Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4178

Appeal PA17-494

Ministry of the Environment, Conservation and Parks

August 20, 2021

Summary: The appellant, a public interest environmental law group, made a request to the Ministry of the Environment, Conservation and Parks for a copy of the risk assessment and resulting workbooks concerning its application for a review under the *Environmental Bill of Rights* with regard to the Ontario Regulation 903: Wells. Ultimately, the ministry issued an access decision granting partial access to the records it located and citing the discretionary exemptions at section 13(1) (advice or recommendations) and 19 (solicitor-client privilege) to withhold the remainder of the information. The appellant appealed and raised the issue of the public interest override to the information withheld under section 13(1). In this order, the adjudicator upholds the ministry's decision finding that the withheld information is exempt under sections 13(1) and 19 However, he also finds that there is a compelling public interest in disclosure of the information withheld under section 13(1) and orders the ministry to disclose this information.

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

Orders and Investigation Reports Considered: Orders P-474, P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), PO-1688, PO-1909, PO-2172 and PO-2557.

Cases Considered: *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

OVERVIEW:

[1] Subsequent to its application for review of Ontario Regulation 903: Wells, the appellant, a public interest environmental law group, made a request to the Ministry of the Environment and Climate Change, now the Ministry of the Environment, Conservation and Parks (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. The 2014 gap analysis/risk assessment prepared by ministry staff to identify and prioritize the 32 issues that were brought forward for consideration during the ministry's review of Regulation 903.

2. The completed surveys, questionnaires and workbooks prepared by ministry staff in relation to the Regulation 903 gaps/risks identified in the above-noted document and considered during the ministry's review of Regulation 903.

[2] After notification to third parties, the ministry issued a decision granting partial access to the responsive records, claiming the application of the mandatory exemption in section 21(1) (personal privacy), as well as the discretionary exemptions in section 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act.*

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC), raising the issues of the possible application of the public interest override in section 23, as well taking issue with the ministry's fee estimate.

[4] During the mediation of the appeal, the ministry provided an explanation for the fee estimate and maintained its position on its application of the exemptions. The appellant subsequently advised that it was no longer interested in appealing the fee issue, but wished to proceed to adjudication as to the claimed exemptions under sections 13(1) and 19 of the *Act.* The appellant also advised that it was not interested in appealing the ministry's application of section 21(1). As a result, pages 48, 461 and 642 of the records are no longer at issue. Lastly, the appellant advised the mediator that the possible application of the public interest override in section 23 was still at issue.

[5] As mediation did not resolve the appeal, it moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. The adjudicator originally assigned to the appeal sought representations from the ministry; however, the ministry did not provide representations at that time. The adjudicator then sought representations from the appellant, which were received and shared with the ministry. The ministry provided representations at this point, which in turn were shared with the appellant who provided a reply. The appeal was ultimately reassigned to me to continue with the adjudication of the appeal.

[6] In this order, I uphold the ministry's finding that the exemptions at sections 13(1) and section 19 of the *Act* apply. However, I also find that the public interest

override applies to the information found to be exempt under section 13(1) and order the ministry to disclose this information to the appellant.

RECORDS:

[7] The severed information appears within the 689 pages making up 24 responsive records.

[8] Records 1 and 2 contain the two severed excerpts where the ministry has claimed the application of section 19; the remainder of this information being disclosed.

[9] Records 3 to 24 contain the severed information that the ministry claims is exempt under section 13(1) with the remainder of the information being disclosed, except for information that was identified as personal information that was not at issue in this appeal.[1]

ISSUES:

A. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the records?

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

C. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to the records?

D. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[10] Both the ministry and the appellant provided a background to the request which I set out here.

[11] In 2013, the appellant submitted an application to the ministry for a review under the *Environmental Bill of Rights*, 1993 (the *EBR*) relating to Ontario Regulation

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[1] Records 4 to 24 consist of excerpts from the 12 workbooks. The ministry has divided the withheld parts of the 12 workbooks by sections or tables to total 21 records. For the purposes of this appeal, I accept the ministry's record identification.

903, Wells (the Regulation). On the application, the appellant indicated that the current wells framework is "incomplete, outdated, and inadequate to protect the environment and public health and safety," citing issues related to licensing, definitions, exemptions, consistency of requirements, and the need for additional requirements.

[12] The ministry notes that under section 67 of the *EBR*, following an application for review, the minister is required to decide whether to undertake a review and to give notice of the decision to the applicant. The ministry submits that in order to determine whether the public interest warrants a review, all 32 issues raised by the appellant were considered in accordance with the *EBR*. Ultimately, the ministry confirms that it advised the appellant that it would instead undertake a focused review of 24 issues. According to the ministry, the purpose of the focused review was to assess the selected issues raised by the appellant in Ontario's existing wells legislative and regulatory framework, and identify preliminary options for addressing key gaps, if required.

[13] The ministry submits that the review included participation from five divisions of the ministry, including a technical and policy working group experienced in delivering the wells program. The ministry submits that it engaged seven other ministries, twenty-two key stakeholder organizations, Source Protection Committee Chairpersons, the Ontario Drinking Water Advisory Council, First Nations organizations, the well industry and interested organizations to inform them of the review and seek their input on the issues under review.

[14] The ministry submits that its staff working groups conducted technical reviews of the 24 issues, recording their work in 12 workbooks, including such matters as experience or evidence of the issue by ministry staff, advice and recommendations on gaps if any, priorities and preliminary options to address any gaps.

[15] The ministry submits that it completed the review of the Regulation and related sections of the *Ontario Water Resources Act* (the *OWRA*) and advised the appellant of the results as required under the *EBR*. The ministry notes that the review found that there are opportunities to enhance Ontario's existing wells program through potential improvements to regulatory and non-regulatory components of the wells program for some of the issues raised by the appellant.

[16] The ministry notes that some program improvements were made but it did not move forward with proposing any amendments to the Regulation.

[17] The appellant provided an affidavit sworn by the executive director and counsel of the organization, a public interest law group that represents vulnerable communities in the courts and before tribunals on a wide variety of environment issues. In the affidavit the director states that the appellant made an original *EBR* application in 2003. However, the director submits that the ministry did not conduct the requested review of the Regulation. The director states that at the time, the ministry referred her organization's concern about insufficient well disinfection requirements to the Ontario Drinking Water Advisory Council (ODWAC) for consideration. The director notes that in its annual report filed with the Ontario Legislature, the independent Environmental

Commissioner of Ontario (the ECO) was highly critical of the ministry's refusal to revise the Regulation as requested by the appellant as illustrated in the following excerpt:

> The well regulation should require best construction practices, as recommended by Mr. Justice O'Connor. However, concerns have been raised (for example, through an EBR application ...) that the new well regulation, as currently drafted, does not meet those intentions, especially with respect to private domestic wells. For instance, there are concerns that the regulation does not require well constructors to verify, through water testing, that new wells have indeed been disinfected. Nor is there a requirement that well contractors disinfect private wells after carrying out repairs ...
>
> RECOMMENDATION 11: The ECO recommends that MOE ensure that key provisions of the Wells Regulation are clear and enforceable, and that the ministry provide a plain language guide to the regulation for well installers and other practitioners.[2]

[18] The director notes that in subsequent annual reports, the ECO has expressed concern about the ministry's "continuing failure to update and improve the 'severely flawed' Regulation 903, which 'endangers public health and impedes environmental protection.'" In the 2005/06 annual report, the ECO stated:

> The ECO is very disappointed that MOE has shown itself unable or unwilling to resolve widespread and well-founded concerns about a regulation that is so vital to Ontario's environmental protection and drinking water safety.[3]

[19] The director states that in light of the ministry's continuing inaction on disinfection and other significant issues, the appellant filed its second EBR application for review of the Regulation. The director states that when the ministry informed the appellant of the outcome of the review, it indicated that it would not pursue the various legislative and regulatory improvements identified in the application for review. The director states that the ministry's preference was to propose some minor changes to its non-binding guidance manual for water wells.

[20] The director indicates that it advised the ministry that the outcome was inadequate and non-responsive to the issues raised in the application and a meeting was scheduled to further discuss the matter. The director submits that it was at the meeting that the ministry revealed the existence of certain records (e.g. Regulation 903 gap analysis, workbooks, surveys etc). The director submits that the ministry initially

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[2] Environment Commissioner of Ontario 2003/04 annual report, page 115.
[3] Environment Commissioner of Ontario 2005/06 annual report, pages 53-54.

agreed to provide this information but ultimately provided only some of the requested records resulting in the access request which is the subject of this appeal.

Issue A: Does the discretionary exemption at section 13(1) of the *Act* apply to the records?

[21] As noted above, the ministry withheld portions of records 3 through 24 on the basis that they are exempt under section 13(1) of the *Act*. 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.

[22] 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.[4]

[23] "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.

[24] "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.[5]

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

[26] 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.[6]

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[4] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[5] See above at paras. 26 and 47.
[6] 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

[27] 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.[7]

[28] 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 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).[8]

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

- factual or background information[9]
- a supervisor's direction to staff on how to conduct an investigation[10]
- information prepared for public dissemination.[11]

Representations

[30] As noted, since the ministry did not provide representations when it was first asked, the appellant provided its representations first on each issue. These representations were in turn shared with the ministry who then provided its representations in reply.

[31] The appellant submits that even if the records contain advice or recommendations, the ministry has provided no evidence that the records were communicated directly from staff to the actual political decision-maker who holds the ultimate authority to determine whether the *OWRA* or the Regulation should be amended as requested by the appellant. It submits that at best the records constitute an internal compilation of technical staff's analysis of the Regulation but fall short of constituting advice or recommendations.

[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.

[7] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[8] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

[9] Order PO-3315.

[10] 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.).

[11] Order PO-2677.

[32] The appellant also submits that the exceptions to the exemption at section 13(2) may apply including: factual material; statistical surveys; environmental impact or similar records; reports or studies on the performance or efficiency of an institution's program or policy; and reports by an interdepartmental committee, task force or similar body formed to report on a particular topic.

[33] In its representations, the ministry submits that the records fall within the section 13(1) exemption as the contents reveal the substance of the advice, recommendations, or policy options provided by ministry staff. The ministry submits that disclosing this information would also permit the drawing of accurate inferences related to the advice and recommendations given.

[34] The ministry refers to *John Doe v. Ontario (Finance)*,[12] where the Supreme Court of Canada held that "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." The ministry submits that the Court held that interpreting the exemption so as to require disclosure of advice given by officials and the disclosure of confidential deliberations of the public service on policy options would erode government's ability to formulate and to justify its policies. The ministry also refers to Order PO-3480, where the adjudicator found that "the exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure."

[35] The ministry submits that the withheld information would disclose the ministry's deliberative process about whether to undertake a review in response to the application and then deciding the outcome of the scoped review. It submits that the withheld information contains the analysis and opinions of public servants on the identified matters as well as preliminary policy options and considerations identified by the public servants. The ministry submits that this advice of its staff was provided to the ministry staff responsible for the EBR application for review to inform the ministry's decisions on the application for review and the outcome of the focused review.

[36] The ministry submits that Record 3 is contained in an internal document which is marked as "draft and confidential." The ministry submits that this document captures comments made by ministry staff during the risk analysis sessions where each of the 32 issues raised by the appellant were discussed. The ministry submits that the part of this record withheld under section 13(1) consists of staff opinions and their evaluative analysis of the 32 issues. The ministry submits that the comments contained in this record consist of advice from ministry staff experienced in delivering the wells program to help guide the ministry's ultimate decision to undertake a focused review of 24 issues.

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[12] 2014 SCC 36.

[37] The ministry submits that for over a one-year period, ministry staff working in groups recorded their work in 12 workbooks which identified the 24 issues under review, team membership, context, jurisdictional and scientific scan information, identification of and preliminary options for any legislative/regulatory gaps, linkages to other issues, and references. The ministry submits that the parts of the workbooks withheld under section 13(1) in records 4 to 24 consist of advice specifically related to legislative/regulatory gaps, and recommended preliminary policy options to address any gaps. It submits that this advice was intended to inform the ministry's decisions on the outcome of the review, including potential legislative and/or regulatory gaps, if any, and preliminary options to address them, if required.

[38] The ministry submits that the review found that there are opportunities to enhance Ontario's existing wells program through potential improvements to regulatory and non-regulatory components of the wells program through potential improvements to regulatory and non-regulatory components of the wells program for some of the issues raised by the appellant in its application. The ministry submits that it made some program improvements but did not amend any legislation or regulation. The ministry submits that the advice contained in the workbooks was considered in the process of deciding on the outcome of the review and the outcome of the review was communicated to the appellant, as well as other stakeholders. However, the ministry submits that these workbooks were not finalized and approved by the ministry and the specific advice contained within them has not been publicly released. The ministry notes that some of the workbooks were shared with specific ministries on a confidential basis.

[39] The ministry submits that records 3 to 24 represent staff considerations and recommended preliminary options and constitute an evaluative analysis of aspects of the wells program as opposed to objective information. It submits that the information in the workbooks identifies multiple options for addressing the perceived "gaps," along with staff views on the acceptability of each of the options and their recommendations on potential considerations.

[40] The ministry submits that the exception for factual material at section 13(2)(a) does not apply to the records as they contain evaluative assessment and possible options and considerations by ministry staff. It submits that the records also do not fall in the other categories of records in section 13(2) that are excepted from exemption in section 13(1).

[41] The ministry submits that when exercising its discretion under section 13(1) its decision was governed by the principle that information should be made available to the public and that the application of the exemptions should be limited and specific. The ministry submits that it made the decision to release as much of the information as can be disclosed while reasonably balancing the harms of releasing information within the scope of the exemptions under section 13(1). The ministry submits that its decision is informed by the relevance of the information contained in the severed information to the ministry's current decision-making process.

[42] The ministry submits that the withheld information is sensitive as it is recent with

the timeframe between 2014 and 2016. The ministry also submits that some of these issues discussed in the records remain at issue among itself and some stakeholders. The ministry submits that the sensitivity of the topic is evident when reviewing the records. The ministry submits that its staff were being asked to critically analyze a regulatory program which they continue to administer and enforce. It submits that the since the advice remains in draft form without going through an approval process, it therefore represents the perspective and advice of the collective of public servants noted in the record. It submits that the advice was considered in determining the outcome of the review, and the outcome of the review is not necessarily the same as the advice contained in the records. The ministry submits that withholding the information from disclosure is essential to ensuring that candid advice can continue to be obtained in regulatory reviews such as this.

[43] In reply, the appellant submits that the ministry has conflated "advice/recommendations" with the existing regulatory gaps identified by staff when it refers to its staff's "evaluative analysis" or "risk analysis." The appellant submits that "analysis" per se does not necessarily constitute "advice" or "recommendations" within the meaning of the *Act* and that the ministry has not met its burden under section 53 to demonstrate that all essential elements of section 13(1) are applicable to the withheld information.

[44] The appellant submits that the ministry has not provided a factual basis upon which to infer any harm that will result from disclosure of the requested records.

Analysis and finding

[45] I have reviewed the withheld information and find that it contains advice or recommendations within the meaning of section 13(1).

[46] Record 3 (page 14 to 23 of the records) contains comments by ministry staff addressing each of the 32 issues raised by the appellant in its application. I find that the portions that the ministry severed consists of staff opinions and their evaluative analysis of the 32 issues. This finding is supported by the ministry submission that the staff involved are experienced in delivering the wells program to help guide the ministry's ultimate decision to undertake a focused review of 24 issues.

[47] The remainder of the information withheld under section 13(1) is found in records 4 to 24 and consists of withheld information from the 12 workbooks used by ministry staff over a one-year period. It is clear when reviewing the severed portions of these records that the ministry withheld information that consists of its staff's considerations and recommended preliminary options and constitute an evaluative analysis of aspects of the wells program as opposed to objective information. The severed information in the workbooks identifies multiple options for addressing the perceived "gaps," along with staff's views on the acceptability of each of the options and their recommendations on potential considerations. I find that this represents advice and recommendations and is exempt under section 13(1).

[48] The appellant submits that one or more of the exceptions found at section 13(2) may apply to the withheld information including: factual material (section 13(2)(a)); statistical surveys (13(2)(b)); environmental impact or similar records (13(2)(d)); reports or studies on the performance or efficiency of an institution's program or policy (13(2)(f)); and reports by an interdepartmental committee, task force or similar body formed to report on a particular topic (13(2)(j)). However, based on my review of the withheld information, I find that none of these exceptions applies. While the records contain some factual material, it is inextricably intertwined with the advice or recommendation and I find that section 13(2)(a) does not apply to it.

[49] Although I have found that this information is exempt under section 13(1), the appellant has claimed that the public interest override at section 23 applies in this appeal and I will discuss this issue next.

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

Section 23 states:

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

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

[51] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing 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.[13]

[52] A public interest does not exist where the interests being advanced are essentially private in nature.[14] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[15]

[53] The word "compelling" has been defined in previous orders as "rousing strong

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[13] Order P-984.
[14] Orders P-12, P-347, P-1439.
[15] Order MO-1564.

interest or attention."[16]

[54] Any public interest in *non*-disclosure that may exist also must be considered.[17] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[18]

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

- another public process or forum has been established to address public interest considerations[19]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[20]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[21]
- the records do not respond to the applicable public interest raised by appellant.[22]

[56] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[57] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[23]

Representations

The appellant's representations

[58] The appellant submits that even if the section 13(1) exemption is found to apply, the information should nevertheless be disclosed pursuant to the public interest override at section 23.

[59] The appellant submits that the two-part test for 23 is satisfied. First, there is a compelling public interest in disclosure of the records, particularly because they identify

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[16] Order P-984.
[17] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[18] Orders PO-2072-F, PO-2098-R and PO-3197.
[19] Orders P-123/124, P-391, M-539.
[20] Orders P-532, P-568.
[21] Order P-613.
[22] Orders MO-1994 and PO-2607.
[23] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

substantive problems under the Regulation that, according to the ministry's own technical staff, pose significant risks to environmental quality and public health and safety. The appellant submits that disclosure of the withheld information will serve the *Act*'s central purpose of shedding public light on the operations of the ministry, particularly its land and water policy branch. The appellant submits that enabling public scrutiny of the information contained in the records will assist Ontarians in expressing their opinions in relation to this provincially significant matter.

[60] Second, the appellant submits that the overwhelming public interest in disclosing the withheld information clearly outweighs the administrative purpose of the section 13(1) exemption, which is to facilitate free and frank discussions between public servants and governmental decision makers. The appellant submits that the desire to shield bureaucratic deliberations about regulatory issues does not trump the paramount objective of safeguarding Ontarian's health against risks known to ministry staff, but not publicly disclosed. The appellant submits that if it receives the withheld information, it intends to utilize and publicly disseminate the information as part of its ongoing efforts to improve and strengthen the Regulation, and to educate Ontarians about significant gaps in the regulation.

[61] The appellant refers to Order PO-2557 where the adjudicator found that a compelling public interest exists regarding the disclosure of records pertaining to water quality. The appellant submits that the same reasoning in that appeal should be applied in this instance and sets out the following from that order:

> I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in this appeal, because they also deal with the safety of public drinking water.

[62] The appellant submits that the withheld information clearly deals with well water quality, environmental risks and public health and safety under the *OWRA* and the *Regulation*, and therefore should be disclosed to ensure that the "maximum amount of information with respect to programs to deliver safe drinking water" is provided to Ontarians.

[63] The appellant submits that disclosure of the withheld information will shed considerable light on how (or on what basis) ministry staff decided to "scope" the EBR review and why it is refusing to implement long-overdue legislative and regulatory reforms to the regulation. The appellant submits that disclosure is necessary to achieve the governmental accountability objective of the EBR, as well as the public right of access to governmental records pursuant to the *Act*.

[64] The appellant also submits that disclosure of the withheld information would help address public health and safety concerns by alerting well owners about the substantive shortcomings in the Regulation identified by the ministry's own technical staff,

particularly in relation to well disinfection requirements. The appellant submits that armed with this information, well owners can then determine if they need to take further or better steps to protect themselves from well-related risks to human health or the environment.

[65] In the affidavit provided by the appellant from its executive director and counsel, the director states that for decades the appellant has advocated the timely implementation of effective laws, regulations and policies to protect drinking water sources within Ontario and across Canada. The director states that she and another lawyer in their organization were co-counsel for the Concerned Walkerton Citizens at parts one and two of the Walkerton Inquiry. The director also states that the appellant has a lengthy history of involvement in the development of *Ontario's Safe Drinking Water Act*, 2002, *Nutrient Management Act*, 2002, and *Clean Water Act*, 2006, including the numerous regulations, policies, manuals and guidelines under these provincial laws.

[66] The director states that the appellant's organization water-related work has identified the need to improve and strengthen the Regulation. The director states that the Regulation, administered by the ministry, is intended to protect the environment and public health by establishing provincial standards for the drilling, construction, cleaning, maintenance, and decommissioning of wells throughout Ontario. The director submits that millions of Ontarians who use or rely upon domestic wells for drinking water and these private wells are not covered by the source protection plans approved under the *Clean Water Act* to safeguard municipal water supplies. The director states that the Regulation is therefore the only line of regulatory defence for Ontarians who are wholly dependent upon private wells for potable water.

[67] The director notes that the application for review raised serious environmental and public health concerns about the ongoing inadequacy of key provisions of the *OWRA* and the Regulation, thereby posing considerable risks to the numerous Ontarians who used domestic wells. The director states that upon completion of the ministry's review, it informed the appellant that it would not pursue the various legislative and regulatory improvements identified in the application. The director states that the ministry's general preference was to merely propose some minor changes to the ministry's non-binding guidance manual for water wells.

The ministry's representations

[68] The ministry submits that, in the circumstances of this appeal, there is no public interest that clearly outweighs the purpose of the section 13(1) exemption. It submits that the withheld information reflects the opinions and advice of ministry staff including technical, policy, operational and field staff. Referring to the workbooks, the ministry submits that their purpose was to solicit candid opinions and advice from staff regarding potential gaps between what the regulatory regime provides and what is needed from the regulatory regime and potential solutions.

[69] The ministry reiterates that the advice in the withheld information remained in draft form as it did not go through an approval process. It submits that it therefore

represents the perspective and advice of the collective of public servants noted in the record. The ministry submits that the policy branch responsible for the Wells EBR Review together with senior management in the ministry used this advice to develop a recommendation to the minister on the ministry's response to the Wells EBR Review. It submits that the outcome of the Wells EBR Review on a particular issue is not necessarily the same as the advice contained in these records, which was considered, and as with any policy and program development, there were different perspectives and considerations that needed to be weighed in developing the outcome of the Wells EBR Review.

[70] The ministry submits that it is imperative that staff have space to critically consider the issues and to provide full and frank advice and not simply advice that they think will be well received. It submits that protecting records such as these, which have as their purpose soliciting such advice from front-line staff, is essential to ensuring that candid advice can continue to be obtained.

[71] In its reply to the ministry's representations, the appellant reiterates that the information identifies substantive problems under the Regulation that, according to the ministry's own technical staff, pose significant risks to environmental quality and public health and safety.

Analysis and findings

[72] I have considered the representations of the parties and have reviewed the records at issue. In my view, and for the following reasons, I find that there is a compelling public interest in the disclosure of the withheld information in these records that outweighs the purpose of the exemption at section 13(1).

[73] As noted above, in considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government.

[74] The information at issue in Record 3 captures comments made by ministry staff during their risk analysis sessions concerning the 32 issues raised by the appellant in its EBR application. As noted by the ministry, the parts of this record that were withheld under section 13(1) consist of staff opinions and the evaluative analysis of the 32 issues and contains advice from ministry staff, experienced in delivering the wells program, to help guide the ministry's ultimate decision to undertake a focused review of 24 of the 32 issues.

[75] The remainder of the information withheld under section 13(1) (records 4 to 24) consists of the withheld information from 12 workbooks used by ministry staff over a period of time where they recorded their work concerning the technical review of the 24 issues identified to be reviewed. As noted by the ministry, each of the 12 workbooks identified the issues under review, team membership, context, jurisdictional and scientific scan information, identification of and options for any legislative/regulatory

gaps, linkages to other issues and references. The parts of the information that the ministry withheld consist of advice or recommendations specifically related to legislative/regulatory gaps and policy options to address them.

[76] The appellant's EBR application identified what it viewed as 32 deficiencies in the Regulation and the records represent the ministry staff's review. Despite the ministry's submission that the advice remained in draft form without going through an approval process, it also submits that its policy branch, responsible for the EBR review, together with senior management, used this advice to develop a recommendation to the ministry on the response to the EBR review. I note the ministry's submission that it made some program improvements but did not amend any legislation or regulation following its review. I find that disclosure of the withheld information would serve the central purpose of shedding light on the operations of government because the ministry used this advice to develop its response to the EBR review.

[77] As noted by the appellant, the adjudicator in Order PO-2557 considered whether section 23 applied to records relating to the treatment of water in Wiarton, Ontario. The adjudicator states:

> … In May 2000, the drinking water system in the town of Walkerton became contaminated with deadly bacteria. Seven people died, and more than 2,300 became ill. The Ontario government subsequently appointed the Honourable Justice Dennis O'Connor to lead a Commission of Inquiry into the circumstances that led to the tragedy in Walkerton and to make recommendations with respect to the safety of public drinking water in Ontario.
>
> After conducting his inquiry, Justice O'Connor released two reports that were widely praised and that led to the strengthening of the statutory regime governing public drinking water in Ontario. In the second part of his report, he emphasized the importance of transparency and providing citizens with access to information relating to the safety of public drinking water:
>
> > … because of the importance of the safety of drinking water to the public at large, the public should be granted external access to information and data about the operation and oversight of the drinking water system. In my view, as a general rule, all elements in the program to deliver safe drinking water should be transparent and open to public scrutiny.
>
> In short, I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in

this appeal, because they also deal with the safety of public drinking water.

[78] In another order of the IPC, Order PO-2172, the adjudicator considered the environmental and health and safety issues relating to the practice of underwater logging, in applying section 23 in the circumstances of that appeal. He wrote:

> A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues. In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:
>
> > … I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
> >
> > I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. …
>
> In Order PO-1688, the adjudicator dealt with an appeal involving certain records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In concluding that there is a compelling public interest in the disclosure of the records under section 23 of the *Act*, he stated:
>
> > The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing

> the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.
>
> …
>
> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added in original]

[79] In considering the case law, I agree that records that relate to the environment and specifically water safety, by their very nature, raise a public safety concern. Further, when considering the maximum disclosure principle established by the Walkerton Inquiry, the representations of the appellant and the substance of the records themselves, I find that there is a compelling public interest in the disclosure of the withheld information to the appellant.

[80] In making this finding, I also considered whether there is any public interest in non-disclosure of the information. In its representations against a compelling public interest, the ministry did not specifically address this issue and I find that there is no public interest in non-disclosure of this information.

Purpose of the exemption

[81] I have found that there is a compelling public interest in disclosure of the records at issue However, for section 23 to apply, it must also be shown that this compelling public interest outweighs the purpose of the exemption that has been claimed.

[82] Despite my finding that the exemption at section 13(1) applies to the information at issue, in the circumstances of this appeal, I find that the compelling public interest outweighs the purpose of the exemption. 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.[24] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 13(1) serves to limit disclosure of advice or recommendations of public servants

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

in this context. However, in my view, the information withheld under section 13(1) is clearly of considerable interest to the residents of Ontario and the Regulation has significant implications on the environment and the health and safety of a great number of Ontario residents. The appellant has indicated that if it receives the withheld information, it intends to utilize and publicly disseminate the information as part of its ongoing efforts to improve and strengthen the Regulation, and to educate Ontarians about significant gaps in the regulation. In my view, in the circumstances of this appeal, the public interest considerations in disclosure outweighs the purpose of the section 13(1) exemption.

[83] Therefore, I find that the circumstances of this appeal, the compelling public interest in disclosure of the information withheld under section 13(1) outweighs the purpose of the section 13(1) exemption. Accordingly, I will order that this information be disclosed to the appellant.

Issue C: Does the discretionary exemption at section 19 (solicitor-client privilege) apply to the records?

[84] The ministry has severed two excerpts of information in records 1 and 2 where it has claimed solicitor-client privilege under section 19(a) of the *Act*.

[85] Section 19 of the *Act* states in part:

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

[86] Section 19 contains two branches. Branch 1, found in section 19(a) ("subject to solicitor-client privilege"), is based on the common law. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the ministry claims the application of solicitor-client communication privilege.

[87] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[25] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[26] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at

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[25] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.[27]

Representations

[88] The appellant submits that even if the information was confidential, it does not necessarily follow that it is privileged and notes the distinction between legal advice and legal information. It submits that to the extent that the records contain general legal information provided by counsel, it would fall outside the scope of the section 19(a) exemption.

[89] In the alternative, the appellant submits that any privilege was implicitly waived when ministry staff not only informed the appellant of the existence of the records but also initially agreed to provide the records to the appellant. The appellant submits that in these circumstances, it would be unconscionable to allow the ministry to subsequently invoke the section 19(a) exemption.

[90] In its representations, the ministry submits that the confidentiality of the solicitor-client privilege is to be maintained as found in numerous IPC orders and judicial review decisions which provide that the purpose of the privilege is to ensure that a client "may confide in his or her lawyer on a legal matter without reservation." The ministry refers to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[28] where the Supreme Court of Canada upheld solicitor-client privilege as an exemption that is as close to absolute as possible.

[91] The ministry submits that if the information withheld under section 19 were disclosed, it would reveal the substance of legal advice provided by its legal counsel and that the core of the privilege is engaged in this case. The ministry submits that it therefore exercised its discretion to withhold these records pursuant to section 19 to maintain confidentiality of these internal communications and to protect the high public interest in maintaining the confidentiality of the solicitor-client relationship.

[92] In reply, the appellant notes that section 53 of the *Act* places the onus on the ministry to demonstrate that all essential elements of the subsection 19(a) exemption are applicable to the communications (if any) between Crown counsel and ministry staff. The appellant submits that this onus has not been discharged adequately or at all since the ministry concedes, in its representations, that the withheld information (in records 1 and 2) was prepared by technical staff, not by counsel in a confidential manner and intended to provide professional legal advice. The appellant submits that the ministry has presented no valid reasons to withhold the information, and because there is no factual basis upon which to infer that harm will result from disclosure, the information should be disclosed.

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[27] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[28] [2010] 1 S.C.R 815.

Analysis and finding

[93] I have reviewed the excerpts in records 1 and 2 that the ministry withheld under section 19, and find that the exemption applies to this information.

[94] As set out above, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[29] I find that the information in the records claimed to be subject to section 19 falls within the scope of the exemption because disclosure of this information would reveal the nature of confidential communications provided in the context of a solicitor-client relationship or reveal the substance of the confidential communication or legal opinion provided.

[95] Following my review of the excerpts in records 1 and 2, I find that this information qualifies for exemption under Branch 1, solicitor-client communication privilege. The appellant notes that the withheld information was prepared by technical staff and not by legal counsel. While it is true that the withheld information consists of communications of ministry staff and not counsel, the communications convey or refer to legal advice provided by the ministry's legal counsel in each of the two excerpts. It is clear when reviewing this information that disclosure would reveal the substance of legal advice provided by the ministry's legal counsel which is contained in internal ministry communications. Consequently, the withheld portions of these records qualify for exemption under section 19(a).

[96] Further, I find that there is no evidence of waiver of this information by the ministry. Despite the appellant's argument that the ministry waived any privilege when it informed it of the existence of the records and initially agreed to provide them, it has provided no authority to support this argument and I find that the ministry's initial position on disclosure is not sufficient to waive the privilege.

[97] As a result, I find that the withheld information in records 1 and 2 is exempt under section 19, subject to my finding on the ministry's exercise of discretion below.

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

[98] The section 19(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[99] In addition, the Commissioner may find that the institution erred in exercising its

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[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

discretion where, for example,

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

[100] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] This office may not, however, substitute its own discretion for that of the institution.[31]

[101] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[32]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

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[30] Order MO-1573.
[31] Section 54(2).
[32] Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

Representations

[102] The ministry submits that it exercised its discretion to withhold the information under section 19 to respect the confidentiality of the solicitor-client privilege. It submits that the rationale for solicitor-client privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

[103] The ministry notes that the information that has been withheld under section 19(a), if disclosed, would reveal the substance of legal advice provided by its legal counsel. Thus, it submits, the core of the privilege is engaged in this case. The ministry submits that it has therefore exercised its discretion to withhold this information pursuant to section 19 of the *Act* to maintain confidentiality of these internal communications and to maintain the confidentiality of the solicitor-client relationship.

[104] The appellant did not specifically address the ministry's exercise of discretion in its representations.

Finding

[105] I uphold the ministry's exercise of discretion to deny access to the two excerpts in records 1 and 2 on the basis of section 19(a) of the *Act*. I am satisfied that the ministry did not err in exercising its discretion to withhold this information. I accept that considerations relevant to the ministry's exercise of discretion include the importance of maintaining solicitor-client privilege and the sensitivity to its recipients of information subject to legal privilege. I find that the ministry did not consider any irrelevant factors.

[106] In all the circumstances, I uphold the ministry's exercise of discretion with respect to the information that I have found to qualify for exemption under section 19(a) of the *Act*.

ORDER:

1. I uphold the ministry's decision that information in records 1 and 2 is exempt under section 19(a) of the *Act*.

2. I find that the public interest override in section 23 applies to the information in records 3 to 24 that the ministry withheld under section 13(1). Accordingly, I order the ministry to disclose this information to the appellant by **September 24, 2021**

3. In order to ensure compliance with paragraph 2, I reserve the right to require the ministry to send me a copy of the pages that I have ordered to be disclosed to the appellant.

Original signed by: August 20, 2021

Alec Fadel
Adjudicator