



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2554

Appeal PA-050028-2

Ontario Realty Corporation



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NATURE OF THE APPEAL:

The Ontario Realty Corporation (the ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the ORC's proposed acquisition of certain identified lands, together with the severance and sale or disposition of certain provincially owned lands (the "Lands Exchange"). The request read:

... we request copies of the following records, electronic or otherwise, in the files of the ORC relevant to the environmental assessment of the Lands Exchange that are not otherwise currently publicly available as defined in the [*Act*]:

1. All studies, reports, documents, correspondence, meetings and telephone conversations regarding the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange during the following periods:
 - (a) prior to the development and inception of the Lands Exchange proposal (*i.e.*, from approximately Summer, 2003) and leading up to the ORC's official announcement in April, 2004 of the ORC's class environmental assessment of the Lands Exchange (the "Class EA"); and
 - (b) since the official announcement of the Class EA in April, 2004 to the present time.
2. Without limiting the generality of the foregoing, we request that the records in item I above include all such records
 - (a) within the ORC, including, but not limited to, the land exchange team;
 - (b) between the ORC and other ministries, departments and agencies of the Ontario government, including, but not limited to [a list of specific ministries and offices].

Following telephone conversations between the requester and the Freedom of Information Co-ordinator of Management Board Secretariat, who was coordinating this and the requester's similar requests to three other institutions under the *Act* (collectively, including the Ministry, the "Institutions"), the requester wrote to the Freedom of Information Co-ordinator. In the letter, the requester confirmed that the request sought access to, "...documents and other communications in the records of the Institutions that include information as to the decision-making that led to the announcement of the Class Environmental Assessment of the Lands Exchange project...". The requester provided some additional information regarding the requested records, and also recommended that the Institutions search their files for records from June 1, 2003 onward.

The ORC issued an interim access decision and also identified that it was extending the time to respond to the request by an additional 90 days. The requester (now the appellant) appealed the ORC's time extension decision, and this office opened Appeal PA-050028-1, which was eventually closed through mediation.

The ORC subsequently issued an access decision, in which it granted partial access to the records it identified as responsive to the request. The ORC applied the exemptions found in sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (invasion of privacy) of the *Act* to deny access to the undisclosed records and parts of records. The ORC also provided a final fee decision, and identified that some information in the records was “non-responsive” to the request.

The appellant appealed the ORC’s denial of access to portions of the records. This office opened Appeal PA-050028-2, the present appeal.

During mediation, the appellant advised the mediator that it was not pursuing access to the information to which the ORC had denied access under sections 19 and 21(1) of the *Act*, and this information and these exemptions are no longer at issue in this appeal. The appellant also advised that it wanted to appeal the issue of whether the information identified by the ORC as “non-responsive” is, in fact, not responsive to the request.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the ORC, initially, and received representations from it. I then sent the Notice of Inquiry, along with a copy of the complete representations of the ORC, to the appellant, who also provided representations in response.

RECORDS:

There are 22 records or portions of records remaining at issue. These records include e-mails, presentations, memoranda and draft memoranda, handwritten notes, an excerpt from a draft Communications Plan, a document relating to consultation and public communications efforts, a draft Comments Regarding Draft Presentation, a stated position table, a scenario analysis, Option Analysis Tables and an excerpt from an issue note.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

The ORC takes the position that portions of the records contain information that is not responsive to the appellant's request. The ORC refers to the original request and states that the requester asked for records in the files of the ORC “relevant to the environmental assessment of the Lands Exchange [as that term was defined in that letter] *that are not otherwise currently publicly available as defined in the Act.*” Accordingly, the ORC states that any parts of the records that contain information that was publicly available as of the date of the request are not responsive to the request.

In addition, the ORC refers to the fact that the records the appellant is seeking are in regard to “the policy strategies, deliberations, directives and decisions with respect to the environmental assessment of the Lands Exchange.” In support, the ORC refers to correspondence from the

requester which stated that the request was for “documents and other communications ... that include information as to the decision-making that led to the announcement of ...”. On this basis, the ORC states:

Accordingly, records that may, in one way or another, relate to the Lands Exchange or the environmental assessment of the Lands Exchange but do not concern policy strategies, deliberations, directives or decisions made with respect to the environmental assessment of the Lands Exchange are not responsive to this request.

Finally, the ORC confirmed that the request did not include any records created prior to June 1, 2003.

The ORC then summarizes the circumstances giving rise to the creation of the records at issue, and follows this with representations on the responsiveness of certain specific portions of records as follows:

The parts of Records 1, 2 and 10 identified by the ORC as non-responsive ... all constitute publicly available generic information about the requirements under ORC’s then existing Class Environmental Assessment document. ORC has advised that this information was posted on ORC’s website and was available to members of the public at the time of the request.... Accordingly, this information is not responsive to the request which expressly excluded from the request publicly available information.

The parts of Records 3, 9 and 11 identified by ORC as non-responsive do not constitute information regarding any “policy strategies, deliberations, directives or decisions with respect to this environmental assessment”.... In the case of Record 3, this information is procedural and requests a response. The part of Record 9 identified as non-responsive is merely a historical summary of events to the date of the Record and does not concern policy strategies, deliberations, directives or decisions. In the case of Record 11, the non-responsive part merely is an introductory message regarding the comments on the draft presentation to follow. It also does not fall within the parameters of the request....

The non-responsive parts of Records 13, 14, 15 and 16 are identical in each case. The procedural information contained therein merely (i) describes the steps ORC must take in conducting the required environmental assessment and (ii) provides an update on the steps in that connection taken to the various dates of these records.... This information is not responsive to the request, as defined by the appellant.

The part of Record 4 identified as non-responsive deals with administrative and procedural steps that needed to be taken once the decision about the

environmental assessment had been made with the result that it is also outside the parameters of the request.

The part of Record 17 identified as non-responsive deals with issues unrelated to ORC's environmental assessment with the result that it is also outside the scope of the request.

In its representations, the appellant argues that the ORC has an obligation to adopt a liberal interpretation to the request, and asks that a careful review of the records which the ORC claims are non-responsive, be conducted.

Findings

Previous orders of the Commissioner have established that to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request. (See also Order P-1051)

Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

I adopt this approach to the issue in the circumstances of this appeal.

The appellant's request in this case is set out above. It is general in the sense that it requests "all studies, reports, documents, correspondence, meetings and telephone conversations", but then specifically limits the request to include only records "regarding the policy strategies,

deliberations, directives and decisions with respect to the environmental assessment”. It also confirms that it includes all such records within the ORC (and not limited to the land exchange team) and between the ORC and other Ministries, departments and agencies of the Ontario government.

The ORC claims that portions of 12 of the records are not responsive to the request, as set out above. I have reviewed these records in detail. Each of these records relates to the environmental assessment of the Lands Exchange, and no portions of these records relate to other matters. Furthermore, the request included “all ... documents, correspondence ... with respect to the environmental assessment of the Lands Exchange ...”. The request proceeds to specify that these records include records within the ORC and between the ORC and other bodies, “without limiting the generality of” the earlier portion of the request.

I have carefully reviewed the portions of the records the ORC claims as “non-responsive” and I make the following findings:

- With respect to those portions of Records 1, 2 and 10 which the ORC claims are non-responsive, as they “constitute publicly available generic information about the requirements under ORC’s then existing Class Environmental Assessment document”, and include information that was posted on ORC’s website and was available to members of the public at the time of the request, I find the ORC’s approach is unduly restrictive. Although it may be true that the factual information contained in the relatively brief background portions of these three records which the ORC states are non-responsive (two of which are e-mails, and the third of which is a draft document) are generally known to the public, I am not satisfied that these portions of these records are “publicly available” for the purpose of the *Act*. Without reviewing the possible application of section 22 to these portions of records in detail, there is no suggestion that the portions of these actual records were made available to the public. Given the context in which this information is recorded (in documents which contain information clearly responsive to the request), I am satisfied that these portions of records are responsive to the request.
- With respect to the ORC’s position that portions of Records 3, 4, 9, 11, 13, 14, 15 and 16 are non-responsive, the substance of the ORC’s position is based upon its view that these portions of records do not directly contain information regarding any “policy strategies, deliberations, directives or decisions with respect to this environmental assessment”. The ORC argues that some of the information is procedural or administrative (Records 3, 4, 13, 14, 15, and 16), or background or introductory information (Records 9 and 11). Although I accept the ORC’s categorization of these portions of these records, in my view this sort of information is responsive to the appellant’s request for all records “regarding the ... deliberations ... and decisions with respect to the environmental assessment of the Lands Exchange...”. Accordingly, I find that these portions of records are “reasonably related to the request”, and are responsive to it.

- With respect to the portion of Record 17 which the ORC identifies as non-responsive on the basis that it deals with issues unrelated to the ORC's environmental assessment, I have carefully examined this portion of Record 17. Although it relates to a different aspect of the environmental assessment issues, I am satisfied that it is "reasonably related" to the request for records regarding "decisions with respect to the environmental assessment of the Lands Exchange", and that it is also responsive to the request.

In summary, I find that all of the portions of records which the ORC has claimed are not responsive to the request are, in fact, responsive to the appellant's request. Accordingly, I will order the ORC to issue access decisions regarding those portions of records.

CABINET RECORDS

The ORC has relied on sections 12(1), 12(1)(d) and (e) to deny access to certain records. These sections read as follows:

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

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

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

The ORC submits that section 12(1) applies to all of Records 5, 6, 7, 8 and 22, and pages 1 and 2 of Record 17. In particular, ORC claims that the exemption in the introductory language of

section 12(1) applies to Records 7, 8 and 22; that section 12(1)(d) applies to Record 17; and that the exemption in section 12(1)(e) applies to Records 5 and 6.

Introductory wording of section 12(1)

The ORC has claimed that the introductory wording of section 12(1) applies to all of Records 7, 8 and 22; however, I note that the ORC's representations on this exemption only focus on a small portion of each of these records. As previously noted, if disclosing a record that has never been placed before Cabinet or its committees would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld [Orders P-226, P-293, P-331, P-361 and PO-2320].

The ORC states as follows with respect to these three records:

These Records all contain information about the government's decisions related to the environmental assessment process. In each of these three Records, certain words have been underlined on the copies provided to your office by ORC and ORC submits that this information in these Records, if disclosed, would "reveal the substance of deliberations of the Executive Council or its committees" in accordance with the opening words of section 12(1). Thus, these records are entitled to protection thereunder.

On my review of the specific underlined portions of these three records, I am satisfied that their disclosure would "reveal the substance of deliberations of the Executive Council or its committees" in accordance with the introductory language of section 12(1), and that these brief portions of those records qualify for exemption under section 12(1). However, in the absence of representations supporting the application of the section 12(1) exemption to the remaining portions of these records, I find that the other portions of these records do not qualify for exemption under 12(1).

Section 12(1)(d)

As identified above, the ORC relies on section 12(1)(d) in respect of the first two pages of Record 17. Record 17 is a series of handwritten notes, identified by the ORC as notes of "a discussion between a representative of ORC (believed by the ORC to be an identified ORC employee) and the Premier's office." The ORC then states:

It is clear from the notes (and the tenor of the discussion) that the discussion was with a senior officer in the Premier's office.

Concerning the application of the exemption to this record, the ORC states:

As indicated in Order PO-1725, some of the more senior officers in the Premier's office assume responsibilities and perform tasks that facilitate the Premier's priority-setting role by identifying problems and possible solutions. Thus, certain senior staff within the Premier's office stand virtually in the same shoes as the Premier in fulfilling the Premier's role in consensus building within the democratic political environment.

Thus, records of discussions with senior staff in the Premier's office are entitled to protection under section 12(1)(d) where, as here, they relate to the making of government decisions or the formulation of government policy.

Finding

The ORC is correct in identifying that, in Order PO-1725, former Assistant Commissioner Mitchinson recognized the vital role senior staff members have in performing the responsibilities and delegated tasks for which the Premier himself is answerable. In that order he stated:

In so doing, they facilitate the Premier's priority-setting role by identifying problems and possible solutions, making the Premier aware of the pros and cons of various options, and conveying the positions of those affected by particular decisions. In a very real sense, the Premier's senior staff constitute his eyes and ears, and the information thus presented to them will often have a considerable influence over the decisions which the Premier must make.

... the Premier's policy-making and priority setting functions do not occur in a vacuum, but within the political framework which brought the ruling party to power. Cabinet, and the Premier in his capacity as leader of the winning party, are charged with the task of prioritizing and implementing the major policy choices of party members by translating political party values into strategies for legislation and other programs. By virtue of his dual role as party leader and head of Cabinet, the Premier is at the apex of both the political and legislative policy-making functions. In the person of the Premier, Cabinet deliberations cannot be divorced from the consensus building process that must occur within the democratic political environment. To the extent that certain senior staff within the Premier's Office are integral to that process, they stand virtually in the same shoes as the Premier in assisting in his pre-eminent deliberative role within Cabinet.

I note, however, that the ORC argues that Record 17 qualifies for exemption on the basis of section 12(1)(d), which reads:

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

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

In my view, Record 17 does not qualify for exemption under the wording of section 12(1)(d). The section 12(1) exemptions are designed to protect Cabinet records, not records which document discussions amongst Crown employees. Record 17 is a series of handwritten notes of “a discussion between a representative of ORC ... and the Premier's office”. Section 12(1)(d) states that, in order to qualify for exemption under this section, the record must be “a record used for or reflecting consultation among ministers of the Crown”. I have not been provided with sufficient evidence to satisfy me that Record 17 was used for or reflects “consultation among ministers of the Crown”, as required by section 12(1)(d).

Accordingly, I am not satisfied that Record 17 qualifies for exemption under section 12(1) of the *Act*.

Section 12(1)(e)

The ORC takes the position that Records 5 and 6 qualify for exemption under section 12(1)(e). The ORC states:

These Records (which are PowerPoint slide decks) are clearly marked as presentations to [the Chair of Management Board Secretariat].... They are dated February 18, 2004 and February 23, 2004 and both deal with the environmental assessment issue. Record 5 (on pages 9-11) identifies various options related to the environmental assessment issue. Record 6 outlines and discusses the pros and cons of the various options in greater detail.

It is clear from page 11 of Record 5 and from the entirety of Record 6 that the options related to the environmental assessment issue identified and discussed in these Records were intended to be and were the subject of consultations among ministers relating to this decision. Accordingly, ORC submits that these Records are entitled to protection pursuant to section 12(1)(e).

The ORC then acknowledges that, in interpreting section 12(1)(e) in the past, previous orders of this office have held that section 12(1)(e) is not applicable to either records that have already been presented to and dealt with by the Executive Committee (the ORC refers to Orders 22 and 40) or records that have been, but are no longer, the subject of consultations among ministers (the ORC states that this line of cases are more relevant in these circumstances, and refers to Order P-1182).

The ORC then submits that the approach taken to the interpretation this section ought to be reconsidered, and submits as follows:

The decisions in these Orders are based on the fact that section 12(1)(e) applies to records that "are" the subject of consultations among ministers. Accordingly, Order P-1182 has held that the use of the present tense "are" means that section 12(1)(e) does not apply to records that have been but are no longer the subject of consultations among ministers.

In [the] ORC's submission, the intended result of the use of "are" in section 12(1)(e) is unclear with the result that the intended effect of section 12(1)(e) is, in this respect, ambiguous. The use of "are" could potentially indicate that, in order for that exemption to apply, the relevant consultations among ministers "are" ongoing at the time of the request (as the previous Orders have held). But, equally, the use of "are" could mean that it is necessary that the consultations "are" ongoing at the time the record was prepared in order for section 12(1)(e) to be available. Given this ambiguity, ORC respectfully requests that the Commissioner reconsider the interpretation given to section 12(1)(e) in previous Orders which ORC submits is inconsistent with the principles of statutory interpretation established and repeatedly reaffirmed by the Supreme Court of Canada, given the ambiguity in section 12(1)(e) itself and the clear and significant difference between section 12(1)(e) and section 12(1)(c). Neither of these factors appears to have been considered in the previous Orders dealing with section 12(1)(e).

The ORC then submits the following regarding its view of how this section ought to be interpreted:

On the issue of statutory interpretation, it is well established that, today, there is only one principle or approach to statutory interpretation. As the Supreme Court of Canada has repeatedly stated and confirmed, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of the enacting legislature: see *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26; and *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62 at para. 9. As the Supreme Court has pointed out, this means that statutory interpretation cannot be founded on the words of the relevant statutory provision alone. Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. Thus, the context within which any statutory provision is found must be fully considered: see, most recently, *Montreal (City) v. 2952-1366 Quebec Inc.*, supra at para. 9-12.

For present purposes, this means that the meaning of section 12(1)(e) and, in particular, whether it applies only to records that concern matters that are currently the subject of consultations among ministers or whether it applies equally to records that concern matters that have in the past been the subject of such consultations that were ongoing at the time the records were created, must be determined taking into account the context within which section 12(1)(e) is located.

In that connection, it is instructive to note the clear differences between section 12(1)(c) and section 12(1)(e) of the *Act*. Section 12(1)(c) deals with records that contain background explanations or analyses of certain kinds of problems submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions.

Section 12(1)(c) expressly states, however, that it provides an exemption for such records only "before those decisions are made and implemented". In connection with section 12(1)(c), therefore, the Legislature considered the period of time during which that exemption applied and limited it to the period of time until the relevant decisions were made and implemented.

There is, of course, no similar temporal limit found in the exemption contained in section 12(1)(e). In ORC's submission, if the Legislature had intended that section 12(1)(e) be subject to a temporal limitation of the kind found to exist in previous Orders, it would clearly have included such a provision in section 12(1)(e), given that it did so for section 12(1)(c).

The result reached in the previous Orders referred to above is to "read in" such a temporal restriction into section 12(1)(e), notwithstanding the clear difference between section 12(1)(e) and section 12(1)(c). Such a result is, it is submitted, inconsistent with the proper approach to statutory interpretation mandated by the Supreme Court of Canada.

Accordingly, it is ORC's submission that the result reached in the earlier Orders referred to above ought not to be applied here. It is further submitted that section 12(1)(e) in fact applies to records created while the relevant consultations among ministers were ongoing. Since that is the case in respect of Records 5 and 6 (both of which are dated in February, 2004 - before the decision to proceed [in a particular manner] was announced) ..., section 12(1)(e) is available and requires that Records 5 and 6 not be disclosed.

The appellant's representations do not directly address this argument from the ORC.

Analysis/Findings

In Order P-1182, former Assistant Commissioner Tom Mitchinson confirmed the approach taken by this office to the application of the exemption in section, and stated:

In Order 131, former Commissioner Sidney B. Linden held that in order to qualify for exemption under this subsection, the record itself must have been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; or,
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

In Orders 22 and 40, Commissioner Linden, in addressing the proper interpretation to be placed on the wording of section 12(1)(e), held that:

The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

In my view, the use of the word “are” in that portion of the section which discusses consultations among ministers also precludes the application of section 12(1)(e) to a record which has been, but is no longer, the subject of consultations among ministers.

The former Assistant Commissioner then applied this approach to the records at issue in that appeal.

In Order P-1205, Former Assistant Commissioner Mitchinson again considered whether records, which in that appeal consisted of draft and final versions of an “Information Sheet” which accompanied draft regulations being considered by the Legislation Committee of Cabinet, were exempt under section 12(1)(e). The former Assistant Commissioner re-stated the requirements for this section as set out in Orders 22, 40 and 131, and found that the records did not qualify for exemption under section 12(1)(e), because “these records have either already been presented to and dealt with by Cabinet or are no longer the subject of ongoing consultations among Ministers.”

However, the Assistant Commissioner went on to determine that portions of the records qualified for exemption under the introductory wording of section 12(1), as their disclosure would reveal the contents of records which qualified for exemption under the introductory wording of that section. On that basis, he found that the records were properly exempt pursuant to the introductory wording of section 12(1) of the *Act*.

I choose to apply the approach to the section 12(1)(e) exemption established by the former Assistant Commissioner for the purposes of this appeal.

The thrust of the ORC's position is that, as the wording of section 12(1)(c) specifically includes a temporal limit, and the wording of section 12(1)(e) does not, the ORC argues that, based on the principle that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of the enacting legislature, that section ought not to be read as containing a temporal limit. However, on my review of this section, in light of the wording of section 12(1) as a whole, and in keeping with previous orders of this office, I do not accept the position taken by the ORC.

Section 1 of the *Act* sets out the purposes of the *Act*, which includes: to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific,

In addition, in the context of this discussion, I find it helpful to review all of section 12(1) to place the various subsections referred to in context. Section 12(1) reads:

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

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

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

In my view, the specific records described in sections 12(1)(b) and (c), and the relationship between sections 12(1)(b) and (c), make them distinct from the records described in section 12(1)(e). Sections 12(1)(b) and (c) apply to actual records submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions. Furthermore, those sections state that the policy options or recommendations are exempt and remain exempt after a decision is made (section 12(1)(b)), but that the background explanations or analyses of problems, although exempt before those decisions are made and implemented, are not exempt after that event occurs. In my view, it is significant that these sections apply directly to the actual records submitted, or prepared for submission, to the Executive Council or its committees. The section 12(1)(e) exemption describes a different type of record from the type of record identified in section 12(1)(b) and (c).

The exemption in section 12(1)(e) specifically refers to a record “prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers ...”. This type of record is, by its nature, prepared in advance of the meetings referred to in section 12(1)(e). The premature disclosure of these sorts of records, although not necessarily caught by the introductory wording of section 12(1), would result in the disclosure of information before or proposed to be brought before Executive Council or its committees. In my view this is precisely the reason why subsection 12(1)(e) included these specific types of records within section 12(1). However, once a record has been presented to and dealt with by the Executive Council or its committees, it may or may not fall within the introductory wording of section 12(1). The necessity for the prospective language found in subsection 12(1)(e) is no longer required. Accordingly, the outcome of interpreting section 12(1)(e) in the manner in which it has been interpreted in previous orders is, in my view, consistent with a proper interpretation of this section read as a whole.

In particular, I find that the interpretation of section 12(1)(e) which has been applied in previous orders is one that accords with the modern rule of statutory interpretation as articulated by R. Sullivan in *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pp. 1 and 3:

... [I]n the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo and Rizzo Shoes Ltd.* [[1998] 1 S.C.R. 27 at 41].

...

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

(a) Plausibility or Compliance with Legislative Text

As identified by Senior Adjudicator John Higgins in his recent Order MO-2154, *Driedger* states (at p. 123) that to be a plausible interpretation it “must be one that the words of the text can reasonably bear.” In my view, for the reasons set out above identifying the context of section 12(1)(e) within section 12(1), the interpretation of section 12(1)(e) applied in previous orders as set out above is one that the words of the text can reasonably bear.

I also make this finding having regard to the specific wording of section 12(1)(e). In Order PO-1182 former Assistant Commissioner Mitchinson stated that the use of the present tense, namely the word “are” in that portion of the section which discusses consultations among ministers, precludes its application to a record which is no longer the subject of consultations among ministers. In my view, this approach appropriately interprets section 12(1)(e) to give meaning to the specific wording of that section and its inclusion of the word “are” in that portion of the section. It also distinguishes it from the wording in section 12(1)(b) and (c), which do not include that wording.

(b) Promotion of Legislative Intent

Section 1 of the *Act* provides some context for the interpretation of the language used in section 45(1)(c) and in the Regulations. Section 1 states:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 1 makes it clear that the intent of the Legislature in enacting the *Act* is that government information should be available to the public, subject only to limited and specific exemptions.

The interpretation of section 12(1)(e) advanced in previous orders clearly accords with the purpose of the *Act* that “necessary exemptions from the right of access should be limited and specific”. This is particularly evident given the overall wording of section 12(1) in which, as identified in previous orders, the various subsections of section 12(1) are merely types of records to which section 12(1) applies. In that regard, whether or not the various subsections (including subsection 12(1)(e)) apply, if the disclosure of a record would reveal the substance of deliberations of the Executive Council or its committees, the record is exempt under the introductory wording of section 12(1).

(c) Outcome must be Consistent with Legal Norms and Reasonable and Just

In the *Driedger* text quoted above, Ruth Sullivan discusses the meaning of “legal norms” and indicates, at p. 2, that “[t]heir primary source ... is the common law.” As well as conforming with such norms, the outcome must be reasonable and just.

In my view, the interpretation of section 12(1)(e) advanced in previous orders is not inconsistent with legal norms, and the outcome of such an interpretation is, in my view, reasonable and just. As identified above, the exemption in section 12(1)(e) specifically refers to a record which is, by its nature, prepared in advance of the meetings referred to in section 12(1)(e). The premature disclosure of these sorts of records would result in the disclosure of information before or proposed to be brought before Executive Council or its committees. However, once a record has been presented to and dealt with by the Executive Council or its committees, the introductory wording of section 12(1) may apply to it, if in fact the disclosure of the record would reveal the substance of deliberations of the Executive Council or its committees. Again, the result of interpreting section 12(1)(e) in a prospective manner (as done in previous orders) is, in my view, consistent with legal norms, reasonable and just.

As a result, in my view the approach to the section 12(1)(e) exemption taken in previous orders correctly states that the use of the present tense in the section precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

However, I must still determine whether portions of the records qualify for exemption under the introductory wording of section 12(1).

On my careful review of Records 5 and 6, I find that Record 5, and pages 1 through 6 of Record 6, contain what I would describe as background information regarding the subject matter of these records. Pages 7 through 12 of Record 6, however, contain specific comparisons and recommendations regarding the subject of Record 6.

I have found above that the introductory wording contained in section 12(1) applies to portions of Records 7, 8 and 22, based on the ORC's submissions that this information, if disclosed, would "reveal the substance of deliberations of the Executive Council or its committees". On the basis of the information provided by the ORC in support of the application of the introductory wording in section 12(1) to those records, I am also satisfied that the introductory wording of section 12(1) applies to pages 7 through 12 of Record 6, because the disclosure of those pages would also reveal "the substance of the deliberations of the Executive Council or its committees".

However, regarding the remaining pages of Record 6, and the information contained in Record 5, I have not been provided with sufficient evidence to establish that these portions would "reveal the substance of the deliberations of the Executive Council or its committees". These pages appear to be more in the nature of background and factual information relating to the issues, and the ORC has not provided sufficient evidence to satisfy me that these pages qualify for exemption under section 12(1).

Section 12(2)(b)

Section 12(2)(b) of the *Act* provides an exception to the section 12(1) exemption. It reads in part:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Previous orders of this Office have held that this provision does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at minimum, is that the head turn his or her mind to this issue: Orders P-334, P-894 and P-1146.

Moreover, if it is established that a head has exercised his or her discretion, under section 12(2)(b), to decide if Cabinet consent should be sought, this Office has held that it lacks authority under the statute to substitute its own discretion for that of the head. If, in the circumstances of a particular appeal, an adjudicator is satisfied that the head has made an error in the exercise of discretion under this section, by, for example, failing to consider relevant factors, the adjudicator may issue an order requiring the head to reconsider the exercise of discretion (See Orders P-1390, PO-1831).

In this appeal, the ORC states as follows with respect to the application of section 12(2)(b):

In preparing ORC's response to this request, ORC had consultations with various stakeholders and affected ministries, including Cabinet Office and Municipal Affairs and Housing, each of which received an identical request under the *Act*. ORC then considered whether consent should be sought from the Executive Council and determined that there is no reasonable basis for concluding that the Executive Council would consent to access being given to any of the Records to which section 12(1) applies. After weighing those consultations, ORC decided to withhold certain records under the *Act*.

Based on the representations of the ORC, which were also shared with the appellant, I am satisfied that the ORC has properly exercised its discretion under section 12(2)(b), and has considered relevant factors in doing so.

ADVICE OR RECOMMENDATIONS

Introduction

The ORC takes the position that many of the records or portions of records remaining at issue qualify for exemption under section 13(1) of the *Act*, which reads:

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

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

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084,

upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

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

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

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

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [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]

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

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

Representations

The ORC begins by indicating that, in its view, none of the exceptions contained in section 13(2) applies to any of the records in respect of which ORC relies on section 13(1). In addition, it states that section 13(3) has no application here since none of the records is more than 20 years old and none has been cited publicly by the head of ORC as the basis for making a decision or formulating a policy.

The ORC then states:

The issue, therefore, is whether each of the various Records in respect of which ORC relies on section 13(1) is a record "where the disclosure would reveal advice or recommendations" of a public servant, a person employed in the service of an institution or a consultant retained by an institution within the meaning of section 13(1).

There are two parts to section 13(1). First, the information must constitute "advice" or a "recommendation". Second, the advice or recommendation must come from a person of the type listed....

Thus, the relevant issue is whether the various Records in respect of which ORC relies on section 13(1) contain "advice" or "recommendations". ORC relies on section 13(1) in respect of Records 12 and 17-21 in their entirety and relies on that section in respect of parts of Records 1-5, 7-11, 13-16 and 22.

The ORC then refers to the decision of the Court of Appeal for Ontario in *Ontario (Ministry of Transportation)* (cited above) which recently considered section 13(1) and, in particular, the meaning of "advice" and "recommendations". It then refers to the discussion of those phrases as referenced in that case, and states:

At paragraph 28 of his reasons, Juriansz J.A. indicated that the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose and is reasonable. Then, at paragraph 29, he said:

In any event, the Commissioner's interpretation leaves room for "advice" and "recommendations" to have distinct meanings, though she did not draw one. A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It was unnecessary for her to draw a distinction between the two words to deal with the issues raised this case. [sic]

The ORC also identifies that a similar process was gone through by Justice Juriansz in *Ontario (Ministry of Northern Development and Mines)* (cited above) at paragraphs 7-12.

After reviewing the purpose of the exemption, as set out above, the ORC states:

In this case, the records in respect of which section 13(1) is relied on disclose the views, advice and recommendations of various stakeholders and affected ministries within the government as, collectively, a process was worked through leading up to the making of a decision concerning the level of environmental assessment. Initially, there were differing views and different recommendations as to the appropriate level of environmental assessment.... In the end, there was general agreement

It is, in ORC's submission, precisely the types of information in respect of which section 13(1) is relied on here that section 13(1) was intended for. The Records here in issue contain background and analysis which constitute the content of deliberations necessary for the "decision-making process" leading to the ultimate decision and detail the various, sometimes inconsistent, pieces of advice and recommendations as to the appropriate decision to be made coming from different quarters within the government. Such information is exactly what section 13(1) is intended to protect. Once a decision to choose one among several available options is made, it is in no one's interests that there be public disclosure of the fact that, prior to such decision being made, there may have been different recommendations put forward from different constituencies. If that were to happen, the reality is that such conflicting advice and recommendations would not be provided (or at least documented) with the result that the "free flow of advice" intended to be protected by section 13(1) would disappear. It is for these reasons that disclosure of records protected by section 13(1) is generally not desirable, even though section 13(1) is a discretionary exemption. It is for this reason that ORC has exercised its discretion against disclosure in respect of all those Records or parts of Records for which it relies on section 13(1). This is particularly the case given that the environmental assessment process in issue here is still in progress. Accordingly, it is entirely reasonable for ORC to decide not to disclose information that is protected by section 13(1) while that process is still alive.

Following these general representations on the application of section 13(1), the ORC provides specific representations on the application of the exemption to each of the records for which it is claimed, and they are set out below.

The appellant's representations on the application of the section 13(1) exemption highlight the purposive approach which it argues ought to be taken to the application of this exemption, and state that the exemption is not intended to apply to all communications between public servants. The appellant also challenges the ORC's position that it is in "no one's interest" to know how and why the ORC made particular decisions, and argues that the process of government decision-

making ought to be transparent. The appellant also takes issue with the ORC's position that the disclosure of "conflicting advice" would result in the disappearance of the "free flow of advice" in the context of the records at issue. In addition, the appellant challenges the ORC's statement that the categorization process is "still alive".

Findings

In Order PO-2084 former Assistant Commissioner Tom Mitchinson carefully set out the principles to follow in deciding whether information contained in records constituted "advice or recommendations" for the purpose of section 13(1) of the *Act*. He stated:

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

...

In Order PO-2028, referred to above, I had to determine whether the section 13(1) exemption applied to a similar record. Most of the record in that appeal had already been disclosed to the requester. The remaining portions consisted of two paragraphs under the heading "Potential Issues", and a number of listed "Funding Options", together with pros and cons for each option. In this appeal the Ministry submits that the potential issues listed in Records 37 and 42 qualify for exemption for the same reasons that were argued and rejected in Order PO-2028.

In Order PO-2028, I made the following findings:

The severances on pages 4 and 5 each consist of a paragraph listed under the heading "Potential Issues". The Ministry submits that they contain advice, and states:

With respect to the severed "Potential Issues", there is certainly an implied suggestion that these are matters which the decision-makers should take into consideration in reaching a decision on whether or not to approve the project for funding. The suggested course of action in this section is that the decision-makers should take the issues into account during the deliberative process.

I do not accept the Ministry's position on these two severances. In my view, these paragraphs simply draw matters of potential relevance to the attention of the decision-maker. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given.

Similarly, in this appeal, I find that the portions of Records 37 and 42 that refer to "potential issues" do not advise or recommend anything, and, for that reason, do not qualify for exemption under section 13(1).

In Order PO-2028, I also reviewed in some detail the approach this office has taken to the application of section 13(1) to "options". After reviewing a number of orders, I stated:

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

Applying this approach to the severed portions of pages 9 and 10, I find they do not contain "recommendations" or "advice". The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC does not extend to "recommending a particular course of action to be followed". In my view, the description of each option itself is "mere information". The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to "advise" the NOHFC in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The "pros and cons" description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a

particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

The next question is whether disclosure of these portions would allow one to accurately infer any advice given. When considered as a whole and in the context of the roles played by Ministry staff in providing support to the NOHFC and the Board of that organization as a decision-making body for Northern Ontario project funding, I find that disclosure of the "pros and cons" for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various "pros and cons" it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the "pros and cons" portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.

I take the same approach to the portions of Records 37 and 42 that identify options. I find that these options, including the pros and cons associated with each, do not constitute "advice or recommendations", nor would their disclosure allow one to accurately infer any such advice or recommendations. However, unlike the record at issue in Order PO-2028, Record 37 in this appeal includes a page that consists of a clearly stated recommendation, including conditions and processes. I am satisfied that this page of Record 37 contains a recommendation for the purpose of section 13, and qualifies for exemption under section 13(1).

I accept the approach taken in the above orders, and apply it in the context of this appeal. I will now review the specific records at issue and the specific submissions made by the ORC on the application of each record, to determine whether the record qualifies for exemption under section 13(1) of the *Act*.

Records 1 and 2

The ORC representations state that section 13(1) applies to the relevant portions of Records 1 and 2 because:

The portions of these Records in respect of which section 13(1) is relied on are substantially the same, modified only slightly because Record 1 was intended to be sent to the Management Board Secretariat and Record 2 was sent to the Ministry of Municipal Affairs and Housing.

The relevant portions of these Records set out the then current situation and they identify a number of recommendations by those at ORC and the reasons therefor. The word "recommends" is used several times in each Record.

Records 1 and 2 are similar copies of an email sent from an ORC employee. The portions of these records for which section 13(1) is claimed (which does not include the "background" information" discussed under scope of the appeal, above) contain information which clearly sets out a number of specific recommendations made by the ORC, and I find that these portions of Records 1 and 2 qualify for exemption under section 13(1).

Record 3

The ORC states:

Paragraphs 1 and 3 of this Record, in respect of which ORC relies on section 13(1), outline ORC's "position" (which, for the purposes of section 13(1) is in the nature of a "recommendation" in this context). Disclosure of these portions of Record 3 would, therefore, disclose or permit the drawing of accurate inferences as to the nature of the recommendations by ORC. Thus, section 13(1) is available in respect of these portions of this Record.

On my review of paragraph 1 of Record 3, which contains a list of the ORC's position set out in point form, I am satisfied that its disclosure would reveal the advice or recommendations provided by the ORC. The other portions of this record for which the exemption is claimed simply request that certain information be provided. Accordingly, I am not satisfied that they qualify for exemption under section 13(1).

Record 4

ORC submits that:

... if the first sentence of Record 4 is disclosed, along with other information in issue on this Appeal, accurate inferences as to the nature of ORC's advice and recommendations could easily be made. This sentence would have undoubtedly been written very differently if the final decision had [been different].

I accept the ORC's position that the disclosure of the first sentence of Record 4 would enable accurate inferences to be drawn regarding the nature of specific advice given by the ORC, and I find that the first sentence of Record 4 qualifies for exemption under section 13(1).

Record 5

The ORC submits:

Pages 9 and 10 of this [Record 5], in respect of which section 13(1) is relied on, set out advice and recommendations on the part of those at ORC concerning the type of environmental assessment required and their possible concerns about other potential options. The word "advised" is found on page 9 and page 10 and clearly constitutes ORC's recommended method of proceeding.

Accordingly, section 13(1) applies to these two pages of Record 5.

On my review of this record, I find that page 9 of the record contains information relating to advice and recommendations made by the ORC, and qualifies for exemption under section 13(1). However, page 10 of the record contains information which simply identifies a number of issues and options. In my view, this page does not contain advice or recommendations of the purpose of section 13(1).

In addition, I have not received representations concerning the application of the section 13(1) exemption to the remaining pages of this record, and I will order that it be disclosed.

Records 7 and 8 and 22

The ORC submits as follows concerning Records 7 and 8, and also Record 22:

The portions of Records 7 and 8 (which are identical) in respect of which section 13(1) is relied on are entitled to protection for the same reasons set out above in relation to the portion of Record 4 in respect of which section 13(1) is relied on.

I have found above that the highlighted portions of these records qualify for exemption under section 12(1) of the *Act*. With respect to the remaining portions of these records, I find that they do not qualify for exemption under section 13(1) of the *Act*. These portions of the records contain information which summarizes actions which have been taken, and in my view do not contain "advice or recommendations" for the purpose of section 13(1) of the *Act*. Accordingly these portions of records do not qualify for exemption under the *Act*.

Record 9

The ORC submits:

The various portions of this Record in respect of which section 13(1) is relied on contain information about various options concerning the environmental assessment process to be followed and the advice and recommendations in respect thereof provided from various quarters within the government at different times.

As such, the portions identified by ORC are entitled to protection under section 13(1).

The ORC takes the position that bullet points 2, 3, 4, 5, 10 and 11 in the “Background” section of this Record, and the second, third, fourth and fifth bullet points under the next section of this Record, qualify for exemption. On my review of those bullet points, I am satisfied that the disclosure of all of them, with the exception of bullet point 11 in the “background” section, qualify for exemption under section 13(1) of the *Act*. I am satisfied that their disclosure would either actually disclose advice or recommendations, or would permit one to accurately infer the advice or recommendations given. I make this finding notwithstanding that some of the bullet points in this record are listed under the “Background” section of the Record. In my view, the manner in which the information is described in these bullet points discloses or summarizes information which would reveal “advice or recommendations for the purpose of section 13(1).

In my view, bullet point 11 simply discloses factual background information, and does not qualify for exemption under section 13(1).

Record 10

The ORC states as follows with respect to this record:

This Record, in general, outlines the pros and cons of the various options being considered in respect of the environmental assessment issue. On page 5, it expressly includes a number of recommendations by ORC with the result that section 13(1) applies to this record.

On my review of this record, I am satisfied that much of it constitutes advice or recommendations for the purpose of section 13(1) of the *Act*. This record is a draft, and although it contains some information relating to various options being considered, in my view the nature of this information (in draft form) discloses certain advice, and its disclosure would reveal “advice or recommendations for the purpose of section 13(1)”. However, in my view the later portions of this record (from the bottom of page five to the end) simply identify background and factual information, and these portions of Record 10 do not qualify for exemption under section 13(1) of the *Act*.

Record 11

The ORC states:

ORC relies on section 13(1) for the large majority of this Record. ... It constitutes the comments of [an identified employee] of ORC on [a draft slide presentation] then being prepared. It is apparent that this draft presentation had been sent to [the employee] for his review and comment before it was finalized.

Each of [the employee's] eleven comments contains an express statement of what the presentation "should" contain or do. Each of these eleven comments is, therefore, clearly a "recommendation" concerning the content or format of the presentation then being prepared. Accordingly, section 13(1) applies to each of these eleven comments.

In addition, the final paragraph constitutes [the employee's] expression of his view that an action that would be "beneficial". It necessarily follows that he was "recommending" or "advising" that that action take place with the result that section 13(1) applies to that paragraph as well.

Based on the ORC's representations, and on my review of Record 11, I am satisfied that it contains advice or recommendations for the purpose of section 13(1) and qualifies for exemption under that section.

Record 12

The ORC states:

On page 2 of this Record, ... [an identified ORC employee], writing to the Management Board Secretariat, outlines the differences between [categories of] Environmental Assessment. It is clear from a review of page 2 that this Record was written consistent with the ongoing recommendation of ORC personnel Page 2, therefore, if disclosed, would permit the drawing of clear inferences with respect to the course of action being recommended by ORC: see Order PO-2400 where it was held that, in addition to explicit advice and recommendations in a record, the cumulative effect of information in a record can be to suggest that a course of action be followed with the result that section 13(1) can apply thereto.

The ORC also provides representations in support of its position that the other portions of this record qualify for exemption under section 13(1), as their disclosure would reveal information that constitutes "advice" as to how a particular process should unfold.

Based on the ORC's representations, and on my review of Record 12, I am satisfied that it contains advice or recommendations for the purpose of section 13(1) and qualifies for exemption under that section.

Records 13, 14, 15 and 16

The ORC states:

These Records are different versions of the same record. Some contain more information than others. Record 16 contains all of the information contained in any of them. Accordingly, ORC's submissions will be directed to Record 16 but

they will apply equally, where the same information is contained therein, to Records 13, 14 and 15.

Record 16 (beginning at the top of page 2) reflects the advice and recommendations of various stakeholders with respect to the decisions to be made concerning the environmental assessment process as of late 2004 and early 2005. ... different recommendations and advice were received from different advisers. Three options were identified (see page 3), the relevant advantages and disadvantages, as identified by the various advisers are set out on page 4 and then, on page 5, the different recommendations of the various advisers are outlined, with reasons therefor.

This type of free-flow of advice and recommendations is precisely the type of information that section 13(1) was intended to protect. Accordingly, section 13(1) applies to protect the parts of Records 13, 14, 15 and 16 in respect of which ORC relies on that section.

I would note here that parts of Records 15 and 16 are also entitled to protection under section 19 of the *Act*. The appellant has not sought to appeal ORC's decisions based on section 19 with the result that those portions of these Records in respect of which the protection of section 19 has been claimed are not in issue in this appeal.

I accept that Records 13 through 16 are similar, and will make a determination on Record 16, as it contains the information which is also contained in Records 13 through 15. In addition, I accept that the portions of Record 16 for which the section 19 exemption is claimed is not at issue in this appeal.

Record 16 is a memo which contains information relating to the options discussed. It contains a summary of the background to the process, a summary of the position taken by a number of groups, a listing of the various options, a review of the advantages and disadvantages of the various options, and a conclusion, which contains various comments and recommendations relating to the options.

As identified above, in Order PO-2084 former Assistant Commissioner Tom Mitchinson reviewed the approach to take with respect to documents containing "options" including the pros and cons of the various options, as follows:

I take the same approach to the portions of Records 37 and 42 that identify options. I find that these options, including the pros and cons associated with each, do not constitute "advice or recommendations", nor would their disclosure allow one to accurately infer any such advice or recommendations. However, unlike the record at issue in Order PO-2028, Record 37 in this appeal includes a page that consists of a clearly stated recommendation, including conditions and

processes. I am satisfied that this page of Record 37 contains a recommendation for the purpose of section 13, and qualifies for exemption under section 13(1).

In Record 16, I find that the background portion on page 1 and a portion of page 2, the listing of the options on page 3 and the chart identifying the advantages and disadvantages of the options, set out on page 4, generally (with one exception) do not contain “advice or recommendations” for the purpose of section 13(1), nor would their disclosure reveal or allow one to accurately infer any advice or recommendations. There is one exception to this, contained on page 4 of Record 16, which identifies a particular preferred approach, and I find that this portion of page 4 does contain “advice” for the purpose of section 13(1).

In addition, I find that the listing of the positions of the various groups as set out on the chart on page 2, and the conclusion set out on page 5, do contain advice or recommendations for the purpose of section 13(1), and qualify for exemption under that section.

Record 17

The ORC states:

ORC relies on section 13(1) in respect of page 3 of this Record, which constitutes the handwritten notes of, it is believed, [an identified employee] of ORC detailing his discussion with a senior official in the Premier's office. On page 3, there are a series of questions on which it is evident that [the employee] (and ORC) were being asked for advice by the Premier's office.

On my review of page 3 of Record 17, I accept that it details a series of questions for which the ORC employee is asked for advice; however, it does not contain that advice, nor would it, in my view, reveal any advice or recommendations given. Accordingly, I find that it does not qualify for exemption under section 13(1).

Record 18

The ORC states:

This Record is a chart showing the position (i.e. the advice or the recommendation) of each of the stated stakeholders in respect of the various issues listed that relate in one way or another to the environmental process. This record is, therefore, clearly entitled to protection under section 13(1).

On my review of Record 18, I accept that it contains the various positions taken by the various parties, and accordingly the disclosure of this record would reveal the advice or recommendations of these parties. As a result, Record 18 qualifies for exemption under section 13(1).

Record 19

The ORC states as follows with respect to Record 19:

This Record is a chart showing the time periods needed to complete the environmental assessment and planning process, with numerous interim dates for completion of various steps along the way, assuming that each of the three different possible options listed on the chart for how to proceed in respect of the environmental assessment is selected.

This chart, which was prepared by ORC, constitutes ORC's advice on that timing issue. It must be remembered that this chart was prepared in a particular context - when the decision about the approach towards environmental assessment was being considered. The amount of time each of the three options would take was a factor in that decision-making process. Thus, the information on this chart constitutes part of the advice and recommendations made by ORC in connection with that issue with the result that Record 19 is entitled to protection under section 13(1).

On my review of this record, I accept the position taken by the ORC that its disclosure would reveal the advice provided by the ORC timing issues, and it qualifies for exemption under section 13(1)

Records 20 and 21

The ORC submits as follows concerning the application of section 13(1) to Record 20 (and identifies that the same considerations apply to Record 21, which it identifies as a modified version of the chart in Record 20):

This Record ... sets out, in chart form, the various issues related to the three different possible approaches to the environmental assessment issue identified on the record. While the chart lists various advantages and disadvantages in respect of all three options, it is clear, from reading the chart as a whole, that [an identified option] is the recommended option: see Order PO-2400 supra. Accordingly, this chart which was prepared by ORC personnel constitutes, in chart form, the recommendation or advice of ORC personnel with respect to which of the three identified options should be followed. It follows that section 13(1) applies to this chart.

I have carefully reviewed Record 20 (as well as Record 21, which is similar to Record 20). These records consist of tables setting out an analysis of the various options discussed. Each of the considerations for the various options are analyzed and classified in the charts, and in my view the disclosure of these records would clearly disclose the advice or recommendations given. I find that these records qualify for exemption under section 13(1).

In summary, I find that the following records or portions of records qualify for exemption under section 13(1) of the *Act*:

- the portions of Records 1 and 2 for which section 13(1) is claimed,
- paragraph 1 of Record 3,
- the first sentence of Record 4,
- page 9 of Record 5,
- bullet points 2, 3, 4, 5 and 10 in the "Background" section of Record 9, and the second, third, fourth and fifth bullet points under the next section of Record 9,
- the first five pages of Record 10,
- portions of pages 2, 4, and 5 of Record 16,
- all of Records 11, 12, 18, 19, 20 and 21.

COMPELLING PUBLIC INTEREST

In its representations, the appellant takes the position that there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the section 13 exemption. As a result, the appellant argues that section 23 of the *Act* applies. That section states:

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

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

The appellant takes the position that the decisions made regarding the subject matter of the records are improper and flawed, and that it is in the public's interest to understand how and why the ORC came to make those decisions. The appellant also argues that there is a public interest in accessing the records to permit a more informed discussion on the issues and to allow the public to assess the ORC's process. The appellant also states that the public ought to have access to the documents in order to review the ORC's compliance with certain processes, and for the protection of the environment.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

"Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of

the relationship of the record to the *Act's* central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

I accept that there may exist a public interest in the subject matter reviewed in the records, although the information provided by the appellant on the public's interest in this matter is not particularly detailed. However, I am not satisfied that any public interest which may exist in the disclosure of those portions of the records which I have found to be exempt is sufficiently compelling.

The appellant's representations begin by referring to its position that the decisions made by the ORC regarding the subject matter of the records is improper and flawed. The appellant states that access to the records would permit the public to assess the ORC's process, the ORC's actions, and consequently protect the environment. However, the appellant fails to provide sufficient evidence to establish that there exists a compelling public interest in the disclosure of this information. Although the appellant's relatively brief representations identify why it is interested in reviewing these records, and its position concerning the ORC's actions, I am not persuaded that there exists a sufficiently compelling public interest in the disclosure of the portions of the records which I have found qualify for exemption.

Having found that a compelling public interest in the disclosure of the portions of the records which qualify for exemption does not exist, it is not necessary for me to determine whether the public interest clearly outweighs the purpose of the section 13(1) exemption.

ORDER:

1. I order the ORC to issue access decisions regarding those portions of records which the ORC has claimed are not responsive to the request. For greater certainty, I have highlighted in blue those portions which the ORC is to issue access decisions on, on the copies of those pages sent to the ORC along with this order.
2. I uphold the ORC's decision to deny access to the underlined portions of Records 7, 8, and 22, and pages 7 through 12 of Record 6, on the basis of the exemption in section 12(1). For greater certainty, I have highlighted in yellow the portions of Records 6, 7, 8

and 22 which are not to be disclosed on the copies of those pages sent to the ORC along with this order.

3. I uphold the ORC's decision to deny access to the following records or portions of records on the basis of the exemption in section 13(1): The portions of Records 1 and 2 for which section 13(1) is claimed, paragraph 1 of Record 3, the first sentence of Record 4, page 9 of Record 5, bullet points 2, 3, 4, 5 and 10 in the "Background" section of Record 9, and the second, third, fourth and fifth bullet points under the next section of Record 9, the first five pages of Record 10, portions of pages 2, 4, and 5 of Record 16, and all of Records 11, 12, 18, 19, 20 and 21. For greater certainty, I have highlighted in yellow the portions of Records 1, 2, 3, 4, 5, 9, 10 and 16 which are not to be disclosed on the copies of those pages sent to the ORC along with this order.
4. I order the ORC to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by April 2, 2007.
5. In order to verify compliance with this order, I reserve the right to require the ORC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 4.

Original signed by:
Frank DeVries
Adjudicator

March 2, 2007