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

INTERIM ORDER PO-2087-I

Appeal PA-010372-1

Ministry of Finance

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Finance (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> Any and all information, background material and records relating to the drafting and/or enactment of Sections 1 and 2 of Schedule D to the *Tax Credits To Create Jobs Act, 1997*, including, without limiting the generality of the foregoing, any notes, briefs, summaries, minutes, drafts, memoranda, correspondence, policy statements and submissions which relate to said drafting and/or enactment.

The Ministry located 37 responsive records and granted access to eight of them in their entirety. The Ministry denied access to the remaining 29 records on the basis of the application of sections 12 (cabinet records), 13 (advice or recommendations) and/or 19 (solicitor-client privilege) of the *Act* as set out on an index of records that it attached to the decision letter.

The appellant appealed the Ministry's decision to deny access to the records.

Mediation could not be effected and this appeal was forwarded to adjudication. I sought representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues at inquiry. The Ministry submitted representations in response. After reviewing them, I decided to seek representations from the appellant on all of the issues in this appeal, and provided him with a copy of the Notice and the complete representations of the Ministry. The appellant also submitted representations. I subsequently sent the appellant's representations to the Ministry and provided it with an opportunity to reply to them. The Ministry declined to submit representations in reply.

RECORDS:

Two of the records originate from the Ministry's Legal Services Branch, 18 originate from the Office of the Budget and Taxation and the remaining nine from the Retail Sales Tax Branch. They consist, generally, of memoranda, e-mails, questions and answers and drafts of Position/Briefing papers.

In its representations, the Ministry indicates that it withdraws its reliance on the discretionary exemption in section 13(1) for Record 13. Since this is the only exemption claimed for it, Record 13 is no longer at issue and should be disclosed to the appellant.

Many of the documents contained in the records at issue are duplicates, at times differing only by date (for example, Records 29, 33 and 34) or by the inclusion of handwritten comments/editing (such as Records 11 and 14). In some cases, e-mails have been duplicated as part of overlapping strings of messages (including Records 15/16 and 19/20). For consistency, my decision with respect to one copy will apply equally to the other copies (unless otherwise specified).

PRELIMINARY MATTER:

LATE RAISING OF AN ADDITIONAL DISCRETIONARY EXEMPTION

In its representations, the Ministry states:

> In addition to the Records mentioned above in respect of which the Ministry has claimed section 19 of [the *Act*], the [Ministry] wishes to claim section 19 of [the *Act*] with respect to the sixth paragraph of the document (which begins with the words: "in 1991, (…) the purchaser.") as that part of the document reflects legal advice received by the Ministry in respect of one aspect of the taxation of promotional distributions.

On November 6, 2001, the Commissioner's office provided the Ministry with a Confirmation of Appeal, which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until December 11, 2001) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

Former Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, former Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

As is evident above, the Ministry claimed the application of section 19 to additional information for the first time in its representations, submitted approximately eight months after the 35-day time frame set out in the Confirmation of Appeal. The Ministry does not provide any representations on why it has waited this long to raise section 19 for this portion of the record or on why I should depart from the policy of this office with respect to this issue. Moreover,

although the Ministry has numbered the records (which as noted above, total 29, and comprise approximately 116 pages) it has identified the portion of "a" record only by reference to the "sixth paragraph" beginning with a certain sentence as containing the information that it submits is subject to exemption under section 19.

In my view, the Ministry has made no effort to address the late raising of a new discretionary exemption, nor has it made it reasonably possible for me to even identify the information that it seeks to exempt. I find that the Ministry has failed to sufficiently explain why I should depart from the policy of this office regarding the late raising of additional discretionary exemptions and I will not specifically consider the application of section 19 to the portion of them referred to in the Ministry's representations.

However, as I indicated above, there is duplication in the records (either the record itself is duplicated or the information contained in one record is clearly taken from another record for which a different exemption has been claimed). Similarly, in some cases, the Ministry has claimed the same exemptions for the duplicated pages, in others it has not addressed the same exemption claims. Where it is obvious on the face of the record that the information is the same, as I indicated above, my decision will apply to all duplicated copies. It may well be that the information identified by the Ministry above is contained in one of these duplicated pages and will thus be "caught" in my ultimate decision.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims the application of the exemption in section 19 to Records 1, 2, 10, 14, 16, 21-24 and 29-35.

Section 19 of the *Act* reads:

> 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

Solicitor-client communication privilege

Previous orders of this office have identified that 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).

The Supreme Court of Canada has described this privilege 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* (1982), 141 D.L.R. (3d) 590 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).

The appellant does not dispute the Ministry's general reliance on section 19, but is rather seeking only information that does not specifically relate to the provision of legal advice by the Legal Services Branch. The appellant notes, however, that:

> It has recently been confirmed by the Federal Court of Appeal in the case of [*Blank v. Canada (Minister of the Environment)*], 2001 FCA 374, that "not all communications between solicitor and client are privileged" and that "**especially in the case of lawyers employed by government**", advice sought or given may sometimes relate to matters of policy rather than law". [emphasis in the original]

The appellant takes the position that to the extent that any of the records reflect "things other than the provision of legal advice", they should be disclosed. The appellant also refers to section 10(2) of the *Act* and submits that to the extent that the records reflect the provision of legal advice and other advice, the non-exempt portions should be severed and disclosed.

In *Blank*, which pertains to an access request made under the federal *Access to Information Act* (the *ATA*), the Federal Court of Appeal commented on the records at issue and the appellant's submission with respect to them as follows (at paragraphs 19 and 20):

> Almost all of the documents in issue are letters or memoranda representing communications between solicitor and client … Those communications either seek or give legal advice, or represent an integral part of the ongoing dialogue relating generally to the matter of the criminal charges, in which the legal advice is expressly or implicitly referred to.
>
> Counsel for the appellant pointed out that not all communications between solicitor and client are privileged and that, especially in the case of lawyers employed by government, advice sought or given may sometimes relate to matters of policy rather than law. **While that is true in theory, in this case I was unable to identify any advice sought or given that could not properly be characterized as legal advice**. [my emphasis]

In my view, this decision is not helpful to the appellant as I similarly find that the vast majority of the information contained in the records at issue in this discussion constitutes communications for the purpose of giving or receiving legal advice as contemplated by section 19 and the common law.

In particular:

Records relating to the Budget Bill

Records 1 and 2, which consist of a covering memorandum with a list of Budget items attached, and a "Legislative Decision Document" for the 1997 Budget Bill, respectively, were all prepared by legal counsel. The Ministry indicates that these records were prepared in response to a request by the Deputy Minister and submits that:

> [t]hey contain advice as to how certain measures announced in the 1997 Budget are to be implemented as well as a list of outstanding matters that remain to be resolved.

I am satisfied that these records form part of the continuum of communications between the client (in this case, the Deputy Minister) and his solicitor aimed at keeping both informed so that advice may be sought and given as required, as contemplated in *Balabel*.

Memoranda

Records 10, 14, 21, 29, 30, 31, 32, 33 and 34 contain memoranda between legal counsel and various staff or senior staff of the Ministry or between staff. In some cases, these are covering memoranda attached to other documents, in others, the memoranda stand alone.

On review, I find that a portion of the memorandum in Record 14 either makes reference to or reflects the legal advice that is contained in a record at issue in this discussion, and therefore qualifies for exemption under section 19. Although not claimed by the Ministry, I note that a portion of the memorandum contained in the first two pages of Record 36 (which is a memorandum from the Director, Retail Sales Tax Branch to the Assistant Deputy Minister) re-iterates the legal advice received from legal counsel in other records at issue. In order to obtain a consistent result, I find that this portion of the memorandum also qualifies for exemption under section 19.

In addition, I find that Record 21, which contains a covering memorandum from staff to legal counsel with a draft document attached, when viewed with Record 22 (discussed below), is best described as a request for a review and comment, which, in my view, is in the nature of a request for a legal opinion. I am satisfied that this is a confidential communication between the client and his solicitor made for the purpose of obtaining professional legal advice as contemplated by section 19.

Record 10 contains a covering memorandum from the Assistant Deputy Minister, Tax Division to the Assistant Deputy Minister, Office of Budget and Taxation. Page 3 of Record 36 is a duplicate copy. This memorandum is a communication between two Assistant Deputy Ministers relating to the status of the legislation and the proposed changes to it. I am not persuaded that disclosure of this portion of the record would either disclose or reveal information that is subject to solicitor-client communication privilege. However, Record 10 also contains an Appendix, consisting of four "legal memoranda" prepared by counsel in the Legal Services Branch. The Ministry notes that each of these four documents:

> … sets out the facts and relevant agreements and analyzes the applicability of the RST Act to promotional distributions. Various provisions of the RST Act are analyzed in the context of different fact situations and legal advice is provided in respect of the applicability of retail sales tax.

On review, I concur and find that these four attachments to Record 10 fall squarely within the exemption.

I also find that Record 29, Records 30, 31, 32, 33 and 34, in part (which are duplicates of the Appendices to Record 10) all contain legal advice and, in the case of the remaining portion of Record 34, a request for legal advice on legal and policy-related issues such as the interpretation and application of the *Retail Sales Tax Act* and matters which were being dealt with by the Retail Sales Tax Branch. The memoranda in these records are all captured within the solicitor-client communication privilege continuum.

Position/Briefing papers

The final document in Record 10 is a "Position Paper". Pages 4-7 of Record 36 contain a duplicate copy of this paper. Record 14 contains a "Briefing Paper". Pages 2-3 of Record 11 contain a duplicate copy of this paper (with handwritten comments on it, which are not included in the discussion under section 19). These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.

The remaining portions of these records do not reveal the legal advice provided by counsel and are, therefore, not exempt under section 19.

Record 34 contains a copy of a Position Paper, which is similar, but not identical to the Position Paper in Record 10. This paper was attached to a memorandum in which the Assistant Deputy Minister – Tax Division requests legal advice from a solicitor in the Legal Services Branch. It is apparent that the advice was being sought with respect to the information contained in the Position Paper, and it therefore forms an integral part of the request. Accordingly, this portion of Record 34 qualifies for exemption under solicitor-client communication privilege.

Pages 4-6 of Record 37 contain a duplicate of Record 34. In the circumstances, I find that this portion of Record 37 also qualifies for exemption under section 19.

E-mails

Records 16, 22, 23, 24 and 35 contain e-mails either between staff and senior staff or between staff and legal counsel.

On review, I find that only a portion of Record 16, which is an e-mail between staff and senior staff, contains references to prior legal advice provided by counsel for the Ministry. I am satisfied that disclosure of this portion of the record would reveal that legal advice and is therefore exempt under section 19.

Record 22 contains legal counsel's comments and advice regarding the attachment to Record 21 in direct response to the request for same in the covering memorandum to that record (as noted above). I am satisfied that Record 22 is a confidential communication between the client and his solicitor made for the purpose of providing legal advice and as such, falls squarely within the exemption.

Records 23 and 24 contain e-mails exchanged between staff and legal counsel. On review, I am satisfied that they form part of the continuum of communications between legal counsel and the client aimed at keeping both informed as contemplated by *Balabel*.

Record 35 is a request for a legal opinion regarding a situation relating to a promotional distribution. I am satisfied that this record constitutes a confidential communication between the

client and his lawyer made for the purpose of seeking legal advice on a matter with legal implications and thus qualifies for exemption under section 19.

Severance

Section 10(2) of the *Act* reads:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

The Court in *Blank* (referred to by the appellant), commenting on the comparable provision in the *ATA*, stated (at paragraph 13):

> The Minister argues that a record that is subject to solicitor-client privilege is not subject to the severance provision in section 25. I do not agree. Section 25 is said to apply "notwithstanding any other provision of this Act". If a document contains a communication that is within the scope of the common law solicitor-client privilege and also contains information that is not within the scope of the solicitor-client privilege, the Minister cannot refuse to disclose the latter.

With respect to the severance principle to section 19 of the *Act*, Senior Adjudicator David Goodis offered the following comments in Order PO-1663:

> In *Minister of Finance* [*Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71], the court (at page 77) stated the following with respect to the application of section 10(2) in the context of the section 19 solicitor-client communication privilege exemption:
>
> > It is apparent that the effect of the order under review is to compel the Ministry to disclose what it told its legal advisor to obtain legal advice. In my view, that constitutes a derogation of solicitor-client privilege and cannot be supported as a acceptable interpretation of s. 19. Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.
> >
> > I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. If facts communicated to legal counsel are to be

> found in some other form in the records of the Ministry, those records are not sheltered from disclosure simply because those same facts were disclosed to legal counsel. Similarly, documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: *Ontario (Attorney General) v. Hale* (1995), 85 O.A.C. 229 (Div. Ct.).

In my view, none of the records claimed to be exempt under section 19 combines communications to or from counsel for the purpose of obtaining legal advice with communications "for other purposes which are clearly unrelated to legal advice". In addition, neither of the other limitations referred to by the court in *Minister of Finance* is applicable here. Therefore, I find that the section 10(2) severance provision has no application with respect to Records 2, 5 to 9, and 12 to 18.

With respect to the issue of severance generally, in Order PO-1727, Senior Adjudicator Goodis discussed the principles to be applied in considering whether severance is appropriate:

> Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71, the Divisional Court stated:
>
> > I would note, however, that while the Commissioner has taken an excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministry made an effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.
> >
> > In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.

I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.

Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the *Access to Information Act*, which provides for severance, reads:

> Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and <u>can reasonably be severed</u> from any part that contains any such information or material. [Emphasis added]

Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

Similarly, in *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)* (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:

> To attempt to comply with s. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

Applying the principles enunciated in these decisions, I have reviewed the records to determine whether they may be severed.

A number of the records at issue in this discussion were prepared by non-legal staff of the Ministry and they contain information other than and in addition to the legal advice referred to in them. In my view, the portions of these records that do not contain or reveal legal advice and that are not privileged communications as a whole cannot be characterized as "disconnected snippets" or "worthless" *per se*. While possibly not of significant interest to the appellant, they are reasonably severable, subject to my findings below under the remaining exemptions claimed by the Ministry.

Disposition of Records subject to exemption under section 19

As I indicated above, the appellant does not dispute the Ministry's general reliance on section 19, but is rather seeking only information that does not specifically relate to the provision of legal advice by the Legal Services Branch. In my view, the appellant is essentially asking that I confirm that the records for which section 19 has been claimed do, in fact, qualify for exemption. Having done so, I find that Records 1, 2, 21, 22, 23, 24, 29, 30, 31, 32, 33, 34 and 35 and the portions of Records 10, 11,14, 16, 36 and 37 that qualify for exemption under section 19 should not be disclosed.

ADVICE OR RECOMMENDATIONS

The Ministry claims the application of section 13(1) to Records 10-21, 24-27, 36 and 37. I found above that Records 21 and 24 and portions of Records 10, 11, 14, 36 and 37 are exempt under section 19. In the circumstances, I will direct the following discussion only to the remaining records and parts of records.

Introduction

Section 13(1) reads as follows:

> 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 orders have established that advice and recommendations, for the purposes 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 P-94, P-118, P-883 and PO-1894). 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) of the *Act* (Orders P-1054, P-1619 and MO-1264).

The interpretation of section 13(1) first introduced in Orders 94 and P-118 was applied in Order P-883, upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (December 21, 1995), Toronto Doc. 220/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and 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." Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Order 24; PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

In general, the Ministry submits that:

> This exemption may apply where it is evident that the records were prepared by public servants to provide advice to decision makers and policy makers within the institution, even though they are not addressed to a particular individual (See Orders #P-522, P-128). A record may be exempt if it would reveal advice or recommendations by inference even though it is not itself advisory in nature (See Order #P-233). A draft document may be exempt if the institution can establish that the draft contains a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process. A draft form may be exempt in its entirety under this section where it can be shown that its contents would be accepted or rejected during the deliberative process (P-324). (See also Orders #P-278, P-324, P-827). This exemption includes the "response" sections of the Minister's issue notes. These contain advice from a public servant to the Minister as to how to respond.
>
> The appellant takes the position that section 13(1) should not apply to the records at issue since they "appear to contain recommendations and advice dealing with ***how the legislation is to apply*** and ***how it should be interpreted***, rather than actual advice as to a suggested course of action that will ultimately be accepted or rejected by its recipient during a deliberative process". [emphasis in the original]

I do not agree with the appellant's interpretation of the "deliberative process". In my view, the development, interpretation and application of legislation is a significant component of the deliberative decision-making that takes place in government. Accordingly, where the evidence

establishes that records contain advice or recommendations relating to this aspect of government decision-making, they will qualify for exemption under section 13(1).

Application of section 13(1) to specific records

Position/Briefing Papers, Proposed Amendments and Questions and Answers

Records 10, 11, 14 and 36 contain duplicate copies of the Position and Briefing Papers. As noted above, substantial portions of these two documents are exempt under section 19. The Ministry makes the following submissions regarding the application of section 13 to the remaining portions:

> The Position Paper outlines the issues related to the taxation of promotional distributions and provides recommendations on how to deal with this matter. The [Ministry] is of the view that section 13(1) of [the *Act*] applies to the covering memorandum and the Position Paper. The disclosure of these Records would reveal advice to government and recommendations within the deliberative process of government decision making and policy making. This free exchange of information and advice would be inhibited if information, advice, recommendations, and analysis which was prepared with an understanding that it would be maintained in confidence for a specific audience and for a specific purpose are made public.
>
> Record 11 consists of a handwritten covering note and a Briefing Paper in respect of proposed amendments to the Regulations to the RST Act to clarify the application of the tax to promotional distributions. The Paper provides a number of recommendations and advice on how to clarify the application of the Regulations. The disclosure of these Records would reveal advice to government and recommendations within the deliberative process of government decision making and policy making.

The Ministry indicates that Record 27:

> …consists of [Questions and Answers] in respect of the amendments to the provisions dealing with promotional distributions. This document was prepared to advise the Minister of Finance on how to respond to issues raised by members of the Legislature in relation to the passage of the Bill.

Page 1 of Record 17 and page 2 of Record 25 contain "legal specifications" of a proposed amendment to the *Retail Sales Tax Act*. Page 2 of Record 21 and pages 3, 5 and 7 of Record 24 contain duplicates of these two records. The Ministry states that Record 17 "provides a recommendation and advice on how to clarify the application of the Regulations". According to the Ministry, Record 25 was prepared to "clarify the application of the tax to promotional distributions".

With respect to Records 10 and 11, the appellant states:

> The Ministry's failure to disclose significant material information (including its author, the circumstances of its preparation and the deliberations that would have been affected by it) regarding Record 10 strongly suggests that he Ministry cannot sustain withholding the documents in question under ss. 13(1)… the Ministry's bald assertion that "it is not possible to separate the factual content from the advice and recommendation" … is not supported by the evidence and should be rejected.
>
> … it is clear that a document which is entitled "Briefing paper" must have been prepared for informational (or "briefing") purposes (rather than actual advice as to a suggested course of action that will ultimately be accepted or rejected by its recipient during a deliberative process)…

The appellant takes the position that the exemption in section 13(1) is "clearly not applicable" to Record 27.

Relying on his interpretation of the "deliberative process" discussed above, the appellant submits that section 13(1) is not applicable to exempt Records 17 and 36 from disclosure.

Finally, with respect to Record 25, the appellant submits that the Ministry has failed to establish that the record contains advice or recommendations.

In Order PO-2028, Assistant Commissioner Mitchinson reviewed previous orders of this office that have addressed the application of section 13(1) to records that are similar in nature to Records 10, 11 and 27 (such as issues or options papers and questions and answers), and concluded:

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

In Order P-1137, former Adjudicator Anita Fineberg upheld the application of section 13(1) to a "briefing note" (which also contained draft questions and answers) in the circumstances of that appeal, stating:

> Record 105 is a briefing note prepared by a Ministry policy analyst for the Minister's meeting with an association with an interest in the MPTAP. The

> Ministry submits that the portion of this record including the draft recommended questions and answers, which have yet to be finalized by the provinces, satisfy the section 13(1) exemption.
>
> Previous orders of the Commissioner's office have found that the response sections of briefing notes and/or issue sheets often do not qualify for exemption under this section because they constitute mainly factual material which does not fall within the deliberative process of government. In my view, Record 105 may be distinguished from these cases in that the information contained in this record constitutes advice which is in many cases contingent on the position which the Ministry and the government as a whole will take with respect to the MPTAP and other issues surrounding compensation. Many of the suggested answers refer to responses to be developed with the assistance of the legal branch and have to accurately reflect the information in the agreement which had not been finalized at that time. In addition, there were several matters regarding the contribution fund which were in flux at the time of the drafting of the briefing note. Accordingly, I find that Record 105 constitutes recommendations which are part of the government's deliberative process involving HIV compensation and thus qualifies for exemption under section 13(1) of the *Act*.

In contrast, in Order PO-1995, Assistant Commissioner Mitchinson made the following comments regarding a document commonly referred to as a "Questions and Answers" in concluding that it does not qualify for exemption under section 13(1):

> Record A3, as noted earlier, is a series of questions and answers. The record is dated June 24, 1996, and deals with various aspects of the settlement agreement and its implementation. The author of the document in not identified by the Ministry, nor is the recipient. It would appear from the content of this record that it was most likely prepared to assist the recipient, as a representative of the Ministry, to respond to questions raised in some type of public forum.

With these comments in mind, I have reviewed each of the categories of records to determine whether they contain advice or recommendations.

Position Paper

The Position Paper was prepared by staff in the "Tax Advisory – Retail Sales Tax Branch". The author and recipient of the record are not apparent on its face. However, it is clear from other records at issue in this appeal, including the covering memorandum attached to Record 10, that it was prepared by staff in that branch and was submitted to a number of more senior staff at the "manager" level up through to, at least, the Assistant Deputy Minister.

The discussions in this paper are contained under several headings, including: subject, issue, background, considerations, conclusion and recommendation. I am satisfied that disclosure of the "Issue" and "Recommendation" sections of this paper contain or would reveal a suggested course of action, which will ultimately be accepted or rejected by its recipient during the

deliberative process. Accordingly, I find that disclosure would reveal the advice and recommendations of a public servant and thus qualify for exemption under section 13(1) of the *Act*.

With one exception, I find that the portions of this paper under the headings "Subject", "Background", "Considerations" and Conclusions" would not reveal the advice or recommendations of a public servant, nor would their disclosure permit the drawing of accurate inferences with respect to the advice or recommendations that are contained in the record. This information is entirely factual and pertains to the current status of the legislation and Ministry policy pertaining to it.

In my view, however, the fifth paragraph under the heading "Considerations", while not including specific advisory language or an explicit recommendation, in effect "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. I find, therefore, that this paragraph qualifies for exemption under section 13(1).

Briefing Paper

The Briefing Paper was similarly prepared by staff in the "Tax Advisory – Retail Sales Tax Branch". As was the case with the Position Paper, the author and recipient of the record are not apparent on its face. However, it is clear from other records at issue in this appeal, including the covering memorandum attached to Record 14, that it was prepared by staff in that branch and was submitted to a number of more senior staff at the "manager" level up through to the Assistant Deputy Minister.

This paper also contains a number of headings of discussion, including: Proposed Amendments, Current Legislation, Current Administrative Practice. The Briefing Paper also contains an Appendix setting out the provisions of the *Retail Sales Tax Act* that address promotional distributions. In my view, the information contained in the Appendix is purely factual and easily severed from the substantive portion of the paper. I am not persuaded that disclosure of the Appendix would reveal or permit the drawing of accurate inferences regarding the nature of the advice and recommendations contained in this or any other record at issue.

With respect to the paper itself, I find that the information under the heading "Current Legislation" and the first paragraph under the heading "Current Administrative Practice" would not reveal the advice or recommendations of a public servant, nor would its disclosure permit the drawing of accurate inferences with respect to the advice or recommendations that are contained in the record. Similar to my findings regarding the Position Paper, this information is factual and pertains to the current status of the legislation and Ministry policy and/or practice pertaining to it.

I am satisfied that the reasoning applied by former Adjudicator Fineberg in Order P-1137 applies to the remaining portions of this paper, in that the discussion contained in these portions reveals, contextually, the suggested course of action being recommended. The information pertaining to the suggested course of action is intertwined with the factual information in such a way that it cannot be severed. I find that the remaining information constitutes advice or recommendations within the meaning of this section.

Questions and Answers

The Ministry indicates that Record 27 formed part of the Bill Binder for Bill 164, but in its submissions states that this record was prepared for the Minister to be used by him in answering questions in the Legislature. In my view, the Ministry's submissions suggest that the information in this record was intended to be used in a public forum (similar to the conclusions reached by Assistant Commissioner Mitchinson in Order PO-1995).

The Ministry bears the onus of establishing the requirements of the section 13(1) exemption claim, and it has failed to do so with respect to this record. Based on its content, Record 27 is factual in nature, and in essence, reflects the decisions that have already been made by senior staff in the Ministry. Apart from the one statement in its representations referred to above, the Ministry has not demonstrated how or why the exemption in section 13(1) applies to this record in the circumstances. Accordingly, in the absence of sufficient evidence or representations from the Ministry, I find that section 13(1) does not apply to this record.

Proposed Amendments and legal specifications

I agree with the appellant that the Ministry's representations are extremely sparse in their description of the records and their explanation as to how the exemption applies to them. However, the records themselves constitute a significant part of the evidence before me, and on review of the relevant portions of Records 17 and 25 (and the duplicate portions of Records 21 and 24), I am satisfied that they were prepared by public servants and that they advise or make recommendations on a suggested course of action *vis-à-vis* legislative amendments within the deliberative process of government decision-making. Consequently, I find that they qualify for exemption under section 13(1).

Page 2 of Record 17, page 3 of Record 21, pages 4, 6 and 8 of Record 24, page 3 of Record 25 and Record 26 contain draft legislation or would reveal draft legislation. The Ministry has also claimed section 12(1)(f) for these portions of the records. In his representations, the appellant indicates that if Records 17, 21, 24, 25 and 26 actually contain draft legislation, those portions of these records may be severed from the remaining portions. He implies that he is not interested in pursuing access to the draft legislation, but wishes me to confirm that they do, in fact, contain this information. I have reviewed these records and am satisfied that they contain actual draft legislation or would reveal the draft legislation through the explanatory notes included with the drafts. Therefore, these portions of the records are exempt from disclosure since the appellant is prepared to accept the application of the *Act* to them.

Notes and memoranda

Record 10 contains a covering memorandum from the Assistant Deputy Minister – Tax Division to the Assistant Deputy Minister – Office of the Budget and Taxation (the third page of Record 36 is a duplicate). This memorandum, as I have previously mentioned, was attached to the Position Paper and four legal memoranda. The memorandum identifies the issues raised in the attached documents and for the most part reflects the advice and recommendations contained

therein. I find that disclosure of the majority of the content of this memorandum would reveal the advice and recommendations of a public servant and thus qualifies for exemption under section 13.

The first page of Record 14, which is a covering memorandum to the Manager, Sales and Commodity Taxes – Taxation Policy Branch from a Legislation Design Specialist, was attached to the Briefing Paper. Similar to the memorandum in Record 10, portions of this memorandum reiterate or reflect the advice and recommendations provided in the attached document. Other portions of this memorandum do not reveal the advice or recommendations in the other document. Rather, they reflect problems that have been identified with respect to the legislation as it then existed. In my view, disclosure of this information would not permit the drawing of accurate inferences as to the advice and recommendations as to how these problems should be addressed.

Other information on these memoranda, such as the "to" and "from" lines, date and so on can be severed from the "content" of each record and to do so provides the appellant with information about the process without revealing exempt information. In my view, although the amount of information is small, it cannot be characterized as "worthless" or "meaningless" or "disconnected snippets" (as discussed above), and should therefore be disclosed to the appellant.

The first page of Record 11 is a handwritten note to a Legislation Design Specialist from a Senior Manager – Tax Advisory Branch. Although the Ministry has made representations on the attached Briefing Paper, its representations are silent on the covering memorandum except to assert that its disclosure would reveal advice to government. The memorandum contains general comments made by the senior manager and instructions to the staff person. In my view, disclosure of this page of the record would not reveal advice or recommendations, nor could accurate inferences be drawn from it. Accordingly, I find that the memorandum does not qualify for exemption under section 13. Since section 13 is the only exemption claimed for this record, it should be disclosed to the appellant.

The Briefing Paper that is attached to Record 11 has been dealt with previously. However, this copy of the Paper contains handwritten comments/questions made by the Senior Manager – Tax Advisory Branch. I am not persuaded that the comments/questions would reveal the advice or recommendations contained in the Paper, and, when read in the absence of the portions of the Paper to which they relate (which I have found qualify for exemption), their disclosure would appear to result in "disconnected snippets" of "worthless" or "meaningless" information. However, many of the records at issue follow a sequence of communications and when read together, provide a more complete picture. In this context, the comments are given meaning when read with Record 12 (which I will discuss next), since Record 12 was prepared in direct response to them.

The Ministry states that Record 12 consists of a handwritten memorandum, which, in part, provides background information as to how other provinces in Canada treat promotional distributions for sales tax purposes, and in part provides advice and recommendations on how Ontario should deal with one aspect of this matter. As I noted above, the majority of this record was prepared in direct response to the comments/questions made by the Senior Manager on the

copy of the Briefing Paper attached to Record 11. There is no "advisory" element to the response portion of this memorandum and section 13(1) does not apply to it.

The last sentence of the memorandum, however, contains a recommended course of action. I am satisfied that disclosure of this portion of the memorandum would reveal advice within the meaning of the section 13(1) exemption.

Records 17 and 25 contain handwritten notes from the Legislation Design Specialist to the Senior Manager in which he poses certain questions relating to the proposed amendments to the *Retail Sales Tax Act* or makes reference to the proposed amendments. The appellant is of the view that these records do not contain advice or recommendations.

When viewed contextually, I am satisfied that disclosure of the information on these two records written by the Legislation Design Specialist would reveal the advice or recommendations that is contained in the other records at issue in this appeal and, therefore, qualify for exemption under section 13(1).

Record 25 also contains a handwritten notation made by the Senior Manager. In my view, this portion of the record would neither reveal nor permit the drawing of accurate inferences with respect to the advice or recommendations provided by staff. However, as I noted above, this process involved several levels within the Ministry. I am satisfied that disclosure of the Senior Manager's note would permit the drawing of accurate inferences as to the advice or recommendations provided by him to the next level of decision-making within the deliberative process, and this portion of the record, therefore, also qualifies for exemption.

Pages 1 and 2 of Record 36 comprise a memorandum from the Director of the Retail Sales Tax Branch to the Assistant Deputy Minister. I have exempted a portion of this memorandum under section 19. The Ministry states that the remaining portion "provide[s] a number of recommendations and advice on how to clarify the application of the Regulations".

On review, I am satisfied that most of the remaining portions of this memorandum essentially recap the advice and recommendations provided in the paper attached to it (which I have discussed above) and their disclosure would reveal the advice or recommendations of a public servant. The portions of this memorandum that are left over are informational only and provide some insight into the internal processes followed in the legislative amendment process. I find that this information is reasonably severable from the exempt portions.

E-mails

Record 15 is an e-mail from a manager to the Legislation Design Specialist in which she asks him to respond to certain questions she has relating to the issue of promotional distributions (which are included as an attachment to the e-mail).

Record 16 contains this same e-mail in the string containing the Legislation Design Specialists responses to her questions.

The Ministry states that:

> Record 15 consists of a covering email and a list of questions concerning the application of the provisions in the RST Act in respect of promotional distributions. Record 16 consists of an email that outlines certain issues with respect to the proposed amendments to the RST Act and Regulations in respect of promotional distributions. These records are related. Record 15 contains analysis in respect of various aspects of the application of the RST Act in respect of promotional distributions and forms the basis of various recommendations made in Record 16.

According to the Ministry, Records 18, 19 and 20 consist of a sequence of e-mails that "raise various issues in respect of the proposed amendments … and contain advice on how to deal with a particular issue related to the proposed amendments".

Referring to the Ministry's characterization of the information in Records 15 and 16, the appellant submits that [a list of questions and analysis] are not sufficient to bring the records within the scope of section 13(1) unless they contain "advice as to the recommended course of action". The appellant submits further with respect to all of these records that "the outlining of 'issues' is clearly not exempt from disclosure", but accepts that if a record contains "recommendations" as defined above, this information could be severed and the remainder disclosed.

It is apparent that in developing the proposed amendments to the *Retail Sales Tax Act* and preparing the documents that contain their advice and recommendations with respect to the proposal, staff of the Ministry consulted various departments internally, and considered the interests/comments of each of them. Some of these communications are informational, some are directional, in that senior staff pose questions to the staff working on the amendments and staff have provided responses to them relating to the current status of the legislation and/or policy, and some are primarily administrative. In my view, most of this type of information in the e-mails contained in Records 15, 16, 18, 19 and 20 would not reveal the advice or recommendations contained in the other records. Nor can the comments made in the e-mails be construed as advice or recommendations in their own right since there is no evidence in them of a suggested course of action within the deliberative process.

Certain portions of Records 16, 18, 19 and 20, however, refer to or reveal the advice and recommendations made by staff regarding the proposed amendments and therefore, fall within the scope of section 13(1).

Record 37, in part, comprises another sequence of e-mails. Although the Ministry claims the application of section 13(1) to this record in its entirety, its representations only address the attachment to one of the e-mails (the Position Paper, which I dealt with above). I have reviewed the e-mails to determine whether they contain any information that refers to or would reveal or permit the drawing of accurate inferences as to the advice or recommendations contained in the Paper or any other advice or recommendations that have been made.

The first two e-mails contain references to instructions received from the Assistant Deputy Minister and the staff member's interpretation and application of those instructions. The Ministry has not identified the staff in either of these two e-mails. It is apparent from other records that the e-mails were prepared by a Senior Manager in the Legislation Retail Sales Tax Branch, but I am not able to determine the position of the recipient in the Ministry from the records. It is clear, however, that they have received instructions from senior Ministry staff and the e-mails refer to both the instructions and how they will be carried out. In my view, neither of these e-mails contains advice or recommendations, nor would their disclosure reveal any.

One sentence in the second e-mail refers to personal plans of one of the staff identified in the e-mail. In my view, this information constitutes the personal information of the staff member. Neither section 2(1) nor 21(1) was raised as an issue in this appeal. However, it is apparent from the nature of his request and the representations made by the appellant that he is seeking information pertaining to the legislative amendments, not the personal information of various staff working for the Ministry. I am, therefore, withholding the personal information in the second e-mail on this basis. If the appellant disagrees with this decision, he may submit a request that I reconsider this issue.

The third e-mail was sent to the Director of the Retail Sales Tax Branch from the Assistant Deputy Ministry and appears to contain the instructions referred to in the previous e-mail. Similar to my findings regarding the other two e-mails, this e-mail does not refer to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process and section 13(1), therefore, does not apply to it.

Disposition of Records subject to exemption under section 13(1) and other exemptions

In summary, I find that portions of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 qualify for exemption under section 13(1), subject to the Ministry's exercise of discretion which I will address below.

I also find that part of page 2 of Record 37 and parts of Records 17, 21, 24 and 25 and Record 26 are exempt under sections 21(1) and 12(1)(f), respectively. These portions of the records should not be disclosed to the appellant.

CABINET RECORDS

The Ministry relies on section 12(1)(f) to deny access to Record 1, page 3 of Record 2, Record 17, page 3 of Record 21, pages 4, 6 and 8 of Record 24, page 3 of Record 25 and Record 26. In addition, the Ministry submits that the introductory wording of section 12(1) of the *Act* applies to Records 1, 2, 17, 19, 21, 22, 24, 25, 26 and 27 in their entirety.

I found above that Records 1, 2, 21, 22 and 24 qualify for exemption under section 19. I found further that portions of Records 17, 19, 25 and 26 qualify for exemption under section 13. I also confirmed that portions of Records 17, 21, 24, 25 and Record 26 contain draft legislation, and pursuant to the appellant's representations, removed them from the scope of this inquiry. As a result, only a portion of Record 19 and Record 27 remain at issue. I will address the application

of section 12 to this record and part of a record only. The Ministry has claimed the application of the introductory wording of section 12 to these two records. This provision reads:

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

The Ministry's representations regarding these two records are as follows:

> Record 19 is an email which highlights certain issues with the proposed amendments in respect of promotional distributions.
>
> Record 27 consists of Questions and Answers in respect of Schedule "D" and the proposed changes to the RST Act. This document was prepared to advise the Minister of Finance on how to respond to questions in the Legislature on the proposed legislative changes…

With respect to Record 19, the appellant submits that e-mails that "highlight certain issues" with the amendment are not sufficient to preclude disclosure under section 12(1). Insofar as Record 27 is concerned, the appellant points out the section 12(1) cannot apply to it "since it deals with the public defence of the legislation as enacted and does not in any way reveal the substance of the Executive Council's deliberations".

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) (Orders P-11, P-22 and P-331). It is also possible that a record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This could occur where an institution establishes that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations (Orders P-226, P-293, P-331, P-361 and P-506).

In my view, the Ministry's representations fall short of establishing the application of section 12(1) to either record. The Ministry does not provide any information on the Cabinet deliberations regarding this matter and makes no effort to link what would appear to be relatively innocuous e-mails to the subject matter of those deliberations. In my view, the Ministry has failed to establish that disclosing the e-mails in Record 19 would reveal the substance of deliberations of Cabinet or its committees, or that their release would permit the drawing of accurate inferences with respect to those deliberations.

With respect to Record 27, Assistant Commissioner Mitchinson's findings in Order PO-1995 would appear to be on point in the circumstances of this appeal and, for the same reasons, I find that the Ministry has failed to establish the application of the exemption in section 12(1) to Record 27:

> Record A3 consists of a series of questions and answers, dated June 24, 1996. It is not clear from the face of the record who prepared this document, nor do the Ministry's representations establish the requirements of the section 12(1) exemption claim. Absent the necessary evidence or representations from the Ministry in this regard, there is no indication that disclosure of this record would reveal the substance of deliberations of Cabinet, and I find that Record A3 does not qualify for exemption under section 12(1) of the *Act*.

SUMMARY:

The Ministry withdrew its objection to the disclosure of Record 13 and I concluded that it should be disclosed to the appellant. I also found that Records 15 and 27 should be disclosed to the appellant in their entirety and that the memorandum and Appendix in Records 11 and 14 and pages 1 and 3 of Record 37 should be disclosed in their entirety. In addition, I found that, with the exception of one line, page 2 of Record 37 should be disclosed.

I found above that Records 1, 2, 21, 22, 23, 24, 29, 30, 31, 32, 33, 34 and 35 and parts of Records 10, 14, 16, 36 and 37 qualify for exemption under section 19 of the *Act*. I also found that parts of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 qualify for exemption under section 13 of the *Act*. Moreover, I concluded that certain portions of the records should not be disclosed on the basis that they contain personal information (one sentence in the second e-mail in Record 37) or draft legislation (Record 26 and parts of Records 17, 21, 24 and 25). For greater clarity, I have highlighted the portions of Records 10, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 and the remaining portions of Records 11 and 37 that qualify for exemption on the copy of those pages that I am sending to the Ministry's Freedom of Information and Privacy Co-ordinator with the copy of this order. The portions of these records that are not highlighted are not exempt and should be disclosed to the appellant.

EXERCISE OF DISCRETION UNDER SECTION 13

In response to the Ministry's submissions, the appellant points out that section 13 is a discretionary exemption and that it is incumbent on the Ministry to consider whether it is appropriate to release the records even though they may fall within the scope of the exemption.

The Ministry's representations do not address the exercise of discretion, nor, on review of the minimal representations provided, is it possible to determine the basis for its exercise.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed (Order MO-1277-I).

In Order P-344, Assistant Commissioner Mitchinson considered the question of the proper exercise of discretion in circumstances where the records contained the appellant's personal information. In my view, the principles underlying these comments are similarly applicable to the exercise of discretion generally. He stated:

> ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.
>
> In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

In Order MO-1573, Senior Adjudicator David Goodis commented on the obligations of institution with respect to discretionary exemptions (under the municipal *Act*):

> The section 15(a) exemption is discretionary, in that it permits an institution to disclose information, despite the fact that it could be withheld because it is publicly available. On appeal, the Commissioner may review the institution's exercise of discretion, to determine whether or not it has erred in doing so, but this office may not substitute its own discretion for that of the institution (see section 43(2)). An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations. In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations.

In the current appeal, it is not apparent that the Ministry has at any time exercised its discretion in deciding to withhold the records from disclosure under section 13. Therefore, I have decided to return this matter to the Ministry for the purpose of properly exercising discretion in deciding whether or not to claim exemption for the records at issue pursuant to section 13(1) of the *Act*.

ORDER:

1. I uphold the Ministry's decision to withhold Records 1, 2, 21, 22, 23, 26, 29, 30, 31, 32, 33, 34 and 35 and parts of Records 10, 11, 14, 16, 17, 21, 24, 25, 36 and 37 from disclosure.

2. I order the Ministry to disclose Records 13, 15 and 27 as well as the Appendix to Records 11 and 14 and pages 1, 2 and 3 of Record 37 as indicated on the highlighted copy of this last record that I am sending to the Ministry's Freedom of Information Co-ordinator with the copy of this order.

3. I order the Ministry to consider the exercise of discretion under section 13 with respect to the portions of Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36 that I have found to qualify for exemption under section 13, and to provide me with representations as to the factors considered in doing so by **January 6, 2003**. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. I will defer my final decision with respect to disclosure of the records identified in Provision 3 pending my review of the Ministry's exercise of discretion as required by that Provision.

5. I remain seized of this appeal in order to deal with the exercise of discretion under section 13 and the final disposition with respect to Records 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25 and 36.

6. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the material sent to the appellant pursuant to Provision 2.

Original signed by: December 17, 2002
Laurel Cropley
Adjudicator