Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1925

Appeal PA_000262_2

Ministry of Training, Colleges and Universities

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Training, Colleges and Universities (the "Ministry") under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant made a request to the Ministry for access to certain records, in the following terms:

> ... any and all records subsequent to and not already included in my earlier requests of December 9 and December 22, relating to or amending applications requested thereunder, and related to and including subsequent applications by Trent University made to or to be passed through the Ministry for substantial funds directed towards building and similar projects, as under the program generally referred to as SuperBuild ...
>
> ... this request is also directed to the Ministry's review of such applications ... further, it includes internal records of the Ministry relating to the processing of and delays in connection with my earlier FOIPP requests of December 9 and December 22 ...

In April 2000, the Ministry issued a fee estimate, stating that the estimated cost of generating the information requested was $211.60. It requested the appellant's "written acceptance of the fee estimate, together with a deposit" in the amount of 50% of the total estimate, prior to proceeding with the request. In the same letter, the Ministry informed the appellant that he had a right to file an appeal regarding any part of his access request under section 50 of the *Act*, and that an appeal must be requested within 30 days of the date of this letter.

The appellant sent cheques to the Ministry which included payment of the deposit requested by the Ministry with respect to this request, "together with payment in good faith of the residue of the estimates". In the letter accompanying the cheques, the appellant stated, among other things, that he was "paying these amounts without prejudice to any further issues of appeal". He also intended to appeal this requirement of written acceptance.

The Ministry then issued an access decision granting partial access to 72 records it identified as responsive to the request. Access was denied to records 1, 5, 6, 9, 10, 11, 12, 13 and 15 in their entirety, and to portions of records 4, 7, 29, 47, 55, 58, 59, 61 and 67. In doing so, the Ministry claimed the application of the following exemptions: section 12 (Cabinet records), section 13 (advice to government), section 17 (third party information), section 19 (solicitor-client privilege) and section 21 (personal privacy). In its decision letter, the Ministry again notified the appellant that he had the right to file an appeal regarding any part of his access request, and that such an appeal must be made within 30 days of this letter.

In August 2000, the appellant appealed the Ministry's decision and, among other things, asserted the existence of a compelling public interest in these matters which raises the issue of the application of section 23 of the *Act*. The appellant also asserts that further responsive records should exist, in addition to those identified by the Ministry. He cites, in particular, notes and correspondence accompanying the process of review and evaluation. During mediation, the appellant agreed not to appeal the denial of several records (records 3, 16, 45, 46, 60, 62, 68, 69, 70, 71 and 72). Further, the appellant clarified that this request is intended to cover all responsive records generated between December 22, 1999 and February 21, 2000.

A Notice of Inquiry summarizing the facts and issues of this appeal was sent to the Ministry, initially. The Ministry submitted detailed representations in response to the Notice which were shared with the appellant in full. The appellant returned a response.

RECORDS:

There are 18 records at issue in this appeal, described as follows:

Record	Description	Exemption(s) claimed
Record 1	Superbuild Growth Fund for Postsecondary Education Support Universities and Colleges	s. 12(1)(b)
Record 4	Assessment Worksheet for SuperBuild Growth Fund, Category 2 Proposals for Innovative Academic Projects	ss. 12(1)(e), 13, 17
Record 5	[Ministry] SuperBuild Growth Fund for Postsecondary Institutions, Category 1 Proposals - Scoring Breakdown Explanatory Notes	s. 12(1)(e)
Record 6	[Ministry] SuperBuild Growth Fund for Postsecondary Sector, Summary of SBGF Proposal Applications Submitted by Postsecondary Institutions - Category 1	s. 13
Record 7	SuperBuild Institution Debrief	s. 13
Record 9	[Ministry] SuperBuild Growth fund for Postsecondary Institutions, Category 1 Proposals - scoring Breakdown Explanatory Notes	s. 12(1)(e)
Record 10	Category 1 - Project Listings with Staff Adjustments	s. 12(1)(e)
Record 11	Category 2 - Projects Listings with Staff Adjustments	s. 12(1)(e)
Record 12	Institution and Project Title, Project and Program Description, Project and Institutions Details, Considerations and Issues	s. 12(1)(e)
Record 13	Institution and Project Description, Project and Institutions Details, Considerations and Issues	s. 12(1)(e)
Record 15	Year End Pressures (post-secondary institutions and available space)	s. 12(1)(e)
Record 29	February 23, 2000 e-mail, from an affected party to Ministry staff	s. 21
Record 47	February 15, 2000 e-mail, between Ministry staff	s. 19
Record 55	January 31, 2000 e-mail, between Ministry staff	s. 12

Record 58	January 24, 2000 e-mail, between Ministry staff	s. 12
Record 59	January 21, 2000 e-mail, between Ministry staff	ss. 12(1)(e), 13
Record 61	January 20, 2000 e-mail, between an affected party and Ministry staff. Copy to Minister and SuperBuild staff (only the hand-written notes are at issue)	ss. 13, 21
Record 67	January 11, 2000 e-mail, between Ministry staff	s. 12

PRELIMINARY MATTERS:

Scope of the Request

The Report of the Mediator states:

> The appellant believes that the Ministry has erroneously identified certain records as responsive to the request because they are dated outside of the December 22, 1999 to February 21, 2000 request time frame.

The records at issue here are record 29 (dated February 23, 2000) and records 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15 (not dated).

The Ministry has identified record 29 as responsive to the request, and while records 4, 5, 6, 7, 9, 10, 11, 12 , 13 and 15 are not dated, the Ministry has provided affidavit evidence that these records are also responsive. It appears that while the appellant seeks access to these records, he objects to the Ministry disclosing them on the basis that they fall outside the time-period specified in this request. In my opinion, no useful purpose would be served by inquiring into whether they are responsive to this request or another of the appellant's related requests. Consequently, I will consider records 4, 5, 6, 7, 9, 10, 11, 12, 13, 15 and 29, in their entirety or in part, to be responsive to this request and will apply the exemptions as claimed by the Ministry.

Reasonableness of Search

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

A preliminary step in determining whether the search conducted by the Ministry for responsive records was reasonable is to determine whether the Ministry properly interpreted the appellant's request.

In the IPC Practices entitled "Clarifying Access Requests", institutions are provided with guidance on how to fulfill their obligations under the *Act*. In doing so, the IPC Practices note:

> It is vital that government institutions have a clear understanding of the nature and scope of requests in order to process them efficiently.

The *Act* recognizes that both requesters and institutions have obligations in ensuring that a request is responded to properly. Section 24(1) specifies that a requester must provide sufficient detail to enable an experienced government employee to identify the record. Section 24(2) requires institutions to inform and assist requesters in reformulating their requests in those cases where a request does not sufficiently describe the record sought.

To properly discharge its obligations under the *Act*, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

Representations

The Ministry's representations on the search issue were provided to the appellant. He responded with the assertion that responsive records, in addition to those identified by the Ministry, should exist. He makes specific reference to "notes and correspondence accompanying the process of review and evaluation".

The Ministry submits:

> ... there was no lack of contact with the appellant. The appellant was in regular contact with the FOI coordinator and the program area about the previous requests and the Ministry had already gone through mediation with one of them. The appellant's request was clear and it never changed. In the course of nine telephone exchanges between the FOI coordinator and the appellant between May and August 2000, there was no indication of either party misunderstanding the scope of this request as indicated in the wording of the request: "... any and all records ... relating to or amending ... relating to and including ...". The appellant requested access in the broadest terms possible, was in frequent phone contact with the Ministry, and was not interested in limiting the scope of his requests.

The Ministry also provides affidavit evidence from the Coordinator of the Postsecondary Capital Unit (the "Coordinator"). The Coordinator describes his duties, experience, and knowledge of the postsecondary capital unit, and sets out his familiarity with the request. He confirmed that he was personally responsible for the search for responsive records and describes his efforts, and those of others, to locate the requested records. He also explained that due to the nature of the continuum of the appellant's previous access requests, it was not necessary to contact the appellant directly to clarify his request.

After considering the material before me and the representations of the Ministry, I am satisfied that the Ministry's search was carried out by an experienced employee who was familiar with the

nature of the records requested and that the Ministry's search for responsive records was reasonable.

Fee Estimate

The appellant raises several concerns with respect to the Ministry's fee estimates. The only issue I need to decide here, however, is whether or not the Ministry's fee estimate was calculated in accordance with section 57(1) of the *Act* and the provisions regarding fees found in section 6 of the Revised Regulations of Ontario, Regulations 460.

In reviewing the Ministry's fee estimate, my responsibility under section 57(5) is to ensure that the amount estimated by the Ministry is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Ministry.

The Ministry's decision letter of April 12, 2000, calculates the fee estimate as follows:

Search time 4 hours @ $30.00/hr	$120.00
Record Preparation time 1 hr @ $30/hr	$30.00
Photocopying 308 pages @ $ .20/page	$61.60
TOTAL	$211.60

The Ministry submits:

> ... that the fee estimate was fairly calculated. In fact, as the sworn affidavit indicates, [the Coordinator] believes that the time spent by his staff and himself was in excess of that included in the estimate. The affidavit outlines the steps necessary in locating records from the time of the request and the various locations assessed. As the affidavit makes clear, ... the Coordinator of the Postsecondary Capital Unit, was the employee most familiar with the type and contents of the requested records and therefore personally conducted the search. A breakdown of the fee estimate, as included in a letter to the requester, is attached.

The appellant also states that there is a discrepancy between the fee estimate, which indicates that 308 pages would need to be copied, and the 284 pages that were actually copied and received. The monetary difference is $4.80 and the Ministry could have refunded this amount. However, given how small the difference is, I am not prepared to make an order to this effect. In any event, the appellant could have avoided overpaying by submitting 50% of the estimate as the Ministry requested, rather than the entire amount.

Based on the Ministry's detailed information as to how the fee estimate has been calculated and its affidavit to support its claim, I am satisfied that the Ministry's fee estimate was reasonable.

The appellant pointed out that the Ministry required "written acceptance of the fee estimate", together with the deposit, "prior to proceeding with the request". It seems that in the early years of the *Act*, this statement was often included in fee estimate letters. Since then, most institutions have abandoned the practice as there is no legislative authority providing that "written acceptance of the fee estimate" is a prerequisite to processing an access request. I recommend that the Ministry also abandon this practice.

DISCUSSION:

CABINET RECORDS

The Ministry relies on section 12(1)(a) and (b) of the *Act* to deny access to records 1, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 55, 58, 59 and 67. These sections read:

> 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,
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

Previous orders have determined that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of an Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), or permit the drawing of accurate inferences with respect to the actual deliberations, qualifies for exemption under section 12(1) (Orders 22, P-293 and P-331).

The appellant does not address section 12 in his submissions other than to state that, "in drawing material incorporated by reference from the earlier related request of December 9, 1999, I ask you to note that the Ministry raised this exemption frivolously, only to drop it subsequently without explanation."

I will address the applicability of section 12(1), 12(1)(b) and/or 12(1)(e) to each of the relevant records below.

Record 1

Record 1 contains information and recommendations pertaining to the background of the SuperBuild Growth Fund ("SuperBuild") initiative. It includes financial information and

discussion points on named institutions. The Ministry denied access to this record in its entirety relying on section 12(1)(b).

For the exemption in section 12(1)(b) to apply to a document, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees.

The Ministry states that record 1 contains policy options and recommendations relating to the disposition of SuperBuild funds:

> This record was prepared by the [Ministry] for submission to the Cabinet Committee on Privatization and SuperBuild on a meeting date during the period of request, at which time the Committee would deliberate the decisions proposed in the record and accept or reject them.

I have reviewed record 1, and while it is not identified as a Cabinet submission, in the circumstances, the contents clearly indicate that it formed the substance of Cabinet deliberations. The record contains an extensive analysis of various options for a Cabinet Committee's consideration, as well as an analysis of a specific recommendation. I am satisfied that record 1 contains policy options and recommendations, and was submitted to a Cabinet Committee. Accordingly, I find that record 1 qualifies for exemption under section 12(1)(b) of the *Act*.

Records 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15

The Ministry submits that records 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15 were incorporated into a submission made to the Cabinet Committee on Privatization and SuperBuild, as attachments to record 1. More specifically, the Ministry states that they are comprised of "statistical reports and a debriefing note on the analysis that led to the SuperBuild decisions in round 1."

Record 4 contains notes on several proposals and includes a summary in chart form. The Ministry granted full access to the first 5 pages. With respect to the summary, access was denied to lines 1, 2, 3, 6, 8, 9, 13, 16, 17, 18, 19 and 20 in their entirely; partial access was granted to lines 4, 5, 7, 10, 11, 12, 15 and 21. The Ministry relied on the exemptions under sections 12(1)(e).

Record 5 consists of notes on the ranking of institutions. The Ministry denied complete access to record 5 on the basis of section 12(1)(e).

Record 6 records the scoring breakdown of 4 criteria that were identified in record 5. Access was denied to all but the headings. **Record 7** identifies institutions and their ranking, and elaborates on the criteria set out in record 5. With the exception of the category headings and the name of an institution, access was denied in full. For both these records, the Ministry relied on the exemption under section 13. However, as section 12 is a mandatory exemption, I will consider its application in the circumstances.

Record 9 provides the criteria for scoring and assessing proposals, and contains explanatory notes. The Ministry denied access to the information but the heading of this record, relying on the exemption under section 12(1)(e).

Records 10 and 11 both contain a summary of proposals that were submitted by postsecondary institutions and which are classified as, "A", "B" and "C". The Ministry granted access to the only headings of both records. For both records, the Ministry relied on the exemption under section 12(1)(e).

Records 12 and 13 consist of assessments and recommendations on the applications of two affected parties. The Ministry disclosed only the column headings and the names of the two institutions, relying on the exemption under section 12(1)(e).

Record 15 summarizes the year end pressures of identified institutions and contains financial and other information. The Ministry granted access to only the column headings, relying on the exemption under section 12(1)(e).

I have reviewed each of the above documents and accept the Ministry's submissions that disclosure of the severed portions of these records would reveal the substance of the deliberations of the Cabinet Committee. I find that records 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15, in part or in full as indicated by the Ministry, are exempt under the introductory wording of section 12(1) of the *Act*. Because of this finding, it is not necessary to consider the application of other exemptions that are claimed by the Ministry with respect to these records.

Record 29

Record 29 is an e-mail message between a government official and third party staff person, on which three messages appear. Access to all but the information contained in the "To", "From", "Sent", and " Subject" lines at the top of the page, was denied on the basis of section 21. The Ministry asserts that the exchange between the third party and the Coordinator was in a personal capacity. As I did earlier, I will consider the application of the mandatory exemption under section 12.

Having carefully considered the content of record 29, I conclude that the information in the original message replicates recommendations that are contained in record 1. The other messages are in response to the original message. Consequently, I find that the exemption at section 12(1)(b) applies to record 29.

Records 55, 58 and 67

The Ministry submits that the exemption at section 12(1) applies to records 55, 58 and 67, as they bear "on preparations for and the security of" the Cabinet meeting held during the period of the request.

Records 55, 58 and 67 are e-mail messages between various Ministry staff. The names of the sender, the recipients and the subject-line are identified in **records 55 and 58,** and were disclosed to the appellant. Access was denied to the information contained in the body of the

text of both these records. **Record 67** consists of an original e-mail message and a forwarded message. The information contained in the original message was denied in its entirety. The names of the sender and recipients to whom this message was forwarded, as well as the subject-line, were disclosed to the appellant.

In Order PO-1725, Assistant Commissioner Tom Mitchinson examined the dates of entries of requested records and their proximity to Cabinet and committee meetings. The requester had sought access to copies of the appointment or scheduling book of a senior staff member in the Premier's Office. Assistant Commissioner Mitchinson found that the records reveal issues and options which the Premier or the named senior staff person would reflect upon in formulating and establishing Cabinet's "agenda". He concluded that the records "would tend to reveal the substance of the deliberative process and, therefore, the substance of the deliberations of Cabinet ... ."

The circumstances of this case before me are different from those in Order PO-1725. In this case, records 55, 58 and 67 merely confirm the dates, times and venues of two proposed Cabinet meetings at which the SuperBuild project was to be discussed. It cannot be said that these records, unlike those in Order PO-1725, would reveal the "relative priority attached to the particular subject matter or policy initiative" or would otherwise reveal the substance of the deliberative process of Cabinet. Therefore, I conclude that records 55, 58 and 67 do not qualify for exemption under section 12(1).

While record 58 contains the names of individuals, as discussed earlier, I am satisfied that they appear in their professional capacity as government staff and do not constitute "personal information" as defined under the *Act*.

In summary, I find that records 1 and 29 are exempt pursuant to section 12(1)(b), and records 4, 5, 6, 7, 9, 10, 11, 12, 13, and 15 are exempt under the introductory wording of section 12(1). I also find that the section 12(1) exemption claimed by the Ministry does not apply to records 55, 58 and 67.

ADVICE OR RECOMMENDATIONS

The Ministry relied on the exemption at section 13 to deny access to information in records 4, 6, 7, 59 and 61. As I have found that records 4, 6 and 7 are exempt under section 12, I will consider only records 59 and 61 under section 13(1). This section reads:

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

Previous decisions have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P_348, P_363, upheld on judicial review in *Ontario* (Human Rights Commission) v. *Ontario*

(Information and Privacy Commissioner) (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P_883, upheld on judicial review in *Ontario* (Minister of Consumer and Commercial Relations) v. *Ontario* (Information and Privacy Commissioner) (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making."

In his submissions, the appellant makes a general comment that the onus of proof with respect to "multiple issues ... rests with the Ministry. The "multiple issues" referred to include "advice or recommendations, third party information, solicitor-client privilege, personal information, qualification for exemption and personal information."

The Ministry submits:

> ... Record 59 constitutes advice of a public servant in the employ of the Ministry relating directly to decisions with respect to the SuperBuild funding which would ultimately be accepted in the deliberative process. The handwritten portion of record 61 (at issue here), severed under section 13, advice for the Minister or delegate on how to respond to concerns in the text of the email (exempted under section 21) about [a named institution's] SuperBuild application. The records at issue were prepared by [the Coordinator], in whole or in part, or by members of his staff in the employ of the Ministry.

Record 59 is an e-mail message between Ministry staff. It recommends responses to inquiries from the SuperBuild Growth Fund Secretariat. I am satisfied that the information contained in the e-mail can be characterized as recommendations and/or advice for dealing with a particular aspect of the SuperBuild Project, and find that it qualifies for exemption under section 13(1).

Record 61 is also an e-mail message and only the hand-written notes are at issue. I have reviewed this record and am satisfied that the hand-written notations constitute advice and/or recommendations to government and are therefore exempt under section 13(1).

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that the discretionary solicitor-client privilege applies to record 47.

Introduction

Section 19 of the *Act* states:

> A head may refuse to disclose a record that is subject to solicitor_client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 therefore encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

Solicitor-Client Communication Privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> … all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship …
>
> (*Descôteaux v. Mierzwinski, supra,* at 618, cited in Order P_1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> … the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at

> each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> (*Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P_1409)

As indicated earlier, the appellant provided no response to this issue.

The Ministry submits:

> The record is an electronic (e-mail) communication that was understood to be of a confidential nature since it was from legal counsel employed by the Ministry to senior Ministry officials and the director of the Legal Services Branch. The communication was in direct response to requests from senior Ministry officials for legal advice on the form of the Minister's SuperBuild award letter. The communication consists of recommendations and advice relating to the draft that was provided to legal counsel.

From my review of the record and the Ministry's submissions, I find that record 47 meets the solicitor-client communication privilege test as set out above. It consists of a communication between a senior counsel and Ministry client/staff members, made for the purpose of providing legal advice to the Ministry, with respect to SuperBuild Terms and Conditions. Based on the nature of the record and the context in which it was prepared, I am satisfied that this information was treated in a confidential manner by the Ministry and the Legal Services Branch.

Accordingly, I find that record 47 qualifies for exemption under the solicitor-client communications privilege component of section 19 of the *Act*.

PUBLIC INTEREST OVERRIDE

Introduction

Section 23 of the *Act* reads:

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

In the circumstances, the public interest override can apply only to records 59 and 61, which I found to be exempt under section 13.

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a compelling public interest in disclosure; and (ii) this compelling public interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note).

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

In his representations, the appellant submits that he is adopting his previous submissions which were considered by Senior Adjudicator David Goodis in Interim Order PO-1871-I. He further states that he was "applying them *mutatis mutandis* to the issues of advice or recommendations, third party information, and personal information hereunder."

The Ministry submits:

> The Ministry provided a lot of public communication about the SuperBuild competition and the final results ... and then subsequently in a number of individual releases regarding individual projects. All of these releases may be found on the Ministry of Training, Colleges and Universities public website. ... Press releases indicated the overall amount to be spent on the SuperBuild Initiative, outlined the proposals process, specified the amount granted to each of the institutions selected, and announced further spending in a second round of spending. When appropriate, the Ministry released macro figures relating to SuperBuild.

Is there a compelling public interest in disclosure of the information found to be exempt?

The threshold issue to be decided is whether there is a compelling public interest in disclosure of the two records which I have found to be exempt under section 13.

In Interim Order PO-1871-I, Senior Adjudicator Goodis adopted the definition of "compelling" in Order P-1398 [upheld by the Court of Appeal for Ontario in *Minister of Finance* (above)], in which former Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention".

For the purpose of this appeal, I also adopt this interpretation of the word "compelling".

In Order PO-1871-I, Senior Adjudicator David Goodis found that "there is strong public interest in the Peterborough community in the specific matter of the University's proposal to dispose of downtown properties, particularly among students, faculty and businesses who may be most affected by the proposal." While I accept that the same general proposition holds true in this case, I am not persuaded that disclosure of records 59 and 61 would advance this public interest to any significant degree, since these records are only marginally relevant to the central SuperBuild issues.

Accordingly, I find that section 23 cannot apply in the circumstances.

ORDER:

1) I order the Ministry to disclose records 55, 58 and 67 by providing the requester with copies. Disclosure is to be made by August 17, 2001 and not before August 13, 2001.

2) I uphold the decision of the Ministry to withhold the remaining records at issue.

3) In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information provided to the appellant with provision 1.

Original signed by: July 13, 2001
Dora Nipp
Adjudicator