

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3470-R

Appeal PA-050250-2

Order PO-2901-F

Ministry of Finance

March 20, 2015

Summary: The appellant sought access to records relating to automobile insurance. Interim Order PO-2793-I determined, *inter alia*, that certain records qualified for exemption under section 13(1) (advice and recommendations), and that other records did not qualify under that exemption. A Judicial Review of Interim Order PO-2793-I was commenced and subsequently placed on hold pending the outcome of a decision of the Supreme Court of Canada on the application of section 13(1) to particular types of records. The Supreme Court issued its decision in *John Doe v. Ontario (Finance)* 2014 SCC 36. As a result of that court decision, this reconsideration decision finds that section 13(1) applies to certain records at issue, but not to other records, and the order provisions in Interim Order PO-2793-I are modified accordingly.

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

Orders and Investigation Reports Considered: PO-2793-I,

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

OVERVIEW AND BACKGROUND:

[1] This is an IPC-initiated reconsideration of certain parts of Interim Order PO-2793-I.

[2] The appellant filed a five-part request with the Ministry of Finance (the ministry) and the Financial Services Commission of Ontario (FSCO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to automobile insurance. The request was for communications, briefing notes, meeting agendas, reports and other records involving FSCO and ministerial officials and identified insurance companies or their trade association representatives on various identified automobile insurance issues.

[3] The ministry located 423 records consisting of a total of 1845 pages that were responsive to the request. After notifying various affected parties, the ministry subsequently issued two decision letters in which it granted partial access to the responsive records. The remaining records or parts of records were withheld pursuant to the following exemptions in the *Act*: sections 12(1) (cabinet documents), 13(1) (advice and recommendations), 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy).

[4] The appellant appealed the ministry's decision to this office. Shortly after the appellant filed his appeal, the ministry issued a third decision letter disclosing additional records, as none of the third parties had appealed the ministry's decision to disclose some of the identified records.

[5] During mediation, the appellant expressed his view that the public interest override at section 23 of the *Act* applies in the circumstances of this appeal. This appeal was not settled in mediation and was transferred to adjudication.

[6] In the course of the inquiry process, the ministry indicated that it had "reconsidered its decision in a number of cases and agreed to release a significant number of additional records." It also issued a new index of records to the appellant.

[7] During the inquiry process, representations were received from the ministry, the appellant and a number of affected parties.

[8] After receiving the representations of the parties, I issued Interim Order PO-2793-I. In that order, I found that certain identified records qualified for exemption under the *Act*, but that other records did not, and I ordered that those records be disclosed. In particular, *inter alia*, I found that certain records qualified for exemption under section 13(1), but that other records did not qualify for exemption under that section, and ordered that they be disclosed.

[9] In Interim Order PO-2793-I, I also deferred my decision regarding certain records for which section 17(1) of the *Act* (third party information) was claimed, due to notification issues. I subsequently issued Final Order PO-2901-F, in which I addressed the issue of the application of section 17(1) to certain records.

[10] The ministry brought an application for judicial review of Interim Order PO-2793-I and Final Order PO-2901-F. I granted a stay of those orders pending the outcome of the judicial review of them.

[11] Following the issuance of the application for judicial review, the ministry abandoned its section 13(1) claim for certain records. As a result, the only section 13(1) records remaining at issue in the judicial review of the interim and final orders were six records (one record in full and portions of five other records).

[12] While the judicial review of Orders PO-2793-I and PO-2901-F was proceeding, the Ontario Court of Appeal and, subsequently, the Supreme Court of Canada were asked to determine issues regarding the application of section 13(1) of the *Act*. As a result, the judicial review of Orders PO-2793-I and PO-2901-F was placed "on hold" pending the outcome of the decision of the Supreme Court of Canada.

[13] The Supreme Court of Canada issued its decision in *John Doe v. Ontario (Finance)*, 2014 SCC 36. That decision addressed the application of the section 13(1) exemption, and may impact the application of that exemption to the records at issue in the present appeal.

[14] As a result of the decision in *John Doe v. Ontario (Finance)*, I decided to reconsider my decision in Interim Order PO-2793-I that certain records do not qualify for exemption under section 13(1) of the *Act*. Accordingly, I invited the parties to provide representations on the application of section 13(1) to the six records or portions of records which I had found did not qualify for exemption under section 13(1), and which remain at issue in the judicial review of Interim Order PO-2793-I.

[15] I sent a Supplementary Notice of Inquiry to the ministry, initially, inviting it to address the application of the exemption in section 13(1) to the six records, in light of the decision in *John Doe v. Ontario (Finance)*. The ministry provided representations in response. I then sent the Supplementary Notice of Inquiry, along with a complete copy of the representations of the ministry, to the appellant, inviting him to address the issues, in light of the decision in *John Doe v. Ontario (Finance)* and with reference to the representations of the ministry. The appellant did not provide representations in response.

[16] In this Reconsideration Order, I find that as a result of the Supreme Court of Canada's decision in *John Doe v. Ontario (Finance)*, four of the records at issue now qualify for exemption under section 13(1) of the *Act*. I also affirm my decision that two of the records do not qualify for exemption under section 13(1).

RECORDS:

[17] The records at issue are those records or portions of records which I found did not qualify for exemption under section 13(1) and which remain at issue in the judicial review of Interim Order PO-2793-I. They are:

FSCO – AID records:

Records 97 (in part), 108 (in part) and 133 (in full).

Minister's Office records:

Records 15 (in part), 25 (in part) and 93 (in part).

DISCUSSION:

Do the records qualify for exemption under section 13(1)?

Findings in Interim Order PO-2793-I

[18] In Interim Order PO-2793-I, I reviewed the application section 13(1) to the six records at issue in this reconsideration order. I considered the representations of the parties regarding the application of section 13(1) to those records and, applying the interpretation of that section which was current at the time the order was issued, found that they did not qualify for exemption under section 13(1) of the *Act*.

The decision in *John Doe v. Ontario (Finance)*¹

[19] As noted above, the Supreme Court of Canada determined how section 13(1) should be applied in its decision in *John Doe v. Ontario (Finance)*.² Adjudicator Cathy Hamilton summarized that decision in Order PO-3365 as follows:

Recently, the Supreme Court of Canada re-visited the exemption in section 13 of the *Act* in the case of *John Doe v. Ontario (Finance)*.³ This appeal arose from an access request made to the Ministry of Finance for records relating to the issue of retroactivity of amendments made to the *Corporations Tax Act*.⁴ The ministry denied access to the records which consisted of undated drafts of a policy options paper, claiming the application of the exemption in section 13(1). The requester subsequently appealed the ministry's decision to this office. In its representations made

¹ 2014 SCC 36.

² Ibid.

³ Ibid.

⁴ R.S.O. 1990.

during the inquiry, the ministry argued that the records were versions of a paper that formed part of the briefings of the Minister and others at the ministry. One of the options was eventually enacted, resulting in the amendments that imposed partially retroactive tax liability.

In Order PO-2872, Adjudicator Diane Smith ordered the ministry to disclose the records. She found that to qualify for exemption under section 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised." She concluded that only the portions of the records indicating which option was not preferred were exempt from disclosure. The remaining information, she held, had to be disclosed as it did not reveal a preferred course of action either expressly or by inference. In addition, Adjudicator Smith found that there was no clear evidence that the information in the records was communicated to any other person. Adjudicator Smith's order was upheld on judicial review⁵ by the Divisional Court, but overturned on appeal by the Court of Appeal.⁶

The Court of Appeal allowed the appeal and ordered the matter remitted to this office, finding that: the ministry is not required to prove that the record at issue went to the ultimate decision maker; and that section 13(1) applies to advice on a range of different options, even if it does not include a specific recommendation on which option to take.

On appeal to the Supreme Court of Canada (the Court), the Court, found that "advice" and "recommendations" have distinct meanings for the purposes of section 13(1). It accepted that material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of "recommendations." However, it held that it must have been the legislative intent to give "advice" a broader meaning than a "recommendation." The Court went on to apply this interpretation to the records at issue in the appeal and found that "advice" would include a public servant's view of policy options to be considered by the decision maker. In addition, the Court held that section 13(1) applies to exempt earlier drafts of material containing advice or recommendations even if the content of the draft is not included in the final version.

The Court also held that evidence that the advice or recommendations were communicated cannot be a requirement of section 13(1). ...

⁵ 2011 ONSC 2030 (CanLII).

⁶ See note 31.

[20] The Supreme Court of Canada's finding in *John Doe v. Ontario (Finance)* has changed the application and interpretation of the section 13(1) exemption. In particular, and relevant to the records at issue in this reconsideration order, previous orders of this office and court decisions had found that a public servant's identification of various options to be considered by a decision-maker, and a list of the considerations or "pros and cons" of each of the options, did not necessarily constitute "advice or recommendations" under section 13(1). The Supreme Court of Canada has now determined that section 13(1) applies to information of this nature. In paragraph 27 of its decision the court made it clear that options constitute "advice" for the purpose of section 13(1) when it stated:

Records containing policy options can take many forms. They might include the full range of policy options ... or may only list a subset ... They can also include the advantages and disadvantages of each option ... but the list can be less fulsome and still constitute policy options... As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

[21] In addition, in paragraph 47 of that decision, the court stated that the "pros and cons" of various options also qualify as "advice" for the purpose of section 13(1) when it stated:

... The information consists of the opinion of the author of the Record as to the advantages and disadvantages of alternative [courses of action]. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).

[22] As a result, I will review the application of the section 13(1) exemption to the records at issue in this reconsideration in light of the findings of the Supreme Court of Canada.

The application of section 13(1) to the records in light of the decision in *John Doe v. Ontario (Finance)*

[23] 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.

[24] 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.⁷

[25] "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.

[26] "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.⁸

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

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁹

[29] 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.¹⁰

[30] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁸ See above at paras. 26 and 47.

⁹ 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.

¹⁰ See note 1 above at para. 51.

version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).¹¹

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

- factual or background information¹²
- a supervisor's direction to staff on how to conduct an investigation¹³
- information prepared for public dissemination¹⁴

[32] 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;

[33] 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.¹⁵ 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.

[34] 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).

Representations and findings

[35] The ministry provides general representations on the application of the section 13(1) exemption in light of the decision of the Supreme Court of Canada in *John Doe v. Ontario (Finance)*, and then provides specific representations on each of the records remaining at issue.

¹¹ See note 1 above at paras. 50-51.

¹² Order PO-3315.

¹³ 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.).

¹⁴ Order PO-2677.

¹⁵ See note 1 above at para. 30.

[36] In its general representations, the ministry states that it repeats and relies on its original appeal submissions. It then states:

The [ministry submits] that the Supreme Court of Canada has, in its unanimous ruling, clarified and broadened the scope of "advice and recommendations" for the purpose of the section 13(1) exemption in the manner described in the following paragraphs.

At paragraph [24] of its decision, the Court noted that:

A recommendation, whether express or inferable, is still a recommendation. "Advice" must have a distinct meaning ... the legislative intention must be that the term "advice" has a broader meaning than the term "recommendations" ... Otherwise, it would be redundant."

At paragraphs [26] and [27] of its decision, the Court noted that:

Policy options are lists of alternative courses of action ... in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made, in other words, they constitute an evaluative analysis as opposed to objective information.

Records containing policy options can take many forms. They might include the full range of policy options ... or may only list a subset ... They can also include the advantages and disadvantages of each option ... but the list can be less fulsome and still constitute policy options... As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

Following a consideration of the legislative intention underlying subsections 13(2) and (3), the Court states at paragraph [35] that:

The term "advice" is broad enough to include "policy options."

At paragraphs [45] and [46], the Court explains the principle for exempting from disclosure the advice given by public servants.

[45] Political neutrality, both actual and perceived, is an essential feature of the civil service in 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. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[46] Interpreting "advice" in section 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

The Court's observations apply not only to public servants, but also to "any other person employed in the service of an institution or a consultant retained by an institution" as set out in the opening words of section 13(1).

At paragraph [47] the Court stated, in respect of the records at issue in that case, that:

[47] ... Although only a small section of each Record recommends a preferred course of action for the decision maker to accept or reject, the remaining information in the Records sets forth considerations to be taken into account by the decision maker in making the decision. The information consists of the opinion of the author of the Record as to the advantages and disadvantages of alternative [courses of action]. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).

The Court at paragraphs [49] and [50] found that there was no requirement that the records actually went to the decision maker in order for the exemption in section 13(1) to apply.

The Court further confirmed that draft advice and recommendations also qualify for the section 13(1) exemption:

[50] ... A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice and recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.

[51] Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. ... the purpose of the exemption [is] to provide for the full, free and frank participation of public servants or consultants in the deliberative process ...

The [ministry submits] that the six remaining records in dispute with respect to section 13(1) of the *Act* must be reviewed within the context of the above principles. The [ministry submits] that the same rationale must apply to the communications, email, policy and briefing documents that were prepared in the context of the automobile insurance reform issues that are the subject matter of this adjudication.

All of these documents were created in the context of the deliberative process by public servants with respect to the government's review and consideration of changes to the laws governing automobile insurance. Each such communication therefore constitutes part of the deliberative process that the Supreme Court of Canada has expressly confirmed to fall within the section 13(1) exemption. There is nothing in section 13(1) that limits the scope of the exemption to any particular form of record.

[37] The ministry then provides specific representations on each of the records at issue. I will now review each of these records in light of the decision of the Supreme Court of Canada in *John Doe v. Ontario (Finance)* and the ministry's general representations.

FSCO-AID Records

FSCO-AID Record 97 (pages 3 and 4)

[38] My decision on this record in Interim Order PO-2793-I read as follows:

The Ministry states:

Record 97 is a briefing memo on proposed cost savings measures related to auto insurance reforms, and suggestions on measures to be undertaken for reaching savings targets. The record contains advice and recommendations of a public servant and is exempt under section 13.

On my review of this record, portions of pages 3 and 4 refer to matters or actions which had already been implemented and, in my view, do not contain advice or recommendations for the purpose of section 13(1). The remaining pages of this record relate to possible additional measures, and are advisory in nature and, in my view, qualify for exemption under section 13(1). As a result, I will order that the identified portions of pages 3 and 4 be disclosed.

[39] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 97 is a briefing memo on proposed cost saving measures related to auto insurance reforms, and suggestions on measures to be undertaken for reaching savings targets. The severed portions on pages 3 and 4 contain information and reflect the analyses of the public servant relating to reform measures undertaken and projected savings targets. It is submitted that the severed information is the advice of a public servant that "sets forth considerations to take into account by the decision maker in making the decision" (*John Doe v. Ontario (Finance)*, para. [47]) and is therefore exempt from disclosure under section 13(1).

Finding

[40] In my decision regarding this record in Interim Order PO-2793-I, I found that most of this record (pages 1-2 and 5-9) contained advice or recommendations for the purpose of section 13(1) of the *Act*, but found that pages 3 and 4 of the record did not qualify for exemption. In my description of these two pages, I confirm that they refer to matters or actions which had already been implemented.

[41] The ministry's current submissions state that these two pages "contain information and reflect the analyses of the public servant relating to reform measures undertaken and projected savings targets." It submits that this information is "the advice of a public servant that sets forth considerations to take into account by the decision maker in making the decision," and refers to paragraph 47 of the *John Doe v. Ontario (Finance)* decision in support of its view that this information therefore qualifies for exemption.

[42] Paragraph 47 of *John Doe v. Ontario (Finance)* reads:

The policy options in the Records in this case present both an express recommendation against some options and advice regarding all the options. Although only a small section of each Record recommends a preferred course of action for the decision maker to accept or reject, the remaining information in the Records sets forth considerations to take into account by the decision maker in making the decision. *The information consists of the opinion of the author of the Record as to advantages and disadvantages of alternative effective dates of the amendments.* It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1). [emphasis added]

[43] In my view, in the context of paragraph 47 as a whole, the reference to "considerations" in that paragraph does not refer to *any* factor that might inform a policy recommendation or decision. The Supreme Court of Canada clarifies what it means by considerations when it refers to "the opinion of the author of the Record as to advantages and disadvantages" of various alternative options. In other words, there is an evaluative component to "considerations."

[44] On my review of the information on pages 3 and 4, I find that it does not contain any evaluative component. It is background information. In addition, I confirm that this information relates to matters or actions which have already been implemented at the time this record was prepared - most of the information in these two pages is factual in nature. The parts of these two pages which, in the ministry's submission, convey an "analysis" of projected cost savings, is more accurately characterized as information in the nature of calculations based on pre-existing facts. I find that this is not the public servant's opinion or analysis pertaining to a decision that is to be made, but rather contains information on matters that are a given. In these circumstances, I find that pages 3 and 4 do not contain or reveal any "advice or recommendations" for the purpose of section 13(1) of the *Act*.

[45] I am also guided in my interpretation by the wording of section 13(1) in the context of the section as a whole. Section 13(2) contains categories of information which are not protected from disclosure under section 13(1). I note that, in addition to being information that is largely factual in nature, some portions of pages 3 and 4 of Record 97 include information similar in nature to that referenced in other exceptions to section 13(1), particularly sections 13(2)(c) and (f).¹⁶ This information is objectively ascertainable and, as noted, does not contain an evaluative component.

[46] I find further support for this decision in *John Doe v. Ontario (Finance)* where the Supreme Court confirmed that the purpose of section 13 is to “preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.” In my view, because of the nature of the information contained in pages 3 and 4, disclosure of these pages would not affect the provision of free and frank advice.

[47] As a result, I uphold my decision in Interim Order PO-2793-I that pages 3 and 4 of this record do not qualify for exemption under section 13(1) of the *Act*.

FSCO-AID Record 108 (portions of pages 20 -22)

[48] In my decision on this record in Interim Order PO-2793-I, I found that a portion of this record qualified for exemption under section 13(1), but also found that another portion only identified specific options and the pros and cons for each of these options. My decision relating to that portion of the record read:

The Ministry states:

Record 108 is a briefing note entitled “Bill 5-Rate Filings”. The record has been released to the Appellant, except for ... the portion providing options for dealing with rate filings and their pros and cons, beginning at page 5 of the record.

The unreleased portion of the record provides advice, options and directions relating to the benchmarks used by FSCO for purposes of assessing auto insurance rate filings.

The Ministry then states that, although the record does not designate any specific recommendation, and that mere options have been held by the IPC to be releasable, the undisclosed portion meets the section 13(1) test. It states that the pros and cons described in the record disclose advice

¹⁶ These sections read: Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains, (c) a report by a valuator, whether or not the valuator is an officer of the institution; (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.

regarding the consequences for the Government of the changes discussed, and a recommendation is implied in the record.

The appellant states:

The Respondent states that the redacted records relate to benchmarks used by FSCO to assess auto rate filings. How could such benchmarks be kept secret from the public when presumably they are created to do the very job FSCO has been mandated to do, namely approve or disapprove premium rate increases. Pros and cons are not advice but simply views of public servants.

Findings

... In my view, the three options and the pros and cons set out under each option are not (with a few exceptions) advice or recommendations for the purpose of section 13(1). As identified by the parties, previous orders have found that options and pros and cons are generally not considered to qualify as advice or recommendations, unless disclosure would reveal such information. In my view, the three options and most of the information under the pros and cons of each option would not reveal such information. However, some specific information under the pros and cons would reveal specific advice, and I uphold the application of the section 13(1) exemption for those bits of information. I will therefore order that the portions of this record that do not qualify for exemption be disclosed, and will be providing a highlighted copy of this record to the Ministry with this order.

[49] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 108 is a briefing note entitled "Bill 5 Rate Filings." The redacted portions of the record consist of a series of options, with pros and cons, relating to possible changes to benchmarks used by FSCO for purposes of assessing auto insurance rate filings. No recommendation is made in the record and consequently these portions of the record were ordered released in Interim Order PO-2793-I. As previously noted, the Supreme Court of Canada has now clarified that policy options, including the advantages and disadvantages of each option, fall within the "advice" component of section 13(1) and may be exempted from disclosure so long as a list sets out alternative courses of action relating to a potential decision. As a result, it is submitted the remaining portion of this record is exempt.

Finding

[50] In my description of the portion of this record that I ordered disclosed in Interim Order PO-2793-I, I confirmed that the portions remaining at issue consist of three options and most of the information under the pros and cons of each option. At paragraph 27 of the decision in *John Doe v. Ontario (Finance)*, the court made it clear that options constitute “advice” for the purpose of section 13(1) when it stated:

Records containing policy options can take many forms. They might include the full range of policy options ... or may only list a subset ... They can also include the advantages and disadvantages of each option ... but the list can be less fulsome and still constitute policy options... As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

[51] In addition, in paragraph 47 of that decision, the court stated that the “pros and cons” of various options also qualify as “advice” for the purpose of section 13(1) when it stated:

... The information consists of the opinion of the author of the Record as to the advantages and disadvantages of alternative [courses of action]. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are “advice” within the meaning of s. 13(1).

[52] Applying this approach from the decision of the Supreme Court of Canada, I find that the portions of Record 108 at issue in this reconsideration, which consist of a description of certain options, and the pros and cons of each of those options, constitute advice for the purpose of section 13(1) and qualify for exemption under that section.

FSCO-AID Record 133

[53] My decision on this record in Interim Order PO-2793-I read as follows:

The Ministry states:

Record 133 is a briefing note entitled “Policy Decisions Regarding the Customized Policy” setting out policy decisions, implications, considerations and advice regarding the customized auto policy. The purpose of the note is to provide recommendations and advice in response to five interrogatories as contained in the note.

The advice is implicit in the bullet point responses to the interrogatories, or can be inferred from the totality of the information provided in the bullet point statements under each of the five issues identified. The record sets out the advice and recommendations of a public servant and is exempt under section 13.

Findings

I have carefully reviewed this record. In my view, the information contained in it relating to the five interrogatories is more in the nature of considerations, and does not contain advice or a recommended course of action, nor would its disclosure reveal any such advice. In my view, this record does not qualify for exemption under section 13(1).

[54] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 133 is a briefing note entitled "Policy Decisions Regarding the Customized Policy" and whose content consists of a number of policy options with respect to the possible development of a customized automobile policy, and the pros, cons and implications with respect to possible decisions about the design of such a policy. Hence, the document presents a series of policy options prepared by public servants for the purpose of informing the decision-making process. It is submitted the document falls squarely within the analysis of the Supreme Court of Canada, as noted above.

Finding

[55] To begin, the ministry indicates in its representations that the five "interrogatories" in this record can also be characterized as five policy options. On my review of them, I accept that they can be so characterized.

[56] In my description of this record in Interim Order PO-2793-I, I confirmed that the information in this record relating to these five interrogatories (or policy options) is "more in the nature of considerations, and does not contain advice."

[57] In paragraph 27 of the decision in *John Doe v. Ontario (Finance)*, the court made it clear that options constitute "advice" for the purpose of section 13(1) when it stated:

Records containing policy options can take many forms. They might include the full range of policy options ... or may only list a subset ... They can also include the advantages and disadvantages of each option ...

but the list can be less fulsome and still constitute policy options... As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

[58] In addition, in paragraph 47 of that decision, the court stated that a record containing "considerations to take into account by the decision maker in making the decision" could qualify for exemption if the information consists of "the opinion of the author ... as to advantages and disadvantages of alternative" options which was "prepared to serve as the basis for making a decision between the presented options."

[59] Applying this approach from the decision of the Supreme Court of Canada, I find that Record 133 contains five policy options and, under each option, sets out the author's view of the factors to be taken into account by the decision maker for each of those options. As a result, I find that this record constitutes advice for the purpose of section 13(1) and qualifies for exemption under that section.

Minister's Office records

Minister's Office Record 15 (portions of pages 6, 8 and 10)

[60] My decision on this record in Interim Order PO-2793-I read as follows:

The Ministry states:

Record 15 is material dated March 2004 that was prepared for the purpose of briefing the Parliamentary Assistant to the Minister of Finance on customized insurance policies. The record includes background information together with the 4 options that were considered for customized policies. Each of the options is described together with a listing of the benefits, drawbacks and a recommendation. Disclosing the severed information would enable an inference as to the recommendations that were made concerning the options and as a result is exempt under section 13(1).

The portions of the record remaining at issue contain specific recommendations regarding the four options, as well as, in some cases, a list of the pros and cons of some (but not all) of the four options.

On my review of this record, I find that the disclosure of the pros and cons for the identified options would not reveal any specific advice or recommendations. However, some of the specific recommendations do qualify for exemption under section 13(1). Accordingly, I will order that the pros and cons on pages 6, 8 and 10 be disclosed.

[61] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 15 is material that was prepared for the purpose of briefing the Minister's Parliamentary Assistant with respect to proposed options for developing customized auto insurance policies. It is submitted that the redacted portions of the record describing the pros and cons of the various options constitute policy options and fit within the meaning of "advice" as described in paragraph [27] of the *John Doe* decision for the purposes of claiming the exemption in section 13(1).

Finding

[62] In my description of the portions of this record that I ordered disclosed in Interim Order PO-2793-I, I confirm that they consist of the pros and cons on pages 6, 8 and 10 relating to various options being considered by the ministry. In paragraph 47 of the decision in *John Doe v. Ontario (Finance)*, the court made it clear that this type of information qualified as "advice" for the purpose of section 13(1) when it stated:

... The information consists of the opinion of the author of the Record as to the advantages and disadvantages of alternative [courses of action]. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).

[63] Applying this approach from the decision of the Supreme Court of Canada, I find that the portions of Record 15 at issue in this appeal, which consist of the pros and cons on pages 6, 8 and 10, constitute advice for the purpose of section 13(1) and qualify for exemption under that section.

Minister's Office Record 25 (the first four paragraphs on page 1)

[64] My decision on this record in Interim Order PO-2793-I read as follows:

The Ministry states:

Record 25 is a briefing note and update on customized insurance policies. It includes a detailed discussion and summary of the issues related to customized insurance policies. The record also contains advice and information related to the future direction of this initiative and is accordingly exempt under section 13(1).

On my review, I find that the first portion of this record (the first four paragraphs) include background and factual information, and does not qualify for exemption. However, the remainder of the record does include information which, in my view, qualifies for exemption under section 13(1), as it either contains advice, or would reveal such advice.

[65] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 25 is a briefing note and update on customized auto insurance policies. The first four paragraphs provide the basis and assumptions relevant to the decision making process and is the type of information described in *John Doe v. Ontario (Finance)*, paragraph [47], as considerations to take into account. It is submitted that this information forms an integral part of the advice given by the public servant with respect to the policy options and is also exempt from disclosure under section 13(1).

Finding

[66] In my decision regarding this record in Interim Order PO-2793-I, I found that most of it (the bottom half of page one and all of page two) contained advice or recommendations for the purpose of section 13(1) of the *Act*, but found that the first four paragraphs on page one included only background and factual information, and did not, therefore, qualify for exemption.

[67] I have considered the ministry's argument that the first four paragraphs provide "the basis and assumptions relevant to the decision making process" and is the type of information described in paragraph 47 of *John Doe v. Ontario (Finance)* as considerations to take into account, and forms "an integral part of the advice given by the public servant with respect to the policy options."

[68] As I stated above, in the context of paragraph 47 as a whole, the reference to "considerations" in that paragraph does not refer to *any* factor that might inform a policy recommendation or decision. The Supreme Court of Canada clarifies what it means by considerations when it refers to "the opinion of the author of the Record as to advantages and disadvantages" of various alternative options. This requires that there be an evaluative component to "considerations."

[69] Although I accept that the information in the four paragraphs of Record 25 at issue relates to the advice contained in the remaining portions of this record, it does not contain any evaluative component. It is factual and background information, and does not contain or reveal any "advice or recommendations" for the purpose of section 13(1) of the *Act*.

[70] As noted, I am also guided in my interpretation by the wording of section 13(1) in the context of the section as a whole. Section 13(2) contains categories of information which are not protected from disclosure under section 13(1). In addition to being factual and background information, paragraphs 2 through 4 also seem to include information that is similar in nature to that referenced in other exceptions to section 13(1). In particular, paragraphs 2 and 3 summarize information, including cost estimate information, which appears to have been produced as a result of a feasibility study.¹⁷ Paragraph 4 summarizes what appear to be the results of a consumer test.¹⁸ This information is objectively ascertainable and, as noted, does not contain an evaluative component.

[71] As a result, I uphold my decision in Interim Order PO-2793-I that the first four paragraphs of this record do not qualify for exemption under section 13(1) of the *Act*.

Minister's Office Record 93 (portions of the chart)

[72] My decision on this record in Interim Order PO-2793-I read as follows:

The Ministry states:

Record 93 is a chart describing the various options being considered for customized insurance policies. The disclosure of the redacted information would enable an inference as to the advice and recommendations that were made with respect to the options and as a result is exempt under s. 13(1).

The only portions of this record remaining at issue are listed pros and cons. On my review of these portions of this record, I am not satisfied that their disclosure would reveal advice or recommendations, and I will order that this record be disclosed.

[73] The ministry has now provided the following specific representations on this record in light of the decision in *John Doe v. Ontario (Finance)*:

Record 93 is a chart describing the various options being considered for customized insurance policies. The pros and cons were redacted on the basis that it is the advice of the public servant. It is submitted that this information is the type of information that is described as a policy option

¹⁷ The exception in section 13(2)(g) states that, despite section 13(1), a head shall not refuse under subsection (1) to disclose a record that contains a feasibility study or other technical study, including a cost estimate, relating to a government policy or project.

¹⁸ The exception in section 13(2)(e) states that, despite section 13(1), a head shall not refuse under subsection (1) to disclose a record that contains a consumer test report.

by the Court in paragraph [27] of the *John Doe v. Ontario (Finance)* decision and therefore exempt from disclosure.

Finding

[74] As is clear from my description of this record in Interim Order PO-2793-I, the only portions of this record remaining at issue are listed pros and cons (the advantages or disadvantages) of the various options. In paragraph 47 of the decision in *John Doe v. Ontario (Finance)*, the court made it clear that this type of information qualified as “advice” for the purpose of section 13(1) when it stated:

... The information consists of the opinion of the author of the Record as to the advantages and disadvantages of alternative [courses of action]. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are “advice” within the meaning of s. 13(1).

[75] Applying this approach from the decision of the Supreme Court of Canada, I find that the portions of Record 93 at issue in this appeal, which lists the pros and cons of the various options, constitute advice for the purpose of section 13(1) and qualify for exemption under that section.

Summary

[76] In summary, as a result of the decision of the Supreme Court of Canada in *John Doe v. Ontario (Finance)*, I find that FSCO-AID Records 108 (portions) and 133, and Minister’s Office Records 15 (portions on pages 6, 8 and 10) and 93 (portions) qualify for exemption under section 13(1) of the *Act*.

[77] In addition, I confirm my findings in Interim Order PO-2793-I regarding the ministry’s exercise of discretion and the application of the public interest to the records, and apply it to the records which I have now found qualify for exemption under the *Act*. As a result, I will amend Provision 1 of Interim Order PO-2793-I to remove those four records or portions of records from that provision of the order.

ORDER:

I amend Provision 1 of Interim Order PO-2793-I to remove the following records from that provision:

FSCO-AID: Records 108 (portions) and 133.

Minister's Office: Records 15 (portions on pages 6, 8 and 10)
and 93 (portions).

Original Signed By: _____

Frank DeVries
Adjudicator

_____ March 20, 2015