

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3393

Appeal PA12-363-2

Ministry of the Environment

September 12, 2014

**Summary:** The Ministry of the Environment (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of records relating to any order proposed by two Senior Environmental Officers in respect of the wind turbines and associated transformer stations located in the townships of Amaranth and Melancthon. The ministry issued a decision in which it provided partial access to the responsive records, withholding some information pursuant to the discretionary exemptions for advice and recommendations at section 13(1) and solicitor-client privilege at section 19. The requester appealed the ministry's decision, claiming that there was a compelling public interest in the disclosure of the records, as contemplated by section 23. The adjudicator upholds the ministry's decision to withhold the records.

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

**Orders and Investigation Reports Considered:** Orders P-320, PO-2097, PO-2087-I.

**Cases Considered:** *John Doe v. Ontario (Finance)*, 2014 SCC 36.

### OVERVIEW:

[1] The Ministry of the Environment (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of records relating to any order proposed by two Guelph District Senior Environmental Officers in

respect of the wind turbines and associated transformer stations located in the townships of Amaranth and Melancthon and operated by a named provider of wind turbine energy. The request was for all communications between the Ministry of the Environment, Guelph District Office, two named Senior Environmental Officers and any other ministry office, including the Toronto Implementation and/or Approvals ministry offices. The time frame for the request was March 2009 to September 2010.

[2] The ministry issued a decision in which it provided access in whole or in part to 29 of the 358 responsive pages of responsive records. The remaining records and parts of records were withheld under the discretionary exemption for advice or recommendations at section 13(1) of the *Act*, the discretionary exemption for solicitor-client privilege at sections 19(a) and (b) of the *Act*, and the mandatory personal privacy exemption at section 21(1) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision to this office, claiming that the information requested is important to the health and safety of Ontarians. The appellant advised the mediator that she is raising the possible application of the "public interest override" in section 23 of the *Act* as an issue in this appeal. The appellant clarified that she is also appealing the application of the section 13(1) and 19(a) and (b) exemptions.

[4] The appellant indicated, however, that she does not seek access to any personal information contained in the records. Accordingly, the exemption for personal privacy under section 21(1) is no longer in issue.

[5] As no mediated resolution proved possible, the file was forwarded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to the appeal sought and received representations from the ministry and the appellant. In accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure and Practice Direction 7*, the ministry's representations were shared with the appellant, with portions being withheld for confidentiality reasons. In its representations, the ministry raised, for the first time, the application of the section 19 exemption to two paragraphs of pages 6 and 7.

[6] The file was then transferred to me for a resolution, following which the appellant filed supplementary representations, the admissibility of which I address below as a preliminary issue.

[7] In this order, I uphold the ministry's decision to withhold the records in issue and dismiss the appeal.

**RECORDS:**

[8] The records remaining at issue are described in an index provided by the ministry to the appellant and this office. The records, and the ministry's decision pertaining to them, are set out in the following table.

<b>Page</b>	<b>Description of records</b>	<b>Ministry's decision</b>
1	Email regarding proposed Order	Partial access— s. 13 applied to advice
3-4	Email regarding proposed Order	Withheld –s.13 and s.19
5	Email regarding proposed Order	Partial access— s. 13 applied to advice
6-7	Email regarding proposed Order	Withheld –s. 13
9	Email regarding proposed Order	Partial access–s. 13 applied to advice
16	Email regarding proposed Order	Withheld - s. 19
17	Residence locations	Withheld - s. 13, s.19 and s. 21
18-20	Email regarding proposed Order and Figure 3 Order	Withheld - s. 13 and s. 19
21- 22	Email regarding proposed Order	Withheld - s. 13 and s. 21
23	Email regarding proposed Order	Partial access-s.13 applied to advice
24	Email regarding proposed Order	Withheld - s. 13
27	Figure 11: Order	Withheld - s. 13 and s.21
28 - 101	Draft Provincial Officer's Report, February 17, 2010	Withheld – s. 13 and s. 19
102-172	Draft Provincial Officer's Report, February 18, 2010	Withheld - s. 13 and s. 19

173 - 213	Draft Provincial Officer's Report, March 1, 2010	Withheld- s. 13
214-217	Draft Order, March 1, 2010	Withheld - s. 13
218-223	Draft Order, March 1, 2010 with two attachments	Withheld - s. 13
224 - 227	Draft Order, March 4, 2010	Withheld - s. 13
228-231	Draft Order, March 8, 2010	Withheld - s. 13
232-237	Draft Order, March 12, 2010	Withheld - s. 13
238-281	Draft Provincial Officer's Report, March 12, 2010	Withheld - s. 13
282-323	Draft Provincial Officer's Report, March 30, 2010	Withheld - s. 13
326 - 328	Email to and from Legal Services Branch to Guelph District Office staff	Withheld - s. 19
335 - 336	Email from Environmental Officer at Guelph DO, to other staff and Legal Services Branch	Withheld - s. 13 and s. 19
345	Email regarding legal advice	Partial - s. 19 applied to legal advice
353-358	Draft information note entitled "Proposed method to deal with ongoing Noise Complaints from .... Wind Farm" March 25, 2010	Withheld - s. 13

**PRELIMINARY ISSUE:**

**Admissibility of the appellant's supplementary representations**

[9] As noted above, after the parties filed their representations, the appeal was transferred to me for a resolution.

[10] The appellant then advised that she wished to file supplementary representations. This office informed the appellant that her supplementary representations should include an explanation of why they should be accepted despite the fact that the deadline for representations had long passed, and that the adjudicator would then determine whether to accept the representations.

[11] The appellant's supplementary representations are dated August 20, 2014 and contain the following explanation for their lateness:

As time progresses more relevant information is uncovered and I appreciate the opportunity to update.

[12] The Information and Privacy Commissioner's *Code of Procedure* applies to appeals under the *Act*. Section 7.08 of the *Code* provides in part:

A party who chooses to submit representations to the IPC shall do so by the date specified in the Notice of Inquiry.

[13] In this case, the appellant's supplementary representations were provided over a year after the deadline for her representations had passed. However, section 2.04 of the *Code* provides me with the power to depart from the procedural requirements of the *Code* where it is "just and appropriate to do so."

[14] I find in this case that it would not be "just and appropriate" to accept the appellant's supplementary representations. The delay in filing them is significant. Moreover, having reviewed the representations, I find that they do not provide any new information or argument that is substantially different from what was provided in the appellant's original representations.

[15] Appended to the appellant's supplementary representations is information on the health effects of wind turbines. Much of that information pre-dates the appellant's original representations and could have been submitted with her original representations. In any event, similar information was supplied with the appellant's original representations. As I find below, it is not necessary, nor is it within my jurisdiction, for me to decide in this appeal whether wind turbines cause adverse health effects, and I accept that this remains a matter of significant study and debate.

[16] Given these factors, I find that it would not be "just and appropriate" for me to accept the appellant's supplementary representations, and I have decided this appeal without reference to them.

## **ISSUES:**

- A. Does the discretionary exemption for advice and recommendations at section 13(1) of the *Act* apply to the records for which it is claimed?
- B. Does the discretionary exemption for solicitor-client privilege at section 19 of the *Act* apply to the records for which it is claimed?
- C. Did the institution exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

## **DISCUSSION:**

### **Background**

[17] The following background is obtained from my review of the parties' representations, and provides some useful context regarding the creation of the records at issue.

[18] In 2009, ministry Senior Field Officers from the Guelph District Office had been responding to numerous complaints about the wind turbines and associated transformer stations<sup>1</sup> located in the townships of Amaranth and Melancthon. In 2010, an Order and Provincial Officer's Report (POR) were drafted to address noise emissions from these local wind turbines. At the same time, the ministry sought voluntary compliance from the wind turbine operator. The draft Order and POR were not issued since the wind turbine operator agreed to take noise reduction measures. However, the ministry advises that the issue is ongoing and that it is still possible that the ministry will issue an Order and POR.

[19] The appellant seeks access to the records relating to the proposed Order and POR.

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<sup>1</sup> References in this Order to the wind turbines also include, where appropriate, the associated transformer stations.

**A. Does the discretionary exemption for advice and recommendations at section 13(1) apply to the records for which it is claimed?**

[20] As noted in the index of records set out above, the ministry withheld certain documents on the basis that they are exempt from disclosure under section 13(1) of the *Act*. That section 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.

[21] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>2</sup>

[22] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[23] In *John Doe v. Ontario (Finance)*,<sup>3</sup> the Supreme Court of Canada held that “advice” has a broader meaning than “recommendations”. It includes “policy options”, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant’s identification and consideration of alternative decisions that could be made. “Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>4</sup>

[24] “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.

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

- the information itself consists of advice or recommendations

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<sup>2</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>5</sup>

[26] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>6</sup>

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

- factual or background information;<sup>7</sup>
- a supervisor's direction to staff on how to conduct an investigation;<sup>8</sup>
- information prepared for public dissemination.<sup>9</sup>

[28] Section 13(2) creates 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. Section 13(2) states, in part:

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

(a) factual material;

[29] The Supreme Court of Canada has observed that the exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations. The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

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<sup>5</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] 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.

<sup>6</sup> Supra note 2 at para. 51.

<sup>7</sup> Order PO-3315.

<sup>8</sup> 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.).

<sup>9</sup> Order PO-2677.



[30] The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).<sup>10</sup>

### ***Representations***

[31] The ministry submits that disclosure of the records at issue would reveal the advice or recommendations of two Senior Environmental Officers of the Guelph District Office, their supervisor, their manager and the Director of West Central Region, who has operational responsibility for the Guelph District Office. The ministry submits that a Senior Environmental Officer had drafted an Order and Provincial Officer's Report (POR) against the operator of the wind turbines, and needed a review by both the Legal Services Branch of the ministry, as well as the Director of West Central Region prior to the Order and POR being issued. The ministry submits that the decision on the ultimate wording of the Order would rest with the Director of West Central Region. The ministry relies on the decision of the Ontario Court of Appeal in *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*,<sup>11</sup> wherein the Court stated that ministry decision-makers "are entitled to confidential policy advice, which may or may not include explicit recommendations as to what the person reporting them believes is the preferred course of action."

[32] After the ministry filed its representations, the Supreme Court of Canada upheld the Ontario Court of Appeal decision relied on by the ministry. I have referred to the Supreme Court decision, *John Doe v. Ontario (Finance)*,<sup>12</sup> above.

[33] The ministry has also provided representations specific to the pages in issue. I will refer to the ministry's representations as necessary in my discussion of the records below.

[34] The appellant has not made representations on the applicability of section 13(1) to the records in issue.

### ***Analysis and Findings***

[35] *Draft Orders and Provincial Officer's Reports: pages 17, 27, 28-101, 102-172, 173-213, 214-217, 218-223, 224-227, 228-231, 232-237, 238-281, 282-323*

[36] The ministry submits that disclosure of the draft Orders and PORs would reveal the advice of staff of the Guelph District Office to their management team and to the Director, West Central Region about the suggested wording of those drafts. It submits that the drafts were amended to reflect the advice of Crown counsel as well as

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<sup>10</sup> Supra note 2 at paras 31 and 32.

<sup>11</sup> 2012 ONCA 125.

<sup>12</sup> See footnotes 4-6, above, and the accompanying text.

management of the ministry, and that they reflect the deliberative process for the issuance of an Order where the matter is ongoing and very complex from an enforcement and technical perspective.

[37] The ministry further submits that for the purposes of the administration of the *Environmental Protection Act*, it is inappropriate for the target of an order to know what other forms the order could have taken.

[38] The ministry submits that the records in issue are similar to those at issue in Order P-320. In that Order, former Assistant Commissioner Tom Mitchinson stated:

The severance also contains the public servant's advice on the position the institution should take in draft Orders of the Director issued under the Environmental Protection Act. I find that this severance satisfies the requirements for exemption under section 13(1).

Severances 2, 3 and 6 are clauses contained in draft Orders of the Director. In my view, these clauses are a formal embodiment of the advice contained in Severance 1. Release of these severances would reveal the advice in Severance 1, and I find that they are properly exempt under section 13(1).

[39] With respect to pages 17 and 27 in particular, the ministry submits that these documents (setting out the location of residences by address and by plot diagram respectively) reflect the scope of the proposed Order and POR, and would form part of the order issued to the energy company.

[40] Having reviewed the parties' representations and the records at issue, and having considered the context in which the records were created, I am satisfied that disclosure of these records would reveal the advice and/or recommendations of a public servant, within the meaning of section 13(1) of the *Act*. I accept the ministry's submission that the draft Orders and PORs represent the advice of the Senior Environmental Officers at the Guelph District Office, and also reflect the advice of Crown counsel and ministry management. Ultimately, a decision on the final wording of the Order would rest with the Director of West Central Region. Each draft represents the advice and/or recommendation, at the time of the draft was prepared, as to the contents of any Order and Provincial Officer's Report to be issued to the operator of the wind turbines. Further, as a result of the Supreme Court of Canada's decision in *John Doe v. Ontario (Finance)*,<sup>13</sup> discussed above, I find that the various draft Orders and PORs constitute "advice and recommendations" within the meaning of section 13(1), even if not all drafts were ultimately communicated to the Director of West Central Region.

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<sup>13</sup> Supra note 2 at paras 48-51.

[41] I also accept the ministry's submission that disclosure of pages 17 and 27 relating to the location of the properties to be covered by the order would reveal advice as to the scope of the proposed order.

[42] I conclude, therefore, subject to my discussion of the ministry's exercise of discretion, below, that pages 17, 27, 28-101, 102-172, 173-213, 214-217, 218-223, 224-227, 228-231, 232-237, 238-281, and 282-323 are exempt from disclosure under section 13(1) of the *Act*.

[43] *Emails and draft information note: pages 1, 3-4, 5-6, 6-7, 9, 18-20, 21-24, 335-336, and 353-358*

[44] These pages consist of emails passing among various ministry staff regarding the proposed Order and POR, and a draft information note.

[45] I have reviewed these records and the parties' representations. For the following reasons, and subject to my discussion of the ministry's exercise of discretion, below, I conclude that the records contained in these pages qualify for the exemption at section 13(1) of the *Act*.

[46] The ministry withheld a portion of the emails on page 1. I have reviewed the withheld portion and I find that it represents a recommendation from the Senior Environmental Officer to his manager concerning changes to the draft Order, which the manager could choose to accept or reject. Therefore, it falls within the exemption found at section 13(1).

[47] The email on pages 3-4 (duplicated at pages 18-19) is from the Senior Environmental Officer to his supervisor and his manager. I have reviewed the email and the ministry's representations, including the confidential portion of its representations which sets out the specifics of the recommendation. Based on my review, I am satisfied that the Senior Environmental Officer was making a recommendation to management, which could ultimately be accepted or rejected. The attachment on page 20 of the record formed part of the recommendation. Therefore, I find that these pages fall within the exemption found at section 13(1).

[48] Pages 6 and 7 contain an email from the Senior Environmental Officer to his managers. The email begins near the top of page 6 and continues onto page 7. I have reviewed the ministry's representations, including the confidential portion of its representations which sets out the specifics of the suggested course of action presented by the Senior Environmental Officer to his managers. Based on my review, I find that the Senior Environmental Officer made a recommendation to his manager, which the manager could choose to accept or reject. As such, I conclude that the emails on pages 6-7 qualify for an exemption from disclosure under section 13(1) of the *Act*.

[49] Two emails are found on page 5 and the top of page 6. The emails are from the Director of the Central West Region and the District Supervisor to the Senior Environmental Officer in response to the latter's email on pages 6-7, described above. The ministry has withheld these two emails, in part, on the basis that they contain advice to the Senior Environmental Officer, which he could choose to accept or reject as part of the deliberative process.

[50] I have reviewed the emails and considered the context in which they were sent. I do not accept the ministry's submission that the Senior Environmental Officer could choose to accept or reject the directions from his managers contained in the emails. However, I am satisfied that the withheld portion of these emails, if disclosed, would *reveal* advice or recommendations made by the Senior Environmental Officer to his managers. The content of the emails allows one to make accurate inferences about the substance of the Senior Environmental Officer's recommendation to his managers found on pages 6 and 7. As such, it qualifies for an exemption under section 13(1) of the *Act*.

[51] Page 9 is an email from the District Manager to the Senior Environmental Officers and their supervisor, in response to the Senior Environmental Officer's email on pages 6-7, described above. The ministry submits that this email represents advice and a recommendation from the District Manager to the Senior Environmental Officer, and that the information is properly redacted as advice provided by the manager to her staff as part of the overall deliberative process with respect to issuing an order against the energy company as part of the noise abatement strategy.

[52] Having reviewed the document, I am satisfied that its disclosure would reveal advice or recommendations. While the email contains senior management's direction to staff, rather than advice or recommendations, I find that disclosure of the email would reveal recommendations of the Senior Environmental Officer contained on pages 6 and 7. As such, it qualifies for an exemption under section 13(1).

[53] Pages 21-24 consist of an email from the Senior Environmental officer to the management team. The ministry has withheld these pages in part. Within the portion that was released, a name was withheld under the personal privacy exemption at section 21(1). As noted above, the appellant no longer seeks disclosure of this personal information and it is, therefore, not at issue in this appeal.

[54] I have reviewed the record, as well as the confidential and non-confidential representations of the ministry. The ministry submits that, in the email, the Senior Environmental officer advised his management team on a particular matter.

[55] I find that disclosure of these pages would reveal advice and recommendations of the Senior Environmental Officer. Portions of the email explicitly set out recommendations. While other portions of the email contain material that could be

described as background information, this background is presented as an evaluative analysis of information, rather than as an objective or clinical recounting of events. I find that the background, if disclosed, would reveal the nature of the recommendations in the email. I also find that, in some areas, the background and the recommendations are so closely intertwined with one another that the background/factual material cannot be considered a separate and distinct body of fact. That being the case, the "exception to the exemption" for factual material in section s. 13(2)(a) does not apply.<sup>14</sup> I conclude that the withheld portions of pages 21-24 qualify for an exemption under section 13(1) of the *Act*.

[56] Pages 335 and 336 consist of an email from the Senior Environmental Officer to the Guelph District Manager and copied to legal counsel and other ministry staff. I have reviewed both the record and the ministry's representations, including its confidential representations setting out the subject matter of the recommendations. I am satisfied that the email contains the recommendations of the Senior Environmental Officer and of legal counsel and as such, qualifies for exemption under section 13(1) of the *Act*.

[57] Pages 353-358 contain a draft information note entitled, in part, "Proposed method to deal with ongoing Noise Complaints from ... Wind Farm". Although this document is unsigned, the ministry advises that it was authored by a Senior Environmental Officer. In the note, the Senior Environmental Officer recommends a strategy for addressing ongoing noise complaints about the wind turbines and transformers. The note is divided into sections with various subheadings including a background section.

[58] The ministry submits that, while the words "advice" or "recommendation" do not appear in most of the document, the information that does not contain those words would, if disclosed, permit one to accurately infer the advice and recommendations given.

[59] The ministry further submits that the section 13(2)(a) (factual material) exception to the section 13(1) exemption does not apply to this information, because the factual information is inextricably intertwined with the advice or recommendations.<sup>15</sup>

[60] I have reviewed the note. As suggested by its title, the note sets out a proposed strategy for addressing ongoing noise complaints about the wind turbines. Certain sections contain explicit recommendations and, as such, I find that those sections fall within the exemption at section 13(1).

[61] As noted above, another section sets out background material. I have, therefore, considered whether this section falls within the exception to the exemption found at

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<sup>14</sup> See, for example, Order PO-2097.

<sup>15</sup> In this regard, the ministry relies on Order PO-2097.

section 13(2)(a). On my review of this background section, I find that, while it does not explicitly set out advice or recommendations, the advice and recommendations are implied. In other words, disclosure of this information would likely reveal the recommendations contained elsewhere in the note. The background section does not contain purely objective material. Rather than being presented in a neutral manner, the background information is evaluative in nature and suggests to the reader the nature of the explicit recommendations contained elsewhere in the note.<sup>16</sup> I find that its disclosure would reveal the nature of the recommendations explicitly stated in the note.

[62] I am satisfied, therefore, that pages 353-358 qualify, in their entirety, for an exemption under section 13(1) of the *Act*.

[63] I conclude that, subject to my discussion of the ministry's exercise of discretion, below, pages 1, 3-4, 5-7, 9, 18-20, 21-24, 335-336, and 353-358 are exempt from disclosure under section 13(1) of the *Act*.

[64] To summarize, the records at the following pages (or withheld portions of pages, as the case may be) are, subject to my finding on the ministry's exercise of discretion, exempt from disclosure pursuant to section 13(1) of the *Act*: pages 17, 27, 28-101, 102-172, 173-213, 214-217, 218-223, 224-227, 228-231, 232-237, 238-281, 282-323, 1, 3-4, 5-7, 9, 18-20, 21-24, 335-336, and 353-358.

[65] The ministry has also claimed the exemption at section 19 for the records/parts of records at pages 3-4, 6-7, 17, 18-20, 28-101, 102-172 and 335-336. As I have found that those pages are exempt under section 13(1) of the *Act*, I do not need to consider whether they are also exempt under section 19 (and I do not need to consider the ministry's request to raise the exemption at section 19 of the *Act* for pages 6-7 outside of the 35-day period provided for in this office's *Code of Procedure*).

[66] I will now consider the application of the exemption at section 19 to the remainder of the records at issue.

**B. Does the discretionary exemption for solicitor-client privilege at section 19 apply to pages 16, 326-328, and 345 of the records?**

[67] The ministry submits that these pages fall within both branches of the solicitor-client exemption, namely section 19(a) (solicitor-client privilege) and section 19(b) (prepared by or for Crown counsel for use in giving legal advice or in contemplation or for use in litigation).

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<sup>16</sup> See *John Doe v. Ontario (Finance)*, supra note 2 at para 31.

[68] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[69] 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.

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

[70] 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 ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>17</sup> In this appeal, the ministry has raised the application of the solicitor-client communication head of privilege.

*Solicitor-client communication privilege*

[71] 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.<sup>18</sup> The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>19</sup>

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<sup>17</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>18</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>19</sup> Orders PO-2441, MO-2166 and MO-1925.

[72] 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.<sup>20</sup>

[73] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>21</sup>

[74] 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.<sup>22</sup>

### ***Branch 2:***

[75] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[76] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, “for use in giving legal advice.” Branch 2 also applies to a record that was prepared by or for Crown counsel in contemplation of or for use in litigation.

### ***Representations***

[77] The ministry submits that Crown counsel provided legal advice to staff of the Guelph District Office and/or to the Director of West Central Region. The ministry submits that a continuum of communications between solicitor and client was maintained. The ministry also submits that none of the documents for which the section 19 exemption has been claimed have been shared with anyone outside of the ministry, so as not to waive solicitor-client privilege.

[78] The ministry has also provided representations specific to the pages in issue. I will refer to the ministry’s representations as necessary in my discussion of the records below.

[79] The appellant has not made representations on the applicability of section 19 to the records in issue.

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<sup>20</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>21</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>22</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).



## ***Analysis and findings***

### *Page 16*

[80] The ministry submits that this email from the Senior Environmental Officer to ministry counsel is exempt from disclosure under section 19 as it constitutes part of the continuum of communications between legal counsel and the client.

[81] I have reviewed this record and am satisfied that it either consists of a communication by the ministry to Crown counsel for the purpose of seeking legal advice, or represents part of the continuum of communications between solicitor and client for the purpose of seeking and providing legal advice. Accordingly, this page qualifies for an exemption from disclosure under section 19(a) of the *Act*.

### *Pages 326-328*

[82] These pages contain an email chain between ministry counsel, the Senior Environmental Officers and other ministry staff. I have reviewed these pages and the confidential representations of the ministry, which set out the nature of the legal advice provided. I am satisfied that these pages either qualify as communications made for the purpose of obtaining and providing legal advice or are part of the continuum of communications for that purpose, as contemplated by Branch 1 of section 19. Accordingly, they qualify for an exemption from disclosure under section 19(a) of the *Act*.

### *Page 345*

[83] The ministry has withheld an email on page 345 from the Senior Environmental Officer, in which he relays to his manager a communication he had received from ministry counsel.

[84] I have reviewed the email and I am satisfied that its disclosure would reveal the legal advice given to a Senior Environmental Officer by Crown Counsel. I agree with the reasoning found in Order PO-2087-I, where former Adjudicator Cropley found that, if disclosure of records prepared by non-legal staff in an institution would reveal legal advice that was provided to the institution, those records are exempt under section 19.

[85] The ministry submits that it has not waived privilege over these records and I see no evidence that it has done so. I conclude that pages 16, 326-328 and 345 are, subject to my conclusion on the ministry's exercise of discretion, exempt from disclosure pursuant to section 19(a) of the *Act*. Given my finding, I do not need to consider whether these records also fall within Branch 2 of the exemption at section 19(b) of the *Act*.

**C. Did the institution exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?**

[86] The section 13(1) and 19 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[87] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[88] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>23</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>24</sup>

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>25</sup>

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

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<sup>23</sup> Order MO-1573.

<sup>24</sup> Section 43(2).

<sup>25</sup> Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

### ***Representations***

[90] The ministry submits that it considered the release of the records, despite the applicability of the discretionary exemptions at sections 13(1) and 19 of the *Act*, but chose not to disclose the severed portions of the records for the following reasons:

- The issue is ongoing and disclosure of the alternative forms of compliance that the ministry was contemplating could be harmful;
- In terms of section 13(1), the ministry balanced its interests with those of the appellant and decided that a number of records could be released that shed light on how the ministry obtained voluntary compliance from the operative of the wind turbine, which was the overarching goal of the ministry. As a result, partial access to the records was provided;
- The records for which section 19 was claimed contain legal advice that was provided on a confidential and privileged basis. The possibility of waiving the privilege was considered and rejected due to the nature of the specific advice contained in the records, and not merely on the basis of a broad principle. The ministry chose not to waive the privilege as the issues raised in the records are still very much a matter for future policy decisions;

- There is a high public interest in maintaining confidentiality of solicitor-client communications (see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*);<sup>26</sup> and
- In the event that the ministry does issue an order in the future, both the Order and the Provincial Officer's Report will be publicly available.

[91] The appellant's representations do not address the issue of the ministry's exercise of discretion.

### ***Analysis/Findings***

[92] Based on my review of the records and the parties' representations, I find that in withholding the records under these exemptions, the ministry considered proper factors and did not take into account improper factors. I find that the ministry exercised its discretion in a proper manner in denying access to the records under sections 13(1) and 19 of the *Act*.

[93] Accordingly, I uphold the ministry's exercise of discretion under sections 13(1) and 19 of the *Act*.

#### **D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?**

[94] I have determined that some of the records in issue are exempt under section 13(1) of the *Act* and that the remainder are exempt under section 19.

[95] However, the appellant has raised the application of the public interest override found at section 23 of the *Act*. This section reads:

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

[96] Section 23 does not list section 19 as one of the provisions the application of which can be overridden by section 23. In the Notice of Inquiry issued by the adjudicator previously assigned to this appeal, the parties were invited to comment on whether section 23 can apply to the discretionary exemption at section 19. The ministry submitted that the *Act* does not indicate that section 19 is one of the exemptions for which a public interest override applies, and that the lack of mention of section 19 in section 23 was upheld in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>27</sup>

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<sup>26</sup> [2010] 1 S.C.R. 815.

<sup>27</sup> *Ibid.*

[97] The appellant made no submissions on this issue.

[98] The Supreme Court of Canada addressed the issue of the absence, in Ontario's access-to-information scheme, of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>28</sup> In upholding the constitutional validity of this statutory scheme, the Supreme Court noted that consideration of the public interest is already incorporated in the discretionary language of the exemption.<sup>29</sup>

[99] Given the Supreme Court's finding and in the absence of submissions from the appellant, I see no reason to further consider in this order whether the public interest override at section 23 can apply to records that have found to be exempt under section 19 of the *Act*.

[100] I will now consider whether there exists a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption.

[101] 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.<sup>30</sup>

[102] 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 Information and Privacy Commissioner reviews 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.<sup>31</sup>

[103] 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.<sup>32</sup> 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

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<sup>28</sup> 2010 SCC 23.

<sup>29</sup> Also at issue was also the constitutional validity of the absence of a public interest override for records exempt under a discretionary exemption for law enforcement records. The Supreme Court found that both law enforcement and solicitor-client privilege exemptions already incorporate the public interest to the extent applicable.

<sup>30</sup> Order P-1398.

<sup>31</sup> Order P-244.

<sup>32</sup> Orders P-984, PO-2607.

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.<sup>33</sup>

[104] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>34</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>35</sup>

[105] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>36</sup>

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

- the records relate to the economic impact of Quebec separation<sup>37</sup>
- the integrity of the criminal justice system has been called into question<sup>38</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>39</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>40</sup> or the province’s ability to prepare for a nuclear emergency<sup>41</sup>
- the records contain information about contributions to municipal election campaigns<sup>42</sup>

[107] 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<sup>43</sup>

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<sup>33</sup> Orders P-984 and PO-2556.

<sup>34</sup> Orders P-12, P-347 and P-1439.

<sup>35</sup> Order MO-1564.

<sup>36</sup> Order P-984.

<sup>37</sup> 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.).

<sup>38</sup> Order PO-1779.

<sup>39</sup> 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.) and Order PO-1805.

<sup>40</sup> Order P-1175.

<sup>41</sup> Order P-901.

<sup>42</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

<sup>43</sup> Orders P-123/124, P-391 and M-539.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>44</sup>
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding<sup>45</sup>
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>46</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>47</sup>

### ***Representations***

[108] In her representations,<sup>48</sup> the appellant submits that she and her husband suffered serious health impacts after the wind facility started up, and that they had no choice but to permanently leave their home. She submits that the same impacts have been and continue to be experienced by others as a result of the Melancthon facility and other facilities. She submits that she asked, without success, for meetings with the Premier and other government officials to discuss the health effects of wind turbines.

[109] The appellant further submits that the information withheld by the ministry is of paramount importance to those who continue to suffer ill health impacts from turbines across the province. She submits that at the very least, Ontario's citizens deserve access to communication among "all parties", especially when it is the health of the citizens that is at stake. She submits that the public needs to understand why wind project residents have been shut out of the system. She submits that transparency is essential for the safety of Ontarians.

[110] The appellant appended several attachments to her representations dealing with the health impacts of wind turbines, and some testimony to the Standing Committee on the *Green Energy and Green Economy Act* in April 2009.

[111] The ministry submits that studies on the health effects of wind turbines have not demonstrated a causal link between wind turbine noise and adverse health effects. The ministry also submits that according to the Ontario Ombudsman's 2011-2012 Annual Report, although many people asked the Ombudsman to launch a systemic

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<sup>44</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>45</sup> Orders M-249 and M-317.

<sup>46</sup> Order P-613.

<sup>47</sup> Orders MO-1994 and PO-2607.

<sup>48</sup> As noted above, I did not admit the appellant's supplementary representations, and they are not referred to here.

investigation into the potential health effects of wind energy and how the ministry deals with wind turbine noise complaints, “the Ombudsman decided not to launch a systemic investigation based on ongoing developments (Environmental Review Tribunal ruling of July 2011 and Ontario’s Research Chair in Renewable Energy Technologies and Health funding)”.

[112] The ministry submits in summary that the appellant has provided insufficient evidence of the benefits of dissemination of the records to the public that would outweigh the purpose of the exemptions invoked.

### ***Analysis and conclusion***

[113] I observe at the outset that the parties’ representations are, in large part, directed at the question of whether wind turbines cause negative health effects. In my view, it is not necessary for me to decide that question. Having reviewed the parties’ extensive submissions, I am satisfied that the question of whether wind turbines are responsible for adverse health effects is currently the subject of considerable research and debate. I also accept that there were numerous complaints of negative health effects related to noise emissions from the facility at issue in this appeal.

[114] The appellant submits that the citizenry deserves access to the records at issue because their health is at stake, and that transparency is essential for the safety of Ontarians. However, she has not explained how disclosure of these particular records would have an impact on the health or safety of Ontarians. In fact, it would appear from her representations that studies on the effects of wind turbines are ongoing, and that the results of these studies are public. I am not satisfied that disclosure of the records in issue would shed much, if any, further light on the matter of the health impacts or safety of wind turbine operations.

[115] The appellant also submits that “the ministry chose to silence the officers and to withhold this incredibly important information from the public”, and that “we all need to understand why wind project residents have been...abandoned by our government”. By this, I understand the appellant to argue that the ministry did not accept the advice and recommendations of the Senior Environmental Officers and that there is a public interest in disclosure of documents that would shed light on why they did not do so. As I have already noted, however, the ministry has advised that this matter is ongoing, and that an order may yet be issued. Under the circumstances, the basis for this particular argument for a compelling public interest in disclosure would appear to be unfounded.

[116] I also note that the ministry disclosed several records to the appellant, including the abatement plan contained in the August 21, 2009 email from a Senior Environmental Officer. I find that this disclosure is adequate to address any public interest in how the ministry is responding to complaints about these wind turbines.



[117] For these reasons, I am not satisfied that any public interest in disclosure of the records at issue is “compelling”, as required by section 23.

[118] I also find, in any event, that the public interest at stake does not outweigh the purpose of the section 13(1) exemption, which is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. As noted by the Supreme Court of Canada:

The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship.<sup>49</sup>

[119] The appellant has not made any submissions on this aspect of the test under section 23. In my view, the records that I have found to be exempt under section 13(1) are precisely the type of records that section 13(1) is designed to protect from disclosure. Further, and as noted by the ministry, the issue is an ongoing one. In my view, disclosure at this juncture may inhibit the free flow of advice as the ministry addresses this ongoing situation. I also see some merit in the ministry’s argument that it is inappropriate for the target of an order (i.e. the operator of a wind turbine facility) to know what other forms the order might have taken. In sum, I find that any public interest in disclosure of the records at issue does not outweigh the purpose of the section 13(1) exemption.

[120] I conclude that the public interest override found at section 23 of the *Act* has no application in this appeal.

**ORDER:**

I uphold the decision of the ministry and dismiss the appeal.

Original Signed By:  
Gillian Shaw  
Adjudicator

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September 12, 2014

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<sup>49</sup> Supra note 2 at para 45.