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

ORDER PO-2115

Appeal PA-020038-1

Ministry of the Environment

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:

The Ministry of the Environment (the Ministry) received a four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to decision packages, policies, guidelines and directives, and public consultation requirements in relation to Terms of Reference under the *Environmental Assessment Act*. The Ministry responded by issuing an interim decision and a fee estimate. The requester then narrowed the request to records comprising the "decision packages" for two identified landfill expansion Terms of Reference.

In response to the narrowed request, the Ministry granted partial access to the responsive records, and withheld the remaining portions under the following exemptions:

- section 13(1) - advice or recommendations;
- section 19 - solicitor-client privilege; and
- section 21 - invasion of privacy.

The Ministry also significantly reduced its fee estimate.

The requester (now the appellant) appealed the Ministry's decision with respect to the application of sections 13(1) and 19 of the *Act*, but not for the section 21 exemption claim or the fee estimate. The appellant pointed to section 13(2)(d), which, if applicable, would provide an exception to the section 13(1) exemption. He also took the position that there was a compelling public interest in disclosing the records under section 23 of the *Act*.

Mediation did not resolve all of the issues, and the appeal was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry initially, and received representations in response. I then sent the Notice of Inquiry to the appellant, along with the non-confidential portions of the Ministry's representations. The appellant provided representations, which were in turn shared with the Ministry. The Ministry submitted reply representations.

RECORDS:

Background

In its representations, the Ministry explains the process by which the records were created.

The Ministry's Environmental Assessment and Approvals Branch (EAAB) is responsible for reviewing applications for approvals of facilities where their development and operation could result in adverse effects on the environment. An Environmental Assessment (EA) is part of this process, as set out in the *Environmental Assessment Act* (the *EAA*). In order to initiate the planning and approval process for a particular project, the *EAA* requires the applicant to prepare a Terms of Reference (TOR), which must be approved by the Minister. Once approved, the TOR sets out a framework that will guide and focus the preparation of an EA.

The applicant in preparing a TOR must also submit a workplan for the EA, as well as a description of consultations that took place during its preparation, and the type of consultation that will take place during the preparation of the EA. The TOR, along with supporting

documentation, is then submitted to the Ministry for public and government comment and review. The EAAB is responsible for coordinating the review and approval process for TORs. Once approved by the Minister, the EA can proceed.

Applicants must give public notice when an EA is submitted, and any interested party has the opportunity to provide comments. The EAAB coordinates the review of the EA and the comments, identifying any shortcomings and assessing how the requirements of the *EAA* have been addressed.

On the basis of the information provided by the EAAB, the Minister decides whether to:

- refer all or part of the matter to the Environmental Assessment Board for a hearing;
- refer the matter to a tribunal for a decision;
- refer the EA to mediation; or
- approve the proposed undertaking with or without conditions.

If a hearing is required, the Minister's decision to approve the undertaking or not must be ratified by Cabinet.

Records at issue

The appellant's request deals with TOR "decision packages" for two identified landfill expansions (Landfill #1 and Landfill #2). The Ministry identified eight responsive records, and has already provided the appellant with access to most of them, in whole or in part. The records remaining at issue consist of portions of Records 1, 2 and 5.

Records 2 and 5 are two different memoranda, dated August 19, 1999 and January 10, 2000, from two Assistant Deputy Ministers to the Minister regarding the proposed TORs for Landfill #1 and Landfill #2. They provide the Minister with information relating to the requests for approval of each of the TORs, and contain various categories of information, including:

- a summary of the decision required;
- the timing of the decision;
- the background to the proposed TOR;
- an overview of the proposed TOR;
- a summary of the government and public review;
- an analysis of the comments;
- the Minister's options; and
- a recommendation.

The Ministry disclosed most of Records 2 and 5, denying access to the portions headed "Option" and "Recommendation" in both records. The Ministry also denied access to four paragraphs of a portion of Record 2 contained in the section headed "Analysis of Comments".

Record 1 is a memorandum dated December 22, 1999 from an Assistant Deputy Minister to the Minister, titled "Minister's decision Note – Paper briefing". It addresses an issue concerning a request made by the appellant concerning the TOR for Landfill #1. This record contains sections

headed "Purpose", "Background", "Considerations" and "Options/Recommendations". The only withheld portions of Record 1 are one paragraph in the "Background" section, and the entire "Considerations" and "Options/Recommendations" sections.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

In its decision letter to the appellant, the Ministry relied on the section 19 solicitor-client privilege exemption for the following portions of the records:

- the undisclosed portion of page 2 of Record 1, contained in the "Background" section;
- the undisclosed portion of page 6 of Record 2, contained in the "Analysis of Comments" section;

For the first time in its representations, the Ministry identifies section 19 as a basis for denying access to the "Considerations" and "Options/Recommendations" sections of Record 1.

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 encompasses two heads of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The Ministry submits that the records qualify for exemption under the solicitor-client communication privilege. Although in its reply representations the Ministry confirms that the Minister's decision regarding Landfill #1 is the subject of a judicial review application, there is no suggestion that it is relying on litigation privilege as a basis for denying access to the records at issue in this appeal.

Solicitor-client communication privilege

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* (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).

Solicitor-client communication privilege has also been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729).

Record 1

The Ministry states that the EAAB sought and received advice from a solicitor with respect to any legal issues raised in the context of the TOR approvals. The Ministry submits that the withheld portions on page 2 of Record 1 contain the legal advice provided in this context. Specifically, the Ministry points out that three individuals were involved in preparing Record 1, and that the severed portions of the record contain advice provided by the solicitor to an EAAB planner who in turn relayed it to the Assistant Deputy Minister who authored the record.

The appellant takes issue with the Ministry's position, and submits:

> …with respect to Record 1, page 2, the [Ministry] is attempting to invoke solicitor-client privilege for a portion of a memo that was written to the Minister by a senior bureaucrat, not a solicitor of the Crown. For this reason alone, the claim for solicitor-client privilege should be rejected by the Adjudicator.
>
> In its representations, the [Ministry] has claimed that these severed portions of Records 1 and 2 "summarized" legal advice purportedly provided by [the solicitor]. … it is clear from the face of the records that [the solicitor] did not author the documents, nor does it appear that she was even copied on these

> documents. Moreover, while both records are marked as "confidential", neither document bears any indication that they are also "privileged" from a solicitor-client perspective.
>
> In these circumstances, [the appellant] submits that [the Ministry's] *ex post facto* claim of solicitor-client privilege is unpersuasive and unsupported by the records themselves….

In reply, the Ministry states that "… the advice was written by a non-lawyer on the basis of legal advice received from the counsel assigned to her branch. The [Commissioner's Office] has consistently adjudicated that it is the information, not the person who wrote the record at issue that is to be considered."

As the Ministry points out, previous orders of this office have considered whether solicitor-client communication privilege can apply to advice contained in records not authored by a solicitor. Recently in Order PO-2087, Adjudicator Laurel Cropley reviewed solicitor-client privilege claimed for a number of documents, including position papers and briefing materials, and stated as follows:

> 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.

I am faced with a similar situation here. Having reviewed the record and considered the Ministry's representations, I am satisfied that disclosing the withheld portions on page 2 of Record 1 would reveal specific legal advice provided by the solicitor to her Ministry client. These portions of the record specifically refer to the Legal Services Branch and directly identify the legal advice received. Therefore, I find that the withheld portions on page 2 of Record 1 fall within the scope of solicitor-client communication privilege, and qualify for exemption under section 19 of the *Act*.

As far as the "Considerations" and "Options/Recommendations" sections of Record 1 found on page 3 are concerned, without discussing in detail the ability of the Ministry to raise section 19 for these portions for the first time in its representations, I am not persuaded, based on the Ministry's representations and my independent review of the record, that they would qualify for solicitor-client communication privilege in any event. There is nothing on the face of these two sections to support the solicitor-client communication privilege claim. Unlike the withheld portion of page 2, the content of the two sections on page 3 would suggest that they reflect the Assistant Deputy Minister's own views. This conclusion is supported by the Ministry's representations on the section 13 claim for these portions of Record 1, which state:

> In this particular case, [the Assistant Deputy Minister] offered the advice based on his expertise as the Assistant Deputy Minister, responsible for bringing the Terms of Reference to the Minister for consideration.

Therefore, I find that the requirements of section 19 have not been established for the "Considerations" and "Options/Recommendations" sections on page 3 of Record 1, and I would not uphold this exemption claim even if I were to permit the Ministry to claim section 19 long after the date for raising additional discretionary exemptions had passed.

Record 2

The Ministry submits that four withheld paragraphs on page 6 of Record 2, contained in the "Analysis of Comments" section of the memorandum, qualify for solicitor-client communication privilege for the same reasons as the exempt portions of page 2 of Record 1 discussed above. After explaining the relationship between the solicitor, the EAAB planner and the Assistant Deputy Minister who authored Record 2, the Ministry states:

> The primary purpose of providing legal advice is found on [the first severed paragraph] of page 7 [should be 6] which states "in consultation with the Ministry's Legal Services Branch" was to review the Terms of Reference from a legal perspective.

The Ministry stresses the importance of the TOR and its significance in the approval process, and points out that the legal advice was summarized by the author of the document. It then submits:

> While reference to the Ministry's Legal Services Branch is not made in [the other three severed paragraphs] of page 7 [should be 6], the advice provided was vetted by counsel for the same reasons as described above.

The appellant's representations on section 19 are set out above in the Record 1 discussion.

It is clear from the representations and the content of Record 2 that the Ministry's Legal Services Branch was consulted in the context of preparing the record. However, it does not necessarily follow that the record qualifies for exemption under section 19 for that reason. Merely having a lawyer review or comment on a document does not cloak that document with solicitor-client communication privilege. Former Assistant Commissioner Irwin Glasberg addressed that issue in Order P-1038, where he stated:

> In its representations, the Ministry points out that legal counsel created Record 4(A). This matter is not in dispute. The Ministry then submits that when legal counsel attached her memorandum to Records 4(B) and (C) (along with her proposed revisions), the nature of these documents was transformed such that they were effectively re-created by legal counsel. I do not accept this argument. While it is true that legal counsel suggested that several parts of Record 4(B) be revised, I do not believe that this fact alone can serve to transform a standard type of record produced by an operating area of the Ministry into a piece of legal advice.
>
> I also share the view expressed by Commissioner Tom Wright in Order P-227 that a record does not qualify for exemption under section 19 simply because it has been reviewed by a lawyer.

In my view, a similar approach is appropriate in considering the application of section 19 to the withheld portions of Record 2 in this appeal.

In support of its position, the Ministry relies on references in the record that a particular position was taken "in consultation with the Ministry's Legal Services Branch". However, the Ministry does not identify what the specific legal advice was or whether it was accepted or rejected by the author, not does it provide any supporting or separate documentation to confirm the nature of any legal advice requested or given. In my view, the representations themselves are not sufficient to support the section 19 exemption claim for the final three of the four withheld paragraphs on page 6.

As far as the first withheld paragraph on page 6 is concerned, following the phrase "in consultation with the Ministry's Legal Services Branch" the author of Record 2 proceeds to identify the specific advice given by that Branch for one aspect of the information covered in the memorandum. In my view, this paragraph qualifies for exemption under section 19 for the same reasons as the withheld portions of page 2 of Record 1 outlined above.

ADVICE OR RECOMMENDATIONS

The Ministry relies on section 13(1) as the basis for denying access to all undisclosed portions of the three records. Because I have determined that the withheld portions of page 2 of Record 1 and the first severed paragraph on page 6 of Record 2 qualify for exemption under section 19 of the *Act*, I will restrict my discussion of section 13(1) to the remaining undisclosed portions, specifically:

- The "Considerations" and "Options/Recommendations" sections of Record 1;
- The "Minister's Options" and "Recommendation" sections of Records 2 and 5;
- The three remaining severed paragraphs on page 6 of Record 2 contained in the "Analysis of Comments" section.

Section 13(1) states:

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

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the section 13(1) 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 (Orders 24, P-1363 and P-1690).

A number of previous orders 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 must relate to a suggested course of action that 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.)).

In Order P-434, I made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants that relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (see, for example, Orders P-1147, P-1299 and PO-2084).

Although Cabinet is the ultimate decision-maker with respect to EA approvals, I am satisfied that the Minister performs a decision-making function in approving TORs, and that he/she does so as part of the business activities of the Ministry. I also accept that the role of Assistant Deputy Ministers is to provide advice and recommendations to the Minister in the context of this decision-making process, and that the two Assistant Deputy Ministers who authored Records 1, 2 and 5 did so in the context of discharging their advisory responsibilities.

In my view, the key remaining contextual issue in this appeal is whether any or all of the remaining portions of records consist of "advice or recommendations", as those terms are used in section 13(1).

I recently reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order PO-2028. In that order, the Ministry of Northern Development and Mines took the position that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". I did not agree, and stated:

> … [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

I will apply this same approach to the analysis of the records at issue in this appeal.

Record 2 and 5

The three remaining undisclosed paragraphs on page 6 of Record 2 are contained in the "Analysis of Comments" section.

Having carefully reviewed the contents of these paragraphs, and applying the reasoning followed in Order PO-2028, I find that they do not contain "advice" or "recommendations" for the purpose of section 13. The three paragraphs contain what I would characterize as factual information concerning matters of potential relevance to the Minister in making his decision. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given. For these reasons, I find that the three remaining paragraphs on page 6 of Record 2 do not qualify for exemption under section 13(1).

The undisclosed portions on page 7 of Record 2 and page 10 of Record 5 contain a list of three "options", followed by a specific identified recommendation. I addressed the question of whether the section 13(1) exemption applies to a list of options in Order PO-2028. After reviewing in considerable detail the earlier orders that dealt with similar records, I stated:

> 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.

Applying this approach to the options listed in Records 2 and 5, I find they do not contain "recommendations" or "advice" for the purposes of section 13(1). These identified options do not "recommend a particular course of action to be followed", nor could they be said to "advise" the Minister in making his decisions on the TORs. I also find that disclosing the information contained in the options section of these records would not allow one to accurately infer any

advice given. The list of options themselves, which do not contain a "pros and cons" outline common to discussions of this nature, contain no statement recommending that the Minister choose a particular option, nor do they infer that one option is preferred by the author of the record. In my view, the outline of the various options is accurately characterized as "mere information" and, as such, does not satisfy the requirements of "advice or recommendations". For these reasons, I find that the listed options on page 7 of Record 2 and page 10 of Record 5 do not qualify for exemption under section 13(1) of the *Act*.

However, Record 2 and Record 5 also both contain a specific recommendation. In addition, the recommendation on page 7 of Record 2 also includes a specified course of action. I am satisfied that the disclosure of these portions of the two records would reveal a clearly stated recommendation, and that the disclosure of the additional information contained in Record 2 would allow a person to accurately infer the recommendation. Accordingly, I find that these severed portions of Records 2 and 5 qualify for exemption under section 13(1).

Record 1

The Ministry claims that one paragraph headed "Considerations" and one paragraph headed "Options/Recommendations" on page 3 of Record 1 qualify for exemption under section 13(1).

Although the paragraph falls under the heading "Options/Recommendations", having reviewed its content, I find that it does not contain options. Rather, it contains a specific recommendation for consideration by the Minister. As such, I find that this paragraph qualifies for exemption under section 13(1).

I also find that the paragraph under the heading "Considerations" qualifies for exemption under section 13(1). Although this portion simply identifies a factor for the Minister to consider in making his determination, in my view, disclosing this factor and the information contained in this paragraph would allow someone to accurately infer the suggested course of action contained the "Options/Recommendations" portion of this record. For this reason, I find that the paragraph under the heading "Considerations" also qualifies for exemption under section 13(1).

In a portion of its confidential representations, the Ministry asks me to consider an additional factor in deciding whether section 13 should apply. I cannot discuss this factor in detail without disclosing information I agreed to hold confidentially. That being said, I have taken this factor into account and it does not impact my findings under section 13.

Section 13(2)(d)

The appellant maintains that the exception in section 13(2)(d) of the *Act* is a relevant consideration in the context of this appeal. This section reads as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > an environmental impact statement or similar record;

If the requirements of section 13(2)(d) are established, the Ministry would be precluded from relying on section 13(1) to deny access.

In support of his position, the appellant submits:

> [Furthermore], while [the appellant] acknowledges that the severed portions of the records are not an "environmental impact statement" *per se*, it is abundantly clear that the severed portions are directly and substantially related to the content of the EA to be prepared by [the applicant] under the *Environmental Assessment Act*. Thus, [the appellant] submits that the severed portions are "similar records" for the purpose of section 13(2)(d) of the *Act*. In other words, the severed portions go to the very heart of what the [applicant's] EA should be required to address in order to safeguard the environment and public health.

The Ministry submits that section 13(2)(d) does not apply. As far as Records 2 and 5 are concerned, the Ministry submits:

> … staff advice is related to the Terms of Reference/environmental assessment process including consultations with the public.
>
> The advice does not address the actual environmental impact which is the subject of the actual environmental assessment conducted by [the applicant] and reviewed by Ministry staff.
>
> The advice in the exempt information is not an environmental impact statement. The technical review of the Terms of Reference were disclosed to the appellant … as part of this request.

Regarding Record 1, the Ministry submits that the withheld portions are not accurately characterized as an "environmental impact statement", and points out that the technical review of the TOR for Landfill #1 has been provided to the appellant.

In PO-1852 I reviewed the possible application of section 13(2)(d) to records relating to environmental hazards. I addressed the issue of section 13(2)(d) as follows:

> *The Dictionary of Environmental Law and Science*, edited by William A. Tilleman, Chair of the Alberta Environmental Appeal Board defines the term "environmental impact statement" as follows:
>
> > **1.** A document required of federal agencies by the National Environmental Policy act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. **2.** A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the

> proponent in accordance with guidelines established by a panel. **3.** An environmental impact assessment report required to be prepared under [Alberta's *Environmental Protection and Enhancement*] *Act*. **4.** A detailed written statement of environmental effects as required by law.

> Although established in the context of another province's environmental protection legislation, I find that this in an appropriate definition to adopt for the purposes of interpreting the same term in section 13(2)(d) of the *Act*.

Applying the definition from Order PO-1852, I accept the Ministry's position that the portions of Records 2 and 5 remaining at issue are not an "environmental impact statement or similar record" for the purpose of section 13(2)(d). As the appellant acknowledges in his representations, the exempt portions of the records are not "environmental impact statements". While I accept that the exception also extends to "similar records", in my view, the exempt portions of the records at issue in this appeal do no fit this characterization. These portions do not, as the appellant suggests, "directly and substantially relate to the content of the EA" for each development. Accordingly, I find that section 13(2)(d) does not apply in the circumstances of this appeal.

PUBLIC INTEREST OVERRIDE

Section 23 of the *Act* states:

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

In the circumstances of this appeal, section 23 only has potential application to the portions of the records that qualify for exemption under section 13(1), since section 19 is not among the listed exemptions under section 23.

In order for the "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and 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.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)).

If a compelling public interest is established, it must then be balanced against the purpose of any exemption found to apply. Section 23 recognizes that each of the listed exemptions, while serving to protect valid interests, must yield on occasion to the public interest in access to the requested information. 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 support of his position that there is a compelling public interest in the disclosure, the appellant submits:

> First, there are site-specific reasons for disclosing the records in dispute. [The appellant] represents numerous residents who live in the vicinity of the existing… landfill site. Given their lengthy experience in living beside the existing site, … our clients are understandably concerned about the environmental and public health implications of the proposed 25-year, mega-expansion of the landfill. In fact, if the expansion is approved, the [named] landfill site will become one of the largest waste disposal sites in Ontario. In these circumstances, [we] must be given access to all policy and/or technical considerations that ultimately led the [Ministry] to approve a scoped [TOR] for the proposed expansion. In our view, this critical information is reflected in the severed portions of the records, and should be disclosed for environmental accountability and protection purposes (e.g. to determine if the [Ministry] decision to approve the scoped [TOR] rests on sound environmental grounds).
>
> Second, there are broader public policy reasons for disclosing the severed portions of the records in dispute. To date, the [Ministry] has not promulgated any detailed policies or guidelines that provide direction or guidance on when the [Ministry] will be prepared to approve "scoped" [TORs], particularly for landfill expansions…. In these circumstances it would be highly beneficial for the severed portions to be disclosed so that all stakeholders and the public at large can more fully understand (and participate in) the [TOR] decision-making process under the EA *Act*. After all, the [TOR] approval is the crucial first step in proceeding with an undertaking under the EA *Act*, particularly since the approved [TOR] provides binding, up-front directions as to which issues will be examined during the EA process.

The Ministry disagrees, and submits:

> The Terms of Reference which were disclosed to the appellant include a work plan for the preparation of the EA which describes the kinds of public consultation that will take place during the preparation of the EA.
>
> In terms of the public interest override, the actual EA will address the public interest in the landfill expansion plans submitted by [the applicant]. As far as the Ministry is aware, the recommendation made by staff to the Minister has not, itself been the subject of any public interest.

The appellant's submissions focus specifically on the public interest in background information and reasons for decision-making. The only information I have found to be exempt under section 13 of the *Act* are the specific recommendations, and information which would disclose those recommendations. The appellant has received the vast majority of information contained in the various records responsive to his request, and will receive more as a result of my decisions in the order. I agree with the Ministry that, based on the arguments put forward by the appellant, there is insufficient evidence to link any public interest that may exist in disclosing records relating to

the EA approval process to the relatively small portion of the records that I have found qualify for exemption under section 13(1) of the *Act*.

Accordingly, I find that section 23 has not application in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose the last three severed paragraphs on page 6 of Record 2, the listed options on page 7 of Record 2, and the listed options on page 10 of Record 5 to the appellant by providing him with copies by **March 20, 2003**.

2. I uphold the Ministry's decision to deny access to the undisclosed information on page 2 of Record 1, the information under the heading "Considerations" on page 3 of Record 1, the information under the heading "Options/Recommendations" on page 3 of Record 1, the first severed paragraph on page 6 of Record 2, the information under the heading "Recommendations" on page 7 of Record 2, and the information under the heading "Recommendation" on Page 11 of Record 5.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: February 27, 2003
Tom Mitchinson
Assistant Commissioner