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

ORDER PO-2355

Appeal PA-030099-1

Ministry of the Environment

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of the Environment (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for the following:

> …[Ministry] hydrologists and other comments relative to the Lafarge Canada Incorporated landfill site at Lot 1, Conc. 3, West Zorra and any other sites connected with [a named company] at 355-151 35th Line, Embro produced by your hydrogeologists from 1985 to the present…

By way of background, this request for information concerns a proposal by a named company to expand its licensed lime quarry for an identified area in the Township of Zorra, County of Oxford (the subject lands). The Ministry was canvassed by the Ministry of Natural resources (MNR) for its comments on the proposal. The appellant is an environmental group formed specifically for the purpose of becoming informed about the details of the proposal and to articulate residents' concerns about the impact of the proposed expansion on water and air quality in the area.

The Ministry granted partial access to the records requested. Portions of the records were severed or denied in full, pursuant to sections 21 (invasion of privacy) and 13 (advice to government) of the *Act*. The Ministry also claimed the application of section 22 (information publicly available), stating that some of the information requested was not disclosed since it is already in the public domain.

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

During the mediation stage, the appellant advised the mediator that it does not wish to pursue access to any personal information contained in the records, nor does it wish to pursue access to documents that are publicly available. Accordingly, these records, and sections 21 and 22 of the *Act*, are no longer at issue in this appeal. The Ministry confirmed that it is relying on section 13 of the *Act* to deny access to the remaining records. During mediation, the appellant also raised the issue of a compelling public interest in the disclosure of the remaining records (section 23 of the *Act*).

Further mediation was not possible and the file was transferred to me for inquiry.

I first sought and received representations from the Ministry. The Ministry agreed to share the non-confidential portions of its representations with the appellant.

I then sought representations from the appellant and provided it with a copy of the Ministry's non-confidential representations. The appellant submitted representations. I felt that the appellant's representations raised issues to which the Ministry should be given an opportunity to respond, so I shared the appellant's representations with the Ministry and sought reply representations from the Ministry. The Ministry submitted reply representations in response.

RECORDS:

The following two records remain at issue under section 13 of the *Act*:

Record 1: a 4-page internal Ministry document (withheld in part)

Record 2: a 6-page "draft" correspondence from a Ministry environmental planner to a MNR aggregate inspector (withheld in full).

DISCUSSION:

ADVICE TO GOVERNMENT

General principles

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making (see Order 94). The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy*

Commissioner), [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, 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.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, cited above].

The section 13(1) exemption is also subject to the mandatory exceptions listed in section 13(2).

Record 1

The parties' representations

The Ministry identifies this record as a 4-page "internal Ministry document". The Ministry describes its contents as the "preliminary advice" of its "Environmental Planner to his management team that was subsequently incorporated into record 2." Portions of this record were disclosed to the appellant. Access to the part titled "Alternative MOE Positions" was withheld pursuant to section 13(1).

The Ministry states that its decision to deny access to the information at issue is based on the view that the information at issue clearly outlines four options for courses of action that will ultimately be accepted or rejected by its decision-makers, its South-western Regional Director in consultation with its Assistant Director and Manager of Technical Support. The Ministry acknowledges that the options do not identify a clear preferred choice. The Ministry states that the author of the document is not in a position to make a decision on the preferred choice; rather, this is the responsibility of the Regional Director in consultation with her management team. The Ministry submits that the options are presented with the intent that the decision-maker will make a determination as to which, if any, of the options should be adopted.

The Ministry submits that it would be premature to release this information at this time because it has not yet decided on the option it will follow. The Ministry states that before making this

decision it will consult with stakeholders and the Zorra Aggregate Committee, which includes local citizens including the appellant. The Ministry submits that it would be inappropriate for the world to become aware of the course of action it is considering before it makes a decision.

The appellant responds that the information at issue in record 1 should be characterized as "mere information" and does not qualify for exemption under section 13(1) for the following reasons:

- the list of options do not contain a "pros and cons" discussion
- there is no specific advisory language or an explicit recommendation to advise the decision maker of a suggested course of action
- the Ministry does not state in its representations that disclosure of the information "would reveal the substance of the advice and recommendations through the ability to draw inferences"

The appellant also submits that the information at issue will not inhibit the Ministry's decision and policy-making processes, since the recipient of the document has "no decision making authority".

In reply, the Ministry submits that the options contained in record 1 provide the Ministry's perspective that was to be presented to MNR as part of a decision-making process regarding this environmental matter. The Ministry states that disclosure of the severed portions of this record would result in added pressure to implement one of the options presented before it has been given proper consideration by the Ministry and MNR.

Analysis and findings

This office has grappled with the characterization of "options" under section 13(1) in several previous orders [see Orders P-529, P-1034, P-1037, P-1631 and PO-2028 upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, cited above]. In Order PO-2028 Assistant Commissioner Mitchinson provides a comprehensive review of some of the past orders on point and makes a definitive statement on this office's approach to this issue. He states:

> The issue of whether or not "options" qualify as "advice or recommendations" for the purpose of section 13(1) has been considered in a number of previous orders. The Ministry's representations refer to two of them: Orders P-529 and P-1037.
>
> In Order P-529 former Assistant Commissioner Irwin Glasberg had to determine whether certain records relating to the evaluation of proposals for the delivery of bus services to the Ministry of Transportation qualified for exemption under section 13(1). Three of them contained different lists of options, and he found

that only one record qualified for exemption as containing "advice". The basis for distinguishing this one record was that, in addition to listing options, this record contained an assessment of the anticipated results or probable outcomes, and, in the circumstances, this information was found to reveal by inference a particular suggested course of action.

In Order P-1037, Adjudicator Cropley considered whether a record containing various options for dealing with proposals for a housing project administered by the Ministry of Health qualified for exemption. After considering the facts and argument provided in that appeal, she identified that "some of [the options] include observations about the possible consequences of implementing the particular option to which they are attached", but rejected the section 13(1) exemption claim on the basis that no preferred option was identified and, therefore, the record did not contain "advice or recommendations". In other words, given the particular context she was facing, Adjudicator Cropley was not persuaded that the content of the various options would reveal a suggested course of action.

Two other appeals not identified by the Ministry also provide examples of how records containing options have been treated in past orders.

In Order P-1631, Senior Adjudicator David Goodis examined records used for the purpose of obtaining directions relating to settlement discussions for litigation involving the Ministry of Natural Resources and the Ministry of the Attorney General. In finding that certain records containing "proposed options and courses of action" qualified as "advice or recommendations" for the purposes of section 13(1), he relied on the fact that the options were accompanied by "pros and cons" that could be taken into account by the decision-makers in the settlement negotiations. Senior Adjudicator Goodis determined, based on the facts and arguments presented to him in that appeal, that the consequences of implementing a particular option outlined in the "pros and cons" discussion could be interpreted as revealing a suggested course of action, and found that they qualified as "advice".

Finally, in Order P-1034, former Adjudicator Anita Fineberg considered whether portions of a record containing options for implementing a non-tax revenue strategy qualified for exemption under section 13(1). She rejected the exemption claim, based on the fact that the options did not include any "pros and cons"; that the author of the record was not "recommending or advising the senior managers that one option should be adopted in preference to the others"; and that the options were not mutually exclusive.

> 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.

The Assistant Commissioner's discussion in Order PO-2028 is relevant to my analysis of record 1.

Having thoroughly considered the parties' representations and the severed portion of record 1, I find that the information at issue does not meet the criteria established by this office for the application of the section 13(1) exemption.

In my view, the information at issue does not qualify for exemption under section 13(1) because the author of the options has not set out a suggested course of action to the decision- maker. What the author has done is provide the decision-maker with a list of four "alternative" options with modest discussion of the benefits of implementing one option over another and the implications or consequences of choosing to do so or not. However, the author does not expressly identify a preferred option and one cannot be inferred from the information. I cannot discern from the options a suggested course of action. Therefore, I conclude that the information at issue in record 1 should be characterized as "mere information" since none of the information at issue actually advises the decision maker on a suggested course of action. Accordingly, having found that section 13(1) does not apply to the information at issue in record 1, it should be disclosed to the appellant.

Record 2

The parties' representations

The Ministry describes this record as a 6-page "draft" correspondence from a Ministry environmental planner to a MNR aggregate inspector. The Ministry has withheld this record in full from the appellant.

The Ministry's decision to deny access is based on two points:

1. The Ministry's decision makers rejected the suggested course of action to send a letter to MNR. Instead, the Ministry chose to send a letter to the

County of Oxford, Community and Strategic Planning Office, in Woodstock, Ontario.

2. The options contained within the draft letter are recommended courses of action and are still under consideration.

The Ministry submits that the document contains "specific courses of action that to date have not been accepted or rejected". The Ministry states that the "advice is found in options 1 to 4 starting on page 3 of the record and the second last sentence of paragraph 4 of the record…"

As with record 1, the Ministry argues that the options set out in this draft document are being presented to the decision maker to determine the best option in the circumstances.

The appellant states in response that "a draft document is not, simply by its nature, advice or recommendations (P-434)." The appellant's remaining representations are very similar to those it makes for record 1. The appellant states that in order for section 13(1) to apply, the record "must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision making." The appellant submits that this record does not qualify for exemption because the options listed do not contain the required "pros and cons" discussion. Rather, the appellant speculates that this document "… suggests several options, but does not advocate one in particular, nor does the Ministry advise if one could accurately infer such advice upon disclosure." The appellant states that, as with record 1, the disclosure of the information contained in record 2 will not inhibit the government's decision-making authority since the intended recipient does not have decision-making authority. The appellant submits that "the Ministry makes decisions on whether to issue permits to take water and MNR makes decisions on whether to issue licences under the *Aggregate Resources Act*."

In reply, the Ministry states that at no time did it claim the application of the section 13(1) exemption on the grounds that record 2 is in "draft" form. The Ministry's position is that the application of section 13(1) is based on the "contents" of the record. The Ministry states that it exercised its discretion, as is required under section 13(1), to make the decision not to disclose. The Ministry submits that the fact that the document is in draft form was not a consideration in the exercise of that discretion. Regarding the appellant's suggestion that the Ministry does not have decision making authority, the Ministry acknowledges that that there is a shared responsibility between it and MNR for accepting or rejecting some of the options. It is the Ministry's position that the options contained in record 2 provide its perspective that it proposed to present to MNR as part of the decision making process. The Ministry, therefore, perceives the decision making process as a "joint endeavour" between it and MNR due to the "cross over of legislative responsibilities between the two ministries." The Ministry concludes that the recommendations contained in record 2 are self evident by the wording used and it provides three examples taken from the actual wording of the options set out in the record.

Analysis and findings

With respect to record 2, the Ministry has withheld the entire record suggesting that its contents contain specific courses of action that should garner the protection of section 13(1). In regard to the issue of the letter being a draft document, I am prepared to accept the Ministry's view that it did not claim the application of section 13(1) on the grounds that that record 2 is in draft form but instead based this decision on its contents. Therefore, I do not find it necessary to consider the draft status of the record. However, this is not the end of the story. I must assess whether or not this record qualifies for exemption under section 13(1). I find that it does not, with one exception.

In my view, much of the information in this record is clearly best described as "mere information", including factual, background and contextual, analytical and/or evaluative information. The Ministry's own words are revealing in this regard. The Ministry specifies in its representations that the "advice" is found in a section of the document that sets out four options and in one other identified part. Accordingly, I find that the information in record 2 consisting of all of pages 1 and 2 and part of pages 3 and 5 is comprised of mere information, which does not qualify for exemption under section 13(1), and should therefore be disclosed to the appellant.

I will now consider the status of the remaining information under section 13(1), most of which is contained in the four options at pages 3, 4 and the top of page 5, and in four additional paragraphs on page 5.

With regard to the four options in record 2, I find that my analysis of the four options in record 1 applies. As with record 1, the options in record 2 do not suggest a course of action to the decision-maker. The author of record 2 has presented four alternative options for discussion purposes. While the options present well-articulated alternative approaches, and provide commentary on the consequences of undertaking each option, a preferred option is not expressly identified and cannot be inferred. I am not able to extract from the options a suggested course of action. Therefore, I conclude that the four options are not exempt under section 13(1).

The remaining information in the four paragraphs on page 5 reveals specific and clear advisory language regarding a suggested course of action for formal consultation with various interest groups regarding the named company's proposal and the benefits of doing so. I find that this information does qualify for exemption under section 13(1). Having found that section 13(1) applies to this information, I will now examine the possible application of section 13(2)(d) to it.

Section 13(2)

In its representations the appellant raises the application of section 13(2)(d), which states:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(d) an environmental impact statement or similar record;

In Order PO-1852, Assistant Commissioner Tom Mitchinson reviewed the possible application of section 13(2)(d) to records relating to environmental hazards. He 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 is an appropriate definition to adopt for the purposes of interpreting the same term in section 13(2)(d) of the *Act*.

Assistant Commissioner Mitchinson also applied this definition in a more recent order (PO-2115).

I adopt this definition for the purposes of this appeal.

If the requirements of section 13(2)(d) are established, the Ministry would be precluded from relying on section 13(1) to deny access to the information I have found exempt in record 2.

In support of its position, the appellant submits that the records "could possibly contain environmental impact statements…" With respect to record 2, the appellant states this record "could contain information about what will happen environmentally" if the named company is not in compliance with environmental legislation and regulations.

The Ministry submits that section 13(2)(d) does not apply.

With regard to record 2, the Ministry states:

> [T]he information is the Ministry's Environmental Planner's interpretation of the reason for the letter being drafted. Given that the Ministry's decision maker did not accept the letter, it cannot be considered to be factual in nature. The letter is not an environmental impact statement as the decision relates to the process of bringing [the named company] into compliance with environmental legislation and regulations. The fact that the company produces dust as part of its process is not in question and has led to complaints by the residents of the area.

With reference to paragraph 2 of the above definition the Ministry states that the records at issue are not "from or by the proponent and they do not contain environmental impact statements of the nature described in the definition…" The Ministry submits that the records were not "prepared or procured" by the proponent; they were "created by Ministry employees for Ministry employees."

Applying the definition from Order PO-1852, I accept the Ministry's view that none of the information remaining at issue in record 2 can be considered an "environmental impact statement" for the purpose of section 13(2)(d). While the information remaining at issue in record 2 provides in parts factual and contextual information and in other parts advice or recommendations pertaining to the named company's proposal, none of this information addresses the environmental impacts of accepting this proposal within the scope of the above definition. Accordingly, I find that section 13(2)(d) does not apply in the circumstances of this appeal.

In conclusion, I find a portion of the information at issue in record 2 exempt from disclosure under section 13(1). Conversely, I find that section 13(1) does not apply to the information at issue in record 1 and the remaining information in record 2.

PUBLIC INTEREST OVERIDE

Introduction

The appellant takes the position that section 23 applies to override the application of the section 13(1) exemption in the event I find any of the information at issue exempt under this section. Since I have found a portion of record 2 exempt under section 13(1), I must consider whether section 23 overrides this exemption. As both parties' representations on the application of section 23 do not specifically address this remaining information in record 2, instead addressing all of the information at issue in records 1 and 2, I will conduct my section 23 analysis as though I found section 13(1) applicable to all of the information initially at issue in the two records.

Section 23 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.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Is there a compelling public interest in disclosure?

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order PO-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The parties' representations

The appellant has described at length the history of the matter that is at the heart of its request for information. I find that the history is relevant to a fair determination of whether a compelling public interest in the disclosure of the records exists.

The appellant states that the named company has operated a "cement plant" in Zorra Township since 1979. According to the appellant, the plant produces a "unique white cement product used for specialized construction and architectural applications." The appellant states that in 1991 the named company purchased a portion of "Beachville Lime's licensed quarry containing an area of approximately 254.5 acres." The appellant states that the lands, licensed since 1974, are "now licensed to the named company under the *Aggregate Resources Act*" for the extraction of up to "one million tonnes [of lime] per year" at a "maximum depth of extraction of 235 metres".

As set out above in the background to the appellant's request, the named company has proposed to extend its license to the subject lands, an area of "approximately 163 acres" which is "approximately two kilometres northeast of the Town of Ingersoll".

The appellant's representations imply that in order to succeed in acquiring the expanded license, the subject lands must be rezoned from their existing zoning of "Agricultural and Residential to Quarry Industrial". The appellant states that the named company must also "submit an

application under the *Aggregate Resources Act* to extend the quarry on the subject lands." The appellant states that in January 2002, Zorra Township held a public meeting regarding the named company's zoning application. The appellant states that the Township Council "deferred making a decision on the zoning application due to concerns by area residents over groundwater impairment and particulate fallout, among other issues."

The appellant indicates that shortly after this public meeting the appellant organization was created to address "concerns of the public and public's desire to become informed about what was going on in their neighbourhood." The appellant states that it has a "membership roster of approximately 100 people" and that it "circulated a petition" that has been "signed by 270 people who are concerned about [the named company's] applications." The appellant submits that the "public relies on [it] to provide them with information on this and other environmental issues affecting the area." The appellant states that it informs the public by having its Communications Director publish an article in a local community newspaper, distributing flyers to the membership and residents of the area, having letters to the editor published in newspapers, providing media interviews, and delivering presentations to the public and other local and regional interest groups. The appellant's Chairperson attends the Zorra Aggregate Advisory Committee meetings, but the appellant feels that the information given at those meetings does not keep the public informed or serve or protect the public's interest. The appellant states that while the meetings are open to the public, the Township does not make available the meeting agendas or the minutes of the meetings. At the Committee meetings, the appellant submits that the "Ministry basically advises they are 'monitoring' the situation with [the named company] and other companies." The appellant feels that the Ministry must do more than "simply monitor the companies, they need to take action against the companies and send the message that enough is enough."

The appellant's concerns about the named company's proposal include impacts on water quality, water quantity and air quality. The appellant provides extensive details regarding these concerns in its representations.

In summary, the appellant's concerns regarding water quantity arise because the named company's proposal for expansion requires digging the quarry pit below the groundwater table. In order to keep the extraction operation dry the water must be pumped out. Without pumping the quarry would fill with water to the level of the surrounding water table. The appellant submits that since the named company wants to take more than 50,000 litres of water per day as part of the "quarry dewatering process", the named company requires a "Permit to Take Water" (a permit) from the Ministry. The appellant states that the named company already has a permit (without an expiry date) for 44 million litres of water per day. To illustrate the magnitude of the named company's dewatering permit, the appellant states that the Town of Ingersoll, with a population of 10,000, uses only 6 million litres of water per day. The appellant is concerned about the impact that "multiple quarrying will have on the ground water supply". In addition, the appellant states that the Ministry has been under intense pressure to ensure water quality, particularly due to "recent drought conditions and the Walkerton tragedy." The appellant states that, as a result, the Ministry is reviewing the entire permit process and the permit issued to the

named company. The appellant states further that as part of the named company's quarry dewatering program, water collected in the quarry will be pumped downstream of the quarry site to the "Tuffnail Drain", which empties into the Thames River. The appellant indicates that it has been advised that this water will not meet Ontario drinking water standards and is not fit for human consumption. The appellant is concerned about the amount of water that will be wasted and that this water will pollute the Thames River. The appellant is concerned that the "Golspie Swamp", located one road north of the subject lands and identified in the "Environmental Features Plan…contained in the Oxford County's Offical Plan" as a "Locally Significant Natural Area, Provincially Significant Wetland and Public Agreement Forest and Conservation Authority Lands", could be drained. Finally, the appellant states that in 2001, Oxford County commissioned a ground water protection study. The results of the study state that due to the County's reliance on groundwater supply as the "sole source" of drinking water, it is critical that the supply be managed and protected. The study also states that "between 2% and 10% of drilled wells have been abandoned in Tillsonburg, Woodstock and Norwich due to insufficient water quantity" and that "agriculture lacks secure access to water."

With respect to concerns about air quality, the appellant provides detailed evidence of long term concern about air quality in the area as a result of lime extraction and cement manufacturing by three quarry operations, one of which is operated by the named company. The evidence includes a report allegedly released by the Ministry in March 2003 which, according to the appellant, states that, due to extraction and cement manufacturing activities the "level of dust in the air does not meet provincial standards[,] is some of the worst in southwestern Ontario [and] has been unacceptable for 25 years." The appellant also states that the report concludes that "particulate can aggravate bronchitis, asthma and other respiratory conditions." The appellant indicates that concerns about air quality have received "significant media coverage" and I note that the appellant has provided me with several newspaper articles on this issue.

The appellant states that "the *Act* requires the Ministry to disclose any record to the public or persons affected if there are reasonable and probable grounds to believe that it is in the public interest to do so, and the record reveals a grave environmental, health or safety hazard to the public." The appellant believes that disclosure of the information at issue is in the public interest.

The Ministry position is that disclosure of the information at issue would not serve to "inform the citizenry in a more effective way than what [it] is already doing in the activities outlined by the appellant [in its representations]."

Analysis and findings

In Order P-1398, Senior Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "arousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Adjudicator Higgins's decision in Order P-1398, the Court of Appeal for Ontario in *Minister of Finance* (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I am adopting Senior Adjudicator Higgins' interpretation of the word "compelling" contained in section 23.

In addition, I find that the analysis and conclusions reached by Senior Adjudicator David Goodis in Order PO-2172, an appeal involving a consideration of the environmental and health and safety issues relating to the practice of underwater logging, apply in this case. In addressing the first requirement under section 23, he states:

> In my view, there is a compelling public interest in the disclosure of any information that would shed light on the serious environmental and health and safety issues raised by the practice of underwater logging in Ontario. I am persuaded by the appellant's representations that there are legitimate concerns about the practice of underwater logging, to the extent that it has potential impacts on both the environment (including the habitat of fish and other species) and public health and safety (including the integrity of the water supply). These concerns are reflected not only in the appellant's representations, but also in many of the records at issue, including media reports and statements by environmental groups, government agencies at the municipal, provincial and federal levels, and other individuals and organizations. The Ministry's submission that underwater logging does not have significant potential impacts on the environment and health and safety is strongly contradicted by the material before me.
>
> A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues. In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:
>
> > In considering the factors listed above to the information which is the subject of these appeals, I find that the subject matter of the responsive records is a matter of public, rather than private interest. In addition, I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without

> having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
>
> I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. …

In Order PO-1688, I dealt with an appeal involving certain records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In concluding that there is a compelling public interest in the disclosure of the records under section 23 of the *Act*, I stated:

> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.
>
> My finding is consistent with one of the fundamental, public interest purposes of the *EBR* which, as the [Environmental Commissioner of Ontario] has stated, is the protection of the environment, in part by providing mechanisms to ensure that government ministries act in the public interest when making decisions about the environment. I agree with the ECO's submission that disclosure of relevant information is crucial if these mechanisms are to work effectively and that, therefore, disclosure of a record regarding the environmental impacts of proposed air emissions, such as the record in this case, would be in the public interest.
>
> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario*

> *(Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added]

As part of Order PO-1688, I also considered the overall purpose of the *EBR*, explaining that the *EBR* was enacted for the following reasons, as described in its preamble:

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a *healthful environment*.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner. [emphasis added]

The right to a safe environment was also emphasized in the Supreme Court of Canada decision in *R. v. Canadian Pacific Ltd.* (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), where the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*

> [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
> >
> > . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .

I am satisfied that there is a compelling public interest in disclosure of the information in the records. The appellant has clearly demonstrated that the named company's current extraction and manufacturing activities and its proposal for the expansion of the quarry on the subject lands has attracted and continues to evoke strong interest and attention in the community most directly affected. As well, this matter has attracted significant attention in the local media and has been the subject of public debate. I find that in these circumstances, there is a compelling public interest in having the information in the records made available for public scrutiny.

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the exemption?

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Parties' representations

Quoting the views of Senior Adjudicator Higgins in Order P-1413, the appellant states that the "Legislature made section 13 subject to the public interest override in section 23 as a clear indication that on specific occasions the exemption must give way to the public interest." The appellant feels that this is one of those occasions for the following reasons:

- the "public's concern about water and air issues", as demonstrated by attendance at various public meetings and the formation of the appellant organization
- the public's concern about "health and safety has been echoed by Zorra Township Council and the [Ministry]"
- the significant media attention that this issue has received
- since the Walkerton tragedy "safe water" has become more important than ever as a public issue

In response, the Ministry states:

> There is concern both with the [Ministry] and [MNR] that the information that has been withheld pursuant to section 13, if it were to be disclosed would reasonably be expected to place undue pressure on the Ministry to implement one of the options prematurely and without due diligence, consideration and discussion. The progress of the decision-making process between the two Ministries could reasonably be expected to be hindered by the disclosure of the records through the chilling affect of those participating in the Zorra Aggregate Committee (who is also involved in the supplying of some of the recommendations).
>
> The purpose of section 13 is to protect the free-flow of recommendations within the deliberative process of government decision-making and policy making and to preserve the head's ability to take actions and make decisions without unfair pressure. It is the Ministry's position that since there are alternative avenues of gaining information available to the public, the information contained in the records will not serve to better inform the public of the government's activities and the Ministry has shown by the appellant's own examples that we are taking an active role in keeping the public well informed and are actively performing our duties and fulfilling our responsibilities […]. The Ministry maintains that the need for disclosure does not outweigh the purpose of the section 13 exemption.

Analysis and findings

The Ministry has submitted that it is extremely important that it and MNR be able to engage in the decision making process without undue pressure so that the right decision will be made at the appropriate time. In addition, the Ministry is concerned that revealing this information may have a "chilling effect" on those participating in this deliberative process and impact the "free flow" of recommendations within this process. The Ministry feels that the public has alternative means of acquiring information and that it has been forthcoming in keeping the public informed.

I have carefully considered the Ministry's representations and I agree with them in a general sense. I recognize that the purpose of the section 13(1) exemption is to ensure that those employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. However, I find that in the particular circumstances of this appeal, the interest in disclosure outweighs the purpose of the section 13(1) exemption.

The named company's proposal application is clearly of great interest to the public and the implications of its approval could have significant implications on the environment and the health and safety of a great number of residents. As a result, the information contained in the records is of great interest and importance to the public. In these circumstances, I am satisfied that there is a significant public interest to be served in disclosing to the appellant, and to the public at large, the information contained in the records. This finding would apply to the records

in their entirety, if I had found them fully exempt, and I expressly find that it applies to the severed information in record 2.

In conclusion, I find that section 23 applies in the circumstances of this appeal. Notwithstanding my finding that a portion of record 2 is exempt from disclosure pursuant to section 13(1), I am satisfied that a compelling public interest in the disclosure of this information clearly outweighs the purpose of this exemption in this case.

ORDER:

1. I order the Ministry to disclose records 1 and 2 to the appellant in their entirety by providing it with copies by **January 31, 2005**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: December 24, 2004
Bernard Morrow
Adjudicator