two records contain legal advice within the meaning of section 19(a) of the *Act*.

E-mails [23]

[68] As I noted above, many of the e-mails at issue in this discussion are duplicated throughout the numerous e-mail chains identified by the ministry.

[69] The withheld portions of HSB records 45, 50, 77, 99, 100, 114, 119, 136, 146, 147, 156 and 157 are e-mails or e-mail chains between legal counsel and the client, in which the client is either seeking legal advice or requesting a legal review of a document, or in which the legal counsel is providing the requested legal advice or review. I find that the information at issue in these records falls squarely within the exemption at section 19(a) as they are 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.

[70] Some of the e-mail chains in the above records, as well as HSB record 212, also contain background and/or factual information or communications which are provided to legal counsel as part of the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required.

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[22] See: footnote 16.
[23] See the following orders that are relied on in determining this issue: Orders MO-2206, PO-2624, PO-2626 and PO-3078.

[71] HSB records 40, 48 and 49 are e-mails addressed to a number of individuals, including legal counsel. They all relate to matters in which legal counsel have been actively involved in providing legal advice, previously or subsequent to the dates of these e-mails. I am satisfied that the information contained in these records falls within the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required.

[72] HSB record 81 is an e-mail containing communications among ministry staff regarding a legal opinion provided by ministry legal counsel relating to the legal issues identified in all of the records at issue in this discussion. I find that one portion of this record reveals the specific legal advice given with respect to the issues contained in the record. I find further that the remaining portions fall within the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required.

Attachments to e-mails or separate documents

[73] The withheld portions of HSB records 45, 49 and 76 contain legal opinions. HSB record 76 also contains additional communications between legal counsel and the client as well as the request for the legal opinion. I find that these communications are part of the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required. HSB record 49 contains some background information related to the legal opinion. Similar to my findings above, this information is not severable from the legal opinion.

[74] HSB record 48 also contains some background information. In the context of this e-mail overall (see e-mail discussion above), I am satisfied that this information is part of the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required.

[75] The withheld portion of HSB record 169 reveals legal advice given in previous documents "for the purpose of processing that legal advice." Accordingly, I find that it falls within the communication privilege aspect of section 19(a).

Background information or information requested or received by legal counsel

[76] HSB records 49, 61, 121, 122, 126, 127, 130, 137, 139, 140, 156 all contain background information or requests by legal counsel for additional information relating to the seeking and giving of legal advice. While I am cognizant of the principles outlined by the appellant, based on the ministry's representations and my review of the content of these records in the context in which they were provided to counsel, I am satisfied that they form part of the "continuum of communications" aimed at keeping both informed so that advice may be sought and given as required. Accordingly, I find that they fall within the communication privilege aspect of section 19(a).

Counsel's working papers

[77] HSB records 76, 201 and 202 contain typewritten notes reflecting the work in progress in preparing a legal opinion. They contain the thoughts, research and relevant documents used by legal counsel and clearly fall within the communication privilege aspect of section 19(a) as they contain the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54

Legal advice and requests for legal advice

<u>e-mails</u>

[78] LSB records 1, 19, 20, 33 and 43 contain communications among ministry staff, including legal counsel, with input by legal counsel relating to the matter under discussion.

[79] LSB records 2, 3, 4, 7, 22, 25, 38, 53 and 54 contain direct communications between legal counsel and ministry staff. In all cases the e-mail chains contain discussions relating to matters in which the ministry's legal counsel have been actively involved, as evidenced in the other records at issue in this discussion.

[80] LSB records 40 and 44 are e-mail chains between several legal counsel relating to legal issues that were being dealt with at the time and reflected in other records at issue.

[81] In all of these records I find that the information contained in them forms part of the "continuum of communications" aimed at keeping both legal counsel and the client group informed so that advice may be sought and given as required. In addition, some of these records also contain requests for legal advice or legal review, contain the legal advice that was provided or contain requests by counsel for, or contain the instructions of the client. In these cases, I find that the records contain 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.

<u>Briefing notes</u>

[82] The withheld portions of the following briefing notes contain specific legal advice relating to a legal issue (either prepared by a legal counsel directly in drafting the note or as provided to ministry staff and subsequently communicated to the minister): LSB records 7, 8, 8(a), 9 and 45. I am satisfied that the withheld portions of these records contain 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.

[83] The withheld portion of LSB record 21 contains reference to a communication from legal counsel relating to a legal matter and falls within the "continuum of communications" aimed at keeping both legal counsel and the client group informed so that advice may be sought and given as required.

[84] LSB record 40 was prepared by legal counsel to brief the minister on legal issues relating to the matter being dealt with. I find that this record also falls within the "continuum of communications" aimed at keeping both legal counsel and the client group informed so that advice may be sought and given as required.

Attachments and/or separate documents

[85] LSB record 11 is described as an "Issue Note." Having reviewed it, I find that it is a legal opinion regarding the issues identified in the record. This record contains some background information to which the legal analysis is directed.

[86] Similarly, LSB records 35 and 52 are legal opinions which contain background, analysis and advice. LSB record 23 is a request for legal advice. This record provides the background for which the request for legal advice is made.

[87] I find that these four records all contain 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. Similar to my finding above, applying the reasoning in *MOF v. IPC,* I find that the information is not severable as it all pertains to the legal issue being addressed by counsel.

Background information or information requested or received by legal counsel

[88] The following records are e-mail chains involving legal counsel and the client group; in some cases the e-mails are between legal counsel and the client, or between two or more legal counsel or include legal counsel in the recipient group along with numerous other ministry staff: LSB records 14, 15, 17, 24, 27, 28, 30, 31, 32, 33, 37, 43, 48 and 49. These records contain discussions among the sender and recipients, requests for information made by legal counsel in order to prepare a legal opinion or responses to legal counsels' requests for information. I find that all of these records fall within the "continuum of communications" aimed at keeping both legal counsel and the client group informed so that advice may be sought and given as required. In addition, specific portions of the e-mail chains contain 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.

[89] LSB records 46, 47, 50 and 51 contain various documents, draft documents, e-mails, draft correspondence, which have been provided to legal counsel to assist counsel to prepare for and provide legal advice. I find that these records, in their entirety, are part of the "continuum of communications" aimed at keeping both legal counsel and the client group informed so that advice may be sought and given as required.

Working papers

[90] LSB records 5, 12, 12(a) and 18 are notes made by legal counsel and include handwritten notes, typewritten notes with handwritten comments or a document with legal counsel's handwritten comments throughout. These records all relate to issues being dealt with by legal counsel and referred to throughout the records at issue. I am satisfied that these records fall within the communication privilege aspect of section 19(a) as they contain the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

[91] LSB records 40 and 53 are documents prepared for or used by legal counsel in the preparation of legal advice. Both records relate to the issues being dealt with by legal counsel with respect to the subject matter of the request. I find that these two records also fall within section 19(a) as they contain the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

Requests for legal review of draft correspondence

[92] LSB records 26, 29, 34, 36, 39, 41 and 42 contain e-mails requesting legal review and/or review and approval forms attached to draft correspondence.

[93] LSB records 36 and 41 also contain legal opinions relating to the draft correspondence contained in the attachments.

[94] I am satisfied that all of these records contain 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. Many of the attachments have handwritten notations made by legal counsel and would also qualify as the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

HSSB Records: Records 3 and 4

[95] The withheld portion of HSSB record 3 is a duplicate of the portion of HSB record 169 that I found to be exempt under section 19(a). The same reasoning applies to the withheld portion of HSSB record 3.

[96] HSB record 4 is a draft document relating to the legal implications of the issues listed in the document. The ministry indicates that this record was drafted by legal counsel. I find that the record, in its entirety contains legal advice on the issues identified in it and thus qualifies for exemption under section 19(a).

[97] In summary, I find that the withheld portions of HSB records: 4, 11, 27, 29, 40, 45, 48, 49, 50, 61, 76, 77, 78, 81, 84, 99 - 101, 114, 117 - 119, 121, 122, 126, 127, 130, 133, 136, 137, 139, 140, 146, 147, 156, 157, 168, 169, 175, 181, 201, 202, 212, 217, LSB records: 1-5, 7, 8, 8a, 9, 11-12a, 14, 15, 17-54, and HSSB records: 3, 4 all qualify for exemption under section 19(a).

C: Does the discretionary exemption at section 13(1) apply to HSB records: 29, 169, 173, 207, 219, LSB record: 46, and HSSB record: 4, 8?

[98] I found above that HSB record 29, LSB record 46 and HSSB record 4 are exempt under either section 12(1) or 19(a). I also found above that a portion of HSB record 169 (third paragraph on page 3) is exempt under section 19(a). In addition, the ministry indicates that it no longer objects to disclosing pages 1, 2, all but the third paragraph of page 3, 4, first two paragraphs of page 5, and pages 7, 8, 9, 10 and 11 of this record. Accordingly, I will only address whether the discretionary exemption at section 13(1) applies to the remaining portion of HSB record 169 (page 5, beginning at "Purpose" and page 6), as well as HSB records 173, 207, 219 and HSSB record 8.

[99] The records at issue under section 13(1) pertain, primarily, to the Expert Panel on Infertility and Adoption. According to the Expert Panel's report entitled "Raising Expectations: Recommendations of the Expert Panel on Infertility and Adoption,"[24] it was established by the Government of Ontario with a mandate to "provide advice on how to improve Ontario's adoption system and improve access to fertility monitoring and assisted reproduction services."[25]

General principles

[100] 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.

[101] 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

[24] http://www.children.gov.on.ca/htdocs/English/documents/infertility/RaisingExpectationsEnglish.pdf.
[25] See: page 5 of the report.

also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[26]

[102] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[27]

[103] "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.[28]

[104] 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.[29]

[105] 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.[30]

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[26] 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.).
[27] see Order PO-2681.
[28] 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.
[29] 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).
[30] 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).

The ministry's representations

HSB record 219

[106] The index provided by the ministry describes this record as HSB "Comments on the Draft Recommendations of the Expert Panel on Infertility and Adoption…" The ministry submits that this record contains what it refers to as "a specific subset of recommendations," that is, the recommendations of the Expert Panel that the ministry staff selected to discuss in the body of this record. The ministry submits that by identifying specific recommendations of the Expert Panel, staff have effectively provided their recommendations to senior officials that only certain recommendations of the Expert Panel be considered.

[107] In addition, the ministry takes the position that this record also contains commentary relating to each of the Expert Panel's recommendations, in which ministry staff advises that a particular course of action be taken and the reasons for that advice.

HSB record 169

[108] This record is a document entitled "Infertility in Ontario." The ministry states that the withheld portions of this record,

> [R]eflect recommendations made by Ministry staff regarding the proposed terms of reference of the expert panel. These recommended terms of reference were not disclosed to the public and differ from the actual terms of reference that were ultimately used by the expert panel and disclosed to the public. Accordingly, the disclosure of these proposed terms of reference would reveal not only recommendations prepared for consideration by senior Ministry officials, but also whether the course of action suggested by the recommendations was adopted.

HSB record 173

[109] The ministry has withheld the last line under the heading "options" on page 1 and page 2 of the document entitled "The Schedule of Benefits for Physician Services." The ministry describes the withheld portions as containing two options and a list of "pros and cons" in respect of each option.

[110] Referring to *Northern Development and Mines* [2005], the ministry submits that in this case, the pros and cons point to a suggested course of action. The ministry notes further that the two options are "separate and distinct" and it would be possible for the ministry to follow both options. The ministry states:

> [T]he pros and cons accompanying each option are essential to understanding the course of action that is being recommended. The fact that this information is labeled as a 'pro' or 'con' is not determinative of the issue. When one examines the substance of these pros and cons, it is clear that they are part and parcel of the two courses of action being recommended in the options. In short, the two options and the pros and cons in this record form distinct recommendations that were proposed for consideration by Ministry officials.

HSB record 207

[111] The ministry notes that this record contains draft recommendations of the Expert Panel. Referring to previous orders of this office,[31] the ministry submits that the draft recommendations, "which are found throughout the record contain several suggested courses of action which were ultimately accepted or rejected by Ministry officials."

[112] The ministry states further that this record "also contains tracked comments in relation to specific draft recommendations" made by ministry staff, which it submits in and of themselves constitute recommendations and advice.

HSSB record 8

[113] This record is identified by the ministry as a communications plan regarding the recommendations of the expert panel prepared for the then Minister of Children and Youth Services. The ministry has withheld pages 6 to 8 of this record on the basis that "they contain recommendations and advice that suggest a course of action that the Minister could undertake."

Appellant's representations

[114] The appellant objects to the ministry claiming section 13(1) for draft versions of the recommendations of the Expert Panel, relying on Order PO-2115 as the basis for determining that draft documents do not qualify as advice or recommendations.

[115] With respect to the ministry's identification of HSB record 219 as containing a "subset" of the recommendations of the Expert Panel, the appellant argues that section 13(2)(k) applies to except this type of information. Section 13(2)(k), which is an exception to the exemption at section 13(1) provides:

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

[31] Orders P-324, 92, 188, P-278, P-324 and P-821.

> a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution.

[116] The appellant submits that the ministry cannot, therefore, withhold any "subset" of any record generated by the Expert Panel.

[117] The appellant offers some general arguments regarding the applicability of section 13(1) to the records at issue. He claims that, based on his original information request and four additional exceptions to the section 13(1) exemption: 13(2)(a); 13(2)(f); 13(2)(g) and 13(2)(i), it is unlikely that any of the records at issue would qualify for exemption under section 13(1). These four exceptions to the exemption at section 13(1) provide:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
>
> (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
>
> (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees.

[118] With respect to his original access request, the appellant states that he requested "factual material."

[119] Regarding the application of the exceptions to the section 13(1) exemption, the appellant notes that at the time of his request, the ministry was engaged in detailed studies on the performance and efficiency of its In Vitro Fertilization program and its

policy on the scope of In Vitro Fertilization eligibility. He submits that any of these studies must be disclosed under section 13(2)(f).

[120] Moreover, the studies he refers to examined the feasibility and cost estimates of the ministry regarding changes to the ministry's policy on the scope of In Vitro Fertilization eligibility. He submits:

> Since the word 'study' can refer not just to a final report of a study, but also can refer to the process of study, which can proceed by way of many incremental insights in hundreds of emails, any records such as memos or emails must be disclosed under s. 13(2)(g). [emphasis in the original]

[121] The appellant submits further that the factual material and studies referred to above led to "proposals for change." Noting that the ministry received many proposed changes to the scope of eligibility for In Vitro Fertilization or public insurance of In Vitro Fertilization through OHIP, this constitutes a proposal for change within the meaning of section 13(2)(i).

[122] Referring to previous orders of this office and as determined by the court, the appellant points out that once section 13(2) is found to apply to a portion of the record, the entire document must be disclosed.[32]

Analysis and findings

[123] The following orders are helpful in determining whether the ministry has properly applied this exemption to the records at issue in this discussion.

[124] In Order PO-2861, Adjudicator Colin Bhattacharjee discussed the analysis that takes place in determining whether section 13(1) applies in a given situation:

> At the outset, it is important to bear in mind the public accountability purpose of the *Act*, which is set out in section 1(a). This provision states, in part, that one purpose of the *Act* is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.
>
> In Order 94, former Assistant Commissioner Sidney Linden emphasised that the section 13(1) exemption should be interpreted in a limited and specific manner, in accordance with the purposes of the *Act*:

[32] Orders P-726, PO-1709, *Ontario (Minister of Health and Long-Term Care) v. Goodis,* [2000] O.J. No.4944 (Div. Ct,).

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

[125] In Order PO-2084, former Assistant Commissioner Tom Mitchinson discussed the information-sharing that occurs amongst government employees in the context of the application of this exemption:

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) [the provincial equivalent to section 7(1) of the municipal *Act*] is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could [if disclosed] reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

[126] He provided additional analysis on the meaning of the word "advice" in Order PO-2115:

> I recently reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order PO-2028. In that order, the Ministry of Northern Development and Mines took the position that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". I did not agree, and stated:
>
> > … [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

[127] The former Assistant Commissioner then reiterated the comments he made in Order PO-2084 (referenced above). It is apparent from a further reading of this order, that the former Assistant Commissioner's reasoning applied equally to the term "recommendations."

[128] With the reasoning in these orders in mind, following my consideration of the representations submitted in the current appeal and my review of the records, I make the following findings.

Options – HSB record 173

[129] Previous orders of this office have found in some cases, that records outlining options (including the pros and cons regarding the options identified) do not fall within the section 13(1) exemption, and in other cases, that they do. In order PO-2186-F, former Assistant Commissioner Mitchinson discussed the approach to take in analyzing these types of records and provides examples of records that will or will not qualify for exemption under section 13(1):

> In Order PO-2028, I reviewed in some detail the approach this office has taken to the application of section 13(1) to "options". After reviewing a number of orders, I stated:
>
> > What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.
> >
> > Applying this approach to the severed portions of pages 9 and 10, I find they do not contain "recommendations" or "advice". The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC [Northern Ontario Heritage Fund Committee] does not

> extend to recommending a particular course of action to be followed". In my view, the description of each option itself is "mere information". The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to "advise" the NOHFC in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The "pros and cons" description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.
>
> The next question is whether disclosure of these portions would allow one to accurately infer any advice given. When considered as a whole and in the context of the roles played by Ministry staff in providing support to the NOHFC and the Board of that organization as a decision-making body for Northern Ontario project funding, I find that disclosure of the "pros and cons" for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various "pros and cons" it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the "pros and cons" portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.
>
> [See also Order PO-2084][33]

I take the same approach to Record 34. I find that the options themselves do not constitute "advice or recommendations". However, in my view, the content of certain comments listed under the various options would allow one to accurately infer advice or recommendations concerning the options. Despite the fact that the author and recipient of

[33] Judicial reviews of Orders PO-2028 and PO-2084 were heard jointly and the decisions in both orders were upheld by the Divisional Court and the Court of Appeal: *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 181 O.A.C. 251 (Div. Ct.), aff'd (2005), 203 O.A.C. 30 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564, File No. 31226 (S.C.C.).

> Record 34 are not known, given the nature of this record and its content, I accept that it was in all likelihood prepared by an advisor and provided to a decision-maker in the context of the 2000 review of Regulation 554/91. Accordingly, I find that the comments contained in Record 34 qualify for exemption under section 13(1). The rest of this record, including the options themselves, do not qualify as "advice or recommendations", and therefore fall outside the scope of the section 13(1) exemption.[34]

[130] Recently, the Court of Appeal[35] clarified its position on the application of section 13(1) to "options." The Court initially refers to the approaches taken to the section 13 analysis in previous orders of this office:

> In *MOT*,[36] the court considered the meaning of the phrase "advice and recommendations" in s. 13(1), and in particular, the government's argument that the two words had to be given different meanings. Thus, the government argued that "advice" did not require a deliberative process and would include information or analysis conveyed without a view to influencing a decision or the adoption of a course of action. Speaking for the court, Juriansz J.A. rejected the government's position. He held that the appropriate rule of interpretation was the associated words rule, where the reader looks for a common feature among the terms. The term "advice" also had to be interpreted in a manner consistent with the purpose of the Act as outlined in s. 1. Juriansz J.A. was satisfied that the Adjudicator had properly interpreted the phrase "advice and recommendations". He adopted this part of the Adjudicator's reasons:
>
> > [A]dvice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act (Orders P-1054, P-1619 and MO-1264).

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[34] See: Orders P-1363, 2432, MO-2433, 2355, PO-2554 and PO-2793-I for examples of the different approaches.

[35] *Ontario (Finance) v.v Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125. [*Finance* 2012].

[36] Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), cited above.

He also noted, at para. 29, that the Adjudicator's interpretation left room for advice and recommendations to have distinct meanings:

> A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.

In *MNDM*,[37] Juriansz J.A., again writing for the court, considered that the interpretation adopted by the Adjudicator in the two orders was reasonable and indistinguishable from the interpretation of the Adjudicator in *MOT*. At paras. 9 and 10, Juriansz J.A. referred to portions of the two orders (PO-2028 and PO-2084) in *MNDM*:

> **PO-2028**
>
> In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making …. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given ….
>
> **PO-2084**
>
> A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process ….

[37] Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner), cited above.

There is a slight distinction in the way the adjudicators in *MOT* and *MNDM* interpreted "advice and recommendations". In *MOT* and PO-2084, the adjudicators refer to information that must "relate" to a suggested course of action. In PO-2028, the adjudicator suggested that the information must "reveal" a suggested course of action. He went on to describe two ways that advice or recommendations may be revealed: "(i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given". Section 13 itself, speaks of the discretion to refuse to disclose a record where the disclosure would "reveal advice or recommendations".

Justice Juriansz went on to hold that the adjudicator in *MNDM* could reasonably hold that the mere fact that a document refers to "options" or "pros and cons" did not determine that the document revealed advice or recommendations. Rather, it depends on the circumstances of each case. He held, at para. 16, that the following was a reasonable approach:

> The [Adjudicator] proceeded on the basis that whether records that set out "options" and "pros and cons" reveal advice or recommendations depends on the circumstances of each case. He assessed the context in which the records at issue were created and communicated and determined they contained no information that could be said to "advise" the Board in making its decision on funding, nor did they allow one to accurately infer any advice given. He found that the records consisted of "mere information" broken down into various pre-determined categories.

Bearing in mind that the standard of review applied by the court in *MOT* and *MNDM* was reasonableness, not correctness, the following conclusions may be drawn about the meaning of s. 13(1). Advice and recommendations, within the meaning of s. 13, must contain more than mere information. If it were enough that the record contained information, s. 13(1) would, as was observed by Juriansz J.A. in *MOT*, at para. 28, severely diminish the public's right to information. The information contained in the records must relate to a suggested course of action that will be ultimately accepted or rejected by its recipient. It is implicit in the various meanings of "advice" and "recommendations" considered in *MOT* and *MNDM* that s. 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that

> permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.

[131] The Court went on to consider the extent to which the term "advice" would apply in specific contexts:

> Whether the material in the document expressly makes a recommendation or simply presents advice on different courses of action, it will be unlikely that the document relates to or reveals only one course of action. Especially where the document is to go to the Minister, it will be unlikely that there is only one possible course of action that the Minister could take in dealing with difficult issues. The civil servants may have a preferred option and this may be obvious from the way in which the document is drafted, but the Minister, as the decision maker, is entitled to advice on a range of possible courses of action. Even where the decision-maker is not a Minister but a senior civil servant, those decision makers are also entitled to confidential policy advice, which may or may not include explicit recommendations as to what the persons reporting to them believe is the preferred course of action…
>
> …
>
> Advice and recommendations in drafts of policy papers that are part of the deliberative process leading to a decision are protected by s. 13(1). There need not be direct evidence that any particular paper made its way to the ultimate decision maker. The circumstantial evidence in this case is overwhelming that all six records were part of the deliberative process that led to a decision by the Minister, based on the advice and recommendations in these policy papers…

[132] With respect to "options", the Court disagreed with previous orders of this office that have held that section 13(1) will protect "only information that identified the single course of action recommended to the decision maker." On this issue, the Court found that such an approach:

> [I]s inconsistent with the context in which the *Freedom of Information and Protection of Privacy Act* operates, which is to protect a properly functioning democratic process in which the civil service provides advice on a range of options, but is not itself always the decision maker.
>
> Section 13(1) protects advice and recommendations. One of the most important functions performed by a civil service in a properly functioning Parliamentary democracy is to provide advice to Ministers of the Crown. Advice comes in different forms and one form is advice as to the range of possible actions. This permits the decision-maker to make the best and

> most informed decision. It would be counter-productive and inconsistent with the policy behind s. 13(1) to strip away this form of advice and protect only advice which is entirely directory. Yet this is the effect of the decision of the Adjudicator and the Divisional Court. To obtain the protection of s. 13(1), the advice would have to be presented to the decision-maker without advice as to the advantages or disadvantages of a particular option and by presenting the advice in a form that supported only one option.

[133] HSB record 173 is a draft outline for a ministry presentation to the Expert Panel on Infertility and Adoption. The withheld portion of this record contains two distinct options, including pros and cons. I am satisfied that these options were provided as part of the decision-making process relating to the issue identified. I am also satisfied that each of these "options" can be considered as distinct recommendations of ministry staff.

[134] In addition, even if considered as two alternate options, I find that, taken together, they comprise a range of possible actions which provide the decision maker with advice that would permit an informed decision on the issue.

[135] Accordingly, I find that HSB record 173 qualifies for exemption under section 13(1).

Draft documents – HSB records 207 and 219

[136] With respect to the issue of "draft" documents, previous orders of this office have generally found that "it is not the 'type' of record, or it being in a draft or final state 'that determines its eligibility for exemption under the advice or recommendations exemption, but rather its content."[38] As noted in Order PO-1690:

> A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under [section 13(1)], the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making.

[137] Although a draft document is not by its very nature, advice or recommendations, it does not necessarily follow that draft documents can never fall within the exemption at section 13(1). Where the record contains or would reveal advice or recommendations of a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-

[38] Order MO-2415.

making, it will qualify for exemption under section 13(1).[39] Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendations given also qualifies for exemption under section 13(1) of the *Act*.[40]

[138] HSB record 207 is a printout of a slide deck which contains an update for the ministry on the draft recommendations of the Expert Panel on Infertility and Adoption. It is clear, from my review of this record, that the draft recommendations presented in it are part of a work-in-progress by the Expert Panel. It is also clear from the record that the draft recommendations have been provided to the ministry for review, discussion and/or comment. The document contains, in addition to the draft recommendations, the comments and concerns raised by ministry staff.

[139] I am satisfied that potions of this record reveal or would permit the drawing of accurate inferences as to the nature of the actual advice and specific recommendations of the Expert Panel, made during the deliberative process of government decision-making. Accordingly, I find that the recommendations set out in the record qualify for exemption under section 13(1).

[140] Furthermore, although I do not agree that the comments made by staff qualify as advice or recommendations within the meaning of section 13(1),[41]I am satisfied that disclosure of staff's comments would reveal the recommendations to which they refer, and are exempt on that basis.

[141] However, there are certain portions of this record that do not contain advice or recommendations. These portions are distinct and severable from the remaining portions of the record that do contain recommendations. They contain factual or descriptive information, information that is already known or too general to reveal the nature of the advice or recommendations and comprise: pages 1, 2, 3, 4, the headings on pages 5 – 10, most of the information on page 12, which is mostly blank, part of the heading and the first paragraph on page 24 and pages 25, 26 and 27. I find that these portions of HSB record 207 are not exempt pursuant to the exception in section 13(2)(a).[42] For greater certainty, I will provide the ministry with a highlighted copy of this record showing the portions that are not exempt along with the copy of the order.

[142] HSB record 219 is a three-page document prepared by ministry staff which contains staff's comments on the Draft Recommendations of the Expert Panel on Infertility and Adoption. Similar to my comments above regarding HSB record 207, this

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[39] Regarding the appellant's argument that a "subset" of recommendations made by the Expert Panel cannot be exempt under section 13(1) due to the application of the exception at section 13(2)(k). With the exceptions of section 13(2)(a), I will address the exceptions to the exemption below under a separate heading.

[40] Orders P-1054, P-1619, MO-1264 and PO-1993.

[41] Keeping in mind the Court of Appeal's discussion in *Finance* [2012].

[42] As these pages and portions of pages contain factual information.

record refers to certain recommendations made by the Expert Panel and staff's comments regarding them. I find that portions of this record qualify for exemption under section 13(1) as they would reveal specific recommendations made by the Expert Panel during the deliberative process of government decision-making or its disclosure of the comments made by staff would reveal the recommendations to which they refer.

[143] However, portions of this record contain background information or comments that do not address the recommendations specifically. Nor would their disclosure reveal the advice or recommendations that have been made. In Order PO-2115, former Assistant Commissioner Mitchinson made the following findings regarding a record that contained similar types of information:

> The three remaining undisclosed paragraphs on page 6 of Record 2 are contained in the "Analysis of Comments" section.
>
> Having carefully reviewed the contents of these paragraphs, and applying the reasoning followed in Order PO-2028, I find that they do not contain "advice" or "recommendations" for the purpose of section 13. The three paragraphs contain what I would characterize as factual information concerning matters of potential relevance to the Minister in making his decision. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given. For these reasons, I find that the three remaining paragraphs on page 6 of Record 2 do not qualify for exemption under section 13(1).

[144] In my view, the information in the remaining portions of HSB record 219 also contains factual information concerning matters of potential relevance to the minister. Accordingly, I find that these portions of HSB record 219 are not exempt under section 13(1). I will also provide a highlighted copy of this record to the ministry along with this order. The highlighted portions are not exempt under section 13(1).

Recommendations – HSB record 169 and HSSB record 8

[145] The appellant does not specifically address whether the withheld portions of these two records constitute recommendations. I will address his general comments below. The following constitutes my findings regarding these two records.

[146] HSB record 169 was prepared by ministry staff. Page 1 of this record, which the ministry consents to disclosing to the appellant, describes the purpose of the paper. In part, one of the purposes is to "[make] recommendations to effectively implement the Ontario government's election commitments." Having reviewed the withheld portions of HSB record 169, I find that they clearly contain staff recommendations to senior ministry officials regarding a specific course of action that will ultimately be accepted or

rejected by the person being advised. Accordingly, I find that the withheld portions of page 5 and page 6 of this record qualify for exemption under section 13(1).

[147] As I noted above, HSSB record 8 is a communications plan prepared for the Minister of the Ministry of Children and Youth Services. The majority of this record has been disclosed to the appellant. The withheld portion of HSSB record 8 contains information about the recommendations made by the Expert Panel on Infertility and Adoption, and staff's recommendations to the minister with respect to the expert panel's recommendations and the proposed actions for the minister to take. I am satisfied that the withheld portion of this record recommends a specific course of action that will ultimately be accepted or rejected by the person being advised. Accordingly, I find that the withheld portion of HSSB record 8 qualifies for exemption under section 13(1).

Section 13(2)

[148] 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. As I indicated above, the appellant asserts that the exceptions in sections 13(2)(a), (f), (g), (i) and/or (k) apply in the circumstances of this appeal.

Section 13(2)(a): factual material

[149] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[43] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[44]

[150] Although the appellant asserts that he has requested only factual information, I find that his request is broadly worded and encompasses any records that "are reasonably related" to it. In the circumstances, the ministry has identified the records at issue as being reasonably related to his request and the appellant has not, seriously, suggested that the records at issue are not responsive.

[151] I found above that portions of HSB records 207 and 219 do not qualify for exemption under section 13(1) because they contain factual or descriptive information. In these two cases, the exception in section 13(2)(a) applies to the identified portions.

[152] Having reviewed the remaining three records in this discussion, I find that any factual information contained in them is inextricably intertwined with the advice or recommendations that I have found to qualify for exemption. Accordingly, I find that

[43] Order 24.
[44] Order PO-2097.

section 13(2)(a) does not apply to remove the withheld portions of HSB records 169 and 173 and HSSB record 8 from the section 13(1) exemption.

Section 13(2)(f): performance or efficiency report

[153] The word "report" appears in several parts of section 13(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[45]

[154] Section 13(2)(f) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution.[46]

[155] I find that none of the records at issue in this discussion constitute a "report" within the meaning of this term as defined above. As noted above, the records at issue contain drafts of recommendations that have been provided to ministry staff for discussion purposes or contain the comments and recommendations of ministry staff as part of the on-going development of government policy-making. None of the records contains a formal statement or account of the results of the collation and consideration of information. On this basis, I find that the exception at section 13(2)(f) does not apply.

Section 13(2)(g): feasibility or other technical study

[156] In Order P-726, former Assistant Commissioner Irwin Glasberg commented on the term "feasibility study". He stated:

> I will now turn to the report of the consulting firm (Study B). The authors of Study A indicate that this document will constitute a "feasibility study for alternative delivery models". Study B examines the various organizational design models which may be applied to the parks system and recommends the model which the authors find to be the most appropriate based on established assessment criteria. I must now determine whether this document constitutes a "feasibility study relating to a government policy or project" for the purposes of section 13(2)(g) of the Act.
>
> The Concise Oxford Dictionary (8th edition) defines the term "feasibility study" as a study of the practicability of a proposed project. As indicated previously, the report under consideration recommends that a particular

[45] Order PO-2681; Order PO-1709, upheld on judicial review in Ontario (Minister of Health and Long-Term Care) v. Goodis, [2000] O.J. No. 4944 (Div. Ct.).
[46] Orders M-941, P-658.

> model for the organization of the provincial parks system be selected and goes on to assess the characteristics of this proposal.
>
> I have carefully reviewed this report and find that it may reasonably be described as a feasibility study relating to a government policy or project. That project is the selection of an organizational design to maximize the utility of the provincial parks system. While it is true that portions of the report provide stakeholder comments on the delivery of park services and evaluate the merits of competing models, the fundamental object of the study is to consider the feasibility of the design which the consulting firm has recommended. On this basis, I find that the section 13(2)(g) exception applies to those parts of the records which had previously qualified for exemption under section 13(1).

[157] In this order, it is clear that the former Assistant Commissioner was dealing with a "feasibility study" that took the form of a "report," and is described in a manner that is consistent with the definition of "report."

[158] In my view, section 13(2)(g) must be read in a manner that is consistent with the general tenor of the exception as a whole. It is noteworthy that many of the other subsections of section 13(2)[47] refer to "reports", "plans" and "proposals." As noted above and below, these terms all share a similar requirement, that is, that they contain a formalized account of the results of the collation and consideration of information or a formulated and pre-determined course of action or method. Of particular note is section 13(2)(f) which refers to either a "report" or a "study." In my view, the appellant's interpretation of "study" to "refer to the process of study," which can include documents such as memos and e-mails that are exchanged through the "incremental process" is inconsistent with the general tenor of the types of documents that fall within the exception. In view of the more structured type of documents referred to in this section of the *Act*, I find that the term "study" must also include a formal accounting of the results of the investigation or assessment undertaken, which may well include information about the process, such as the purpose, methodology, raw data and analysis, along with a conclusion.

[159] On review of the records at issue in this discussion, I find that they do not contain accounts of the results of the collation and consideration of information; nor do they contain a formulated course of action or method. Rather, these records contain an on-going analysis and discussion of the issues that the ministry and/or the Expert Panel are dealing with, which may, ultimately result in a report or study, but have not yet reached the requisite level of formalization. Accordingly, I find that the exception in section 13(2)(g) does not apply in the circumstances.

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[47] Specifically sections 13(2)(c), (e), (f), (h), (i), (j) and (k).

Section 13(2)(i): final plan or proposal to change or establish a program

[160] The term "plan" also appears in sections 18(1)(e), (f) and (g) of the *Act* and has been interpreted as:

- The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[48]

- Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[49]

[161] In my view, other similar terms, such as the reference to "proposals" in section 13(2)(i), are similarly referable to pre-determined courses of action or ways of proceeding.

[162] As I indicated above, the records at issue are part of a work-in-progress, which includes draft recommendations of the Expert Panel that are subject to review, comment and most likely modification. As well, some of the records contain recommendations and advice given by ministry staff as part of the deliberative process. I have no evidence before me that any of the records at issue contain a "final" plan or proposal. Accordingly, I find that the exception in section 13(2)(i) does not apply in the circumstances.

Section 13(2)(k): committee, council or other body report

[163] Section 13(2)(k) has three essential requirements:

(1) the record must be a "report" of a "committee, council or other body";
(2) the committee, council or other body must be "attached to" an institution; and
(3) the committee, council or other body must have been established "for the purpose of undertaking inquiries and making reports or recommendations to the institution."[50]

[164] Section 13(2)(k) applies to any entity, body or organization similar to a committee or council, as long as the other elements of paragraph (k) are met. A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution. If the body reports to a minister, it will be considered to report to an "institution."[51]

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[48] Orders PO-2034 and PO-2598.
[49] Orders P-348 and PO-2536.
[50] Order PO-2681.
[51] Order PO-2681; PO-1709, upheld on judicial review in Ontario (Minister of Health and Long-Term Care) v. Goodis [2000] O.J. No. 4944, Toronto Doc. 684/99 (Div. Ct.); Order PO-1823.

[165] In my view, the Expert Panel on Infertility and Adoption clearly fits within the definition of a committee that is attached to an institution. It is evident from the records at issue that the Expert Panel was created to "analyse all issues related to infertility treatment and adoption and recommend ways to increase and improve access to both." Moreover, in fulfilling its mandate, the Expert Panel engaged in communications, information sharing and receiving input from the ministry.

[166] That being said, as I noted above regarding the other exceptions identified by the appellant, none of the records at issue in this discussion constitutes a "report" within the meaning of that term as defined above. Although much of the information and recommendations contained in the records at issue will likely make their way into a "report" of the Expert Panel in some form, either as is or as amended during the early stages of drafting, they have not yet reached the requisite degree of formalization in order to fall within the exception at section 13(2)(k). Accordingly, I find that this exception does not apply in the circumstances.

D: Did the institution exercise its discretion under sections 13 and 19? If so, should this office uphold the exercise of discretion?

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

[168] In addition, I 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.

[169] In either case I may send the matter back to the institution for an exercise of discretion based on proper considerations.[52] I may not, however, substitute my own discretion for that of the institution.[53]

[170] In his submissions, the appellant indicates that although he does not believe that the ministry exercised its discretion to withhold records under sections 13 and 19, he asks that I not address this issue. While I understand that his reason for asking this is because he does not wish me to send this matter back to the ministry for a re-exercise

[52] Order MO-1573.
[53] Section 54(2).

of discretion, which would delay the ultimate decision, the exercise of discretion is a constituent part of these two discretionary exemptions.

[171] Accordingly, I have reviewed the ministry's exercise, and I disagree with the appellant's contention that the ministry did not exercise its discretion in this matter. I find that the ministry has turned its mind to the discretionary aspect of these two exemptions and that it has considered only relevant considerations in deciding to withhold the records at issue in this discussion.

[172] For example, the ministry notes that it has only claimed the exemption at section 13(1) for eight records (five of which were ultimately considered under section 13(1) in this order). This is a very small number of the 298 records identified by the ministry, and reflects a considered approach in assessing the exemptions under the *Act*. The ministry notes further that the matter to which the records relate is under active consideration and describes its concern that premature disclosure of the information may interfere with the decision-making process.

[173] With respect to its exercise of discretion under section 19, the ministry refers to a number of Supreme Court of Canada decisions relating to access to information appeals and states:

> The Ministry submits that it took the law and principles as stated by the Supreme Court of Canada into consideration when exercising its discretion not to disclose the records in this appeal that are clearly solicitor-client privileged. Specifically, it determined that the public interest in maintaining the integrity of the privilege, and thus not disclosing the records, should be protected.

[174] I find the ministry's approach to exercising its discretion did not take into account irrelevant considerations or be otherwise improper. Accordingly, I uphold the ministry's exercise of discretion under sections 13(1) and 19.

E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

General principles

[175] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[176] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[177] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[54]

Compelling public interest

[178] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[55] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[56]

[179] A public interest does not exist where the interests being advanced are essentially private in nature.[57] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[58]

[180] A public interest is not automatically established where the requester is a member of the media.[59]

[181] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[60]

[182] Any public interest in *non*-disclosure that may exist also must be considered.[61] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[62]

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[54] Order P-244.
[55] Orders P-984, PO-2607.
[56] Orders P-984 and PO-2556.
[57] Orders P-12, P-347 and P-1439.
[58] [Order MO-1564].
[59] Orders M-773 and M-1074.
[60] Order P-984.
[61] Ontario Hydro v. Mitchinson, [1996] O.J. No. 4636 (Div. Ct.).
[62] Orders PO-2072-F and PO-2098-R.

[183] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation.[63]
- the integrity of the criminal justice system has been called into question.[64]
- public safety issues relating to the operation of nuclear facilities have been raised.[65]
- disclosure would shed light on the safe operation of petrochemical facilities[66] or the province's ability to prepare for a nuclear emergency.[67]
- the records contain information about contributions to municipal election campaigns.[68]

[184] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations.[69]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[70]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[71]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[72]
- the records do not respond to the applicable public interest raised by appellant.[73]

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[63] Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 484 (C.A.).
[64] Order P-1779.
[65] Order P-1190, upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[66] Order P-1175.
[67] Order P-901.
[68] Gombu v. Ontario (Assistant Information and Privacy Commissioner) (2002), 59 O.R. (3d) 773.
[69] Orders P-123/124, P-391 and M-539.
[70] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[71] Orders M-249, M-317.
[72] Order P-613.
[73] Orders MO-1994 and PO-2607.

[185] The appellant submits that there is:

> [An] extremely compelling public interest in the disclosure of documents relating to the Ministry's criteria for IVF eligibility – an interest so compelling that it touches on the waste of hundreds of millions of public dollars and the loss of the lives of children in Ontario. [emphasis in the original]

[186] The appellant notes that the Expert Panel on Infertility and Adoption issued its findings and recommendations in August 2009 although this document was provided to the ministry "behind closed doors" in June of that year. The appellant quotes heavily from the Expert Panel's findings regarding the savings to taxpayers that could result from changing the "rules on eligibility of persons to receive IVF as an insured health benefit, which would also result in over 7000 more healthy babies being born, rather than being lost or made very ill in a system which now produces an epidemic of medically-complicated pregnancies and multiple births."

[187] The appellant points out that the Expert Panel "made very emphatic conclusions" on this issue, and highlights some of the comments made by the Expert Panel, such as "*Ontario Cannot Afford NOT to Fund Assisted Reproduction*," and "*Not Funding Assisted Reproduction is a False Economy. It Costs More to Care for Multiple Births than to Prevent Them.*"[74] The appellant references the Expert Panel's conclusion that "Ontario cannot afford not to move forward with our recommendations now."

[188] Referring to the Expert Panel's views regarding this issue, which, the appellant states, "openly and flagrantly disagree with the Ministry," the appellant submits that "this case involves profound questions of human health and safety similar to previous IPC cases concerning nuclear or chemical safety…" The appellant contends that "it is the uncontradicted evidence of the government's own Expert Panel that the health of up to 7000 babies will[75] be affected in coming years by the policy at issue here."

[189] The appellant makes certain assumptions about the nature of the advice and recommendations contained in the records, and on that basis argues that "there is a greatly compelling public interest to be served by disclosure." He describes the ministry's concerns that disclosure of these records "risks limiting the candour of advice of public servants…" and "may interfere with the Ministry's ability to weigh the advice" as "fanciful" even though previous orders of this office and the courts have recognized this as a fundamental aspect of the advice and recommendations exemption. He states further:

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[74] These two quotes are subject titles in the Expert Panel's report. The appellant has included some of the discussion under these two headings in his representations.
[75] Emphasis in the original.

> [T]he only way that disclosure could 'interfere' with the Ministry is that Ontarians would be outraged at the waste of their tax money and the endangerment of their children's lives, and would demand change. In Canada, that sort of demand should never be scorned as 'interference' by a Ministry, but rather should be venerated as democracy, for as previous IPC cases have held (P-984 and PO-2556), the purpose of information disclosure is to inform the citizenry to express reasoned public opinion and to make democratic political choices.

[190] The appellant identifies himself as a university professor working in the field of health policy and indicates that he is "in an unusually good position to educate the public about the Ministry's dangerous and costly IVF policy."

[191] On a slightly different note, the appellant believes that because of his notoriety in this field, the ministry has made his identity an issue and that it may have motivated the ministry to withhold these records from him. He asks that I "draw the inference that the Ministry is avoiding to make disclosure in bad faith, for fear that the applicant is capable of disseminating the information in his professional network of health policy experts, which is unwelcome to the Ministry."

Analysis and findings

[192] With respect to the appellant's final comment, I note that the appellant specifically stated that he did not wish to address the ministry's exercise of discretion, yet now maintains that the ministry has acted in bad faith in its dealings with him. In my view, this assertion is more appropriately addressed under the exercise of discretion rather than as a basis for finding that there is a public interest in disclosure of the records.

[193] Nevertheless, I have considered them in revisiting the evidence and my overall findings in this order. I am not persuaded that the appellant's identity had any bearing on the ministry's decision to withhold the records at issue from him. Nor am I persuaded that the ministry has acted in bad faith to avoid controversy or other "unwelcome" challenges.

[194] I have found above, that, with the exception of certain portions of two records, the exemption at section 13(1) applies to the five records for which it was claimed. I note that out of 298 records, the ministry has granted the appellant full or partial access to approximately 204 of them and has provided reasoned argument for the application of the exemptions to the records and portions of records that have been withheld, in particular, the five records withheld under section 13(1). I do not find the ministry's actions throughout the processing of this appeal to be arbitrary or capricious or to otherwise demonstrate a purpose other than a legitimately expressed concern

about disclosure of the withheld portions of the records. In my view, the appellant's accusations have no merit.

[195] With respect to his other arguments, I agree with the appellant that there is a public interest in the issues identified in the records. This is a matter that affects many individuals and families struggling with issues of infertility. Moreover, funding policies relating to medical issues touch on all citizens of Ontario in the context of public accountability regarding the expenditure of public funds, as well as on a more personal level concerning this and other insured health benefits.

[196] That being said, I am not persuaded that this public interest is compelling. Clearly, the appellant, as a professional working in this area of health sciences, has an active, if not passionate, interest in pursuing the issue through public education and political advocacy. However, in my view, the primary information that would be useful in educating the public about ministry policy regarding IVF funding and the implications of maintaining the status quo is already in the public sphere, either because it has been made public,[76] or because much information has been disclosed to the appellant in response to his access request.

[197] Further, apart from the appellant's strong views on this issue, and the expressed views of the Expert Panel in its public report, the appellant has provided nothing in his representations that suggests a "rousing strong interest or attention" [77] in the matter outside of himself and the Expert Panel.

[198] Finally, much of the information is already available to hold the ministry accountable to the public for its policy directions. The assumptions made by the appellant regarding the nature of the advice are just that, assumptions. The basis on which he has formulated them is not evident in his submissions. I am not persuaded that the information in the five records at issue under section 13(1) would provide additional information that would materially assist in understanding or engaging in political discussion and debate on the issue of assisted reproduction.

[199] Accordingly, I find that, although there is a public interest in the matter to which the records withheld under section 13(1) relate, this interest is not compelling. Moreover, I find that the information at issue in the five records withheld under section 13(1) would not materially assist in understanding or engaging in public debate regarding the issue of In Vitro Fertilization. As a result, the public interest does not apply in this case, and the records remain exempt under section 13(1).

[76] For example, The Expert Panel's report.
[77] Order P-984.

ORDER:

1. I order the ministry to disclose the following records or portions of records to the appellant by providing him with a copy of them on or before **October 18, 2012**:

    - HSSB record 10;
    - HSB record 27: page 5;
    - HSB record 169: pages 1, 2, all but the third paragraph of page 3, page 4, the first two paragraphs of page 5 and pages 7, 8, 9, 10 and 11;
    - HSB record 207: pages 1, 2, 3, 4, the headings on pages 5 – 10, most of page 12, part of the heading and the first paragraph on page 24 and pages 25, 26 and 27. For greater certainty, I have highlighted the portions of this record that are to be disclosed to the appellant on the copy of this record that I am providing to the ministry along with this order; and
    - HSB record 219: the portions that are highlighted on the copy of this record that I am providing to the ministry along with this order.

2. I uphold the ministry's decision to withhold the remaining records from disclosure.

3. 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 have been ordered disclosed pursuant to order provision 1.

Original signed by: September 26, 2012
Laurel Cropley
Adjudicator