Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4225

Appeal PA20-00167

Ontario Energy Board

January 7, 2022

Summary: The appellant, an organization, filed an access request under the *Act* with the board for records relating to it, a specified regulation and a specified proposal. After locating responsive records, the board issued an access decision granting the appellant partial access, applying a variety of exemptions, including sections 12 (cabinet records), 13(1) (advice or recommendations), 17(1) (third party information) and 19 (solicitor-client privilege). The appellant appealed the board's decision to the IPC.

After an inquiry in which several affected parties were notified, the adjudicator partially upholds the board's decisions.

The adjudicator determined that: the mandatory exemption for Cabinet records applies to certain records; the mandatory exemption for third party information does not apply; and, the discretionary exemptions for advice and recommendations or solicitor-client privilege apply to much (but not all) of the information at issue. The adjudicator also upholds the board's exercise of discretion over the sections 13(1) and 19 claims and she accordingly upholds the board's decision to withhold exempt information.

As a result of these findings, the adjudicator orders the board to disclose the information for which she found that the claimed exemptions did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 12, 13(1), 17(1) and 19.

Orders Considered: Order 52.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *R. v. Campbell*, [1999] 1 S.C.R. 565 (SCC).

OVERVIEW:

[1] The appellant, an organization, filed an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ontario Energy Board (the board) for records relating to the appellant, an identified regulation and a specific proposal.

[2] After locating responsive records, the board issued an access decision to the appellant granting it partial access. The board advised the appellant that it applied the exemptions in sections 12 (Cabinet records), 13(1) (advice or recommendations), 14(1) (law enforcement), 17(1) (third party information) and 19 (solicitor-client privilege) of the *Act* to withhold some records. The board also advised the appellant that it withheld certain portions of the records because they were not responsive to the request. The board provided the appellant with an index of records that identified 221 responsive records and the exemption(s) claimed for each record.

[3] The appellant appealed the board's decision to the Office of the Information and Privacy Commissioner (IPC).

[4] A mediator was assigned to explore resolution with the parties. During mediation, the appellant identified a subset of the withheld records that it wished to continue to pursue access to. The board had not applied the exemption in section 14(1) to any of these records, nor did it identify any of these records as not responsive. Therefore, the responsiveness of the records and the application of section 14(1) are no longer at issue in this appeal.

[5] The board reviewed the records remaining at issue and disclosed some additional information to the appellant. The appellant confirmed its interest in obtaining full access to the remaining information.

[6] No further mediation was possible and the appeal was transferred to the adjudication stage.

[7] The adjudicator initially assigned to this appeal conducted a written inquiry by issuing a Notice of Inquiry to the board and several affected parties. The Ministry of Energy, Northern Development and Mines (the ministry) was notified and invited to make representations, including the possible application of the section 12 exemption for Cabinet records. Nine other affected parties were notified and invited to make representations regarding the application of the section 17(1) exemption for third party information.

[8] The board, the ministry and four other affected parties made representations in response to the Notice of Inquiry. One affected party opposed disclosure but did not make representations. The remaining affected parties did not respond.

[9] The appellant was invited to, and did, make representations in response to the issues in the Notice of Inquiry, the submissions made by the board, the ministry, and the non-confidential portions of the affected parties' representations who opposed disclosure.[1]

[10] The appeal was then transferred to me to conclude the inquiry.

[11] In this order, I fully uphold the board's claim that the mandatory exemption for Cabinet deliberations applies to the records for which it was claimed.

[12] Regarding the remaining records, I also find that the mandatory exemption for third party information does not apply.

[13] I also find that much of the information is exempt pursuant to the discretionary exemptions for advice and recommendations and solicitor-client privilege. After reviewing the board's exercise of discretion, I uphold the board's decision to withhold this information.

[14] Lastly, I order the board to disclose the information that I have found is not exempt under the *Act*.

RECORDS:

[15] The records consist of versions of regulations, inquiries from third parties made to the board, draft responses to those inquiries and internal emails. Using the record numbers assigned by the board, the following information is at issue:

- parts of records 61 and 84; and,
- the entirety of records 57-59, 63, 64, 70-75, 98-102, 118-122, 126-143, 145, 147, 166, 169-174, 183-192, 194, 196, 199, 209-212, 216, 218, and 221.

ISSUES:

A. Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the records?

[1] In accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

B. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?

C. Does the mandatory exemption at section 17(1) for third party information apply to the information at issue?

D. Does the discretionary solicitor-client privilege exemption at section 19 apply to the information at issue?

E. Did the board exercise its discretion under sections 13 or 19, as the case may be?

DISCUSSION:

Issue A: Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the records?

Overview of records and brief conclusion

[16] The board and the ministry argue that the exemption for Cabinet deliberations at section 12(1) applies to records 57-59, 63, 64 and 70-75. All of these records, except record 74, are draft regulations and I will refer to them collectively as the "draft regulations." Record 74 is an email that is generally related to the draft regulations.

[17] The appellant does not challenge the board and the ministry's application of section 12(1); however, it asks that I review and determine the board and the ministry's claims in case it is necessary to review the board and the ministry's alternative claims that sections 13 (advice and recommendations) and 19 (solicitor-client privilege) apply to the draft regulations and record 74.

[18] For the reasons below, I find that the section 12(1) applies to the draft regulations and record 74 and it is therefore not necessary to consider the alternative exemption claims nor, therefore, the appellant's arguments against them in relation to these records.

Section 12 in general

[19] Section 12 protects certain records relating to meetings of Cabinet or its committees. The parts of section 12 referred to by the board and/or the ministry are:

> (1) 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,

> [paragraphs (a) to (e) consist of a list of types of records.]
>
> (f) draft legislation or regulations.
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> …
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[20] Because of the introductory wording of section 12(1), any record that would reveal the substance of deliberations of the Cabinet (referred to as the Executive Council in the Act) or its committees qualifies for exemption, not just the types of records listed in paragraphs (a) to (f).[2] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.[3]

[21] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.[4]

[22] The head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record. However, the head must at least turn their mind to it.[5]

Representations

The board

[23] The board submits that all but record 74 are draft regulations on their face and that therefore section 12(1)(f) applies. Regarding record 74, it submits that it contains proposals on how or what to amend in certain regulations.

[24] The board explains that it did not seek Cabinet consent to disclose the draft regulations or record 74 because the board is separate and distinct from the government. It also states that its section 12 claims are alternative to its other claims.

---

[2] Orders P-22, P-1570 and PO-2320.
[3] Order PO-2320.
[4] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[5] Orders P-771, P-1146 and PO-2554.

The ministry

[25] The ministry provided additional context for the records, including confidential representations to explain certain Cabinet deliberations that occurred. The ministry explains that the draft regulations are the ministry's consultation drafts of a regulation to amend a particular regulation under the *Ontario Rebate for Electricity Consumers Act, 2016*, and that the drafts were shared with the board to facilitate necessary consultation.

[26] The ministry submits that other than record 74, all other records to which it claims that section 12(1) applies are, on their face, regulations and fit squarely within the scope of section 12(1)(f).

[27] The ministry's first and main argument is that section 12(1)(f) applies to all of the records, including record 74. The ministry states that section 12(1)(f) provides an unequivocal and clear exemption from disclosure for draft regulations and legislation, even when the drafts are not ultimately put before Cabinet, referring to Orders PO-1851-F, PO-2168 and PO-2186-F.

[28] The ministry explains that although the draft regulations were not presented to Cabinet for approval, they informed and were reflected in the content of the final amending regulation included in a specified Cabinet submission.

[29] Regarding record 74, the ministry explains that although it is not a draft regulation, it describes proposals being developed to amend three different specified regulations made under the *Ontario Energy Board Act, 1998*. It explains that the proposals provide an outline of the draft regulatory policy, a later form of which was eventually reflected in the respective final amending regulations included in specified Cabinet submissions.

[30] The ministry argues that section 12(1)(f) has been held to also apply to records that may reveal the content of such regulations or legislation, citing Orders PO-1663, PO-3006-I and PO-3675. The ministry explains that record 74 outlines the regulatory proposal and preliminary policy instructions on three amending regulations that were eventually put before Cabinet.

[31] The ministry submits that the contents of record 74 detail and reveal the major policy components that were being developed and drafted into the various regulation drafts. It submits that this is evident from reviewing the content of record 74 within the context of the draft regulations at issue in this appeal. To assist this analysis, the ministry provided specific confidential examples that, it says, connect the content of record 74 to the various draft regulations.

[32] Alternatively, the ministry submits that the draft regulations and record 74 are

exempt under the introductory wording of section 12(1) because their disclosure would reveal the substance of Cabinet deliberations or would permit the drawing of accurate inferences about those deliberations.

[33] It explains that the most essential elements of the draft regulations and record 74 have been incorporated into or inform the corresponding and final amending regulations and submissions that were put to Cabinet for approval. To support its arguments, the ministry provided detailed confidential representations to connect the information at issue to the final version of the regulation or regulations, as the case may be.

[34] The ministry addresses section 12(2) and explains that although it was not consulted by the board about the possibility of obtaining Cabinet consent, it nevertheless would not have considered seeking such consent for the following reasons. First, the purpose of section 12(1) is to protect full and frank Cabinet deliberations. Second, there was no reasonable expectation that Cabinet would consent. Lastly, it says that there is a public interest in preserving confidentiality of these types of records outweighed any public interest in disclosure.

The appellant

[35] As noted, the appellant has not made any specific challenge to the board or ministry's claim that section 12(1) applies.

Analysis and finding

[36] I reviewed the draft regulations and record 74 within the context provided by the detailed representations and confidential information provided by the ministry. I find that the draft regulations and record 74 are exempt under the general wording of section 12(1) and also because of section 12(1)(f).

[37] The draft regulations are plainly and obviously draft regulations. I am also satisfied that these drafts led to an eventual version or versions of a regulation that was presented to Cabinet and that therefore disclosure could reveal the substance of Cabinet deliberations.

[38] I also find that disclosure the content of record 74 would reveal the substance of proposed regulations that led eventually to versions of regulations that were presented to Cabinet. The information contained in record 74 is highly detailed and a line can be drawn between the information contained in that record and eventual Cabinet deliberations.

[39] Although there was no requirement for the board or the ministry to seek consent of the Cabinet to disclose the information at issue, both parties have provided a rationale for why they did not. I am satisfied that they turned their mind to the issue.

[40] In sum, I uphold the board's decision to withhold records 57-59, 63, 64 and 70-75 on the basis of the mandatory exemption for Cabinet deliberations at section 12(1).

Issue B: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?

[41] The board argues that the discretionary exemption for advice or recommendations at section 13(1) of the *Act* applies to all but three of the records remaining at issue.[6]

[42] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. As stated by the Supreme Court of Canada in *John Doe v. Ontario (Finance)* (*John Doe*), this exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[7]

[43] 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.

[44] "Advice" and "recommendations" have distinct meanings. "Advice" has a broader meaning than "recommendations."

[45] "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[8] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[46] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[9]

---

[6] All but records 61, 218 and 221.
[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[8] See above at paras. 26 and 47.
[9] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993,

[47] Examples of the types of information that have been found not to qualify as advice or recommendations are:

- factual or background information,[10]
- a supervisor's direction to staff on how to conduct an investigation,[11] and
- information prepared for public dissemination.[12]

[48] 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(1). Relevant parts of sections 13(2) and (3) are:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> …
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[49] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[13] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[14]

Representations about section 13(1) in general

[50] The board refers at length to the Supreme Court of Canada decision, *John Doe*.[15] In particular, the board points to the following principles that it says were established by the Supreme Court in *John Doe*:

---

upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[10] Order PO-3315.

[11] 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.).

[12] Order PO-2677

[13] Order P-24.

[14] Order PO-2097.

[15] Cited above.

- disclosure of advice given by officials would erode the government's ability to formulate and justify its policies, referring to paragraph 44;

- that the exemption can apply even if there is no evidence that the records actually went to the final decision maker, referring to paragraph 49;

- that public servants may engage in writing any number of drafts and that all of the information in those earlier drafts informs the end result, referring to paragraph 50; and,

- to achieve the purpose of the exemption, "to provide for the full, free and frank participation of public servants or consultants in the deliberative process," section 13(1) must apply as of the time the record is prepared not when it is communicated, referring to paragraph 51.

[51] The board makes specific arguments in the context of groupings of records, which will be elaborated on below.

[52] The appellant argues that the board has applied section 13(1) in an overly-broad manner. It concedes that some of the information may be captured by the exemption, but it disputes that the exemption applies to entire contents of email correspondence, for example.

[53] The appellant submits that the board's application of section 13(1) (and section 19) should be scrutinized. The appellant says that the board "course corrected" during the mediation when it disclosed some of the records at issue and that its change in course illuminates, as I understand the argument, an inconsistency or arbitrariness with which the board has applied the exemptions.

[54] Further, the appellant refers to other board records that were disclosed to it in a separate access request that were, as I understand it, embarrassing to the board. The appellant argues that in the context of the present appeal, the board has a motivation to conceal additional embarrassing information and that it should not be permitted to shield itself from scrutiny by applying section 13(1) (or other exemptions claimed).

Analysis and findings

[55] In reaching the following conclusions, I have considered the records themselves, the parties' general arguments outlined above and the board's specific arguments about each record that I will describe in more detail below.

[56] If I find that information qualifies for exemption under section 13(1), I will consider whether the board properly exercised its discretion to decide to withhold the information at Issue E, below.

[57] If I find that information does not qualify for exemption, I will indicate whether the board has made any alternative claims that need to be considered. If no alternative claims have been made, I will order the board to disclose that information.

[58] The board has grouped the records into related bundles, which is how I have organized the following discussion. For clarity and ease of reference, I will refer to the bundles by the heading numbers assigned by the board in its representations.

Bundles involving draft responses to inquiries from third parties

Bundle 4 (records 98-101, 119, 169, 170, 211, 212 and 216)

[59] The board explains that Bundle 4 consists of drafts of a response to an inquiry from a third party regarding the application of legislation or regulations. The board says that its application of section 13(1) to these records is consistent with John Doe and the principles outlined above.

[60] It also submits that drafts prior to final versions are "advice or recommendations" because the contents of the drafts may be accepted or rejected by the decision maker. The board explains that the final version of the document was disclosed to the appellant (record 45[16]) and that therefore provision of the drafts would reveal the changes made to those drafts, which would reveal advice or recommendations made in arriving at that final version.

[61] I have reviewed the final version and compared it with each of the records in Bundle 4. In my view, all of these records qualify for exemption under section 13(1). They are, as indicated by the board, different drafts leading to the final version. Some of the drafts diverge more than others from the final version, and some contain commentary, opinions and advice of the board employees tasked with drafting or responding to the inquiry. It is also my view that the information at issue has a sufficient sensitivity that the word and phrase choices considered and ruled out (or ruled in) by the board could reveal advice and the deliberative process that qualifies it for the protection in section 13(1) as articulated by the Supreme Court of Canada in *John Doe*.

Bundle 5 (records 102, 129 and 130)

[62] The board explains that Bundle 5 consists of drafts of a response to be sent to a third party (Affected Party I) in response to an inquiry about the interpretation or application of legislation or regulations. It submits that these records are exempt under section 13(1) for the same reason as articulated above – that is, that drafts prior to a final version contain proposed responses to address an issue that may or may not be

[16] For clarity, record 45 was partially disclosed, withholding only the identity of a third party. Record 45 is not at issue in this appeal.

accepted and approved and are therefore advice or recommendations.

[63] Having reviewed them it is clear that the records are different versions of a response to Affected Party I's inquiry. Based on notations within them or the content itself, it is clear that two of the records are drafts. It is not clear whether the third is a draft or the final version or if there was a final version at all.

[64] However, it is my view that the information is not evaluative or advisory. It is responsive to the third party's inquiry about the application of the legislation or the regulation. Although there are slight variations across records 102, 129 and 130, in my view these variations are not evaluative and they could not therefore reveal advice or recommendations.

[65] I also considered the dates of the records in the index; however, this information does not provide any further relevant information to assist with understanding how disclosure of these records could reveal advice or recommendations. In summary, I do not have sufficient evidence before me to conclude that disclosure would reveal any deliberations or choices to be made in the development of the response to the inquiry.

[66] Although disclosure of drafts could reveal advice and recommendations, as I have found in relation to other records in this order, there must be a sufficient evidentiary basis for me to reach that conclusion. Under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the information at issue falls within one of the specified exemptions in the *Act* lies upon the institution.

[67] In my view, the board has not met its burden to establish what is evaluative or deliberative about the information at issue in Bundle 5 and it therefore cannot rely on section 13(1).

[68] The board also claims that portions of the records in Bundle 5 are exempt under the mandatory exemption at section 17(1) for third party information. I will consider this claim at Issue C, below.

Bundle 6 (records 118 and 120-122)

[69] The board explains that Bundle 6 consists of drafts of a letter issued by the board regarding the application of legislation or regulations. The board says that its application of section 13(1) to these records is consistent with the principles set out in *John Doe*.

[70] It also submits that drafts prior to final versions are "advice or recommendations" because the contents of the drafts may be accepted or rejected by the decision maker. The board explains that the final version of the document being drafted was disclosed to the appellant (record 31) and that therefore provision of the

drafts would reveal the changes made to those drafts, which would reveal advice or recommendations made in arriving at that final version.

[71] I have reviewed the final version and compared it with each of the records in Bundle 6. In my view, all of these records qualify for exemption under section 13(1). They are, as indicated by the board, different drafts leading to a final version. Some of the drafts diverge more than others from the final version, and some contain commentary, opinions and advice of the board employees tasked with drafting the letter.

[72] It is also my view that the information at issue has a sufficient sensitivity that the word and phrase choices considered and ruled out (or ruled in) by the board could reveal advice and the deliberative process that qualifies it for the protection in section 13(1) as articulated by the Supreme Court of Canada in *John Doe*. In two cases, there are additional comments from staff that are plainly evaluative analysis and information, which on its own falls squarely into the advice and recommendations exemption.

[73] The final version was distributed widely to a number of board stakeholders and I am satisfied that the word and phrase choices considered and ruled out (or ruled in) by the board's employees could reveal advice and parts of the deliberative process that qualifies for the protection in section 13(1) as articulated by the Supreme Court of Canada in *John Doe*.

Bundle 7 (records 126, 127 and 128)

[74] The board explains that Bundle 7 consists of records that are drafts of a response to be sent to third parties (Affected Parties C, F and G) in response to an inquiry about the interpretation or application of legislation or regulations. It submits that these records are exempt under section 13(1) for the same reasons as articulated above – that is, that drafts prior to a final version contain proposed responses to address an issue that may or may not be accepted and approved and are therefore advice or recommendations.

[75] Having reviewed them, I find that the records are different versions of responses to three separate third-party inquiries made by Affected Parties C, F and G. All three inquiries and their draft responses are contained in each of the records in this bundle.

[76] Based on a comparison of the content in the responses, I agree that they are drafts. Considering the difference between the drafts, including the word choices and the notations made by board staff within them, I find that disclosure of the portions of the records in Bundle 7 that contain draft responses would reveal advice of the board staff tasked with responding to the inquiries.

[77] However, I am unable to reach the same conclusion for the portions of the

records that contain only the inquiries made by the affected parties. Considering the content of the inquiries, disclosure of them without any draft responses (or final responses) would not reveal advice or recommendations of board staff.

[78] In sum, the board has established that portions of the records in Bundle 7 are exempt under section 13(1). I will consider the board's alternative claim that the other portions are exempt under the mandatory exemption at section 17(1) for third party information at Issue C, below.

Bundle 8 (records 131, 133, 134, 137, 140 and 141)

[79] The board says that the records in Bundle 8 consist of drafts of a response to an inquiry made by a third party (Affected Party B) regarding the interpretation or application of legislation or regulations. The board also explains that three of these records (131, 137 and 141) are duplicates of each other, which I have verified by my own review, although they have different dates (according to the board's Index).

[80] The board argues that these records are exempt under section 13(1) for the same reasons as articulated above – that is, that drafts prior to a final version contain proposed responses to address an issue that may or may not be accepted and approved and are therefore advice or recommendations.

[81] I have reviewed each of the records and make the following findings.

[82] Leaving aside the duplicates, the records are different versions of responses to an inquiry made by Affected Party B. Based on a comparison of the content of the different versions, I agree that they are drafts.

[83] Considering the differences between the drafts, including the word choices and the notations made by board staff within them – particularly in record 140 – I find that disclosure of the portions of the records in Bundle 8 that contain draft responses would reveal advice of the board staff tasked with responding to the inquiries.

[84] The records also contain a full version of the affected parties' inquiries. I am unable conclude that disclosure of the portions of the records that contain only the inquiries made by the affected parties would reveal advice or recommendations. Considering the content of the inquiries, disclosure could not provide any insight into advice or recommendations to be offered by the board.

[85] In sum, the board has established that portions of the records in Bundle 8 are exempt under section 13(1). I will consider the board's alternative claim that the remaining portions are exempt under the mandatory exemption at section 17(1) for third party information at Issue C, below.

[86] The board also claims that section 19 (solicitor-client privilege) applies to the

records in Bundle 8. However, I do not interpret the board's arguments in this regard to pertain to the information remaining at issue (i.e., the inquiries made from the affected parties), nor is there any reasonable basis to claim that section 19 applies. As a result, I will not consider the possible application of section 19 to the remaining information in Bundle 8.

Bundle 9 (records 132, 135, 138 and 173)

[87] The board explains that Bundle 9 consists of different versions of responses to be sent to third parties (Affected Parties A, D, and H) in response to inquiries about the interpretation or application of legislation or regulations. Each record contains all three inquiries and the various versions of response.

[88] The board submits that these records are exempt under section 13(1) for the same reasons as articulated above – that is, that drafts prior to a final version contain proposed responses to address an issue that may or may not be accepted and approved and are therefore advice or recommendations.

[89] I have reviewed each of the records, including the document dates in the board's index, and make the following findings.

[90] The different versions of responses from the board are drafts and include notations and, in some cases, commentary that is evaluative and revelatory of the deliberative process that occurred to respond to the inquiries. I find that these records contain advice and that section 13(1) applies to them. I am satisfied by comparing their content and considering the document dates contained in the index that these are all draft responses, the disclosure of which could reveal advice and parts of the deliberative process that qualifies for protection under section 13(1).

[91] However, I am unable to reach the same conclusion for the portions of the records that contain only the inquiries made by Affected Parties A, D and H. Considering the content of the inquiries, disclosure of them without any draft responses (or final responses) would not reveal advice or recommendations.

[92] In sum, the board has established that portions of the records in Bundle 9 are exempt under section 13(1). I will accordingly consider the board's alternative claim that the other portions are exempt under the mandatory exemption at section 17(1) for third party information at Issue C, below.

[93] The board also claims that section 19 (solicitor-client privilege) applies to the records in Bundle 9. However, I do not interpret the board's arguments in this regard to pertain to the information remaining at issue (i.e., the inquiries made by the affected parties), nor is there any reasonable basis to claim that section 19 applies. As a result, I will not consider the possible application of section 19 to the remaining information in

Bundle 9.

Bundle 10 (records 136 and 139)

[94] The board explains that Bundle 10 consists of emails between board staff including legal counsel involving the interpretation or application of legislation or regulations. Based on my review, the emails are about an inquiry received from a third party (Affected Party E), a complete copy of which is included in the records.

[95] The board submits that its application of section 13(1) to these records is consistent with *John Doe* and the principles outlined above and that the records are advice or recommendations because they contain material that relates to a suggested course of action that will be ultimately accepted or rejected by the person being advised.

[96] In my view, portions of the records in Bundle 10 reveal an email discussion among board staff about how the board interprets a particular regulation. The emails contain information and opinion and are evaluative in nature, such that they qualify for the section 13(1) protection.

[97] However, the original inquiry from Affected Party E, which appears in both records, may reasonably be severed from the emails and it contains no insight or information about advice or recommendations to be given by board staff. These portions do not qualify for the section 13(1) exemption.

[98] The board claims that the portions of the records involving the third party are covered by the exemption at sections 17(1) for third party information. I will consider this claim at Issue C, below.

[99] The board also made claims that section 19 applies to the email exchanges between board staff. Because these portions are exempt under section 13(1), I need not consider the alternative claim that section 19 applies to those portions.

Bundle 15 (records 166, 209 and 210)

[100] The board explains that the records in Bundle 15 consist of drafts of a response to be sent to a third party regarding the interpretation or application of legislation or regulations. Unlike some of the other bundles, there is no portion of these records that contains the original inquiry from the third party.

[101] The board argues that these records are exempt under section 13(1) for the same reasons as articulated above – that is, that drafts prior to a final version contain proposed responses to address an issue that may or may not be accepted and approved and are therefore advice or recommendations.

[102] Based on my review of them, I find that all three records consist of drafts and contain commentary and advice in the form of revised approaches, word choices or substantive content to be included in the response. Although I am not aware of whether there was a final version of the document being drafted, the content of the records in Bundle 15 is sufficiently evaluative on its own that I am able to conclude that section 13(1) applies to it.

Bundles involving drafts of responses to inquiries from the appellant

Bundle 13 (records 145, 184, 185, 187, 189 and 191) and Bundle 14 (records 147, 194, 196 and 199)

[103] Bundles 13 and 14 relate to inquiries from the appellant to the board (that are unrelated to the access request) and I will consider them together.

[104] The board explains that the records in Bundles 13 and 14 are drafts of, in the case of Bundle 13, a letter and, in the case of Bundle 14, a follow-up letter, sent to the appellant regarding the interpretation or application of legislation or regulations. The board submits that its application of section 13(1) to these records is consistent with John Doe and the principles outlined above.

[105] Like similar claims made, the board submits that drafts prior to final versions are "advice or recommendations" because the contents of the drafts may be accepted or rejected by the decision maker.

[106] The board explains that final versions of the documents were disclosed to the appellant (records 16 and 115) and that therefore disclosure of the drafts would reveal the changes made to those drafts prior to the finalization of the documents, which would reveal advice or recommendations made in arriving at that final version.

[107] Regarding record 115, which was disclosed by the board, it explains that although it bears a "draft" watermark, the content was the "exact same wording as the final letter."

[108] I have reviewed the final versions (i.e. records 16 and 115) and compared them with the corresponding related records in Bundles 13 and 14. In my view, all of these records qualify for exemption under section 13(1). They are, as indicated by the board, different drafts leading to final responses. Some of the drafts diverge more than others from the final versions, and some contain commentary, opinions and advice of the board employees tasked with drafting the particular letter. In my view, the information at issue has a sufficient sensitivity that the word and phrase choices considered and ruled out (or ruled in) by the board could reveal advice and the deliberative process that qualifies it for the protection in section 13(1) as articulated by the Supreme Court of Canada in *John Doe*.

[109] I find that all of the records in Bundles 13 and 14 qualify for exemption under section 13(1).

Bundles unrelated to external inquiries

Bundle 3 (record 84)

[110] Record 84 has been partially-disclosed. The board submits that the remaining withheld portion consists of the opinion of a board employee provided to another board employee about a possible outcome of an inquiry raised by the appellant (unrelated to the access request). The board says that the opinion offered may or may not have been followed by the ultimate decision maker and that for these reasons, the information is advice and recommendations within the meaning of section 13(1) and *John Doe*.

[111] Having reviewed the information, I agree that part of the withheld information consists of the opinion of a board employee and that this therefore qualifies as advice within the meaning of section 13(1). I am satisfied that in the context of the overall exchange and issues being discussed, the opinion offered falls within the realm of protection provided by section 13(1) over the full, free and frank participation of public servants in the deliberative process.

[112] The remaining portions of the email do not qualify for section 13(1) and because the board has not made any alternative arguments about this information, I will order that it be disclosed. I will indicate which portion in the highlighted copy of the records that I provide to the board with the order.

Bundle 11 (records 142, 218 and 221)

[113] The board claims that section 13(1) applies to part of Bundle 11 – record 142. It explains that record 142 is an email between board staff and that it consists of advice and recommendations because it contains material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.

[114] Based on my review, record 142 is an email chain consisting of a discussion among board staff. As is clear from the board's index, the email chain relates to a draft of a letter to be sent to the appellant.

[115] In my view, parts of the email chain consist of evaluative information disclosure of which would reveal the deliberative process leading to the final letter or response in general. The information at issue includes advice about approaches, tone and the content of the draft.

[116] The board also claims that the records in Bundle 11 are exempt under section 19 (solicitor-client privilege). At Issue D below, I will therefore consider whether section 19 applies to the information that I have determined section 13(1) does not apply to.

Bundle 12 (record 143)

[117] The board claims that section 13(1) applies to record 143 (the only record in Bundle 12). It explains that record 143 are emails between board staff and legal counsel about the possible effects of proposed legislation or regulations. It argues that its application of section 13(1) to this email is consistent with *John Doe* and the principles outlined above. It says that the emails contain advice and recommendations because it includes options for how to interpret the impact of a proposed regulation.

[118] Based on my review, record 143 is an email chain consisting of a discussion among board staff, including legal counsel. In my view, most (but not all) of the email chain consists of evaluative information, disclosure of which would reveal the deliberative process undertaken by the board's staff to respond to a recent announcement from the ministry. The information at issue includes information about what the announcement was and how the board should prepare for potential changes and it qualifies as advice.

[119] The board also claims that record 143 is exempt under section 19 (solicitor-client privilege). I will therefore consider whether section 19 applies to the information that I have determined section 13(1) does not apply to at Issue D, below.

Bundle 16 (records 171, 172 and 174)

[120] The board explains that the records in Bundle 16 are drafts of a note on a particular legal issue – a matter of interpretation under the relevant statute. The board argues that these records are exempt under section 13(1) for similar reasons as it has in relation to several of the records, including that its application of section 13(1) to these records is consistent with *John Doe* and the principles outlined above.

[121] Specifically, regarding the records in Bundle 16, it says that they contain advice and recommendations because they contain an answer, or represent a proposed response to address an issue, that may or may not be accepted and approved by the decision maker.

[122] Based on my review of the records in Bundle 16, I first observe that records 174 and 172 are duplicates of each other. Record 171 appears to be a less developed version of the others. I also observe the "note" is similar to a briefing note or a legal memorandum.

[123] Considering the content of the records in Bundle 16, I find that they contain information and analysis within the deliberative process about how to respond to a discrete development that has arisen because of a change to relevant legislation or regulations. In my view, all of the information qualifies for exemption under section 13(1).

Bundle 17 (records 183, 186, 188, 190 and 192)

[124] The board explains that the records in Bundle 17 consist of emails among board staff, including legal counsel, that refer to matters that legal counsel commented on and what legal counsel said.

[125] The board says that the Bundle 17 records are exempt under section 13(1) because they contain advice or recommendations consisting of suggested courses of action that will be accepted or rejected by the person being advised, as well as opinions offered by board employees to be considered by the decision maker.

Record 183

[126] Based on my review, record 183 deals with a matter distinct from records 186, 188, 190 and 192. I will deal first with record 183, then the rest.

[127] Record 183 is an email exchange among board staff, including parts that involve legal counsel. In my view, the withheld emails in Record 183 do not contain analysis or information that qualifies as advice within the meaning of section 13(1). I will not further characterize it because I will first need to consider the board's alternative claim that the withheld information is exempt because of section 19, which I will address at Issue D, below.

Records 186, 188, 190 and 192

[128] Records 186, 188, 190 and 192 are different branches of an email exchange among board staff – that is, different versions of an email chain that originated with the same email. These emails contain several opinions, evaluative information and options for proceeding, as well as a discussion between the decision-maker and those advising the decision-maker.

[129] Taking these considerations and applying to my review of the records, I make the following findings:

- All of the information except the originating email in record 186 qualifies for the section 13(1) exemption.
- Portions of the information in record 188 qualifies for the section 13(1) exemption. I will indicate which portions in the highlighted version of the records provided to the board with this order.
- Records 190 and 192 duplicate the email chain at record 188 and my findings are the same therefore for those portions. The additional emails included in the email chains in records 190 and 192 qualify for the section 13(1) exemption.

[130] As I have found that some information contained within Bundle 17 does not qualify for the section 13(1) exemption, I will consider the board's alternative claim that the records are exempt under section 19 (solicitor-client privilege) at Issue D, below.

Summary

[131] Having concluded in the discussion above that the board may apply the section 13(1) exemption to the information listed below, it is not necessary to consider the board's alternative arguments made in respect of this information. However, I will address whether the board exercised its discretion not to disclose the information at issue at Issue E, below.

- Bundle 3 - 84 (partial)
- Bundle 4 - 98-101, 119, 169, 170, 211, 212 and 216
- Bundle 6 - 118 and 120-122
- Bundle 7 – 126 (partial), 127 (partial), 128 (partial)
- Bundle 8 - 131, (137, 141) (partial), 133 (partial), 134 (partial) and 140 (partial)
- Bundle 9 – 132 (partial), 135 (partial), 138 (partial) and 173 (partial)
- Bundle 10 – 136 (partial) and 139 (partial)
- Part of Bundle 11[17] - 142 (partial)
- Bundle 12 - 143 (partial)
- Bundle 13 - 145, 184, 185, 187, 189 and 191
- Bundle 14 - 147, 194, 196 and 199
- Bundle 15 - 166, 209 and 210
- Bundle 16 - 171, 72 and 174
- Bundle 17 – 186 (partial), 188 (partial), 190 (partial) and 192 (partial)

[132] For the following remaining records, I will consider the board's alternative exemption claims for the information that I have determined does not qualify for the section 13(1) exemption. The alternative claims are indicated in parentheses.

[17] The board claimed only that record 142 of Bundle 11 was exempt under section 13(1).

- Bundle 5 - 102, 129 and 130 (section 17(1))
- Bundle 7 – 126 (partial), 127 (partial) and 128 (partial) (section 17(1))
- Bundle 8 - 131, (137, 141) (partial), 133 (partial), 134 (partial) and 140 (partial) (section 17(1))
- Bundle 9 – 132 (partial), 135 (partial), 138 (partial) and 173 (partial) (section 17(1))
- Bundle 10 - 136 (partial) and 139 (partial) (section 17(1))
- Bundle 11[18] - 142 (partial), 218 and 221 (section 19)
- Bundle 12 - 143 (partial) (section 19)
- Bundle 17 – 183, 186 (partial), 188 (partial), 190 (partial), 192 (partial) (section 19)

[133] Because the board has not made any alternative exemption claims for the remaining information in record 84, I will order that it disclose to the appellant the portions that I determined do not qualify for the section 13(1) exemption.

Issue C: Does the mandatory exemption at section 17(1) for third party information apply to the information at issue?

[134] The board claims that some of the information is exempt under section 17(1) of the Act, which protects certain confidential information that businesses or other organizations provide to government institutions,[19] where specific harms can reasonably be expected to result from its disclosure.[20]

[135] Nine affected parties were notified and invited to make representations regarding the application of the section 17(1) exemption for third party information. As will be described in more detail below, some affected parties objected to disclosure, some did not oppose disclosure and some did not submit representations.

[136] The appellant did not make specific arguments to challenge the board's application of section 17(1).

[137] Considering the issues in the appeal, the relevant parts of section 17(1) state:

---

[18] The board claimed only that record 142 of Bundle 11 was exempt under section 13(1).
[19] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[20] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[138] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1 of the section 17(1) test: the records reveal commercial information

[139] The board argues that the information at issue is commercial or financial information. The affected parties who oppose disclosure (C and D) argue that the information at issue is *commercial* information.

[140] The IPC has consistently described these terms as follows:

> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[21] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[22]
>
> ***Financial information*** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some

[21] Order PO-2010.
[22] Order P-1621.

> examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[23]

[141] Affected Party D explains, in relation to the records pertaining to it, that the information consists of correspondence between it and the board regarding the application of a particular rebate program to three of its customers and that it reveals details about the customers' operations, which it says is commercial information. Affected Party C makes similar arguments.

Finding

[142] Based on my review of all of the information for which the board claims the application of section 17(1), I find that it consists of commercial information because it pertains to the buying and selling of electricity.

Part 2 of the section 17(1) test: some of the information was supplied in confidence

[143] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[24] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[25]

[144] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[26]

[145] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and

[23] Order PO-2010.
[24] Order MO-1706.
[25] Orders PO-2020 and PO-2043.
[26] Order PO-2020.

- was prepared for a purpose that would not entail disclosure.[27]

Findings

[146] The evidence about parts 2 and 3 of the section 17(1) test in this appeal varies considerably based on the information at issue the positions of the affected parties. I will therefore consider parts 2 and 3 in the context of the specific information at issue.

Bundle 5 (102, 129, 130)

[147] The board argues that portions of the records in Bundle 5 were supplied in confidence to the board by Affected I. Affected Party I makes no such argument, having made no representations in the inquiry.

[148] In consideration of the evidence before me and my review of the records themselves, I am unable to conclude that the third-party information at issue in the records pertaining to Affected Party I was supplied in confidence, meaning that part 2 of the section 17(1) test has not been met.

[149] Because all three parts of the test must be established, I conclude that section 17(1) does not apply to the records in Bundle 5. The board has made no further alternative arguments in relation to these records and I will therefore order that these records be disclosed in full.

Bundle 7 (126, 127 and 128)

[150] The information remaining at issue in the records in Bundle 7 are the inquiries made to the board by Affected Parties C, F, and G. Although the inquiries refer to attachments, these attachments do not form part of the records at issue.

[151] The board argues that the inquiries from the affected parties were supplied in confidence to the board.

[152] Affected Parties F and G make no such argument. Although notified and invited to participate in the inquiry, they made no representations.

[153] In consideration of the evidence before me and based on my review of the information at issue involving Affected Parties F and G, I am unable to conclude that the information at issue in the records pertaining to those parties was supplied in confidence.

[154] Because all three parts of the test must be established, I conclude that section

[27] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

17(1) does not apply to the remaining information at issue in Bundle 7 that pertains to Affected Parties F and G. The board has made no alternative argument in relation to these portions of the records in Bundle 7; I will therefore order them to be disclosed.

[155] Affected Party C explains that the information at issue was implicitly provided to the board in confidence. Affected Party C's representations appear to relate to other records that are not at issue in the appeal (although they are referred to in the record). Generally speaking, Affected Party C submits that based on the nature of the inquiry to the board, it was clear to all involved that information shared was to be maintained confidentially. It explains the purpose for the inquiry and that its inquiry included information of other third parties. Affected Party C says that it sought specific consent from the other third parties before contacting the board.

[156] To begin, the information at issue involving Affected Party C was supplied to the board, both in the form of the inquiry itself and information contained within the inquiry within the board's response.

[157] Considering that the board understood and accepts that the information provided by Affected Party C was provided to it in confidence, Affected Party's C's explanation of the circumstances and the information itself, I find that the information pertaining to Affected Party C was supplied in confidence and that therefore, part 2 of the section 17(1) test has been met in relation to that information.

Bundle 8 (records 131, 133, 134, 137, 140 and 141)

[158] The board argues that portions of the records in Bundle 8 were supplied in confidence by Affected Party B. Affected Party B makes no similar argument and does not object to disclosure of the information on the basis that it does not believe its interests are affected by disclosure.[28]

[159] In consideration of the evidence before me, specifically the representations of Affected Party B, I am unable to conclude that the third-party information at issue in the records in Bundle 8 was supplied in confidence. Because all three parts of the test must be established, I conclude that section 17(1) does not apply to the records in Bundle 8.

[160] I will therefore order the board to disclose portions of the records in Bundle 8.

Bundle 9 (records 132, 135, 138 and 173)

[161] The board argues that portions of the records in Bundle 9 were supplied in confidence to the board by Affected Parties A, D, and H.

[28] Section 17(2) of the *Act* states that if a party consents, the head may disclose the record; however, it is still for the institution to decide whether to claim the exemption.

[162] Affected Parties A and H make no such argument. Affected Party A expressly does not object to disclosure of the information at issue. Affected Party H made no representations.

[163] In consideration of the evidence before me, specifically the representations of Affected Party A, I am unable to conclude that the third-party information at issue in the records pertaining to Affected Party A was supplied in confidence.

[164] I reach the same conclusion with respect to the information involving Affected Party H; however, I also considered whether there was anything apparent from the information itself that supported a conclusion that it was supplied to the board in confidence. I am unable to reach such a conclusion.

[165] Because all three parts of the test must be established, I conclude that section 17(1) does not apply to the portions of the records in Bundle 9 that pertain to Affected Parties A and H and I will order this information to be disclosed.

[166] Affected Party D explains that the information at issue consists of its customers' information about a specified program, although it did not identify those customers in its correspondence with the board. Affected Party D elaborates that its customers would have an expectation that it will protect their information and an expectation that it only discloses information for the purpose of which it was provided. In support, Affected Party D explains its role as a license-holder under relevant legislation and its obligation to comply with specified regulatory codes in how it interacts with its customers.

[167] Affected Party D says that because its customers expect Affected Party D to comply with these codes and its license, they would expect that Affected Party D would maintain confidentiality over their information. Affected Party D says that this expectation is an implied contractual requirement between it and its customers.

[168] Affected Party D argues further that on the basis of its customers' expectations about confidentiality, it expects that the information provided to the board about its customers would only be used by the board to respond to its inquiries and would not be disclosed.

[169] To begin, I accept that the information at issue involving Affected Party D was supplied to the board.

[170] Although Affected Party D has established that its customers have a reasonable and objective expectation that their information will be maintained confidentially by Affected Party D, it is less clear whether there was an objective expectation of confidentiality between Affected Party D *and the board*. Indeed, Affected Party D did not, in fact disclose the identities of its clients to the board, which could suggest that it did not have an expectation of confidentiality.

[171] However, the board also states that it understood and accepts that the information provided by Affected Party D was provided to it in confidence.

[172] I find that the information provided to the board by Affected Party D in confidence and that therefore, part 2 of the section 17(1) test has been met in relation to this information.

Bundle 10 (portions of 136 and 139)

[173] The board argues that portions of the records in Bundle 10 were supplied in confidence to the board by Affected E. Affected Party E stated that it does not consent to disclosure but it did not make any representations to respond to the possible application of the section 17(1) exemption.

[174] To begin with, I accept that the inquiry from Affected Party E was supplied to the board. Considering Affected Party E's position, together with the board's view, I also find that the inquiry was supplied *in confidence* and therefore, part 2 of the section 17(1) test has been met in relation to that information.

Part 3 of the section 17(1) test: Disclosure could not reasonably be expected to cause the stated harm

[175] Having determined that parts 1 and 2 of the section 17(1) test have been met in relation to parts of the records in Bundles 7, 9 and 10, pertaining to Affected Parties C, D and E, I must now consider whether the the board and Affected Parties C, D and E have established the third part of the test.

[176] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.[29]

[177] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[30] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the

[29] Orders MO-2363 and PO-2435.
[30] *Merck Frosst Canada Ltd.* v*. Canada (Health)*, [2012] 1 S.C.R. 23.

information.[31]

Findings

[178] Regarding the information remaining at issue in Bundles 7, 9 and 10, the board refers to the harms set out in section 17(1)(a) and (b). It submits in general that disclosure of these types of records "could interfere significantly with the contractual or other negotiations" of affected parties or that it would "result in the information no longer being supplied" to the board where it is in the public interest that similar information continues to be so supplied. The board explains that it is in the public interest that people are able to ask the board questions about how legislation, rules or codes are applied to their situations and that disclosure of these inquiries under the *Act* may cause people to cease being willing to make such requests.

[179] Regarding the information pertaining to it in Bundle 9, Affected Party D refers to section 17(1)(b), that disclosure of the information would result in similar information no longer being supplied to the board. It explains that its customers have a right to confidentiality in respect of their information and that its own expectation that its regulator, the board, would keep such information in confidence. It says that if the information at issue is disclosed, it would have to limit the information that it provides to the board through the inquiry process rendering the inquiry process meaningless.

[180] Regarding the information pertaining to it in Bundle 7, Affected Party C also refers to section 17(1)(b). It says that if the information is disclosed, it will negatively impact its ability to make inquiries of the board, which it says would have a negative impact on the energy programs delivered by parties with which it deals. Affected Party C also submits that there is no public interest in disclosure.

[181] Affected Party E did not make representations about the harms that it believes will flow from disclosure.

[182] Section 17(1)(a) seeks to protect information that could be exploited in the marketplace.[32] Although the board refers generally to the harms described in section 17(1)(a), there is no other evidence before me about whether risk of these harms is present. There is insufficient evidence to conclude that the harms in section 17(1)(a) are present.

[183] The board and affected parties D and C raise a concern that if the information at issue is disclosed, similar information will not be provided to the board in future. Affected Party E has not articulated any similar concern.

---

[31] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[32] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[184] In my view, neither the board nor the affected parties have provided sufficient evidence to support a conclusion that disclosure would result in similar information no longer being supplied.

[185] Affected Party E has provided no evidence that could support such a conclusion.

[186] In the case of affected parties C and D, I find the concerns raised to be speculative or theoretical because there is no evidence before me about the actual views of their customers or members. While I accept that the possibility of disclosure could be a factor that a customer of the affected parties might consider when deciding whether to make similar inquiries in the future, it appears that there are other benefits of making the inquiry that could be weighed against the risk of disclosure.

[187] In sum, I am not persuaded that similar inquiries will no longer be made in the future *because of disclosure* of the information at issue.

[188] I find that the third part of the section 17(1) test has not been met in relation to the information remaining at issue in Bundles 7, 9 and 10. Without any alternative arguments not consider, I will order the portions of the records that are not exempt under section 13(1) to be disclosed to the appellant.

Issue D: Does the discretionary solicitor-client privilege exemption at section 19 apply to the information at issue?

[189] The information remaining at issue for which the board claims that section 19 applies is contained in Bundle 2 (61), Bundle 11 (142, 218 and 221), Bundle 12 (143) and Bundle 17 (183, 186, 188, 190 and 192). The information at issue in these records consists of email correspondence among board staff.

The solicitor-client privilege exemption, in general

[190] Section 19 exempts certain information from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. Relevant parts of section 19 state:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[191] Prior IPC orders have well established that section 19 is comprised of two "branches." The first branch, found in section 19(a) ("subject to solicitor-client privilege"), is based on common law. The second branch, found in section 19(b) (or, if

applicable, and (c)) ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital"), contains statutory privileges created by the *Act*.

[192] The institution must establish that at least one branch applies.

[193] Each of the branches has two components: communication privilege and litigation privilege. The board only argues that common law and statutory solicitor-client communication privileges apply, so I do not summarize or address further common law or statutory litigation privilege.

Branch 1: common law solicitor-client privilege

[194] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[33] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[34] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[35]

[195] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[36]

[196] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[37] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[38]

Branch 2: statutory solicitor-client communication privilege

[197] The branch 2 exemption is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

[198] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

---

[33] Orders PO-2441, MO-2166 and MO-1925.
[34] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[35] *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.
[36] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[37] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[38] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Representations

[199] In reliance on the above principles, cases and IPC orders, the board argues that the information at issue consists of both Branch 1 and 2 solicitor-client communication privileged information. In reference to its branch 2 claims, the board refers to *Liquor Control Board of Ontario v. Magnotta Winery Corporation,*[39] (*Magnotta*) as an authority for the proposition that although the board's legal counsel are not employed by the Ministry of the Attorney General, they are "Crown counsel" within the meaning of section 19.

[200] The board makes more specific arguments in relation to the bundles that I will describe I more detail below.

[201] The appellant disputes the board's claim that a solicitor-client relationship exists between internal board legal counsel and other employees of the board. The appellant submits that common law communication privilege is not present because when board employees who are lawyers provide advice to other board employees, they are not providing that advice as a solicitor advising a client. The appellant says that no retainer agreement exists between the two, they are "simply fellow employees of one and the same public body."

[202] The appellant also denies that the branch 2 statutory solicitor-client communication privilege applies because, it argues, that lawyers employed by the board are not "Crown counsel." The appellant rejects the assertion made by the board that its internal legal counsel are "Crown counsel" within the meaning of section 19. Toward this end, the appellant argues that *Magnotta* has no application to institutions under the Act other than the institution at issue in that case (the Liquor Control Board of Ontario.) The appellant submits, "The decision-maker in [*Magnotta*] simply took for granted a presupposition that no one chose to dispute, noting that no one had disputed it."

[203] The appellant argues that I should find that counsel for institutions under the Act, including the board, do not qualify as Crown counsel for the simple reason that they are not employees of the Ministry of the Attorney General.

[204] Alternatively, the appellant argues that the board has applied section 19 in an overly-broad manner and that only those portions of the information that clearly meet the above-noted tests should be exempt.

Analysis and finding

[205] In reaching the following conclusions, I have considered the records themselves, the parties' general arguments outlined above and the board's specific arguments about each record that I will describe in more detail below.

---

[39] 2010 ONCA 681 at para 32.

[206] For the following reasons, I find that most of the information at issue qualifies for exemption under section 19, and I will consider whether the board properly exercised its discretion to decide to withhold the information at Issue E, below. I also find that a small portion does not qualify for exemption, and I will order the board to disclose that information.

solicitor-client relationship does exist

[207] Before I turn to the records, I will first address the appellant's argument that a solicitor-client relationship cannot exist between the board's legal counsel and its other staff.

[208] To the contrary, it is well established that a solicitor-client relationship can exist between in-house legal counsel and the entity that they advise or represent, as the case may be.[40] Regarding the ability for a solicitor-client relationship to exist within the RCMP, the Supreme Court of Canada held,

> … the fact that the lawyer worked for an 'in-house' government legal service did not affect the creation or character of the privilege. Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is south and rendered.

[209] Addressing the appellant's other argument in a similar vein, that "Crown counsel" in section 19 does not include legal counsel at the board, the IPC has consistently and regularly treated as Crown counsel lawyers providing legal services to institutions covered by the *Act*.[41]

[210] In either case, the focus of the analysis is the nature and circumstances of each particular communication. In neither case does the existence of a solicitor-client relationship provide a blanket protection without regard for whether the communications at issue are confidential communications between lawyer and client (or their agents or employees) made for the purpose of obtaining or giving legal advice.

[211] I will now turn to the records at issue.

Bundle 2 (61)

[212] The remaining withheld portion of record 61 consists of a communication from the board's Associate General Counsel to other board employees. Without characterizing the information to avoid revealing it, I find that it consists of communication for the purpose of providing legal advice and therefore qualifies as both

---

[40] *R. v. Campbell*, [1999] 1 S.C.R. 565 (S.C.C).
[41] Starting with Order 52.

branch 1 and 2 solicitor-client communication privilege. The information is exempt under section 19(1).

Bundle 11 (142, 218 and 221)

[213] The records in Bundle 11 are emails between board legal counsel and other staff. The board submits that the emails are about the interpretation or application of legislation or regulations and that they are direct communications between a solicitor and a client made for the purpose of obtaining or giving legal advice.

[214] I have already determined that portions of record 142 are exempt under section 13(1). In my view, the remainder of the information at issue in record 142 is exempt under section 19. As described by the board, the emails contain communications between the board's legal counsel and other staff for the purposes of obtaining legal advice.

[215] I have considered severing record 142 to disclose a portion of it that relates to administrative matters; however, I find that it is not reasonable to sever this portion because it would consist of an incoherent snippet of information.

[216] I also find that records 218 and 221 are exempt under section 19. They consist of communications between the board's legal counsel and its other employees for the purposes of obtaining legal advice.

[217] In conclusion, all of the information remaining at issue in Bundle 11 qualifies as both branch 1 and 2 solicitor-client communication privilege and is exempt under section 19.

Bundle 12 (143)

[218] I have already determined that portions of record 143 are exempt under section 13(1). The board submits, and I find that the emails contain communications between the board's legal counsel and other staff for the purposes of obtaining legal advice. In my view, the remainder of the information at issue is exempt as solicitor-client communication privilege under branches 1 and 2 and is therefore exempt under section 19.

Bundle 17 (183, 186, 188, 190 and 192).

[219] The board submits that either the records in Bundle 17 are emails between board legal counsel and other staff for the purposes of obtaining legal advice or that disclosure would reveal legal advice provided by legal counsel.

[220] Considering the content of record 183, I find that it consists of communications between the board's legal counsel and other staff for the purpose of obtaining legal

advice. Disclosure would reveal what the board employees have sought legal advice about and in some respect the nature of that advice. Record 183 is exempt in full under section 19 as it is both branch 1 and 2 solicitor-client communication privileged information.

[221] As already described above in relation to section 13(1), records 186, 188, 190 and 192 are different branches of an email exchange among board staff – that is, different versions of an email chain that originated with the same email. I have already concluded that portions of these records are exempt under section 13(1). Based on my review, I make the following findings about the remaining information.

[222] I find that the originating email – the only information remaining at issue in record 186 – does not consist of communications between board legal counsel and board staff, nor would disclosure reveal the content of any legal advice provided. The originating email does not qualify for either branch 1 or 2 solicitor-client communication privilege and I will order it to be disclosed.

[223] Regarding records 188 (and parts of records 190 and 192), I find that all but the originating email referred to immediately above consists of communications between legal counsel and board staff for the purposes of seeking or obtaining legal advice.

[224] Regarding the remaining portions of records 190 and 192, I find that they are either communications between legal counsel and board staff for the purposes of seeking or providing legal advice, or that they contain legal advice provided.

[225] In sum regarding records 186, 188, 190 and 192, I find that with the exception of the originating email, these records contain information that I have already found to be exempt under section 13(1) or that I find to be exempt in under section 19 because the information consists of both branch 1 and 2 solicitor-client communication privileged information.

Issue E: Did the board exercise its discretion under sections 13(1) or 19, as the case may be?

[226] The sections 13(1) and 19 exemptions are discretionary, meaning that the board can decide to disclose information even if the information qualifies for exemption. The board must exercise its discretion.

[227] I may find that the board erred in exercising its discretion where, for example,

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

[228] In either case, I may send the matter back to the board for an exercise of discretion based on proper considerations,[42] but I may not substitute my own discretion for that of the board.[43]

[229] In the context of the present appeal, some examples of relevant considerations are:[44]

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

Representations

[230] Throughout its representations in this inquiry, the board asserts that it considered all relevant factors in deciding to apply the claimed discretionary exemptions. It refers to the fact that it considered the nature of the information, the purpose of the exemptions claimed, the risk of waiving privilege over some of the information and its wish not to do so.

[231] The appellant has not addressed the above principles directly; however, he is skeptical that the board has properly applied the exemptions. As explained already, the appellant believes that the board has applied the claimed exemptions in an overly-broad manner and in ways designed to protect its own interests, including protecting it from

---

[42] Order MO-1573.
[43] Section 54(2).
[44] Orders P-344 and MO-1573.

embarrassment in the relationship between the board and the appellant.

Finding

[232] I acknowledge the appellant's skepticism that the board has applied the exemptions claimed in an overbroad manner and, more pointedly, in a way that protects itself from embarrassment. I have carefully examined the board's exemption claims and my findings about their application is contained in this order. Based on my review of the information, there is no basis to conclude that the board has been motivated improperly by a desire to protect its reputation.

[233] Considering the board's representations, the records themselves, including those that were already partially disclosed, it is my view that the board has weighed and considered whether to disclose information, even when it could refuse to do so on the basis of an exemption. The institution's legitimate claim of an exemption is not evidence of an improper exercise of discretion.

[234] I am satisfied that the board exercised its discretion in relation to the information for which it could claim the application of sections 13(1) or 19 and I uphold it.

ORDER:

1. I uphold the board's claims that section 12(1) applies to records 57-59, 63, 64 and 70-75.

2. I uphold, in part, the board's decision to withhold information on the basis of sections 13(1) or 19, as applicable.

3. By **February 14, 2022** but not before **February 8, 2022**, I order the board to disclose records 102, 129 and 130 in full.

4. By **February 14, 2022** but not before **February 8, 2022**, I order the board to disclose portions of the following records: 84, 131, 133, 134, 137, 140, 141, 132, 135, 138, 173, 126, 127, 128, 136, 139, 186, 188, 190 and 192. With the copy of this order provided to the board, I have highlighted the portions of the records not to disclose because they are exempt under section 13(1) or 19.

5. Upon request, the board will provide the IPC with a copy of the records disclosed to the appellant pursuant to order provisions 3 and 4.

Original Signed by: January 7, 2022
Valerie Jepson
Adjudicator