Information and Privacy Commissioner, Ontario, Canada



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

ORDER PO-4547

Appeal PA22-00299

Ministry of Public and Business Service Delivery

August 22, 2024

Summary: An individual made a request under the *Act* to the ministry for records relating to the Ontario Motor Vehicle Industry Council. The ministry located records and disclosed some of them to the appellant. In this decision, the adjudicator upholds the ministry's decision not to disclose some information under the advice or recommendations and solicitor client privilege exemptions. She dismisses the appeal.

Statutes Considered: Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, sections 13(1), 19, 23, and 49(a).

OVERVIEW:

- [1] This appeal relates to a request for records relating to the Ontario Motor Vehicle Council.
- [2] The Ontario Motor Vehicle Industry Counsel (OMVIC) is the administrative authority responsible for administering and enforcing the *Motor Vehicle Dealers Act, 2002*¹ and administers the Motor Vehicle Dealers Compensation Fund (MVDCF). The relationship between the Ministry of Public and Business Service Delivery (the ministry) and OMVIC is governed by the *Safety and Consumer Statutes Administration Act, 1996*² and the administrative agreement between the Minister and OMVIC. According to the

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¹ S.O. 2002, c. 30, Sched. B.

² S.O. 1996, c. 19.

ministry, it meets with OMVIC regularly through quarterly liaison meetings and reviews OMVIC's draft annual reports and business plans.

- [3] Relevant to this appeal, the ministry states that, at the time of this request, OMVIC was governed by a twelve-member Board of Directors consisting of nine dealer members and three minister appointees. The Board of Trustees of the MVDCF consists of nine members of which the minister appoints three members and the OMVIC Board of Directors appoints the remainder. The ministry states that appointments to the MVDCF Board of Trustees by the OMVIC Board of Directors and by the Minister are required to be made so approximately half the members are representative of consumer interests and the other half are representatives of registrant interests.
- [4] The ministry notes the Board of Director's governance has received attention from different entities. The ministry refers to the Auditor General's report on the value-formoney audit of OMVIC released on December 1, 2021,³ which contained recommendations relating to board governance. The ministry states it is monitoring concerns regarding the Board of Directors' governance as it relates to:
 - Complaints filed by the appellant,
 - Turnover on the Board of Trustees due to Board of Directors' perceived interference with Board of Trustees' decisions, and
 - A complaint by a former Board of Director member upon revocation of their appointment.
- [5] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for specified information pertaining to OMVIC. Specifically, the appellant sought access to the following information:
 - any records relating to the ministry's response to a letter she sent to the ministry in April 2017, the 2016 Annual Report and the 2017- 2018 Business Plan,
 - complaints received by the ministry relating to the "Board turnover" referred in in the Minutes of the Motor Vehicle Dealers Compensation Fund Board of Trustees dated July 22, 2019,
 - any documentation relating to the departure of one of the two public representatives on OMVIC's Board of Directors
 - records relating to any additional complaints received since January 2017 relating to a member of OMVIC's Board, the Compensation Fund Board of Trustees, or any current or former OMVIC staff, and

³ The Auditor General's Report is found <u>here</u>.

- copies of the minutes of every OMVIC/Sector Liaison Branch meeting since January 2017.
- [6] After it issued two interim decisions (relating to a fee estimate and a time extension) and notified an affected party, the ministry issued a decision, accompanied by an index of records, granting the appellant partial access to 179 responsive records. The ministry withheld portions of the records under the mandatory exemptions in section 17(1) (third party commercial information) and 21(1) (personal privacy) and the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*.
- [7] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of the Ontario (the IPC).
- [8] During mediation, the appellant confirmed she does not pursue access to information identified as non-responsive or withheld under sections 17(1) and 21(1). She stated that she pursues access to the information withheld under sections 13(1) and 19 of the *Act*.
- [9] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal began the inquiry by inviting the ministry to submit representations in response to a Notice of Inquiry. The ministry submitted representations.
- [10] The appeal was transferred to me to continue the inquiry. Two of the records contain the personal information relating to the appellant, so I added section 49(a) (access to the requester's own information) to the inquiry. I sought and received representations from the appellant and then, further reply representations from the ministry.
- [11] The appellant raised the possible application of the public interest override in section 23 of the *Act* in her representations. I note the public interest override cannot apply to information exempt under section 19. Therefore, I will only consider whether the public interest override applies to the information I find exempt under section 13.
- [12] In the discussion that follows, I uphold the ministry's decision to withhold information under sections 13(1) and 19 and dismiss the appeal.

RECORDS:

[13] There are 46 records at issue. They are described as follows in the ministry's index of records:

Record	Description	Exemption(s) claimed
No.		

3	Email dated April 3, 2017	Withheld in full under section 19 (solicitor-client privilege)
4	Email dated April 3, 2017	Withheld in full under section 19
5	Email dated April 5, 2017	Withheld in full under 49(a), read with section 19
6	Email dated April 5, 2017	Withheld in full under section 19
7	Email dated April 5, 2017	Withheld in full under section 19
9	Email dated April 6, 2017	Withheld in full under section 49(a), read with section 19
13	Email dated April 10, 2017	Withheld in part under section 19
14	Email dated April 10, 2017	Withheld in part under section 19
15	Email dated April 10, 2017	Withheld in part under section 19
66	Email dated July 24, 2019	Withheld in part under section 19
71	Email dated September 5, 2019	Withheld in part under section 13
73	Email dated September 6, 2019	Withheld in part under section 13
77	Email dated January 7, 2020	Withheld in part under section 19
81	Email dated January 15, 2020	Withheld in part under section 13
82	Email dated February 10, 2020	Withheld in part under sections 13 and 19
84	Email dated February 18, 2020	Withheld in part under section 13 and 19
85	Attachment to email dated February 18, 2020	Withheld in full under section 13
86	Email dated February 19, 2020	Withheld in full under section 19
87	Attachment to email dated February 19, 2020	Withheld in full under section 19
88	Email dated February 21, 2020	Withheld in full under section 19

89	Email dated February 21, 2020	Withheld in full under sections 13 and 19
90	Attachment to email dated February 28, 2020	Withheld in full under sections 13 and 19
93	Email dated May 8, 2020	Withheld in part under section 13
98	Email dated February 19, 2021	Withheld in full under sections 13 and 19
103	Email dated February 19, 2021	Withheld in part under section 19
104	Email dated February 19, 2021	Withheld in full under section 19
105	Attachment to email dated February 19, 2021	Withheld in full under section 19
106	Attachment to email dated February 19, 2021	Withheld in full under section 19
114	Email dated February 22, 2021	Withheld in part under section 19
116	Attachment to email dated February 22, 2021	Withheld in full under section 13
120	Email dated February 22, 2021	Withheld in part under section 19
121	Email dated February 23, 2021	Withheld in part under section 13
128	Email dated March 21, 2021	Withheld in part under section 19
129	Attachment to email dated March 17, 2021	Withheld in full under section 13 and 19
154	Email dated April 9, 2021	Withheld in full under section 13
157	Email dated April 9, 2021	Withheld in full under section 19
158	Attachment to email dated April 9, 2021	Withheld in full under section 19
159	Email dated April 12, 2021	Withheld in full under section 19
160	Email dated April 12, 2021	Withheld in full under section 19
161	Attachment to email dated April 12, 2021	Withheld in full under section 19

162	Email dated April 14, 2021	Withheld in part under section 19
165	Email dated April 15, 2021	Withheld in part under section 19
170	Email dated April 16, 2021	Withheld in part under section 19
171	Attachment to email dated April 16, 2021	Withheld in full under section 19
172	Email dated April 16, 2021	Withheld in part under section 19
177	Email dated April 19, 2021	Withheld in part under section 19

ISSUES:

- A. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?
- B. Does the discretionary solicitor-client privilege exemption at section 19 or section 49(a) read with section 19, of the *Act* apply to the records?
- C. Did the ministry exercise its discretion under section 13(1), 19 and 49(a)? If so, should the IPC uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

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

- [14] The ministry claims the exemption at section 13(1) to withhold records 71, 73, 81, 82, 84, 85, 89, 90, 93, 98, 116, 121, 129 and 154, either in whole or in part.
- [15] Section 13(1) of the *Act* exempts from disclosure certain records containing advice or recommendations given to an institution. 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.⁴

⁴ John Doe v. Ontario (Finance), 2014 SCC 36, at para. 43.

[16] 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.

- [17] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be expressed or inferred.
- [18] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "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.⁵
- [19] "Advice" includes an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.
- [20] 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.⁶
- [21] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.⁷
- [22] 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 section 13(1).8 This is the case even if the content of the draft is not included in the final version.
- [23] Section 13(2) contains a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of the categories listed in section 13(2), it cannot be withheld under section 13(1). One example of information that is not exempt

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 [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.

⁵ See above at paras. 26 and 47.

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

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

under section 13(1) is factual material, which is an exception in section 13(2)(a). I will consider this exception below. None of the other exceptions have been claimed or appear to apply to the information at issue.

Parties' representations

- [24] The ministry submits the records subject to its section 13(1) claim contain advice and recommendations related to issues concerning the Board's governance. The ministry submits many of these records are briefing notes, such as records 73, 85, 89, 90, and 116. The ministry claims these records outline key issues, analysis, as well as recommendations for moving forward with respect to a particular issue. The ministry notes that briefing notes are drafted for the purpose of communicating advice and recommendations to senior officials and the Minister so the Minister can make an informed decision on a course of action. The ministry submits the briefing notes at issue contain recommendations to the Minister. The ministry claims disclosure of the records subject to its section 13(1) claim would divulge the analysis and subsequent recommendation meant to inform the Minister's decision-making process.
- [25] In addition, the ministry submits there are email records summarizing advice or recommendations to the Minister. For example, the ministry submits email record 84 summarizes some of advice contained in the briefing note attached (record 85). The ministry submits the disclosure of these email records would reveal advice.
- [26] Finally, the ministry submits the records contain specific policy options put before the Minister. For example, the ministry refers to record 129 which contains analysis and options for the Minister to take and the risks and implications the Minister should consider when making a decision. In this regard, the ministry submits these options, their advantages and disadvantages, as set out in the records and referenced in the email communications, constitute advice and are squarely within the scope of the process of communicating advice.
- [27] In her representations, the appellant asks the IPC to review the information subject to the ministry's section 13(1) claim to ensure that none consists of background materials or status updates. The appellant submits that where the purpose of a communication between ministry staff is to collaborate on a script to respond to a complaint, it should not be covered by section 13(1), unlike a "meaningful exercise in considering the pros and cons of alternative courses of action." The appellant also asks the IPC to review whether the information at issue reflects a settled course of action as opposed to an analysis of options and whether additional information may be disclosed by redacting the names of the staff involved.
- [28] In its reply submissions, the ministry claims the records subject to its section 13(1) exemption claim do not contain a significant amount of factual information. To the extent there is factual information, the ministry submits it is intertwined with the advice and recommendations and cannot be reasonably severed. The ministry also submits that

communications that contribute to the formulation of a response to a complaint qualifies as advice. The ministry claims advice and recommendations are not limited to the pros and cons, as the appellant suggests, and are broad enough to include a proposed response and various communications that contribute to the creation of a proposed response.

[29] The ministry also submits that "advice" under section 13(1) encompasses materials that permits the drawing of accurate inferences with respect to a suggested course of action. The ministry submits that the disclosure of the background information at issue would permit the drawing of inferences with respect to the advice provided to the Minister.

Analysis and finding

- [30] I reviewed the parties' representations and the records or portions of records subject to the ministry's section 13(1) claim. Based on this review, I find this information is exempt under section 13(1), subject to my review of the ministry's exercise of discretion below.
- [31] I agree with the ministry that "advice" and "recommendations" is not as narrow as the pros and cons of alternative courses of action, as the appellant suggests. As discussed above, "recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. However, "advice" includes policy options as well as 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. In both cases, there is a requirement that the information include some evaluative analysis rather than solely factual or background material.
- [32] I have reviewed records 71, 73, 81, 82, 84, 85, 89, 90, 93, 98, 116, 121, 129 and 154. I find the information subject to the ministry's section 13(1) claim qualifies for exemption. Records 73, 85, 90, 116 and 128 are Briefing Notes prepared in order to provide advice and/or recommendations to the ministry. Based on my review, the records contain the requisite evaluative analysis required for exemption under section 13(1). I acknowledge there are small portions of the records that contain factual or background information. However, if these portions were to be disclosed, I find they would allow for accurate references regarding the advice that was provided to the Minister in the remainder of the note.
- [33] Similarly, I find email records 89, 98 and 154, which were withheld in full, contain advice or recommendations as contemplated by section 13(1) of the *Act*. These records clearly contain the requisite evaluative analysis offered by a public servant regarding the issue under consideration. I find these emails cannot be severed because disclosure of

⁹ See above at paras. 26 and 47.

the remaining information would result in accurate references being drawn regarding the advice or recommendations offered.

[34] I note the ministry withheld discrete portions of email records 71, 81, 82, 84, 93 and 121. I have reviewed the information withheld from disclosure and find it contains advice or recommendations within the meaning of section 13(1) of the *Act*. I find it is not factual or background information and was prepared by staff for the purposes of providing advice or recommendation to the ministry. Therefore, I find the exception to the exemption in section 13(2)(a) does not apply to the information exempt under section 13(1). While some of the correspondence may be considered a "collaboration" between ministry staff regarding a response, I find the specific information withheld from disclosure contains advice or recommendations in the form of the views or opinions of a public servant regarding the policy options to be considered by the decision-maker or other evaluative analysis regarding the issue discussed.

[35] Accordingly, I find the information at issue in records 71, 73, 81, 82, 84, 85, 89, 90, 93, 98, 116, 121, 129 and 154 is exempt under section 13 of the *Act*, subject to my review of the ministry's exercise of discretion below.

Issue B: Does the discretionary solicitor-client privilege exemption at section 19 or section 49(a) read with section 19, of the *Act* apply to the records?

[36] The ministry applied the solicitor-client privilege exemption at section 19 of the *Act* to withhold records 3-7, 9, 13-15, 66, 77, 82, 84, 86-88, 103-106, 114, 120, 128, 157-162, 165, 170-172 and 177, either in whole or in part. I note records 5 and 9 contain the appellant's personal information, ¹⁰ which means I shall consider whether these records are exempt under section 49(a), ¹¹ read with section 19 of the *Act*. I confirm none of the other records at issue in this appeal contain the appellant's personal information.

[37] Section 19 of the *Act* exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. The exemption states, in part:

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[.]
- [38] There are two branches in section 19. The first branch, found in section 19(a),

¹⁰ This term is defined in section 2(1) of the *Act*, in part, as "recorded information about an identifiable individual."

¹¹ Section 49(a) reads, "A head may refuse to disclose to the individual to whom the information relates personal information where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information." [emphasis added]

("subject to solicitor-client privilege") is based on common law. The second branch, found in section $19(b)^{12}$, ("prepared by or for Crown counsel") contains statutory privileges created by the *Act*. The ministry must establish that at least one branch applies.

Parties' representations

[39] In its representations, the ministry submits both branches 1 and 2 of solicitor-client privilege apply to the records at issue. The ministry submits the records consist of emails where legal advice is sought and provided or legal advice is being summarized, discussed and assessed in relation to OMVIC governance concerns. The ministry submits the email records contain requests for legal advice and/or the provision of legal advice. The ministry notes the attachments to the emails subject to its section 19 claim also contain legal advice. Altogether, the ministry submits these "records showcase the continuum of communications between legal counsel and ministry staff." The ministry submits that its staff regularly communicates with legal counsel to provide background information so that legal counsel may review and offer advice and analysis. In this regard, the ministry submits the records at issue were either prepared by or for legal counsel for the purpose of giving or receiving legal advice. The ministry submits the disclosure of these records would reveal the confidential communications between the ministry and its legal counsel.

[40] With regard to the records that contain the appellant's personal information, the ministry submits that the information relating to the appellant was included in the records for counsel to provide legal advice. The ministry submits the appellant's personal information is intertwined with the legal advice requested or provided because counsel was specifically responding to concerns raised by the appellant in her previous correspondence. The ministry submits it considered whether the appellant's personal information could be severed without disclosing privileged information but found it could not.

[41] In her representations, the appellant asked me to consider the following in my review of the ministry's exemption claim:

- The roles and responsibilities of ministry staff involved and whether, if they are communications professionals, the communication was intended to remain confidential or privileged
- Whether some of the information is merely background or factual information
- Whether the record reflects "legal advice" or "is legal counsel performing more of an editing function"
- Whether the records show that legal counsel is acting as "a de facto decision maker
 OR can anyone other than legal counsel be identified as the decision maker"

¹² Also found in section 19(c), but that section is not relevant to this order.

 Whether legal counsel was providing legal advice or advice of an operational nature

Analysis and finding

- [42] I reviewed records 3-7, 9, 13-15, 66, 77, 82, 84, 86-88, 103-106, 114, 120, 128, 157-162, 165, 170-172 and 177 and the parties' representations. Based on this review, I find all the records, or portions thereof, are exempt under section 19 or, in the case of records 5 and 9, section 49(a), read with section 19. The records consist of emails and some attachments to those emails in which ministry staff has requested legal advice or legal counsel is providing legal advice to staff. I agree with the ministry that the records are part of the continuum of communications between ministry staff and legal counsel for the purpose of giving or receiving legal advice. I have considered the concerns raised by the appellant. However, I confirm the role of the staff within the ministry, i.e. whether they are communications staff, does not negate the privilege attached to the advice provided by or requested from legal counsel.
- [43] In addition, I have considered the appellant's request that I consider whether the information is merely factual or background in nature. However, I note there is no similar exception to the section 19 exemption that exists in section 13(2) for advice or recommendations. I have reviewed the emails and their attachments at issue and I find the records, or the portions thereof, contain information that is part of the continuum of communications between legal counsel and ministry staff.
- [44] With regard to the remainder of the appellant's concerns, I cannot confirm the type of legal advice provided by legal counsel or requested by ministry staff. I also cannot confirm who the decision maker is for each record subject to the ministry's section 19 claim. I can only confirm the information at issue is subject to solicitor-client privilege because they either contain a request for legal advice or the legal advice itself.
- [45] I have reviewed records 5 and 9, which contain the appellant's personal information. I agree with the ministry that the personal information is intertwined with the legal advice provided by counsel and cannot be disclosed without revealing confidential legal advice or would result in the disclosure of disconnected snippets that would be meaningless to a reader.¹³
- [46] In conclusion, I uphold the ministry's decision to withhold records 3-7, 9, 13-15, 66, 77, 82, 84, 86-88, 103-106, 114, 120, 128, 157-162, 165, 170-172 and 177, in whole or in part, under section 19 or section 49(a), read with section 19. I will review the ministry's exercise of discretion below.

¹³ See Orders MO-3922, PO-1663 and PO-2973.

Issue C: Did the ministry exercise its discretion under section 13(1), 19 and 49(a)? If so, should the IPC uphold the exercise of discretion?

[47] The exemptions in sections 13(1), 19 and 49(a) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, this office may find the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[48] While I may send the matter back to the ministry for an exercise of discretion based on proper considerations, I may not substitute the IPC's own discretion for that of the ministry.¹⁴

[49] The ministry submits it exercised its statutory discretion under sections 13(1), 19, and 49(a) in a reasonable manner and for purposes that are consistent with the intent of the *Act* and the exemptions claimed. The ministry submits it considered the following factors in its exercise of discretion:

- The disclosure of the information at issue would imperil the candor and frankness of communications, including advice and recommendations, that necessarily take place between public servants in the ministry, legal counsel, and the Minister to reach decisions
- The disclosure of the records at issue would undermine the confidential and iterative free flow of communications ad advice and recommendations between public servants, legal counsel and the Minister.

[50] The ministry submits it considered relevant factors and did not consider irrelevant factors in its decision-making process to deny the appellant access to the records. The ministry submits factors identified in the Notice of Inquiry, such as the purposes of the *Act*, the wording of the exemptions and the interests they seek to protect, whether the requester has a sympathetic or compelling need to receive the information, the nature of the information, and the historic practice of the ministry with respect to similar information, weighed heavily in favour of non-disclosure. Accordingly, the ministry submits it appropriately exercised its discretion to not disclose the records at issue.

[51] The appellant submits the ministry did not exercise its discretion properly. The appellant submits the ministry applied sections 13(1) and 19 as a "form of blanket exemption to capture every record to which these exemptions could potentially apply." The appellant also submits the ministry's representations are "short on specifics regarding how these exemptions apply in the context of specific complaints or workstreams." The appellant claims the ministry failed to take into account the purposes of the *Act*, including

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¹⁴ Section 54(2).

the principles that information should be available to the public and exemptions to the right of access should be limited and specific. The appellant also claims the ministry did not consider her compelling or sympathetic interest in the records, particularly in light of the manner in which it handled her complaint.

- [52] In addition, the appellant asks me to consider the following, which she alleges is evidence of the ministry's bad faith:
 - The ministry requested a 60-day extension in response to her request, which resulted in Order PO-4172, in which the IPC ordered the ministry to issue an access decision no later than August 16, 2021. The appellant states she did not receive the ministry's access decision until June 28, 2022.
 - The appellant submits she raised a "serious confidentiality breach by an OMVIC Board member" in her original complaint to the ministry. The appellant states she asked the ministry to conduct an investigation of this breach, but has received no response.
- [53] In its reply representations, the ministry reiterates the release of the records at issue would be detrimental to the flow of communications and advice and recommendations as between public servants, legal counsel, and the Minister. The ministry claims it exercises its discretion to not disclose the records appropriately.
- [54] I have reviewed the parties' representations and find the ministry considered appropriate factors, including the purposes of the *Act*, the interests the exemptions were created to protect, the fact that some of the records contain the appellant's personal information, and the fact that the listed considerations weigh in favour of non-disclosure. I also find the ministry did not consider irrelevant factors in exercising its discretion.
- [55] I reviewed the appellant's submissions and find her evidence of the ministry's bad faith is not in relation to the manner in which it exercised its discretion to withhold the records at issue, but in relation to other matters relating to the appellant and her complaint. In addition, I note the appellant is not correct in stating the ministry used sections 13(1) and 19 as a form of "blanket exemption" as the ministry often withheld portions of email records under these exemptions rather than an email in its entirety. I also note the ministry disclosed a large number of responsive records to the appellant in full. Based on my review, I find the ministry considered the purposes of the *Act*, particularly that information should be made to the public and exemptions to the right of access should be limited and specific.
- [56] Overall, I am satisfied the ministry exercised its discretion to withhold a discrete number of responsive records from disclosure under sections 13(1) and 19. I find the ministry considered the purposes of the exemptions claimed and applied them in a limited and specific manner. I am also satisfied the ministry disclosed as much information as possible to the appellant. Therefore, I uphold the ministry's exercise of discretion.

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

[57] The appellant raised the possible application of the public interest override to the information the ministry withheld from disclosure. Section 23 does not apply to information that is exempt from disclosure under section 19; however, I will consider whether the public interest override applies to the information I have found to be exempt under section 13(1).

[58] Section 23 provides for the disclosure of records that would otherwise be exempt under another section of the *Act*, where there is a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the exemption. For section 23 to apply, two requirements must be met:

- There must be a compelling public interest in disclosure of the records; and
- This interest must clearly outweigh the purpose of the exemption.

[59] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.¹⁵

[60] In her representations, the appellant submits that her request pertains to the "execution of the Ministry's oversight role regarding a Delegated Administrative Authority which is has entrusted with responsibility for administering a public protection statute." The appellant submits the way the ministry carries out its oversight role is a matter of significant public interest. The appellant also submits the information at issue could enlighten or inform the public in the effective expression of public opinions or in making political choices. The appellant submits there should be "reasonable debate" regarding the appointment of members to the OMVIC's board and who should be permitted to exercise the regulatory powers of the OMVIC.

- [61] The ministry submits there is no public interest in the information withheld under section 13(1). Furthermore, to the extent that there may be public interest in the information at issue, the ministry claims the public interest is not compelling and does not override the purpose of the exemption.
- [62] The ministry notes information relating to the subject matter has been released publicly through the Auditor General's report from December 2021, which contained recommendations relating to Board governance. The ministry submits the public therefore has sufficient information to comment and debate freely. The ministry submits disclosure of the information that it has withheld from the records would not add to the ability of

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¹⁵ Order P-244.

the public to effectively deliberate and comment on public policy.

- [63] I have reviewed the parties' representations and the records subject to the ministry's section 13(1) claim, namely, records 71, 73, 81, 82, 84, 85, 89, 90, 93, 98, 116, 121, 129 and 154. Based on that review, I am not satisfied there is a compelling public interest in the records at issue that outweighs the purpose of the advice or recommendations exemption in section 13(1).
- [64] In her representations, the appellant submits there is a compelling public interest in the ministry's conduct in overseeing OMVIC and the appointment of members to OMVIC's board. I agree with the appellant there was public interest in the manner in the membership of OMVIC's board and there may be some public interest in the information at issue. However, I find the Auditor General's December 2021 report provides information relating to the issues raised by the appellant and OMVIC has publicly released a significant amount of information about the way board members are selected and appointed. Furthermore, the ministry has disclosed a large number of the responsive records to the appellant through her request and this appeal. Given these circumstances, I find the appellant's representations did not establish there is a compelling public interest in the disclosure of the discrete information that remains at issue.
- [65] I have also considered the appellant's claims the information at issue could enlighten or inform the public in the effective expression of public opinions or in making political choices. However, the appellant does not provide any further submissions to support this claim. Based on my review of the specific information remaining at issue, I am not satisfied its disclosure would serve to inform the public in forming their public opinions. I agree with the appellant that there should be "reasonable debate" regarding the appointment of members to the OMVIC's board and who should be permitted to exercise the regulatory powers of the OMVIC. However, the appellant has not provided further information to support her claims. In any case, I reviewed the records subject to the ministry's section 13(1) claim and find their disclosure would not add in a meaningful way to the information that is already in the public domain or shed any further light on the matter.
- [66] Upon review of the parties' representations and records at issue, I find the public interest at stake is not "compelling" in this case. It is, therefore, unnecessary for me to discuss the purpose of the section 13(1) exemption, as the public interest override at section 23 of the *Act* cannot be made out without a public interest that is "compelling."
- [67] Accordingly, I find the public interest override in section 23 does not apply to override section 13(1) and permit the disclosure of the information that remains at issue.

¹⁶ See https://www.omvic.ca/about/governance-and-leadership/board-of-directors/

ORDER:				
I uphold the ministry's decision and dismiss the appeal.				
Original signed by: Justine Wai Adjudicator	August 22, 2024			