



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER PO-2793-I**

**Appeal PA-050250-2**

**Ministry of Finance**



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## **NATURE OF THE APPEAL:**

A requester filed an access-to-information request with the Ministry of Finance (the Ministry) and the Financial Services Commission of Ontario (FSCO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Although both the Ministry and FSCO are institutions under the *Act*, the Ministry is designated by regulation to respond to requests made to FSCO. In this order I will refer to the institutions together as “the Ministry” unless the context requires a reference to FSCO.

The request resulting in this appeal was for the following information:

1. Communications identified [FSCO] officials and ministerial officials exchanged with identified insurance companies or their trade association (an identified association) representatives; on the following auto insurance issues: deductibles, insurance threshold levels, hidden commission fees, insurance company profits/losses, insurance premium increases/decreased customized insurance policies, designated assessment centres.
2. Preparatory notes, meeting agendas and meeting notes by the same identified [FSCO] and Ministerial officials for/in meetings with the same identified insurance company/trade association ... representatives on the above matters listed in point 1.
3. Provide internal meeting notes, communications of identified [FSCO] and ministerial officials on the above matters listed in point 1.
4. Provide unpublished [FSCO]/Ministerial formal reports, consultant studies, option papers on these above auto insurance issues in point 1.
5. [An identified period of time] [FSCO]/Ministerial briefing notes, media lines, issue sheets on these same topics in point 1.

The requester identified seven Ministry/FSCO officials, and three insurance industry representatives to be included in the scope of his request. In a section of his request entitled “Additional Notes,” the requester provided further parameters that more precisely defined the scope of his request and the types of searches the Ministry should conduct.

After additional correspondence and telephone conversations to further clarify the parameters of his request, the Ministry sent the appellant an e-mail that stated that it would generate a fee estimate that excluded “assessment centers” and restricted the search to “readily accessible” records, where possible, and issued a fee estimate. The requester paid the deposit of half of the fee estimate.

The Ministry located 423 records consisting of a total of 1845 pages that were responsive to the request. Some of these records contain information about third parties, and the Ministry sent notices to these third parties, inviting them to provide their views regarding disclosure of the information relating to them. Of the third parties that responded, some agreed to the partial or complete disclosure of the information relating to them, while others objected to any disclosure.

The Ministry then issued a decision letter to the requester in which it identified that access to approximately 884 pages was granted and that some information in the records would not be disclosed pursuant to the following exemptions in the *Act*: sections 12(1) (cabinet documents), 13(1) (advice to government), 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege), and 21(1) (personal privacy). The decision letter also informed the requester that two records contained information that may be regarded as third party information which the Ministry had decided to release. It advised him that the relevant third parties were notified of the decision and had 30 days to file an appeal with this office.

The Ministry subsequently issued another decision letter to the requester that provided the requester with a severed version of the records responsive to the request. This letter also indicated that the Ministry was waiving the remaining fee.

The requester (now the appellant) appealed the Ministry's decision to this office. Shortly after the appellant filed his appeal, the Ministry issued a supplementary decision letter disclosing additional records, as none of the third parties appealed the Ministry's decision to disclose certain identified records.

During mediation, the Ministry provided an index of records to the appellant. After reviewing this index, the appellant informed the mediator that it was inadequate and asked that the adequacy of the index of records be added as an issue to the appeal. He also expressed his view that the public interest override at section 23 of the *Act* applies in the circumstances of this appeal.

This appeal was not settled in mediation and was transferred to adjudication. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the Ministry and eight third parties (the affected parties) and they were invited to submit representations. The Ministry and four affected parties submitted representations. Of the remaining four affected parties, one stated that it had decided not to submit representations, another stated that it did not object to the disclosure of two records, and two did not submit a response.

In its representations, the Ministry stated that it had "reconsidered its decision in a number of cases and agreed to release a significant number of additional records." It also issued a new index of records to the appellant. The appellant subsequently sent a letter to this office that stated that the Ministry's decision to disclose additional records and revise the index "should in no way be taken to satisfy the basic grounds of this appeal."

After resolving issues regarding the sharing of portions of the representations, the Notice of Inquiry along with the non-confidential representations of the Ministry and three affected parties, and the complete representations of one affected party, was sent to the appellant. The appellant provided representations in response, and after resolving further issues regarding the sharing of those representations, the Ministry and the four affected parties who had provided representations were sent a copy of the non-confidential portions of the appellant's

representations, and given an opportunity to respond. The Ministry and three affected parties provided reply representations.

This file was subsequently transferred to me to complete the inquiry process.

## **RECORDS:**

The records remaining at issue that were either completely or partly withheld by the Ministry are set out in the Ministry's index of records.

The index of records identifies four categories of records that remain at issue (a fifth category was disclosed in full). There are approximately 204 records or portions of records remaining at issue, and they are categorized as follows:

*FSCO – CEO Records* (Numbered 1 – 38): remaining at issue are Records or portions of Records 1, 4, 7, 15, 19, 21, 22, 24, 26 – 29, 30, 33, 37 and 38.

*FSCO – AID Records* (Numbered 1 – 177): remaining at issue are Records or portions of Records 9, 10, 19-23, 26, 28, 30, 31, 34, 40, 43-46, 52, 53, 54, 56, 57, 59, 62, 63, 64, 66, 67, 69, 76, 77, 78, 80-89, 91-97, 99, 101, 108, 109, 110, 112, 114, 116-123, 125, 126, 131, 132, 133, 135, 136, 137, 139, 142, 144, 148, 149, 150, 153-156, 158, 159, 162, and 165-176.

*Minister's Office Records* (Numbered 1 – 121): remaining at issue are Records or portions of Records 1-4, 7-11, 13, 14, 15, 17, 19, 20, 21, 24-27, 34, 37, 39, 40, 41, 43, 47-50, 72, 75, 86, 89, 93, 96, 98, 99, 101-111, 113, 114 and 116-121.

*Minister's Office – Third Party Records* (Numbered 1 – 89): remaining at issue are Records or portions of Records 2, 3, 5, 20-23, 25, 26, 28, 40, 41, 44, 45, 46, 48, 50, 51, 52, 56-59, 61, 62, 63, 66, 68, 69, 73, 76, 77, 80, 85, 87 and 88.

## **PRELIMINARY ISSUES**

### **ADEQUACY OF INDEX**

As a preliminary matter, the appellant takes the position that the index provided by the Ministry in this appeal is inadequate. He acknowledges that the Ministry did provide a second index, which was more detailed than the first, but takes the position that it is also inadequate. He states that it is "pretty uninformative" in respect of records that have been completely withheld:

It fails to list all the basic information needed to understand any index namely: the date, author, recipient, full title, number of pages, and the purpose of the document. ... [the index] should be expressed in sufficient detail to support the claim for exemption or withholding in whole and or in part. It is not a disclosure of the contents of the document that is sought in the Index, but rather sufficient

information to allow the Appellant to meaningfully comment on the claim for exemption.

The appellant then provides examples of some of the descriptions of records which he argues are inadequate.

I have carefully reviewed the index, not solely for the purpose of reviewing the issue of its adequacy, but also in my review of the exemption claims. In my view the index provided by the Ministry in this appeal is adequate. It numbers each record, describes it in a general manner, identifies it either by title or brief description, identifies the number of pages of the record, whether it was withheld or exempt, in whole or in part, and the specific exemption claims made for each record. Although the index does not in all instances identify the author of the record or its recipient, in the circumstances I am satisfied that the index provide by the Ministry is adequate.

## **SCOPE OF REQUEST/REASONABLE SEARCH**

### **Introduction**

In his representations the appellant takes the position that additional responsive records exist. He refers, in particular, to his concerns that additional communications to and from the auto insurance representatives and lobbyists should have been located. He also states that he believes that there should be more communications recorded, and refers to particular third parties and their representations, and submits that these representations and the positions the third parties are taking suggest that additional records exist. The appellant also refers to an identified Ministry staff member who is the author of a number of e-mail messages, and questions why there are no indexed records of individuals writing to him. The appellant also states that there are almost no records or e-mails authored by an identified staff member who was actively involved in communicating and meeting with insurance company representatives.

In its reply representations the Ministry takes issue with the appellant raising this issue (which was not identified in the Notice of Inquiry), at this stage. The Ministry takes the position that the appellant is now attempting to expand the scope of the request at this stage of the proceedings, and that the appellant ought not to be able to do so. The Ministry then refers to two letters by the appellant to the Ministry in which the appellant directed that the scope of the request be restricted. After reviewing the scope of the request as identified by the appellant, the Ministry states:

Having previously restricted the scope of the access request ... the appellant now purports to be dissatisfied with [the Ministry's] efforts made in good faith to comply with that request.

I have carefully reviewed the request as well as the two letters referred to by the Ministry. I note that in the first letter from the appellant, the appellant's clarification included the following:

In order to minimize any chargeable fees, the requester agrees that the Ministry is to perform a “general” non-exhaustive, search of its files. The requester understands that the term “general search” provides no assurance that all responsive records will be retrieved. ...

In the circumstances, I agree with the Ministry that, given the appellant’s clarification set out above, it is not appropriate to review the issue of the reasonableness of the search conducted at this stage in this appeal.

## **RESPONSIVENESS OF RECORDS**

In its representations the Ministry refers to portions of certain records which were not disclosed, and which it claims are not responsive to the request. The request for records, as set out above, is fairly broad.

Previous orders of the Commissioner have established that to be responsive, a record must be “reasonably related” to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, “relevancy” must mean “responsiveness”. That is, by asking whether information is “relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is reasonably related to the request. (See also Order P-1051)

Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

I adopt this approach to this issue, and will review each of the portions of records which the Ministry claims is not responsive to the request to determine whether it is or is not responsive.

### ***FSCO-AID***

*Records 9 and 10* – These records are e-mail messages from the Minister’s Senior Policy Advisor to FSCO and Ministry staff summarizing his advice and recommendations on matters arising out of an auto insurance update meeting, and setting out proposed agendas for subsequent meeting. On my review, I agree with the Ministry that the first two substantive topics highlighted on page 1 of both these records are not responsive to the request.

*Records 19, 20, 21 and 22* are e-mail memos from the Senior Manager of Auto Insurance Policy at FSCO to the Superintendent setting out the decisions and recommendations arising from an update meeting on auto insurance issues with the Minister’s office (similar to Record 9). Only the portions in the following numbered paragraphs in the records are responsive to the request: record 19 - paragraphs 2 and 11, record 20 - paragraphs 3 and 10, record 21 - paragraphs 1, 4 and 5, record 22 - paragraphs 1, 2 and 4.

*Record 28* – this record is an e-mail message entitled “Agenda for Parliamentary Assistant’s auto meeting” from a public servant at FSCO attaching another e-mail from a public servant at the Ministry. On my review of this record, I agree with the Ministry that only paragraphs 1 and 4 are responsive to the request.

*Record 43* – this record is an e-mail message from the Senior Manager of Automobile Insurance Policy at FSCO to the Parliamentary Assistant’s Special Advisor. On my review, I agree that only the final paragraph of the letter is responsive to the request.

*Record 44* – this record contains an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent. The Ministry takes the position that the only responsive portions of the record are paragraph 10 and paragraph 12. On my review of this record, I agree with the Ministry that the other portions of the record are not responsive to the request.

*Record 45* - this record is an e-mail message from a public servant at FSCO to the Superintendent. The Ministry states that the record has been disclosed except one sentence that has been severed relating to a matter that is not responsive to the request. Based on my review of the release of additional information contained in this record, and on the one sentence remaining at issue, I am satisfied that this sentence is not responsive to the request. Accordingly, this record is not at issue in this appeal.

*Records 46, 52 and 54* – these records are e-mail memos from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent. I agree with the Ministry that only five identified portions of these records are responsive to the request.

*Record 53* – this record is an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent entitled “meeting with Cabinet Office.” The Ministry states that the last two of the six bullet points, and the last paragraph of the record, are not

responsive to the request as they do not address matters raised in the request. On my review, I agree with the Ministry those portions of Record 53 are not responsive to the request.

*Record 62* - this record is an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent summarizing a discussion. The Ministry states that only paragraph 2 is responsive to the request and, on my review of this record, I agree that only paragraph 2 is responsive to the request.

*Record 63* - the Ministry states that this record has been released except for six words regarding two proposed auto insurance projects which are not responsive to this request. On my review of the portions of this record remaining at issue, I am satisfied that they are not responsive to the request; accordingly, this record is not at issue.

*Record 64* - this record is the minutes of the Auto Insurance Policy Committee involving FSCO and Ministry staff. The Ministry states that only page 1 of the record is responsive to the request. On my review, I am satisfied that the other pages of this record are not responsive to the request.

*Record 66* - the Ministry states that this record is a record of minutes of the Auto Insurance Policy Committee involving FSCO and Ministry staff, and that it has been released, except the portion that is not responsive to the request. On my review of the portion that has not been released, I am satisfied that it is not responsive to the request; accordingly, I will not review this record further.

*Record 83* - this record is a briefing note used to brief the Deputy Minister on a presentation for Cabinet. The Ministry states that items 4 and 5 of the note are not responsive to the request and, on my review of those items, I agree that they are not responsive to the request.

*Record 122* - this record is a briefing note. The Ministry states that the information referred to in paragraph 5 on page 1, and in paragraph 5 on page 4 (continuing on to page 6), is not responsive to the request, as the matter discussed in these paragraphs is not related to the issues referred to in the request. On my review, I agree that these portions of Record 122 are not responsive to the request.

*Records 165 to 175* - these records contain the minutes and agenda arising out of the auto insurance update briefings with the Parliamentary Assistant, the Senior Policy Advisor to the Minister, and staff from the Ministry and FSCO. The Ministry takes the position that only the following portions of these records are responsive to the request:

- Record 165 - paragraphs numbered 2, 5 and 7
- Record 166 - paragraphs numbered 1, 2 and 12
- Record 167 - agenda items 1, 6 and Future Planning Items
- Record 168 - paragraphs numbered 1, 2, 3 and 4
- Record 169 - all
- Record 170 - paragraphs numbered 1, 3 and 5

Record 171 - agenda items 3, 5 and 6, and Future Planning Item 1  
Record 172 - paragraphs 1, 2, and 3, and paragraph 2 on page 3  
Records 173 and 175 - agenda items 1 and 2  
Record 174 - agenda items 2 and 3

On my review of these records, I am satisfied that the portions identified by the Ministry as responsive are the only portions responsive to the request.

### ***Ministry's Office***

*Record 8* – The Ministry takes the position that paragraphs 1, 3, 4, 5, 6 and the attachments are not responsive to the request. On my review of these paragraphs, I accept the position taken by the Ministry.

### ***Summary***

As a result of my decisions on this issue, FSCO-AID Records 45, 63 and 66 are no longer at issue in this appeal. I will review the application of the exemptions only to the responsive portions of the remaining records.

### **DRAFTS OR DUPLICATE COPIES**

The Ministry has identified some records which are duplicates of other records, and on my review of the records I have also identified some records which are duplicates of others. To the extent that there are duplicate copies of the records, it is not necessary for me to review the possible application of the exemptions to these duplicates.

In this regard, I make the following findings:

- The attachment to Record 116 (FSCO-AID) is identical to Record 19 (FSCO-CEO).
- Records 158 and 159 (FSCO-AID) are copies of the attachments to Record 125 (FSCO-AID).
- Record 4 (Minister's Office) is a duplicate of part 2 of Record 117 (FSCO-AID).
- Record 14 (Minister's Office) is a duplicate of Record 162 (FSCO-AID).
- Record 26 (Minister's Office) is a duplicate of Record 24 (FSCO-CEO).
- Record 34 (Minister's Office) is a duplicate of Record 69 (FSCO-AID).
- Record 45 (Minister's Office) is a duplicate of Record 5 (FSCO-CEO) (which was released).
- Record 86 (Minister's Office) is a duplicate of the first part of Record 117 (FSCO-CEO).

- Record 94 (Minister's Office) is a duplicate of Record 82 (Minister's Office) (which was released).
- Record 96 (Minister's Office) is a duplicate of Record 193 (FSCO-AID).
- Record 99 (Minister's Office) is a duplicate of Record 85 (FSCO-AID).
- Record 110 (Minister's Office) is a duplicate of Record 110 (FSCO-AID).
- Record 120 (Minister's Office) is a duplicate of Part A of Record 119 (Minister's Office).
- Record 48 (Minister's Office) is a duplicate of 139 (FSCO-AID).
- Records 41 and 45 (Minister's Office – third party records) are e-mails included as part of an e-mail string in Record 44 (Minister's Office – third party records).
- Record 88 (Minister's Office – third party records) is identical to Record 25 (Minister's Office – third party records).

### **THIRD PARTY RECORDS – NOTIFICATION ISSUES**

#### **Records for which section 17(1) was raised after further disclosure**

As identified above, in its representations, the Ministry stated that it had “reconsidered its decision in a number of cases and agreed to release a significant number of additional records.” It also issued a new index of records to the appellant.

In providing further disclosure during its representations, however, the Ministry has in some instances identified that portions of these newly-disclosed records contain third party information and would qualify for exemption under section 17(1). In most of those instances, the Ministry has disclosed the records except for the portions covered by section 17(1). However, the third parties to whom the information relates have not had the opportunity to provide representations on those portions of records.

These records or portions of records are the following:

***FSCO-CEO:*** Records 4 and 7 (in part)

***FSCO-AID:*** Records 40 (in part), 101 (in part), 109 (in part), 117 (in part), 119 (in part), 131, 137 (in part) 139 (in part), 144, 148 (in part) and 149 (in part)

***Ministry Office:*** Records 3, 43 (in part) and 117

In the circumstances, and due to the mandatory nature of the section 17(1) exemption, I will be notifying the affected parties whose information may be contained in these records or portions of records, prior to making a final determination on the application of section 17(1) to those records.

### **Records relating to one identified affected party (affected party C)**

There are a number of records which the Ministry has claimed qualify for exemption under section 17(1). Many of those records were disclosed in the course of this appeal. A number of the records which remain at issue are addressed below under the section entitled "Third party information." In the case of many of these records, the affected third parties were notified and provided representations on the application of the exemptions. One of the third parties (affected party C), was notified of the request at the time of the request and consented to the disclosure of certain records, but not to the disclosure of other records. This affected party, like a number of other affected parties, was provided with a Notice of Inquiry identifying the facts and issues in this appeal, and was invited to provide representations. Affected party C provided representations on a number of identified records; however, in its representations it also stated:

The above comments [representations] are applicable to all of the [affected party C] records that were referred to in [the adjudicator's] letter, namely: [FSCO-AID Records 56, 125, 126, 155, 156, 158 and 159]

I have carefully reviewed the Notice of Inquiry and letter sent by the previous adjudicator. Contrary to affected party C's position, the "adjudicator's letter" did not restrict the records to which affected party C was invited to make representations. In these circumstances, ordinarily, I would proceed to determine access to the remaining records based on affected party C's general representations. However, as identified above, in the course of processing this appeal, the Ministry in its representations changed its position with respect to a few of the records at issue, and determined that they qualified for exemption under section 17(1) and not under another exemption previously claimed. Many of these records also relate to affected party C.

In the circumstances, I have decided to issue this interim order and to provide affected party C with the opportunity to provide representations on the possible application of section 17(1) to records relating to it which it did not refer to in its representations. Accordingly, I will also be seeking affected party C's representations on the possible application of section 17(1) to the following records: FSCO-CEO records 1 and 33, Ministry's Office (third party records) 20, 21, 22, 23, 25, 26, 28, 44, 46, 48, 50-52, 56-59, 61-63, 66, 68, 69, 73, 76, 77, 80, 85 and 87.

However, affected party C's representations ought to be made with a view to the decisions on the records for which they have made representations, as set out below.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry has relied on the exemption in section 12(1) to deny access to numerous records. This section 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, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

Previous decisions of this office have established that the use of the word “including” in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also possible for a record that has never been placed before Cabinet

or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish 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 [See Orders P-361, P-604, P-901, P-1678, PO-1725].

## **Representations**

### ***Ministry's general representations***

The Ministry makes lengthy representations in support of its position that section 12(1) applies to numerous specific records. These submissions are set out and addressed below. However, in its representations the Ministry also sets out background information regarding the process by which the records were drafted or created. The Ministry indicates that the records relate to Automobile insurance reform, and states:

Automobile insurance in Ontario is a highly regulated product, both in terms of the nature of the coverage provided and the rates that insurers may charge for coverage. The government reviews and considers changes to the laws governing automobile insurance on a regular and ongoing basis.

The specific automobile insurance issues that appear in [the records requested], notably "deductibles", "insurance threshold levels", "customized insurance policies", "designated assessment centres", and "insurance, premium increases/decreases", are important policy matters which are governed by insurance legislation and regulations in Ontario, and were under consideration for reform during the relevant period.

The Ministry defines a number of these terms, and states:

These automobile insurance matters are regulated by the *Insurance Act* and, in addition to other possible reforms, were under active policy consideration by the government for possible changes during the period covered by the action request (i.e. May 2003 to March 2005).

Following the 2003 election, FSCO and the Ministry began regular discussions with the then Parliamentary Assistant to the Minister of Finance, who was appointed to help spearhead automobile insurance reforms....

Many of the responsive records consist of records arising out of those meetings as well as Ministry and FSCO analyses in preparation for and contemplation of advising the Government and preparing policy recommendations for Cabinet in connection with these reforms. They also include advice arising out of proposals submitted by, and discussions with, interested stakeholders, as many of these reforms involve technical and complex issues. A number of records also arose

out of the costing of the estimated savings associated with potential reforms, and their implications for the Government's objectives.

These matters were also the subject of multiple Cabinet discussions on automobile insurance reform during the relevant period, reflecting the government's commitments in the area of automobile insurance reform when it was elected. The auto insurance reform matters discussed in many of the responsive records were before Cabinet during the period covered by this access request.

The Ministry also identifies that the government made changes in several phases to automobile insurance during the period in question, and indicates that, at the time it submitted its representations, the work was still ongoing and a number of the automobile insurance issues were still to be brought forward for decision by the Executive Council or its committees.

In a schedule to its representations the Ministry provides additional information about the process followed by the government to implement certain commitments. It indicates that the MPP appointed as the Parliamentary Assistant to the Minister of Finance was made responsible for the auto insurance portfolio for the purpose of overseeing automobile insurance reform implementation, and that a working group headed by this individual was established with representatives from within the Ministry, FSCO and the Minister's Office. Meetings were held bi-weekly for the purpose of updating the Parliamentary Assistant and Minister's Office staff with respect to the progress being made on automobile insurance reform initiatives. The Ministry refers to information contained in the records to substantiate its position, and also provides confidential representations regarding information submitted to Cabinet.

### *Appellant's general representations*

The appellant also makes general arguments in support of his position that section 12 does not apply to many of the records. He states:

The [Ministry] states that the majority of the records are withheld on the basis of Section 12, Cabinet Records .... The Appellant is not seeking true Cabinet Records that were presented to Cabinet for its decision making. However, the attempt to use the blanket exemption under section 12 is highly suspicious in that [the Ministry] has produced no evidence that any one of the redacted records to or from outside Third Parties (Specified Auto Insurance Representatives) was ever submitted to the Cabinet.

The Appellant acknowledges the convention of Cabinet confidentiality and the need to protect the process of Cabinet decision-making. However, the attempt to extend the mandatory exemption in section 12 to emails, memos or communications between public servants and outside Third Parties and to suggest such material was prepared for the consideration of Cabinet Ministers is to allege that factual information and communication is "advice and recommendation" to

Cabinet. The release of these emails and other communications with Insurance industry representatives will in no way risk undermining the process of collective Cabinet decision-making. In any event, there is no evidence presented to this Commission that it will undermine Cabinet confidentiality, and there is no presumption that it will.

The views expressed by public servants or draft documents exchanged between them do not qualify as “advice or recommendation” to brief the Cabinet or the Minister. Records addressed to the Superintendent are for purposes of informing him on the process of rate setting, benefit changes or other initiatives and are not exempt from disclosure under section 12. Please note that many records dealing with customized automobile policies communicated between public servants and/or to the Superintendent have been disclosed, but any record that appears to be to or from the [identified trade association] or insurers’ representatives allegedly has taken on the mandatory exemption of section 12 plus the discretionary exemption of section 13(1). This is a fundamental inconsistent application of the exemptions and an attempt to extend them beyond their purpose and intent.

The Appellant submits that section 12 has no application to the records to the extent that this Appellant can objectively determine on the refused or redacted records.

### ***General findings***

In considering the general representations of the parties set out above, I note that the Ministry has identified the unique manner in which the decision-making process was followed in the circumstances, and that a working group was established and held bi-weekly meetings to update the Parliamentary Assistant and Minister’s Office regarding the automobile insurance reform initiatives.

As identified above, previous decisions of this office have established that the use of the word “including” in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees qualifies for exemption under section 12(1), and that it is possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if it is established 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.

In these circumstances, and also based on the information provided in the representations which indicate that the section 12(1) exemption applies because information was submitted to Cabinet, I am satisfied that a number of the records specifically identified as arising from or in these special meetings could be found to reveal the substance of deliberations of Cabinet or its

committees, depending on the nature of the information and the representations provided. I also note that, contrary to what the appellant argues, these meetings did not include third parties from outside of government. In addition, if it is established that the disclosure of information provided by a third party would reveal the substance of deliberations of Cabinet or its committees, the section 12(1) exemption could apply to that information.

I also note that the Ministry has not claimed the section 12 exemption for all records in a category, but has specifically indicated the records or portions of records it has made this claim for, and provided specific representations for each of the records.

With this background in mind, I will now address the specific records at issue. Both the Ministry and the appellant provide detailed representations regarding the application of section 12(1) to each of the records for which it is claimed. I will review the representations regarding each of the records.

### ***FSCO – CEO Records***

#### ***Record 15***

The Ministry states:

Record 15 is a series of three e-mail messages ... between the Superintendent and the Senior Manager of Auto Insurance Policy at FSCO. These e-mails contain a discussion regarding a set of slides for a briefing of the Premier's Office in regard to auto insurance reform. The e-mails refer to information contained in a set of slides that was used to brief Cabinet on a particular date indicated in the record.

These e-mails disclose information that was contained in the slide presentation for Cabinet and discuss information contained therein. ...

Although the e-mails themselves were not submitted to or used to brief Cabinet, it is submitted that they disclose the "substance of deliberations of an Executive Council", falling within the introductory wording in section 12, in that they disclose specific content of information and options in records that went to Cabinet, and allow accurate inferences to be drawn regarding deliberations of Cabinet.

In particular, the record discloses information with respect to the deliberations of Cabinet... It is submitted that disclosure of this information will permit the drawing of accurate inferences with respect to decisions and deliberations of Cabinet on the matter of ... as presented at Cabinet.

The appellant states:

Without access to these emails comprising one page, it is impossible to make a meaningful submission. However, how three email messages can possibly be considered cabinet confidences when never presented to Cabinet ministers is difficult to fathom.

*Finding*

On my review of the information contained in these three brief e-mail exchanges, I am satisfied that the e-mails refer directly to information which was submitted to Cabinet, and disclosure would reveal the substance of Cabinet deliberations. Accordingly this record qualifies for exemption under the introductory wording in section 12(1).

**Record 22**

The Ministry states:

Record 22, as severed, is an e-mail message from a public servant dated December 22, 2003, forwarding to other public servants a slide package to be submitted to Cabinet with respect to proposed auto insurance reforms. The portion of the e-mail that has not been released refers to information that is contained in the revised version of a slide package that was used to brief Cabinet.

Although the e-mail was not submitted to or used to brief Cabinet, it was used as a basis for developing and refining the slide deck used to brief Cabinet on auto insurance reforms and, as with record 15, discloses the specific content of a Cabinet Record (as reflected in the Cabinet Office Report in AID record 80). It is submitted the record permits the drawing of accurate inferences with respect to decisions of Cabinet on auto insurance reform matters, and as such qualifies for exemption under s. 12(1).

... Consequently, disclosure of this information reflected in the e-mail will give rise to reasonable inferences as to the deliberations of Cabinet ...

The appellant states that without access to this e-mail, it is impossible to make a meaningful submission.

*Finding*

On my review of the severed portion of this record, which is a brief e-mail, I am satisfied that it refers directly to information which was submitted to Cabinet, and disclosure would reveal the substance of Cabinet deliberations. Accordingly this record qualifies for exemption under the introductory wording in section 12(1).

***Record 28***

The Ministry states;

Record 28 consists of two e-mail messages dated December 16, 2003 and December 17, 2003, to FSCO and Ministry staff from the Superintendent and from a Ministry staff member.

The mandatory exemption in section 12 has not been claimed in the index, only section 13, but it is submitted that the section 12 exemption applies to the bottom portion of the record, which is an e-mail sent at 7:55 a.m. It discloses the content of records regarding auto insurance reforms, including a list of various topics and options that were prepared for the Economic Affairs and Policy (EAP) Committee of Cabinet.

From the discussion in the e-mail of these reforms, and the revisions to be made to them such as additional options and other information added in preparation for a presentation to Cabinet – which took place subsequently with respect to these matters as noted in the discussion above under records 15 and 22, it is submitted that the record would disclose the contents of a Cabinet record. It is also submitted that the record was used as a basis for developing a Cabinet record.

Further, it is submitted that disclosure would permit the drawing of accurate inferences with respect to the deliberations and decisions that were taken by Cabinet on these matters. As with records 15 and 22, it is submitted that this e-mail is exempt under the introductory wording in section 12(1) and is also exempt under section 12(1)(b).

The appellant states that in the absence of additional information, he cannot make meaningful submissions on this record.

***Finding***

I have carefully reviewed the bottom portion of the record, which is an e-mail sent at 7:55 a.m. It clearly identifies information that went before an identified Committee of Cabinet, and details changes which are to be made to the information. I am satisfied that the disclosure of this e-mail would reveal the substance of the deliberations of Cabinet or one of its Committees. Accordingly this record qualifies for exemption under the introductory wording in section 12(1).

*FSCO – AID Records*

*Records 9, 19-23, 44, 46, 52, 54, 62,*

The Ministry's representations on these records, and the application of section 12(1) to them, are somewhat similar. Portions of a number of these records are not responsive to the request, and the Ministry claims that the remaining portions qualify for exemption under section 12(1), as these responsive portions reflect discussions in the "Auto Update" meetings. The Ministry's representations on the application of section 12(1) to these records are as follows:

*Record 9:*

Record 9 is an e-mail message entitled "auto update meeting with Minister's office". The e-mail was sent by the Senior Manager of Automobile insurance Policy at FSCO to the Superintendent and other FSCO staff.

It contains the highlights of deliberations on various auto insurance issues in a meeting between staff from the Ministry, the Minister's office and FSCO. For each item, there is a summary of the discussion indicating staff advice and recommendations, directions for further analysis and recommended next steps.

Only those items at paragraphs 4, 7 and 8 of this record are responsive to the request as the other paragraphs do not address the issues raised in the request.

The function of these meetings was to discuss the formulation of policy and obtain direction from the Minister, and the Parliamentary Assistant to the Minister, as referenced earlier in this submission. The meetings also reflect the directions of Cabinet to the Ministry with regard to additional auto insurance reform measures, as reflected in the Cabinet minute discussed at Record 91.

Pursuant to the Cabinet Minute of October 23, 2003, the Ministry of Finance was directed to report back to Cabinet on plans to implement further auto insurance reforms - see page 3 of the Cabinet presentation at AID record 91. Consequently, the reform items that are the subject of the discussion in these meetings were matters that were before Cabinet and formed the basis for subsequent submissions to Cabinet and its committees.

... In addition, the process being undertaken in respect of the design of auto insurance reforms arose out of the direction from Cabinet, and the matters under discussion were before Cabinet. Decisions and recommendations discussed at these auto update meetings fed directly into the preparation of options and submissions for additional auto insurance reforms. Consequently, the record is exempt under section 12(1) in addition to section 13, it is submitted.

*Records 19, 20, 21 and 22*

Records 19, 20, 21 and 22 are e-mail memos from the Senior Manager of Auto Insurance Policy at FSCO to the Superintendent setting out the decisions and recommendations arising from an update meeting on auto insurance issues with the Minister's office, similar to Record 9. Only the portions in the following numbered paragraphs in the records are responsive to the request: record 19 - paragraphs 2 and 11, record 20 - paragraphs 3 and 10, record 21 - paragraphs 1, 4 and 5, record 22 - paragraphs 1, 2 and 4

... These records are also exempt under the introductory wording in section 12, in that disclosure would permit accurate inferences regarding deliberations of Cabinet or its committee to be drawn.

For example, in Record 21, paragraph 1 discloses the scheduling of regulations for the Legislation and Regulations Committee of Cabinet. In record 22, paragraph 1 discloses options to be presented at the EAP Committee of Cabinet, and paragraph 4 discusses matters approved at Cabinet.

Moreover, the process being undertaken in regard to the design of auto insurance reforms arose out of direction from Cabinet, and the matters under discussion were before Cabinet. Decisions and recommendations discussed at these auto update meetings fed directly into the preparation of options and submissions for additional auto insurance reforms.

Consequently, it is submitted that these records are exempt under section 12(1)...

*Record 23*

Record 23 is an e-mail message from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent reporting on two meetings - a briefing of the Minister, the Parliamentary Assistant to the Minister and other public servants, and a briefing of the Parliamentary Assistant and his staff, on a package of auto insurance reforms that were scheduled for a pending meeting of a committee of the Executive Council.

The e-mail discusses the recommendations for auto insurance reforms as contained in the package of reforms being brought forward, and contains direction and feedback from the Minister.

... As the record reflects consultation with both the Minister and his Parliamentary Assistant on matters relating to the making of Government decisions and policy in regard to auto insurance matters, the record is also exempt under section 12(1)(d). For the purpose of section 12(1)(d) it is submitted that the

Parliamentary Assistant to the Minister is a “minister of the Crown” within the meaning of that section.

Record 23 is also exempt from disclosure under the introductory wording in section 12(1), since the record discloses recommendations contained in the submission prepared for the EAP Committee of Cabinet, including its scheduled date. It is submitted that disclosure of the record would permit accurate inferences to be drawn with respect to deliberations of Cabinet or its committees on these matters.

*Record 44*

Record 44 contains an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent setting out the decisions and recommendations arising from an update meeting on auto insurance issues with the Minister’s office, including the Parliamentary Assistant, similar to Record 9.

The responsive portions of the record are paragraph 10 and paragraph 12.

... Section 12 has been claimed in relation to this record. Although this record did not go to Cabinet, paragraph 12 contains a discussion with respect to a course of action regarding legislative amendments. This discussion formed part of the basis for a discussion on this amendment at the EAP Committee of Cabinet which dealt specifically with this amendment (see discussion in records 92 and 93 regarding *Automobile Insurance Rate Stabilization Act, 2003*). Disclosure of the record will permit the drawing of accurate inferences with respect to the deliberations of a committee of Cabinet on this matter. It is therefore submitted that the record is exempt under the introductory wording in section 12(l) and section 12(1)(b).

*Records 46, 52 and 54*

Records 46, 52 and 54 are e-mail memos from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent setting out the decisions and recommendations arising from an update meeting on auto insurance issues with the Minister’s office, including the Parliamentary Assistant, similar to record 9...

As with Record 9 ... section 12 has also been claimed in relation to these records. Although they did not go to Cabinet, it is submitted that the records, or parts of them, are exempt under the introductory wording in section 12, in that disclosure would permit accurate inferences regarding deliberations of Cabinet or its committees to be drawn.

For example, record 54 discloses the effective date of a proposed amendment and the timing for the Legislative and Regulations Committee of Cabinet. In addition, the records formed part of the basis for a subsequent decision at the EAP Committee of Cabinet which dealt with this amendment (see discussion in records 91, 92 and 93 regarding the *Automobile Insurance Rate Stabilization Act; 2003*). It is therefore submitted the record is also exempt under section 12(1)(b).

Moreover, as discussed previously under record 44, the process being undertaken in regard to the design of auto insurance reforms arose out of specific direction from Cabinet, and the matters under discussion were before Cabinet. Decisions and recommendations discussed at these auto update meetings fed directly into the preparation of options and submissions for additional auto insurance reforms.

Consequently, it is submitted that these records are exempt under section 12(1) ...

#### *Record 62*

Record 62 is an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent summarizing the discussion arising from an update meeting on auto insurance issues with the Minister's office, similar to record 9. Only paragraph 2 is responsive to the request.

... It is also submitted that this record is exempt under section 12(1), for the same reason as is discussed under record 9.

The appellant makes representations regarding the records at issue. In addition to noting that he is constrained in making detailed representations without access to the records, the appellant also notes that the scope of this exemption is limited.

#### *Findings*

I have carefully reviewed these records, as well as the other records which reflect the discussions in these auto update meetings as noted below. Based on the Ministry's representations and my review of the records, I am satisfied that the subject of the discussions and the information in these responsive items, discussed in these meetings, were matters that were before Cabinet and formed the basis for subsequent submissions to Cabinet and its committees. In addition, the decisions and recommendations discussed at these auto update meetings fed directly into the preparation of options and submissions for additional auto insurance reforms. As a result, I am satisfied that they qualify for exemption under section 12(1) of the *Act*.

Accordingly, I am satisfied that the responsive portions of Records 9, 19-23, 44, 46, 52, 54, 62, qualify for exemption under section 12(1).

**Record 53**

The Ministry states:

Record 53 is an e-mail memo from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent entitled "meeting with Cabinet Office" reporting on a briefing of Cabinet Office staff on auto insurance projects, ... including discussion of the recommended agenda and timing for presentation of auto reform initiatives at upcoming meetings of Cabinet committees, and next steps.

[The responsive portion of ] ... the record would permit the determination of the date on which a legislative amendment was being presented to the Legislation and Regulations Committee of Cabinet, and the items and expected timing for other reform items to be presented at the EAP Committee of Cabinet. It is therefore submitted that this record would permit accurate inferences to be drawn with respect to the deliberations of Cabinet or its committees, and is exempt under the introductory wording in section 12(1).

On my review of the relevant portion of this record, I am satisfied that the responsive portion of this record for which section 12(1) is claimed qualifies for exemption under this section.

**Record 57**

The Ministry states:

Record 57 is an e-mail message from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent reporting on a meeting with staff from the Ministry, FSCO and the Minister's office, in regard to possible legislative amendments. ...

The record formed part of the basis for the discussion with respect to the legislative amendment as reflected in Cabinet records 91, 92 and 93. Disclosure of the record would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees on this issue.

On my review of this record, I am satisfied that it qualifies for exemption under section 12(1), as its disclosure would reveal deliberations of Cabinet, or permit the drawing of accurate inferences regarding those deliberations.

***Record 64***

The Ministry states:

Record 64 is a record of minutes of the Auto Insurance Policy Committee involving FSCO and Ministry staff. Only page 1 of the record is responsive to the request. The responsive portion of the record has been released, except for one sentence that ... permits accurate inferences to be drawn regarding the deliberations of Cabinet. It is submitted this information is exempt under section ... 12.

On my review of the severed sentence of this record, I am satisfied that it qualifies for exemption under section 12(1), as its disclosure would reveal deliberations of Cabinet.

***Record 67***

The Ministry states:

Record 67 is a draft version of a regulation prepared by legal counsel that is exempt under section 12(1)(f).

On my review of this record, I am satisfied that it is a draft regulation, and qualifies for exemption under section 12(1)(f).

***Records 76 and 78***

The Ministry states:

Records 76 and 78 are slide presentations entitled "Status of Auto Insurance Reforms". These records were prepared and submitted to Cabinet Office for the purpose of briefing Cabinet Office on the status, recommended strategy and next steps with respect to the Government's auto insurance reform initiatives, consistent with the direction of Cabinet. Record 78 is an earlier draft version of Record 76. ...

Records 76 and 78 formed the basis for, and were incorporated into, a slide presentation used to brief the EAP Committee of Cabinet (see the Cabinet submission and slide presentation contained in AID Records 91 and 92).

These records are therefore exempt as Cabinet records under the introductory wording in section 12(1) and section 12(1)(b). Disclosure of these records would permit accurate inferences to be drawn with respect to the deliberations of Cabinet on the strategy for auto insurance reform.

The appellant does not provide substantive representations on these two records.

On my review of these two records and based on the representations of the Ministry set out above, I am satisfied that the disclosure of these slide presentations, which formed the basis for a presentation used to brief a Committee of Cabinet, qualify for exemption under the introductory wording of section 12(1) of the *Act*.

***Record 77***

The Ministry states:

Record 77 is a slide presentation on auto insurance reforms used to brief the Minister on next steps, objectives and strategies. The record, entitled "Auto Insurance -- Next Steps" and marked "Confidential Advice to the Minister", contains advice and recommendations of public servants on recommended next steps for reform, the rationale and proposed strategy for achieving the Government's objectives and a proposed communications plan. ...

This record is ... exempt under the introductory wording in section 12 and section 12(l)(b). This record contains information related to auto insurance reforms and options before Cabinet and that informed and was used as a basis for subsequent presentations on auto reform to a committee of Cabinet on the matters discussed in the presentation -- see AID record 91. It is submitted that disclosure of the record would permit the accurate drawing of inferences concerning the deliberations of Cabinet on these matters, and is exempt under section 12.

On my review of this record, I am satisfied that it qualifies for exemption under section 12(1), as its disclosure would reveal deliberations of Cabinet, or permit the drawing of accurate inferences regarding those deliberations.

***Records 80, 81 and 82***

The Ministry states:

Record 80 is a Cabinet Office Report. It sets out the deliberations and recommendations of the EAP Committee of Cabinet on proposed auto insurance reforms submitted by the Ministry, and includes the proposed Cabinet minute. The record is exempt as a Cabinet record under the introductory wording in section 12(1) and section 12(1)(a), as disclosure of the record would reveal the deliberations of Cabinet.

Record 81 is a draft Cabinet minute. The record discloses the deliberations of Cabinet and directions to the Ministry in regard to various auto insurance reforms, consequent to the submission to Cabinet at Record 82. The record is exempt as a

Cabinet record under section 12(1) and section 12(1)(a) as disclosure of the record would reveal the deliberations of Cabinet.

Record 82 is a slide presentation prepared for and submitted to Cabinet. The presentation, marked "Confidential Advice to Cabinet", took place on the date indicated on the front page. It is submitted that the record is exempt as a Cabinet record under section 12(1) and section 12(1)(b) as disclosure of the record would reveal the deliberations of Cabinet.

The appellant does not provide substantive representations on these three records.

On my review of these three records and based on the representations of the Ministry set out above, I am satisfied that these records, which consist of a Cabinet Office Report, a draft Cabinet Minute, and a report to Cabinet, qualify for exemption under section 12(1) of the *Act*.

### ***Record 83***

The Ministry states:

Record 83 is a briefing note used to brief the Deputy Minister on a presentation for Cabinet on proposed regulatory amendments and on the status of other auto insurance reforms. Items 4 and 5 of the note are not responsive to the request.

... the mandatory exemption in section 12 applies to this record. The record discloses information concerning the timing, content and options for a submission to Cabinet on auto insurance reform items and recommended next steps. Disclosure of the record would permit accurate inferences to be drawn regarding the deliberations of Cabinet on these items. Consequently, the record is exempt under the introductory wording in section 12.

On my review of this record and the representations, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

### ***Records 84 and 91***

The Ministry states:

Records 84 and 91 are slide presentations on auto insurance reforms prepared for the EAP Committee of Cabinet. Record 84 is a draft version of Record 91, which was submitted and used for the purpose of briefing the Committee on the date referred to on the cover page.

These records are exempt from disclosure as Cabinet records under section 12(1)(b) and the introductory wording in section 12(1), in that disclosure would

reveal policy options or recommendations submitted to a committee of Cabinet and the deliberations of a committee of Cabinet.

On my review of these two records and based on the representations of the Ministry, I am satisfied that the disclosure of these slide presentations, which were prepared and used to brief a Committee of Cabinet, qualify for exemption under the introductory wording of section 12(1) of the *Act*.

***Record 86***

The Ministry states:

Record 86 is a slide presentation marked “Confidential Draft” used to brief the Deputy Minister on auto insurance reform proposals. It sets out a proposed model for a particular reform, an explanation of how the proposal will operate and other considerations in relation to this reform. The purpose of the presentation was to recommend and obtain approval and direction from the Deputy Minister.

... This record also formed the basis and was incorporated into a subsequent submission on this topic to the EAP Committee of Cabinet - see page 6 of the Cabinet presentation at AID record 91.

It is therefore submitted that this record is exempt as a Cabinet record under section 12(1)(b), and the introductory wording in section 12(1), in that the record contains policy options or recommendations submitted to a committee of Cabinet and would permit accurate inferences to be drawn with respect to the deliberations of Cabinet.

On my review of this record and the representations, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

***Record 89***

The Ministry states that the responsive portion of this was used to brief the Deputy Minister on auto insurance reform issues. On my review of this record, I find that it is similar in nature to records 83 and 86, and that the responsive portions of this record qualify for exemption under section 12(1), as its disclosure would reveal deliberations of Cabinet.

***Records 92, 93 and 94***

The Ministry states:

Record 92 is a Cabinet Submission on auto insurance reforms prepared for Cabinet or its committees. This presentation to Cabinet of the matters discussed

in this submission took place on the date indicated on the cover page, as referenced in the Cabinet Office Report at Record 93.

The record is exempt as a Cabinet record under section 12(1)(b), and the introductory wording in section 12(1), in that the record contains policy options or recommendations prepared for submission to Cabinet and disclosure would reveal the substance of deliberations of Cabinet.

Record 93 is a Cabinet Office Report prepared for members of the EAP Committee of Cabinet in relation to the meeting of that Committee referred to in the submissions at records 91 and 92, discussed above. It contains key decision points, options and proposed Cabinet minute.

... the record is exempt as a Cabinet record under section 12(1)(a), (b) and the introductory wording in section 12(1) in that the record contains policy options, recommendations and proposed Cabinet minute. The record was prepared for submission to a committee of the Executive Council and disclosure of this record would reveal the deliberations of a committee of the Executive Council with respect to the matters discussed therein.

Record 94 is a slide presentation, marked "confidential", that was prepared and submitted to the EAP Committee of Cabinet in regard to a presentation that took place on the date indicated on the cover page .... The record is exempt as a Cabinet record under section 12(1)(b) and the introductory wording in section 12(1) in that the record contains policy options and recommendations prepared for and submitted to a committee of Cabinet and disclosure would reveal the substance of deliberations of that committee.

On my review of these three records and based on the representations of the Ministry, I am satisfied that they qualify for exemption under the introductory wording of section 12(1) of the *Act*.

### ***Record 95***

The Ministry states:

Record 95 is a set of Questions and Answers prepared as background advice to the EAP Committee of Cabinet, and a one page briefing note prepared for the Minister in briefing that Committee on auto insurance reforms. The record was prepared in connection with the presentation referenced in the Cabinet Office Report at Record 80.

... The record is ... exempt under section 12(1)(b) and the introductory wording in section 12(1) on the basis that the record contains policy options and

recommendations prepared for submission to Cabinet, and disclosure of the record would permit accurate inferences to be drawn with respect to the deliberations of Cabinet on the matters discussed therein.

On my review of this record, which includes a presentation made to a committee (not prepared for the public), I am satisfied that it qualifies for exemption under the introductory wording of section 12(1).

***Record 96***

The Ministry states:

Record 96 is a slide presentation prepared for the Minister on auto insurance reforms, in preparation for a briefing of the EAP Committee of Cabinet on auto insurance reforms, as referenced at record 94.

... The record was used to brief a minister of the Crown in relation to matters that were before Cabinet. The record also formed the basis for the preparation of subsequent presentations to Cabinet or its committees on the reforms discussed in the record (see records 91, 92 and 93). Consequently, disclosure would permit accurate inferences to be drawn regarding the deliberations of a committee of Cabinet.

It is therefore submitted that the record is exempt under the introductory wording in section 12(1), section 12(1)(b) and section 12(1)(e).

Again, this record includes information which formed the basis of a presentation made to a committee of Cabinet, (not prepared for the public), I am satisfied that it qualifies for exemption under the introductory wording of section 12(1).

***Record 99***

The Ministry states:

Record 99, as severed, is a briefing note providing options and recommendations on the subject of the repeal of legislation.

... the unreleased portion of this briefing note is ... exempt under the introductory wording in section 12(1)... This record relates to the options and recommended approach for amendments to legislation that were the subject matter of a presentation to Cabinet as reflected in AID records 91, [92] and 93. This record formed part of the basis for the discussion and recommendation on this matter in those records. Disclosure of this record will permit the drawing of accurate

inferences concerning the deliberations of Cabinet with respect to this reform matter.

On my review of this record and based on the representations, I am satisfied that its disclosure would permit the drawing of accurate inferences concerning the deliberations of Cabinet, and that it qualifies for exemption under the introductory wording in section 12(1).

***Record 116***

The Ministry states:

Record 116 is a briefing note prepared by a public servant with the Ministry which sets out a proposed multi-step strategy for achieving the Government's auto insurance reform commitments, including its strategy for discussions with industry stakeholders on proposed reform measures.

... It should also be noted that this record was prepared shortly before the presentation to Cabinet on auto reform initiatives as referenced in the Cabinet Office Report at record 80. Although this note was not put before Cabinet, the issues discussed in this record were matters that were before and informed Cabinet in its deliberations on its approach for auto reforms.

The Ministry then provides confidential representations which refer to the specific information discussed in these records, and indicates that this information is outlined and described in a Cabinet minute. The Ministry then states:

It is therefore submitted that disclosure of this record would disclose deliberations of Cabinet, or allow accurate inferences to be drawn with respect to the deliberations of Cabinet on its approach and strategy for auto insurance reform.

On my review of this record, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

***Record 118***

The Ministry states:

Record 118 is a briefing note on auto insurance reforms entitled "Confidential: Advice to Cabinet". The record was prepared for the purpose of providing advice to the Minister and his staff.

This record discloses the strategy of the Government for addressing its commitments regarding auto insurance reform, and was prepared and formed the basis for the submission to Cabinet outlining the Government's strategy on these

matters, as is reflected in the Cabinet minute in record 80. Consequently ... it contains strategic information of a type that would permit accurate inferences as the deliberations of Cabinet on these matters. The record is exempt under the introductory wording in section 12(1).

On my review of this record, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

***Record 121***

The Ministry states:

The record has been withheld based on section 12. It is submitted the record would permit accurate inferences with respect to the Government's cost savings strategy (reference page 9 of the Cabinet presentation at record 82), and is exempt under the introductory wording in section 12(1) of the Act.

On my review of this record, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

***Record 176***

The Ministry states:

Record 176 is a set of slides prepared for the Parliamentary Assistant marked "Draft 3 – Confidential". This record was prepared for the purpose of briefing the Parliamentary Assistant on the development and design of the customized auto insurance policy. The record sets out key design issues options and next steps.

... It is also submitted that this is exempt under section 12(1)(b) and the introductory wording in section 12(1) on the basis that the record contains policy options or recommendations submitted or prepared for submission to Cabinet or its committees, and would permit the drawing of accurate inferences with respect to the deliberations of Cabinet.

The Ministry provides confidential representations which refer to the specific subjects discussed by the EAP and the decisions made. The Ministry then states:

The Parliamentary Assistant's briefing as set out in this record informed or formed the basis for the submission to the EAP Committee on this matter, and the record is therefore exempt ....

On my review of this record and based on the Ministry representations, I am satisfied that it qualifies for exemption under the introductory wording in section 12(1).

## Minister's Office

*Records 2, 9, 11, 13, 17, 19, 21, 37, 41, 47, 50, 72, 89, 98, 101-106, 109, 113, 116, 118, 119 and 121*

The Ministry provides significant representations on the application of the section 12(1) exemption to the records for which it is claimed. Some portions of the representations are confidential, however, the Ministry also provides specific representations for each of the records it claims fall within section 12(1). These representations state:

*Record 2* was prepared ... for the purpose of updating the Minister regarding the status of the respective automobile insurance reform initiatives. ... the disclosure of this information would reveal information in relation to matters that were proposed to be brought before Cabinet.... The remaining information that was redacted is exempt under section 12(1) as it refers to information related to the timing for seeking Cabinet approval for the specific automobile insurance reform initiatives.

*Record 9* is a chart summarizing the status and further treatment of the various automobile insurance reform initiatives including the timelines for seeking the respective Cabinet approvals. The information reflected on the summary was presented to Cabinet for deliberations regarding the listed initiatives.

*Record 11:* At [an identified] presentation to the Economic Affairs and Policy Committee of Cabinet (see Record 101), the Ministry was asked to develop [identified information]. Cabinet's request is reflected in Record 104, page 6. The request was placed on the agenda for the following meeting of the working group on October 25, 2004. Record 11 documents the issues that were discussed at this meeting. The first segment that has been severed describes [identified information]. The suggestion is reflected in Record 104, page 5 (as discussed ... below). As this option was developed at the request of Cabinet and will be presented to Cabinet, it falls within the introductory wording of section 12(1). [based on Orders 72 and 206]

*Record 13* was prepared for the Minister concerning the communications strategy [respecting identified information] ... The Cabinet minute arising from the meeting of December 23, 2003 (see FSCO/AID Record #80) [included identified information...].

*Record 17* is an issue note discussing the various options related to [an identified issue]. The contents of the record reflect the ongoing policy work on these matters that are planned to be brought before Cabinet.

*Record 19* is a work plan. The severed information refers to the timelines for various stages in the process for the purpose of bringing the matter to Cabinet.

*Record 21* is a summary which was prepared February 3, 2004 to update the Minister with respect to the status of automobile insurance reform for Cabinet discussions. The record reveals the various policy options and directions that were being considered for automobile insurance reforms which were ultimately put forth to Cabinet.

*Record 37* is an email dated December 20, 2003 from the Superintendent to staff in the Minister's Office. Upon re-consideration, a severed version has been released to the appellant; however, the claim for exemption under section 12(1) ... remains. The information redacted in paragraph 5 was the subject to Cabinet discussions and is exempt under section 12(1).

*Record 41* is advice given to the Minister concerning [identified matters]... [D]isclosure of this information would reveal information in relation to matters that were ... to be brought before Cabinet ...

*Record 47* is a memorandum dated November 17, 2003 from the Minister's Legislative Assistant to the Minister recommending a timetable for implementing the Government's automobile insurance reform initiatives and the matters that will be discussed at Cabinet.

*Record 50* are copies of briefing plans/agendas for [an identified Minister] on automobile insurance reform. The severed information relates to the timing as to when proposals for automobile insurance reform would be presented to the Priorities and Planning Board of Cabinet.

*Record 72* contains information regarding [an identified matter to go before Cabinet].

*Record 89* was prepared to brief the Minister [regarding an identified matter submitted to Cabinet].

*Record 98* is a work plan for the various automobile insurance reform initiatives that were submitted to Cabinet.

*Record 101* is a draft of a slide deck presentation that was made to the EAP Committee on October 13, 2004 seeking approval to proceed to Cabinet with the Ministry's further recommendations for automobile insurance reform.

*Record 102* is a copy of the slide deck presentation that was made to Cabinet on December 23, 2003 seeking Cabinet's approval for the next stage of automobile insurance reform.

*Record 103* is a copy of the Regulation Approval form that was submitted to Legislation and Regulations Committee of Cabinet on November 22, 2004. This record is exempt from disclosure as it contains the policy discussions and recommendations that were made to the Committee.

*Record 104* is a copy of the draft slide deck presentation proposed for the EAP Committee in November, 2004....

*Record 105* is a slide deck prepared for the purpose of updating Cabinet on the status of automobile insurance reform....

*Record 106* is a draft of a summary of [an identified matter] .... The information reflected in this record formed the basis for the policy considerations and recommendations that were set out in the submission that was made to Cabinet on December 23, 2003 (Record 102, see .... above).

*Record 109* is an email sent December 11, 2003 from the Superintendent to staff in the Minister's Office expressing his views with respect to the comments that were made at the Ministry's presentation to the EAPC on December 10, 2003. ... disclosure of this record would reveal information that was reflected in the submission and the deliberations of the Committee....

*Record 113* are draft speaking notes prepared for the Minister for Cabinet discussion.

*Record 116* is a schedule for automobile insurance reform items that were planned for submission to Cabinet in August 2004.

*Record 118* are speaking notes prepared for the presentation to EAPC given by the Minister's Executive Assistant on the subject of the status of automobile insurance reform.

*Record 119* is comprised [of] 2 distinct parts: Part A which is a slide deck presentation (7 pages) and Part B which is a copy of a draft regulation approval form. Part A was prepared for the Minister concerning the communications strategy for automobile insurance reform. The Cabinet minute arising from the meeting of December 23, 2003 (see FSCO/AID Record 80) [contained information regarding an identified matter]. Part B is a duplicate of Record 103 as discussed ... above.

*Record 121* is an earlier version of Record 102 which is a copy of the slide deck presentation that was made to Cabinet on December 23, 2003 (see ... above).

The appellant makes general representations on a number of these records, and also acknowledges that, if these records disclose cabinet confidences, he is not seeking access to them.

### ***Findings***

On my review of the records and the detailed representations of the Ministry regarding the remaining records for which section 12(1) is claimed, I am satisfied that all of these records qualify for exemption under section 12(1) and, in particular, the introductory wording of that section. As is clear from the representations set out above, a number of the records were either presented to Cabinet, or contain information that was presented to Cabinet or its committees. The disclosure of other records would, in my view, reveal the substance of deliberations of the Executive Council or its committees. Accordingly, I am satisfied that these records qualify for exemption under section 12(1) of the *Act*.

## **ADVICE OR RECOMMENDATIONS**

### **Introduction**

The Ministry takes the position that many of the records or portions of records remaining at issue qualify for exemption under section 13(1) of the *Act*, which reads:

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

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. 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)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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

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

[Order P-434; Order PO-1993, Order PO-2115, Order 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.)]

### ***Sections 13(2) and (3): exceptions to the exemption***

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

### **Representations and findings**

The Ministry refers generally to the section 13(1) exemption, and states:

It should be noted that many of the records for which section 13 has been claimed consist of e-mail messages between FSCO and other government officials, and are therefore not formal briefing documents with a specific section clearly designated as "advice" or "recommendations". Nonetheless, there is nothing in section 13 that limits the scope of section 13 to any particular form of record, and advice and recommendations can be communicated as effectively by e-mail as in a briefing document or other record, and in some ways more efficiently and directly.

However, as a more informal mechanism for communicating advice and recommendations, an e-mail message often depends on a pre-existing level of background knowledge between sender and recipient.

It is therefore important to carefully review and consider the e-mail content along with its context in order to assess whether it contains advice or recommendations,

because these may be implicit or inferred, rather than formally labelled or immediately obvious, yet be no less evident to the recipient as being intended as advice or recommendations. This may be particularly true when there are a series of such e-mail records, and may require that they be reviewed as a whole.

The Ministry then refers to what it calls the "legal tests" for section 13. It restates the purpose of the exemption, as set out above, and then states:

In the context of a highly regulated sector such as automobile insurance, it is important that FSCO and the Ministry can rely upon the confidential advice of public servants and this advice must be informed by discussions with the sectors regulated by FSCO. Hard choices by heads based on frank recommendations from public servants are crucial in such an environment and the confidentiality of advice, like that in a solicitor-client relationship, is essential.

... The IPC has held that in order to qualify as "advice" or "recommendations", the records cannot contain mere information but must relate to a suggested course of action that will ultimately be accepted or rejected during the deliberative process. [Orders P-94, P-118, P-883, P-1894, PO-1993, upheld by the Court of Appeal on appeal from the Divisional Court, in *Ministry of Transportation v. Cropley*, [2005] O.J. No. 4047.

In addition, the IPC has found that advice or recommendations may be found in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given. [Orders P-1037, P 1631, PO-1993]

According to another view, the word advice ... should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact...on which a public body must make a decision for future action. [*College of Physicians and Surgeons of B.C. v. B.C. IPC* [2002] B.C.J. No. 2779 B.C.C.A.]

In the Cropley case, Mr. Justice R.G. Juriansz noted that the IPC's interpretation of advice and recommendations in that case "leaves ample room to accord the two words with different meanings" and that,

A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.

Mr. Justice R.G. Juriensz's comments that advice may be construed more broadly are noteworthy, particularly in the context of decisions on the meaning of "advice" in other jurisdictions as noted in paragraph 31 above. According to the B.C. Court of Appeal, for example, "The word advice ... should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact...on which a public body must make a decision for, future action." [*College of Physicians and Surgeons of B.C. v. B.C. IPC* [2002] B.C.J. No. 2779 B.C.C.A.].

The Information Commissioner of Canada has also stated that:

It is not always possible to put "facts", "advice" and "recommendations" in airtight compartments. Many documents have more than one aspect. For example, an official may advise the minister that a particular criterion ought to be given a particular weighting for a certain policy reason, or recommend that an application with a certain characteristic ought to be awarded a specified number of points. A written record of such advice or recommendation is correctly described as "advice or recommendations" to the minister even if it is also a record of the fact that the official considered a particular weighting or awarding of points. In such a case, the exception ... applies despite the factual aspect of the record. [*The Information Commissioner of Canada and the Minister of Industry Canada*, [2001] F.C.J. No. 1326 (FCA).]

The definition of "advice" should therefore continue to be construed broadly, particularly in an Ontario context, in determining whether the information, if disclosed, would "permit one to accurately infer the advice or recommendations given".

It has been held that where factual information relied upon by a Committee was inextricably intertwined with the advice and recommendations being provided by it to the Ministry in the record, it was not possible to separate the factual information, the record as a whole was exempt. [P-24, P-48, P-920, PO-2097].

It has also been held that an e-mail containing a number of suggestions for amendments to documents is exempt from disclosure [PO-2061], and that a communications strategy is exempt [PO-2061, PO-2071].

It has been held that the fact that the decision making process has already been completed does not preclude the application of this exemption, which is designed to have a prospective effect on the free flow of advice and recommendations within government [MO-1180].

It has been held that where a record contains a series of questions posed by one civil servant to another related to the strategies to be employed in negotiations being undertaken with the appellant it is exempt; since accurate inferences could be drawn as to the suggested course of action recommended in response to the record [P-1593].

### ***General findings***

Relying on statements made by the courts and others, the Ministry suggests that “advice or recommendations” in section 13(1) should be accorded a broad interpretation, perhaps broader than previously held in orders of this office. I am not persuaded that any of the comments referred to above reflect any contrasting position regarding the manner in which section 13(1) should be interpreted. In my view, the discussions cited above are entirely consistent with the manner in which this section has been interpreted by this office. Adjudicator Laurel Cropley addressed a similar argument in PO-2725 where she stated:

I do not agree with the Ministry that the Court of Appeal has held that “advice” and “recommendations” should be understood as having distinct meanings. Nor does the above discussion reflect any contrasting position taken by the Court or by this office in the manner in which section 13(1) should or has been interpreted. In [the Court of Appeal decision in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A.], the Court has upheld the consistently applied interpretation of this section by adjudicators of this office, recognizing, as previous orders of this office have, that the record itself need not contain the actual suggested or recommended course of action. ... where a record contains information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given, it also would qualify for exemption under section 13(1) of the *Act*. In any case, the “advice” or “recommendation” must relate to a suggested course of action within the deliberative process of government decision-making.

Accordingly, I have approached the assessment of the application of section 13(1) in a similar manner, and consistent with previous decisions of this office, as noted above.

I will now review the arguments made by the parties regarding the specific records for which section 13(1) is claimed.

*FSCO – CEO Records*

*Record 19*

The Ministry states:

Record 19 is an e-mail message dated January 20, 2004 from the Superintendent to the Minister's policy advisors containing the Superintendent's recommendations and suggested direction and approach for addressing industry stakeholder issues and concerns. Attached is a memo marked "confidential" that sets out the findings from his meeting with industry stakeholders on insurance industry rate filings and on auto insurance reforms and his advice and recommendations on next steps related to same.

The six bullet points on page 3 under "Bottom line", and the second last paragraph on page 4, are not responsive to the request as the issue discussed therein is not an issue raised in the request.

It is submitted that the entire record represents advice to the Government in its deliberative process in considering auto insurance reforms. The bottom portion of the memo provides a set of specific recommendations, but it is submitted the entire memo constitutes advice related to a suggested course of action for dealing with stakeholders and for achieving savings and reduced costs for the insurance system. Disclosure of the memo would permit accurate inferences to be drawn as to the suggested strategy and course of action recommended.

The record contains some factual information relating to the positions of some stakeholders, but it is inextricably tied to the Superintendent's advice and recommendations on the Government's strategic approach. It is submitted the entire purpose and the tenor of the record is the disclosure of strategic advice between FSCO and the Minister's advisors related to the Superintendent's meetings with stakeholders. As such, it is submitted that record 19 is exempt in its entirety under section 13.

Disclosure of the record would limit or restrict the frank exchange of information related to Government policy reforms between FSCO and Ministry officials, which is the fundamental principle underlying section 13, and would interfere with FSCO's legislated mandate to make recommendations to the Minister.

The appellant states:

[Record 19] is now disclosed as an email from the Superintendent to unknown policy advisors but no evidence is submitted on the principles applied to exercise discretion to withhold it. It must contain more than mere information in order to

qualify as exempt. To qualify as advice or recommendation, the information must relate to a suggest[ed] course of action to be taken by the recipient who must be a decision maker within the deliberative process. A policy advisor does not qualify as a decision maker within the deliberative process because he or she cannot accept or reject advice and therefore any communication to him or her does not qualify for exemption.

### *Findings*

On my review of this record and the representations of the parties, I am satisfied that it qualifies for exemption under section 13(1) of the *Act*. This e-mail contains specific recommendations about a proposed course of action, and given the relationship of the parties and the context within which this information is given, I am satisfied that its disclosure would reveal specific recommendations. In addition, although some of the information is of a factual nature, I am satisfied that, in the context, the disclosure of this information would also reveal advice or recommendations for the purpose of section 13(1). Accordingly, this record qualifies for exemption.

### *Record 21*

The Ministry states:

Record 21 is an e-mail message dated January 5, 2004 from the Senior Manager of Automobile Insurance Policy at FSCO to the Superintendent and other FSCO staff, in response to an earlier e-mail message from the Superintendent. The e-mail addresses stakeholder reform proposals.

The record sets out his recommendations, advice and recommended strategy in connection with proposed auto reform measures, including recommendations for and against particular initiatives, the suggested timing for implementing reforms, potential savings and recommended strategy.

It is submitted that disclosure of this record would reveal advice or recommendations of a public servant, and is exempt under section 13. A key part of the auto reform policy development process was analysis and advice of stakeholder proposals by FSCO, whose mandate includes the provision of advice and recommendations to the Minister. It is submitted that the frank analysis and strategic advice around proposed reforms and stakeholder proposals that are required for the Government policy development process would be inhibited by the release of records such as this.

The appellant states that he cannot comment on the application of the section 13 exemption without access to the record.

*Findings*

On my careful review of this relatively brief e-mail exchange, which includes a request for advice and the provision of information in response to the request, I am satisfied that, given the context in which the information is given and the nature of the information, this record qualifies for exemption under section 13(1). In my view the disclosure of this record, and the continuum of information referred to in it, would reveal advice for the purpose of section 13(1).

***Record 24***

The Ministry states:

Record 24, as severed, is an e-mail message from the Superintendent to the Minister's Senior Policy Advisor. The e-mail provides advice regarding the impact and implications for the insurance industry and the regulator of possible Government action with regard to insurance rates.

While the message contains some factual information, and is couched in terms of the consequences of particular policy approaches, the inference is to recommend against one of these approaches and in favour of the other. Its impact is to provide advice, in the Superintendent's judgment, as to the likely consequences of particular action for the government to take into consideration in connection with the Government's proposals. It is submitted that the record reflects FSCO's legal commitment to provide advice and recommendations to the Minister, and meets the test under section 13.

The appellant states:

The comments being made in the email ... appear to be factual information and over-all analytical information on the role of the provincial regulator and the federal regulator ... It is not advice or recommendations to elected officials on a suggested course of action. It is directed at a public servant and not an elected decision maker and therefore section 13 does not apply.

*Findings*

The first two paragraphs of this e-mail have been disclosed. The remaining two paragraphs contain information which, in my view, constitutes advice for the purpose of section 13(1), and the severed portion qualifies for exemption.

***Record 26***

The Ministry states:

Record 26 consists of two e-mail messages dated December 18, 2003. The earlier e-mail sent at 2:05 p.m. contains a discussion of a proposed approach put forward by a public servant for achieving insurance cost savings.

Although options are not usually considered advice, in the context of this e-mail it is submitted that this option is put forward as a recommended approach and hence disclosure of this record would reveal advice of public servants with respect to achieving cost savings. Alternatively, it would permit accurate inferences to be drawn as to a suggested course of action. From its context the record would also reveal advice, directly and indirectly, from the Superintendent and other public servants on this matter.

It is submitted that the ability to put forward reform proposals, and to discuss them in the context of contemplated reforms and policy development, is critical to the Government policy development and deliberation process, and would be hampered by disclosure of this kind of discussion. It is submitted that this record is exempt under section 13.

The Respondent is also relying on s. 18 in relation to this record, as discussed below.

The appellant states:

The Respondent admits this document is not advice or recommendation to an elected official, yet attempts to claim exemption on basic information about achieving insurance cost savings, which is the very duty that FSCO is set up to do in respect to compulsory auto premiums. General views of public servants are not advice.

***Findings***

On my careful review of Record 26, which is a brief e-mail exchange, I am satisfied that its disclosure would reveal advice or recommendations for the purpose of section 13(1). Although the record does (briefly) refer to various options, given the manner in which these brief e-mails are worded, I find that disclosure of the record would reveal the advice given.

***Record 27***

The Ministry states:

Record 27, as severed, is an e-mail message dated December 18, 2003 from the Superintendent to the Parliamentary Assistant's Special Advisor providing advice and recommendations on particular policy choices for auto insurance reforms, particularly in regard to elements of the customized auto policy and a recommended approach for enforcement, in response to a request from the Parliamentary Assistant.

It is submitted that this record reflects the important and ongoing advice and recommendations role played by FSCO in assisting the Ministry in the development of auto insurance reforms. It is submitted that disclosure of records of this type would inhibit the kind of free flowing advice and frank exchange of expertise that is necessary to properly advise the Minister. It is submitted the record meets the section 13 test.

The appellant states:

This record on the face of it states it is a response to a request for "some ideas on what can be done in terms of consumer advice/advocacy" and therefore cannot be advice and recommendations but rather a statement of views or options.

***Findings***

Portions of this e-mail message have been disclosed to the appellant. On my review of the remaining portions, I am satisfied that those portions contain advice or recommendations for the purpose of section 13(1), and that they qualify for exemption. Some of the withheld information contains specific advice about recommended courses of action. Other sentences contain information which is general in nature, but I am satisfied that, given the context, disclosure of those portions would reveal the advice given.

***Record 28***

This record is a brief e-mail string. I have found, above, that the bottom portion of this record (an e-mail message sent at 7:55 am) qualifies for exemption under section 12. With respect to the top portion of this record, the Ministry states:

Record 28, discussed above under Issue D (Cabinet Records Exemption), consists of two e-mail messages dated December 16, 2003 and December 17, 2003.

... The later e-mail in Record 28, sent at 7:59 a.m., is from the Superintendent to the Deputy Minister and various Ministry officials, entitled "Autos - next steps".

It discusses the likely cost implications of a package of auto insurance proposals, as well as implications arising from stakeholder discussions, and is part of the ongoing strategic advice for Ministry staff by FSCO arising out of meetings by the Superintendent with stakeholders.

It is submitted that disclosure of this record would interfere with this kind of frank and strategic exchange of views necessary to support the development of Government policy. While the e-mail contains opinions, they are opinions involving the exercise of judgment and skill brought to bear on the matter of auto insurance reforms and in this context it is submitted the record discloses the advice of a public servant and is exempt under section 13.

The appellant states that he cannot make meaningful submissions without more information.

### *Findings*

On my review of the e-mail sent at 7:59, I find that it qualifies for exemption under section 13(1). This brief e-mail message contains information about considerations that must be taken into account if a particular, identified, course of action is followed. The disclosure of this e-mail would, in my view, reveal advice or recommendations for the purpose of section 13(1).

### ***Record 29***

The Ministry states:

Record 29 is an e-mail message dated December 6, 2003 from the Superintendent addressed to the Director of the Automobile Insurance Services Branch of FSCO, and copied to other FSCO and Ministry officials including the Special Advisor to the Parliamentary Assistant, the Minister's Senior Policy Advisor and the Deputy Minister...

The e-mail concerns a proposed rate increase, and advises Ministry officials of the Superintendent's proposed actions and what is needed in regard to insurance rates pertaining to that industry participant. Although the e-mail contains some factual information, it is integral to the strategic advice provided. As with Record 28, it is submitted that the e-mail, in advising the Ministry of the matter and of the Superintendent's recommended next steps, constitutes advice of a public servant and is exempt under section 13.

In addition, the portion discussing the proposed rate filing information constitutes third party information and is discussed below under Issue E.

The appellant states:

This record is apparently from [an identified individual] to [another individual] and not to any elected official... This email in any event appears to be an exchange of information between public servants.

*Findings*

This record, which is a relatively brief e-mail concerning a matter in which several courses of action are discussed, and one course of action is advised. Given the nature of the information in the record, the context in which the information is given, and the suggested courses of action referenced, I am satisfied that it qualifies for exemption under section 13(1), as its disclosure would reveal advice or recommendations.

***Record 30***

The Ministry states:

Record 30 consists of an e-mail message dated December 5, 2003 from the Superintendent to the Special Advisor to the Parliamentary Assistant to the Minister. It provides advice on draft speaking notes to be used by the Parliamentary Assistant in a speech. It is submitted the record constitutes advice and recommendations of a public servant and is exempt under section 13. It has been held that advice in respect of a communications strategy is exempt from disclosure under s. 13 [Order PO-2071].

The appellant states:

This record is apparently draft speaking notes given by one public servant to another. How can this been characterized as advice or recommendation to an elected official? To qualify as “advice” or “recommendations”, the information must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A special advisor to a Parliamentary Assistant is not someone who is elected nor is authorized to determine a matter as part of the deliberative process of an elected official.

*Findings*

On my review of this record, I am satisfied that its disclosure would reveal advice or recommendations. The record is a brief e-mail chain which contains specific advice to a decision-maker, and it qualifies for exemption under section 13(1).

***Record 38***

The Ministry states:

Record 38, as severed, is a series of four e-mail messages dated November 27, 2003 between various FSCO and Ministry staff. It is submitted the undisclosed portion of the record is exempt under section 13. The record discloses advice as to the impact and consequences to the Government of the matters discussed and strategic advice regarding discussions with stakeholders...

The appellant states:

This series of emails deals with a press release by a regulated Insurance company. It is not addressed to any elected official and it is not credible that the redacted information could be advice or recommendations to elected officials. No exemption was claimed for personal information or opinions expressed ... and none can now be claimed to attempt to expand the reasons for failure to make full disclosure of these email messages.

***Findings***

On my review of the withheld portions of this e-mail string (two paragraphs from the top e-mail and one paragraph from the third e-mail), I am satisfied that the first two paragraphs contain specific information which constitutes advice for the purpose of section 13(1). In addition, the disclosure of the last withheld paragraph (from the third e-mail) would reveal the advice or recommendations given. As a result, I find that the withheld portions of this record qualify for exemption under section 13(1).

**FSCO-AID Records**

***Record 10***

The Ministry states:

Record 10 is an e-mail message from the Minister's Senior Policy Advisor to FSCO and Ministry staff summarizing his advice and recommendations on matters arising out of an auto insurance update meeting, and setting out a proposed agenda for a subsequent meeting. The first two substantive topics highlighted on page 1 of the record are not responsive to the request.

Among other things, the record reflects his endorsement of a particular model being put forward and his advice and directions as to additional matters to be explored.

As with Record 9, this record discloses the recommendations and advice of a public servant in relation to this and other auto insurance reform projects, direction as to next steps, and options being considered in connection with the reform item being considered. This record constitutes “advice or recommendations of a public servant” within the meaning of section 13 and is therefore exempt.

On my review of this record, I am satisfied that it contains the advice and recommendations of a senior policy advisor, and qualifies for exemption under section 13(1) of the *Act*.

***Record 26***

The Ministry states:

Record 26, as severed, is an e-mail message from the Senior Manager of Automobile Insurance Policy at FSCO describing a staff meeting with a policy advisor to the Minister, and setting out the recommendations, views and directions of that advisor to the Superintendent and other FSCO and Ministry staff in a statement with respect to particular auto insurance reform options. The record contains advice and recommendations and is exempt under section 13.

On my review of the severed sentences in this record, I am satisfied that they contain specific recommendations made by staff regarding a suggested course of action, and that they qualify for exemption under section 13(1) of the *Act*.

***Record 28***

The Ministry states:

Record 28 is an e-mail message entitled “Agenda for Parliamentary Assistant’s auto meeting” from a public servant at FSCO attaching another e-mail from a public servant at the Ministry. The record contains advice and recommendations on a proposed draft agenda for a briefing of the Parliamentary Assistant on auto insurance issues, including suggested contents of briefing materials. Only paragraphs 1 and 4 are responsive to the request. The record contains the advice and recommendations of a public servant and is exempt under section 13.

On my review, I am satisfied that the responsive portions of this record, which is a draft proposed agenda, contain advice or recommendations for the purpose of section 13(1).

***Records 30 and 31***

The Ministry states:

Records 30 and 31 are e-mail messages from the Senior Manager of Automobile Insurance Policy at FSCO, to other FSCO and Ministry staff in the case of Record 30, and to the Superintendent and Ministry staff, in the case of Record 31.

These records provide recommendations in regard to a particular auto insurance reform proposal, in response to a request from the Ministry for comments. In the case of Record 30 the tenor of the advice is against proceeding with a particular policy option.

In the case of Record 31, the advice relates to the implications and proposed design of the reform, and proposes a course of action for testing possible options. The records contain the advice and recommendations of a public servant and are exempt under section 13.

On my review of these two relatively brief e-mail strings, I find that they contain specific staff advice and recommendations regarding proposed actions, and their disclosure would reveal the specific advice. Accordingly, I am satisfied that they qualify for exemption under section 13(1).

***Record 43***

The Ministry states:

Record 43, as severed, is an e-mail message from the Senior Manager of Automobile Insurance Policy at FSCO to the Parliamentary Assistant's Special Advisor. The e-mail provides advice in connection with a letter from a stakeholder regarding auto insurance reforms. Only the final paragraph of the letter is responsive to the request. The e-mail addresses and provides advice regarding the issues raised by the stakeholder. The tenor of the advice is that the proposed model does not give rise to the concerns identified by the stakeholder. It is submitted the record is exempt under section 13.

On my review of the last paragraph of this e-mail, which is the only responsive portion of this record, I find that it contains specific advice and recommendations regarding proposed actions, and that its disclosure would reveal the specific advice. Accordingly, I am satisfied that this paragraph qualifies for exemption under section 13(1).

***Record 69***

The Ministry states:

Record 69 is a briefing note entitled “Tort” which has been released except one sentence setting out a staff recommendation on possible reforms.

The one line that has been severed from this record and not disclosed contains a specific staff recommendation, and I am satisfied that it qualifies for exemption under section 13(1).

***Records 85, 132 and 153***

The Ministry states:

Records 85, 132 and 153, as severed, are versions of a chart entitled “Customized Policy Issues Chart”. The record sets out policy issues, stakeholder comments, policy considerations and recommendations of staff regarding the development of a customized automobile insurance policy.

The issue and stakeholder comments have been released to the Appellant. The recommendations and policy considerations have been withheld on the basis they reveal the advice of public servants in connection with the policy development of this particular reform and the recommendations in regard to the specific design issues identified. The undisclosed portion of the record is exempt under section 13.

The appellant takes the position that the policy considerations in the Chart are not exempt under any section.

On my review of these three documents, I am satisfied that the withheld portions would reveal advice or recommendations for the purpose of section 13(1). I agree with the appellant that, ordinarily, policy considerations are not “advice or recommendations” under section 13(1); however, in these instances, on my review of the records, the policy considerations set out would clearly reveal the actual recommendations, based on the manner in which they are worded and described. Furthermore, although there is some factual information interspersed within the policy considerations, severing these portions would do little more than provide the appellant with “disconnected snippets” and, in my view, doing so would not serve a useful purpose. Accordingly, I am satisfied that the withheld portions of these records qualify for exemption.

***Record 87***

The Ministry states:

Record 87 is a project work plan marked “Confidential”. It contains the proposed plan for the development of the customized insurance policy. The record discloses the advice and recommendations of public servants and is exempt under section 13.

The suggested course of action disclosed in the record relates to the specific project work and tasks to be undertaken, the proposed resources, directions of the Parliamentary Assistant regarding the scope of the project, proposed timing, steps to be completed and proposed consultation plan.

On my review of Record 87, it is clearly a general workplan, which identifies the various tasks to be completed and the timing of those tasks. Attached to it is a draft letter. In my view, both the workplan and the attached letter are of a very general nature, and do not contain “advice or recommendations” for the purpose of section 13(1). Accordingly, I will order that this record be disclosed.

***Record 97***

The Ministry states:

Record 97 is a briefing memo on proposed cost savings measures related to auto insurance reforms, and suggestions on measures to be undertaken for reaching savings targets. The record contains advice and recommendations of a public servant and is exempt under section 13.

On my review of this record, portions of pages 3 and 4 refer to matters or actions which had already been implemented and, in my view, do not contain advice or recommendations for the purpose of section 13(1). The remaining pages of this record relate to possible additional measures, and are advisory in nature and, in my view, qualify for exemption under section 13(1). As a result, I will order that the identified portions of pages 3 and 4 be disclosed.

***Record 108***

The Ministry states:

Record 108 is a briefing note entitled “Bill 5-Rate Filings”. The record has been released to the Appellant, except for the portion advising as to the implications that would arise out of any changes to the assumptions used by FSCO in approving rate filings, and the portion providing options for dealing with rate filings and their pros and cons, beginning at page 5 of the record.

The unreleased portion of the record provides advice, options and directions relating to the benchmarks used by FSCO for purposes of assessing auto insurance rate filings.

The Ministry then states that, although the record does not designate any specific recommendation, and that mere options have been held by the IPC to be releasable, the undisclosed portion meets the section 13(1) test. It states that the pros and cons described in the record disclose advice regarding the consequences for the Government of the changes discussed, and a recommendation is implied in the record.

The appellant states:

The Respondent states that the redacted records relate to benchmarks used by FSCO to assess auto rate filings. How could such benchmarks be kept secret from the public when presumably they are created to do the very job FSCO has been mandated to do, namely approve or disapprove premium rate increases. Pros and cons are not advice but simply views of public servants.

### *Findings*

I have carefully reviewed Record 108 and the representations. Portions of this record have been released to the appellant. The remaining portions include some material under the heading "Implications," as well as three options and the list of pros and cons for each option.

In my view, the information remaining at issue under the "Implications" section is in the nature of specific advice, and I find that these portions of paragraphs from pages 5 and 6 would reveal advice or recommendations for the purpose of section 13(1). However, the three options and the pros and cons set out under each option are not (with a few exceptions) advice or recommendations for the purpose of section 13(1). As identified by the parties, previous orders have found that options and pros and cons are generally not considered to qualify as advice or recommendations, unless disclosure would reveal such information. In my view, the three options and most of the information under the pros and cons of each option would not reveal such information. However, some specific information under the pros and cons would reveal specific advice, and I uphold the application of the section 13(1) exemption for those bits of information. I will therefore order that the portions of this record that do not qualify for exemption be disclosed, and will be providing a highlighted copy of this record to the Ministry with this order.

***Record 114***

The Ministry states:

Record 114, as severed, is a draft e-mail from the Superintendent to the Director of the Automobile Insurance Services Branch, marked “Confidential - Advice to the Minister and Cabinet”.

The unreleased portion of this record discusses the results of rate filings submitted by insurers, the implications for the Government of these results and suggestions for Government policy and strategy. While the record does contain some facts and analysis of the information, it is in aid of, and integral to, the advice component of the record. The record discloses advice and recommendations of a public servant and is exempt under section 13.

The appellant states:

There is no evidence on the face of what has not been redacted that this is advice and recommendation to a Cabinet minister.

***Findings***

This record contains advice or recommendations, or information which would reveal the advice or recommendations of staff to the Minister’s office. In the circumstances, I am satisfied that it qualifies for exemption under section 13(1).

***Record 117***

Record 117 is a seven-page document. The second part of this record (pages 5-7) is a duplicate of a document from the Minister’s office. For the first part of this record, the Ministry states:

Record 117 consists of two briefing notes. The first is a four page note entitled “Auto Insurance Summary” and the second is a three page note entitled “Auto Insurance - Next Steps” and labelled “Confidential Advice to the Minister”.

The first briefing note outlines a set of proposed new auto insurance reforms and the projected cost savings associated with each reform item, as determined by two third party actuarial firms. One of those is an actuarial firm retained by FSCO and the other was retained by a stakeholder as identified in the record.

The note also contains advice in relation to what level of cost savings is required by the Government in order to achieve its targeted savings, a proposed timeline for additional steps recommended to be taken regarding the release of bulletins and policy statements, advice regarding communication strategy, and advice and

recommendations as to what reforms the Government should commit to. This record contains the advice and recommendations of public servants with respect to auto insurance reforms and is exempt under section 13.

...

It should also be noted that the record contains costing information provided by an actuary for one of the stakeholders. This information discloses estimated premium savings associated with the proposed reforms calculated by that actuary on behalf of the stakeholder. Although section 17 was not claimed in the index in relation to this record, it is submitted that the third party information is exempt under the mandatory exemption in section 17, for the same reasons as are discussed under record 101. Permission is requested to claim section 17 in relation to the third party information that is contained on page one of the record, and the chart on page 2.

The appellant states:

This record is called Auto Insurance Summary in the Index. It has not been disclosed and it should be examined very carefully to determine if it is truly advice to a Minister. If it contains as stated, actuarial information from a party ... then it should be severed and that information disclosed because it failed to [meet] the section 17 tests.

### *Findings*

The first page and the chart on the second page of this record contain what I consider to be factual information. This does not qualify for exemption under section 13(1), however, the third parties will be given an opportunity to provide input on this record.

With respect to the remaining portion of this record, there is a mix of factual information and specific advice, and I find that disclosure of any of this information would reveal advice or recommendations for the purpose of section 13(1).

### ***Record 120***

The Ministry states:

Record 120 is a briefing note ... that sets out a description of the objective and goal of the proposed insurance reforms, provides a list of recommended reform measures put forward to achieve the targeted objectives, and associated cost savings associated with those proposed measures. The record contains advice and recommendations and is exempt from disclosure under section 13.

On my review of this record, I am satisfied that it contains a proposed course of action, and qualifies for exemption under section 13(1).

***Record 122***

The Ministry states:

Record 122 is a briefing note that sets out the advice, comments and recommendations of the Superintendent for the Minister's staff, arising out of information ... with respect to the cost savings associated with a set of auto reform proposals. The purpose of the briefing note was to provide an assessment by the Superintendent of the costing and other information ....

The information referred to in paragraph 5 on page 1, and in paragraph 5 on page 4, are not responsive to the request, as the matter discussed therein is not related to the issues referred to in the request.

The advice of the Superintendent relates to the implications of the stakeholder comments, and reflects the Superintendent's strategic advice as to whether the proposals advance the Government's objectives. The note contains some factual information with respect to the proposals, and third party information relating primarily to the costing and assumptions behind the proposals by the stakeholder. However, it is not practicable to sever the factual and third party information because they are woven into, and integral to, the discussion.

It is submitted that the entire document is exempt under section 13 as providing advice of a public servant. Requiring disclosure of advice of this sort would restrict or limit the frank exchange of advice between FSCO and the Ministry related to auto insurance reforms and interfere with FSCO's legislated mandate to provide recommendations to the Minister....

On my review of Record 122, I am satisfied that the responsive information contained in this record contains or reveals specific advice, and that it qualifies for exemption under section 13(1).

***Record 133***

The Ministry states:

Record 133 is a briefing note entitled "Policy Decisions Regarding the Customized Policy" setting out policy decisions, implications, considerations and advice regarding the customized auto policy. The purpose of the note is to provide recommendations and advice in response to five interrogatories as contained in the note.

The advice is implicit in the bullet point responses to the interrogatories, or can be inferred from the totality of the information provided in the bullet point statements under each of the five issues identified. The record sets out the advice and recommendations of a public servant and is exempt under section 13.

*Findings*

I have carefully reviewed this record. In my view, the information contained in it relating to the five interrogatories is more in the nature of considerations, and does not contain advice or a recommended course of action, nor would its disclosure reveal any such advice. In my view, this record does not qualify for exemption under section 13(1).

***Record 135***

The Ministry states:

Record 135 is a chart entitled “Stakeholder Summary Chart”. It has been released to the Appellant, except for the last column entitled “Other Suggested Reforms/Comments”, which contains recommendations and advice of public servants in relation to the information contained in the portion that has been released, and is exempt under section 13.

*Finding*

On my review of the information contained in the last column of this record, I am satisfied that, if disclosed, it would reveal advice or recommendations for the purpose of section 13(1).

***Record 162***

The Ministry states:

Record 162 is a briefing note dealing with possible auto insurance reforms that could be implemented through regulation. The record has been released to the appellant except one paragraph which contains the advice and recommendations of a public servant that is exempt under section 13.

On my review of the one paragraph remaining at issue, I am satisfied that it contains a recommendation and qualifies for exemption under section 13(1).

### ***Records 165 to 175***

The Ministry states:

Records 165 through 175 contain the minutes and agenda arising out of the auto insurance update briefings with the Parliamentary Assistant, the Senior Policy Advisor to the Minister, and staff from the Ministry and FSCO. These records are similar to AID records 19 through 22, discussed previously in this submission.

These records discuss advice from public servants, strategy on consultation, recommended next steps, the status of the auto insurance reform projects and direction from the Parliamentary Assistant and the Minister's staff. Although there is some factual and background information in some of these records, and lists of items being considered, it is submitted that the purpose and tenor of these meetings was the provision of advice by public servants.

It is submitted that these records are exempt under section 13, for the same reasons as are discussed in relation to AID records 19, 20 and 22. The exemption in section 12 is no longer being claimed in relation to these records.

The responsive portions of these records, it is submitted, include the following:

- record 165 - paragraphs numbered 2, 5 and 7
- record 166 - paragraphs numbered 1, 2 and 12
- record 167 - agenda items 1, 6 and Future Planning Items
- record 168 - paragraphs numbered 1, 2, 3 and 4
- record 169 - all
- record 170 - paragraphs numbered 1, 3 and 5
- record 171 - agenda items 3, 5 and 6, and Future Planning Item 1
- record 172 - paragraphs numbered 1, 2, and 3, and paragraph 2 on page 3 of the record
- records 173 and 175 - agenda items 1 and 2
- record 174 - agenda items 2 and 3

### ***Findings***

These records, though similar in some ways to FSCO-AID records 19, 20 and 22, are different in kind. On my review of the remaining responsive portions of these records, I find that the records which contain agenda items (Records 165, 167, 169, 171, 173, 174 and 175) do not contain "advice or recommendations" for the purpose of section 13(1). However, I am satisfied that the responsive portions of the remaining portions of the record do qualify for exemption under section 13(1).

## **Minister's Office records**

The Ministry makes specific representations on its records in support of its position that section 13(1) applies to the withheld portions. After providing general introductory representations on section 13(1), the Ministry makes specific representations on each record.

### ***Representations and Findings***

#### ***Record 1***

The Ministry states:

Record 1 is an email, sent September 22, 2004, from the Director of the Industrial and Financial Policy Branch to staff in the Minister's Office summarizing a discussion she had with the actuary who had reviewed information related to customized insurance policies. The actuary's findings and comments were material for the purposes of evaluating the various proposals concerning customized insurance policies. As the disclosure of the severed information would enable an inference as to the advice and recommendations that were given related to customized insurance policies, the Ministry submits that this record is exempt under s. 13(1).

On my review of the severed sentence in this record, I am satisfied that it contains specific recommendations, and that this information qualifies for exemption under section 13(1).

#### ***Record 7***

This record was disclosed in part. The Ministry states as follows with respect to the remainder of the record:

Record 7 is a memorandum prepared by the Superintendent seeking guidance on the position to be adopted with respect to the disclosure of insurance commission fees. The record sets out the background, analysis and recommendation as to the position that the Government should adopt on this matter. As the record contains the advice and recommendations of a public servant, it is exempt under section 13(1).

On my review of the withheld portion of this record, it clearly contains both specific advice (in the first portion) and a recommended course of action (in the second portion). I am satisfied that it qualifies for exemption under section 13(1).

***Record 8***

The Ministry states:

Record 8 is an email, sent December 18, 2003, from the Superintendent to staff in the Minister's Office. Paragraphs 1, 3, 4, 5, 6 together with the attachment have been redacted as they are non-responsive. Paragraph 2 contains the advice and recommendations of the Superintendent related to an automobile insurance reform initiative and is therefore exempt under section 13(1).

On my review, I am satisfied that paragraph 2 contains advice, and qualifies for exemption under section 13(1).

***Record 10***

The Ministry states:

Record 10 is an email, sent September 22, 2004, from the Superintendent to staff in the Minister's Office concerning a survey that was conducted on focus groups regarding auto insurance reform. The consultant's email is also attached in which the survey findings are summarized together with her analysis of the findings. A further severed version of the record has been released upon re-consideration. Paragraph 2 has been severed since it discusses the advice and conclusions made by the Superintendent based on his review of the survey findings and analysis. As the disclosure of the severed information would enable an inference as to the advice of the Superintendent, it is exempt under section 13(1).

On my review of the one paragraph severed, I am satisfied that its disclosure would reveal the advice or recommendations of staff, and it qualifies for exemption under section 13(1).

***Record 15***

The Ministry states:

Record 15 is material dated March 2004 that was prepared for the purpose of briefing the Parliamentary Assistant to the Minister of Finance on customized insurance policies. The record includes background information together with the 4 options that were considered for customized policies. Each of the options is described together with a listing of the benefits, drawbacks and a recommendation. Disclosing the severed information would enable an inference as to the recommendations that were made concerning the options and as a result is exempt under section 13(1).

The portions of the record remaining at issue contain specific recommendations regarding the four options, as well as, in some cases, a list of the pros and cons of some (but not all) of the four options.

On my review of this record, I find that the disclosure of the pros and cons for the identified options would not reveal any specific advice or recommendations. However, some of the specific recommendations do qualify for exemption under section 13(1). Accordingly, I will order that the pros and cons on pages 6, 8 and 10 be disclosed.

***Record 25***

The Ministry states:

Record 25 is a briefing note and update on customized insurance policies. It includes a detailed discussion and summary of the issues related to customized insurance policies. The record also contains advice and information related to the future direction of this initiative and is accordingly exempt under section 13(1).

On my review, I find that the first portion of this record (the first four paragraphs) include background and factual information, and does not qualify for exemption. However, the remainder of the record does include information which, in my view, qualifies for exemption under section 13(1), as it either contains advice, or would reveal such advice.

***Record 39***

The Ministry states:

Record 39 is a fax cover sheet dated December 30, 2003 from the Superintendent to staff in the Minister's Office to which two published articles regarding auto insurance were attached. The last paragraph has been severed as it contains the advice and recommendation of the Superintendent concerning automobile insurance reform and is therefore exempt under section 13(1).

On my review of the one severed paragraph, I am satisfied that it contains advice or recommendations for the purpose of section 13(1).

***Record 75***

The Ministry states:

Record 75 is an update on matters related to the disclosure of insurance commission fees that was prepared for the work in progress meeting between Ministry staff and FSCO staff... The redacted information concerns the advice and recommendations related to options that were considered for this matter.

The redacted portions of this record, which consist of the last two bullet points on page 2, contain specific recommendations, and I am satisfied that they qualify for exemption under section 13(1).

***Record 93***

The Ministry states:

Record 93 is a chart describing the various options being considered for customized insurance policies. The disclosure of the redacted information would enable an inference as to the advice and recommendations that were made with respect to the options and as a result is exempt under s. 13(1).

The only portions of this record remaining at issue are listed pros and cons. On my review of these portions of this record, I am not satisfied that their disclosure would reveal advice or recommendations, and I will order that this record be disclosed.

***Record 111***

The Ministry states:

Record 111 is an email sent January 6, 2004 from staff in the Minister's Office to the Superintendent concerning various automobile insurance reform initiatives. The redacted information is advice to the Superintendent regarding the initiatives. The disclosure of this record would permit an inference as to the recommendations that were ultimately made by the Superintendent regarding the initiatives and is accordingly exempt under section 13(1).

On my review of the redacted information in this record (certain bullet points under section B), I am satisfied that the disclosure would reveal advice or recommendations for the purpose of section 13(1).

***Record 114***

The Ministry states:

Record 114 is documentation dated October 24, 2004 and contains information related to the following automobile insurance reform issues: rate freeze legislation, changes to income replacement benefits and further cost saving measures. The background information and concerns related to each issue are set out in the documentation. The information related to the advice and recommendations for each of the issues has been severed as it is exempt from disclosure under section 13(1).

On my review of the portions of this record that remain at issue, I am satisfied that their disclosure would reveal advice or recommendations for the purpose of section 13(1).

## **SOLICITOR-CLIENT PRIVILEGE**

When the request in this matter was filed, section 19 stated as follows:

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 was subsequently amended (S.O. 2005, c. 28, Sch. F, s.4). However, the amendments are not retroactive, and the version reproduced above applies in this appeal.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

### **Branch 1: common law privilege**

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]

#### ***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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the Ministry must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### ***Litigation privilege***

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. ...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

### **Branch 2: statutory privileges**

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

***Statutory litigation privilege***

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

**Representations and findings**

The Ministry has claimed that section 19 applies to Records 34, 59, 123 and 150 contained in the FSCO-AID category of records. The appellant acknowledges that some records appear to have been written by lawyers, and that section 19 may apply. However, he states that no attempt has been made to sever the factual information from the legal opinions expressed in those records, and that this should be done and the factual information fully disclosed.

***Record 34:***

Record 34 is an e-mail message referring to an attached confidential legal opinion, and summarizing some information in that opinion. The Ministry states:

Record 34 is an e-mail message [between staff] ... summarizing a legal opinion prepared by FSCO legal counsel in regard to the legal implications of a particular auto reform option. The e-mail states that the opinion is confidential. Although the e-mail message was not prepared by counsel it discloses the legal advice contained in the opinion of counsel.

On my review, I am satisfied that this record contains solicitor-client communication privileged information, and qualifies for exemption under section 19 of the *Act*.

***Record 59:***

The Ministry states:

Record 59 contains a legal opinion from legal counsel to the Ministry, to other Ministry and FSCO staff. This record was prepared by counsel for use in giving legal advice, and is exempt from disclosure under section 19.

On my review of this record, which is a brief e-mail string, I am satisfied that it contains solicitor-client communication privileged information, and qualifies for exemption under section 19 of the *Act*.

**Record 123:**

The Ministry states:

Record 123 is an e-mail message containing a legal opinion from FSCO legal counsel to staff at FSCO. The record was prepared by counsel for use in giving legal advice, and is exempt from disclosure under section 19.

I have reviewed this record, which contains an e-mail from a lawyer to staff identifying the lawyer's legal opinion on a number of matters. I am satisfied that this record contains solicitor-client communication privileged information, and qualifies for exemption under section 19 of the *Act*.

**Record 150:**

The Ministry states:

Record 150 is a legal opinion prepared by FSCO legal counsel for staff of FSCO. The record contains a notation that it is a solicitor-client correspondence. The record was prepared by counsel for use in giving legal advice, and is exempt from disclosure under section 19.

On my review of this record, I am satisfied that it is a legal opinion prepared by a lawyer for his client, and that it qualifies for exemption under section 19 of the *Act*.

**ECONOMIC AND OTHER INTERESTS**

The Ministry has claimed that certain records and portions of records are exempt under section 18(1)(e) of the *Act*. That section reads:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

**Introduction**

The purpose of section 18 is to protect certain economic interests of institutions and avoid creating an unfair advantage for those with whom the institution may do business by the premature disclosure of plans to change policy or commence projects. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission

Report) explains the rationale for including a “valuable government information” exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. ...

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project. ...

[T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

In order for section 18(1)(e) to apply, the Ministry must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

## Representations

### *Minister's Office*

The Ministry's representations on the identified records state:

*Record 27* is an email sent December 22, 2003 from the Superintendent to staff in the Minister's Office discussing the meeting being proposed with insurance industry representatives. This record includes further information related to the Government's position in its role as negotiator for automobile insurance reform implementation.

*Record 40* was prepared January 22, 2004. Page 1 has been released to the Appellant upon re-consideration. The 5th paragraph on page 2 is non-responsive and is accordingly severed. This record was prepared for the purpose of advising the Minister for the meeting being proposed with insurance industry representatives related to the Government's position in its role as negotiator for automobile insurance reform implementation. The information deals with rate changes which has a direct effect on the insurance industry and consequently has an economic impact on Ontario.

*Record 107* is a subsequent version of Record 40 [referred to above] which was revised. This record reflects information that is non-responsive and has been accordingly severed. As with Record 40, this record was prepared for the purpose of advising the Minister for the meeting being proposed with insurance industry representatives related to the Government's position in its role as negotiator for automobile insurance reform implementation. The information deals with rate changes which has a direct effect on the insurance industry and consequently has an economic impact on Ontario.

*Record 108* is a confidential note prepared for the purpose of discussions with insurance industry representatives concerning the Government's position in its role as negotiator for automobile insurance reform implementation.

The appellant takes the position that section 18(1) does not apply. He states:

The [Ministry] itself has no economic interest as an institution of government in the information sought. It has no commercially valuable information that is exempt from disclosure in the sense of government sponsored research. It has information disclosing its mandate and role as regulator of a regulated industry and it is this information that should be disclosed in the broad public interest.

## Findings

I have reviewed the representations of the parties and the records for which the section 18(1)(e) claim has been made. It is clear from the material that the Ministry is claiming the section 18(1)(e) exemption for the Government's role as negotiator for automobile insurance reform implementation. Previous orders of this office have established, however, that the section 18(1)(e) exemption was not meant to apply in the context of the government developing policy with a view to introducing new legislation, regardless of whether this process included negotiations. Former Senior Adjudicator Goodis stated as follows in Order PO-2064:

In my view, the term "negotiations" in section 18(1)(e) is not intended to apply to consultations by the government with third party stakeholders for the purpose of developing legislation. In the circumstances of this appeal, the government is merely seeking comments from interested and knowledgeable parties, to assist it in developing legislation that will accomplish its goal and meet with broad acceptance from such parties and the general public. This is to be contrasted with true "negotiations", in which the government and the third party seek to arrive at a legally binding agreement or contract [see, for example, Orders P-454, P-809, P-1437 (native land claims), P-1238 (settlement of litigation), P-1593 (allocation of forest resources), R-98007 (consulting services)]. This interpretation is supported by the following definitions of the word "negotiation":

. . . Deliberation and discussion on the terms of a proposed agreement, and includes conciliation and arbitration.

*Dictionary of Canadian Law*, D. Dukelow *et al.* (Toronto: Carswell, 1991) at p. 675

. . . [The] process of submission and consideration of offers until acceptable offer is made and accepted . . . The deliberation, discussion or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction.

*Black's Law Dictionary* (6th ed.), J.R. Nolan *et al.* (St. Paul, Minn.: West Publishing Company) at p. 1036

In the legislative context, by definition the government does not enter into an agreement or settlement with third parties. At its highest, both sides may reach an informal "understanding", but this falls well short of a legally recognized agreement.

I find further support for this view in statements by the authors of *Public Government for Private People: The Report of the Commission on Freedom of*

*Information and Individual Privacy/1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage . . .

[T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively (page 321).

With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

An agency may refuse to disclose:

A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.

We favour the adoption of a similar provision in our proposed legislation.

In my view, this lends support to the notion that section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.

I adopt the approach taken to the section 18(1)(e) exemption as set out in Order PO-2064. The records at issue in this appeal for which the Ministry has claimed section 18(1)(e) relate to proposals and suggestions made by insurance industry representatives, and relate to the Government's position in its role as negotiator for automobile insurance reform implementation. In my view, section 18(1)(e) does not apply to information of this nature.

Accordingly, the responsive portions of the Minister's Office Records 27, 40, 107 and 108 do not qualify for exemption under section 18(1).

### **THIRD PARTY INFORMATION**

The Ministry and a number of affected parties take the position that the mandatory exemptions in sections 17(1)(a), (b) and/or (c) apply to a number of records.

In the course of processing this appeal, the Ministry notified approximately 13 affected parties regarding their views on disclosure of the records relating to them. Some affected parties did not respond to the notice, some responded and stated that they had no objection to disclosure of information, and others responded that they objected to the disclosure of some or all of the information relating to them. The Ministry disclosed the third party information in those instances where there was no objection to disclosure.

In the subsequent processing of this appeal by this office, eight affected parties received Notices of Inquiry and were invited to submit representations. Four affected parties submitted representations and, of the remaining four affected parties, one stated that it had decided not to submit representations, another stated that it did not object to the disclosure of two records, and two did not submit a response.

As set out above under the "Preliminary Issue" section of this order, I have identified certain records which require additional notifications and, except for Ministry Office third party records 20-23, which also relate to another affected party, I will not review the application of the section 17(1) exemption to those records at this time. The remaining records or portions of records for which the section 17(1) claim has been made are the following:

***FSCO-CEO:*** Record 37

***FSCO-AID:*** Records 56, 125, 126, 136, 155 and 156

**Minister's office:** Records 24, 48 and 117

**Minister's office third party records:** Records 2, 3, 5 and 20-23

### **Section 17(1)**

Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

## General representations

The Ministry and the affected parties take the position that the records contain financial, commercial and/or technical information for the purpose of part one of the three part test. The Ministry states:

It has been held that “financial information” refers to information relating to money and its use or distribution and must contain or refer to specific data [Orders P-47, P-87, P-113, P-228].

“Commercial information” has been held to mean information which relates to the buying, selling or exchange of merchandise or services [Order P-493].

“Technical information” has been held to mean information belonging to an organized field of knowledge, notably related to applied sciences or mechanical arts [Orders P-454, 463, 479].

It has been held that information filed by insurance companies with an expectation of confidentiality that was implicit, rather than explicit, was exempt under section 17 [Order P-1526].

Later in its representations the Ministry also states:

It is submitted that [certain identified records] contain technical, commercial and financial information, within the meaning of these terms in section 17, as those terms have been interpreted in previous orders. Examples of “financial information” in previous ... orders have included cost accounting method, pricing practices, profit and loss data, overhead and operating costs, etc. [Orders P-47, P-87, P-113, P-228; P-295 and P-394]. This information is integral and intertwined with the discussion in [certain identified e-mails] ... so that severance of these records is not practicable.

The affected parties also argue that the records contain commercial, financial, technical or trade secret information. One affected party states that one of the records, which includes a slide of “proprietary calculations” specifically illustrating an impact on that affected party contains “technical, commercial, and financial information” that is “regularly considered a trade secret in the insurance industry.” Another affected party states that the information in identified records “discuss issues related to setting rates, proposed planned pricing strategies and other of [the affected party’s] business practices,” and that they qualify under section 17(1).

The appellant takes issue with this position, and states that only some of the records contain the type of information which qualifies for exemption under section 17(1). In particular, he takes issue with the position that any information from one of the affected parties (an identified trade association - Affected Party C) can contain “commercial information.”

*Findings*

Generally speaking, I am satisfied that the information contained in the records for which the section 17(1) claim has been made contains commercial and/or financial information. Many of the records for which the third party exemption is claimed include information relating to interest rates charged, rate filing information, and profit/loss data, or the impact that adjustments to these numbers may have on identified affected parties.

For the reasons discussed below under “harms” it is not necessary for me to make a determination on the application of the first two parts of the test for records that relate to affected party C.

*Supplied in confidence*

The Ministry states:

It has been held that information filed by insurance companies with an expectation of confidentiality that was implicit, rather than explicit, was exempt under section 17 [Order P-1526].

Later in its representations the Ministry also states:

It is further submitted that [certain] information was supplied by the third party implicitly in confidence as part of its contribution to automobile insurance reforms. This information was provided by e-mail, or in conversations with FSCO staff.

[Certain identified records] were not specifically marked “confidential”. However, it is [the Ministry’s] understanding that this information was supplied in confidence implicitly by the stakeholders to FSCO and the Ministry for the specific purpose of facilitating the Government’s auto insurance reform process, as well as to bring specific issues to FSCO’s attention. [The Ministry’s] position is that this information was not intended to be made public. Records do not need to be explicitly marked “confidential” if the expectation of confidentiality is implicit [Order P-1526].

The affected parties also support the position that the information provided to the Ministry was supplied by them to the Ministry “in confidence.”

*Findings*

Again, on my review of the records generally, (with certain exceptions addressed separately, below), I am satisfied that the information contained in the records for which the section 17(1) claim has been made were supplied by the affected parties to the Ministry in confidence. I make

this finding based primarily on the representations of the affected parties, who have identified that that was their expectation when providing the information.

### **Harms – 17(1)(b)**

The Ministry and affected parties rely primarily on the exemption found in section 17(1)(b) to deny access to the records.

The Ministry states:

In the context of a regulated sector such as automobile insurance, information provided by industry stakeholders such as rate filing information, and information relating to the costing of possible auto insurance reforms, is crucial to a successful risk-based regulatory structure, and to effective public policy development, which rely in part on the active participation of the regulated sectors.

The release of valuable information provided to FSCO or the Ministry in confidence would not only damage or destroy the value of protected informational assets, but also interfere with the ability of FSCO and the Ministry to effectively regulate automobile insurance and to develop sound public policy, since in the absence of clear protection, industry stakeholders can reasonably be expected to limit providing FSCO and the Ministry with necessary and valuable information, beyond the minimum amount of information that is strictly required by law.

This would significantly diminish the ability of the government in its ability to develop effective policy, given the technical and complex nature of auto insurance. ...

It is submitted that the sharing of useful financial and technical information of this type to FSCO and the Ministry related to the impact of reforms, and the profitability of industry participants, is of benefit to government and the public. This sharing would reasonably be expected to be impaired or limited by disclosure. It would be to the detriment of the public if stakeholders are not able to provide financial and statistical information to the government officials on a confidential basis in the context of legislative reform and regulatory initiatives.

FSCO and the Ministry strive to have an open door policy for the sharing of statistical, financial and technical information by stakeholders, and encourage frank and direct communication. The ability to provide effective regulation depends on timely sharing of information by stakeholders, not just that which is legally mandated. The provision of financial, technical and commercial data from industry stakeholders is critical to policy choices and regulatory decisions made with respect to automobile insurance.

The reasonable expectation of stakeholders is that this information is provided on a confidential basis and is not shared.

It is submitted that a reasonable consequence of the release of these records is that the disclosure of similar information by stakeholders, and consequently the ability of the regulator and the Ministry to obtain timely, useful and sensitive information from stakeholders, will become impaired.

The Ministry also states:

The third parties are perhaps in the better position to assess the consequences of this disclosure and they have been asked to make their own submissions.

The affected parties state that disclosure of the records will result in their reluctance to provide similar information to the Ministry when invited to do so in the future. The statements by the affected parties can be summarized as follows:

- if this information is released, the affected parties would be reluctant to offer suggestions to the Ontario government in the future;
- the objectives of the Ministry, FSCO, and other government bodies would be made more difficult if insurers were unable to provide information to government bodies with the comfort and certainty that company information would be held in confidence;
- disclosure of the records would result in companies feeling that they are unable to fully cooperate with the government;
- disclosure of the information would discourage open dialogue with government bodies regarding proposed legislation and policy.

Regarding whether it is in the public interest that the information continue to be supplied to the government, the affected parties take the position that it is in the public interest that the Ontario government obtains the expert advice of professionals in the insurance industry on matters relating to proposed changes to insurance. They also take the position that, absent such expert advice, it is likely that the proposals would have unintended consequences, and result in additional harm, particularly in the field of auto insurance.

The appellant's representations focus primarily on the records relating to affected party C. Affected party C is not an insurance company; rather, it is an identified trade association. This affected party's representations state:

The third party information at issue ... relates to the Driver's Choice option for the automobile insurance product. We suggest that the description of this product option is a type of "technical information" as that term is used in section 17(1). The organized field of knowledge is the field of insurance and the work was created by insurance professionals.

[Affected party C] supplied the information to FSCO directly and in response to the request from the Ontario government for alternatives to the proposal that it had developed for an auto insurance choice product. In view of this, it was and remains [affected party C's] expectation that the material would not be disclosed to third parties, but would instead be used by the Ontario government to determine whether to proceed with the auto insurance choice option. There was an implicit reasonable expectation that the information would be treated confidentially and, in fact, FSCO has indicated it intends to abide by that.

With respect to the harms in section 17(1), affected party C takes the position that the harm in section 17(1)(b) would apply to the information. It states:

If this information is released to a third party, [affected party C] would be reluctant to offer suggestions to the Ontario government on alternatives to proposals relating to insurance that have been developed by the government. It is in the public interest that the Ontario government obtains the expert advice of professionals in the insurance industry on matters relating to insurance, with respect to which the government is proposing changes. Without this expert advice on the implications of the options that the government is proposing, it is quite likely that the proposals would have unintended consequences and create more harm than is the harm that the proposal was intended to address. This concern is particularly acute in the field of auto insurance, which is a product that all owners of vehicles operated on highways are required, by law, to have.

*Appellant's representations*

Affected party C's representations were shared with the appellant. The appellant took issue with affected party C's position, and stated:

Information submitted by [affected party C] does not qualify as "commercial information". Records put forth by [affected party C] in response to requests from FSCO or as responsive to a consultation process as an interested stakeholder do not contain commercial information as that term has been defined. [Affected party C] does not produce or submit records that related to any specific merchandise or service it sells or is bought by FSCO or the Ministry or the public. The [affected party C] records do not contain information individually associated with any private insurance company but deal with the insurance industry as a whole and contain [affected party C's] recommendations for the operation of the regulatory system. The [affected party C] documents or reference to information from it in emails or other denied communications does not meet part 1 of the tests under section 17. With respect to the application of Part 3 of the tests regarding harms, the Appellant repeats that [affected party C] does not have a competitive position and so cannot suffer prejudice to its competitive position. The Appellant

submits that the reasoning in Order PO-2233 in [its] entirety is applicable to the refusals under section 17.

The appellant also states that any information provided to the Ministry by lobbyists such as affected party C does not meet the mandatory exemptions in Section 17 for the following reasons:

- [affected party C] is not a business but rather a lobbyist group to which some insurance companies belong, but not all;
- [affected party C] does not possess confidential business “informational assets” but simply generic statistical information assembled from its members;
- [affected party C] does not have records that relate to any specific merchandise or service sold by the [affected party C] or bought by FSCO or the Ministry or any other person;
- [affected party C] does not have commercial or financial information of individual companies that it supplies to [the Ministry] but rather actuarial and average statistical information, which if disclosed would have no financial impact on itself or its individual members;
- [affected party C] has not submitted any evidence that the disclosure of its actuarial or costing proposals would cause any reasonable expectation of harm to any company or individual. A mere statement by Counsel in a letter submission is not evidence.

The appellant also makes specific representations on the application of section 17(1) to affected party B, which are addressed below.

In its reply representations, affected party C states:

The appellant argues that evidence has not been provided by the third parties to prove, e.g. that, with respect to an exception claimed under section 17(1)(b), “the disclosure could reasonably be expected to result in similar information not being supplied to the institution”. The statement by a third party, that it is likely that it would not supply further information to the institution if that institution were to disclose the information, ought to be sufficient proof of that fact. ... We also pointed out why it would be in the public interest that the Ontario Government continues to obtain the expert advice of professionals in the insurance industry on matters relating to insurance. The information [affected party C] provided was comprised of analysis of data and so qualifies as “technical information”. It was provided to FSCO by [affected party C] voluntarily. FSCO does not have the authority to compel [affected party C] to produce such information....

### ***General findings***

In general, in light of the representations set out above and the information provided regarding how the records were created and the consultation process, I am satisfied that records provided by identified insurance companies during the consultation process, and which would reveal confidential commercial, financial or technical information about those companies, qualify for exemption under section 17(1)(b). Contrary to the position taken by the appellant, it appears that the third parties were involved in the consultation on a voluntary basis, and the companies provided the information about their own situation to the Ministry in confidence. In my view, based on the representations of the parties, disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the institution by these companies. I also find that, based on the representations and the description of the consultation process, it is in the public interest that similar information continue to be so supplied. Accordingly, where the records contain information about identified companies, these records qualify for exemption under section 17(1)(b).

However, as a general finding, I am not satisfied that the disclosure of the information provided by affected party C and relating to it could reasonably be expected to result in the harms under section 17(1)(b). Affected party C is a trade association. One of the purposes of this association includes lobbying government on matters which would impact affected party C's members. In that regard, I find that information contained in records which reflect the input provided by affected party C on behalf of its members, and which does not otherwise reveal information supplied in confidence by its members, could not reasonably be expected to no longer be provided to the government. Given that one of the stated purposes of affected party C is to provide input to government, I do not accept affected party C's argument that it would be reluctant to provide similar information in the future if the information at issue is disclosed. However, in the event that the records contain information relating to other affected parties, or would reveal such information, the information may qualify for exemption.

In this context, I will now review the records for which the section 17(1) claim is made.

#### ***Records relating to Affected party A:***

##### ***FSCO-CEO: Record 37***

The Ministry states:

Record 37 is an e-mail message from an executive of an insurance company to the Superintendent commenting on profit and loss information concerning [an identified body] and another insurance company.

This record contains affected party A's comments, including references to its own financial information as well as additional comments provided to the Ministry. I am satisfied that it qualifies for exemption under section 17(1)(b).

*Minister's Office – third party records: Records 2, 3 and 5*

These records are e-mail communications from affected party A to the Ministry regarding its submissions and comments. Affected party A consented to the disclosure of a number of records relating to it. For records 2, 3 and 5, affected party A states:

Insurance companies compete with each other in a number of ways. Since coverages are largely standardized under legislation, the industry competitors seek to differentiate themselves on the basis of pricing and services. These include the design of their insurance programs (pricing, discount schedules, and risk classification systems), better matching of premium revenues to assume the risk, and through design of their marketing programs. Due to the competitive nature of this industry, information relating to planned price changes, marketing plans, and costs on a product line or geographic basis, are confidential and proprietary. This is proprietary information and much of it has been developed through proprietary data gathering and analysis programs over many years. [Affected party A], much like the other insurers, treats this information as confidential trade secrets.

[Records 2, 3 and 5] discuss issues related to setting rates, proposed planned pricing strategies and other of [affected party A's] company business practices. These issues are discussed with Finance, FSCO and other regulators on a confidential basis and the information is not intended to be released, including with respect to any request under any freedom of information legislation.

[Affected party A's] information regarding ratings and segmentation strategy are always treated as containing trade secrets. Disclosure of such information can reasonably be expected to significantly harm our competitive position and it can reasonably be expected to result in undue financial loss to our company or undue gain to competitors who gain access to the information. Disclosure of price testing and segmentations strategies would enable a company's competitors to design marketing plans to target a company's customers. The result would be clear and direct harm to the company whose information was disclosed, an unfair competitive advantage to competitors and financial damage to the disclosing company.

*Findings*

Affected party A is an insurance company engaged in the provision of insurance. On my review of the records and the representations of affected party A, I am satisfied that the disclosure of Records 2 and 5 could reasonably be expected to result in the harms under section 17(1). These records consist of e-mail communications from affected party A to the Ministry and include references to affected party A's rates and other financial information.

However, on my review of Record 3, I am not satisfied that its disclosure would result in any of the harms set out in section 17(1). This record appears to contain relatively innocuous information about a press release, and I find that it does not qualify for exemption.

***Records relating to Affected party B:***

*Minister's Office – third party records:* Records 20, 21, 22 and 23

These four records consist of three draft reports and one final report sent from affected party B to affected party C. Affected party B states:

We supplied the information to [affected party C] which, with our permission, then passed the information on to the government in response to [a] government request for alternatives to the proposal that it had developed for an auto insurance choice product. In view of this, it was and remains our expectation that the material would not be disclosed to third parties. There was an implicit reasonable expectation that the information would be treated confidentially.

Affected party B then states that section 17(1)(b) applies to these reports:

If this information is released to a third party, [affected party B] would, be reluctant to offer suggestions to the government on alternatives to proposals relating to automobile insurance that have been developed by the government. It is in the public interest that the government obtains the expert advice of professionals in the insurance industry on matters relating to insurance, with respect to which the government is proposing changes. Without this expert advice on the implications of the options that the government is proposing, it is quite likely that the proposals would have unintended consequences and create more harm than is the harm that the proposal was intended to address. This concern is particularly acute in the field of auto insurance, which is a product that all owners of vehicles operated on highways are required, by law, to have.

The appellant submits that generic actuarial reports proposing the cost of individual components of insurance coverage do not meet the tests under section 17 and that, in particular the actuarial reports in Records 20, 21, 22, and 23 should be fully disclosed.

*Findings*

On my review of these four records (the three draft reports and the final report), I am not satisfied that they qualify for exemption under section 17(1). These reports were prepared by affected party B for affected party C, which then forwarded them on to the Ministry. Affected party B is identified as a company providing actuarial and consulting services. It is unlikely that this does not entail a fee for service. There is nothing on the face of the record to suggest that affected party C is precluded from using the information in the report for its own purposes. In

the circumstances, I have not been provided with sufficient evidence from affected party B to persuade me that disclosure of this record would result in similar information no longer being supplied to the Ministry. Accordingly, I do not accept affected party B's position that these records qualify for exemption under section 17(1)(b). However, because these reports were provided to the Ministry by affected party C, affected party C will be given an opportunity to provide representations on these records.

***Records relating to Affected party D:***

*FSCO-AID: Record 136*

The Ministry states:

Record 136 is a slide presentation containing a submission from an insurer to the Parliamentary Assistant to the Minister on auto insurance reforms. The record has been withheld under section 17 of the *Act*. The Respondent relies upon the submission of the third party with respect to the applicability of the section 17 tests to the record.

Affected party D states that the entire hard copy of the slide show should remain confidential as it "constitutes the ... strategic position of [affected party D] with respect to automobile insurance reform".

*Finding*

On my review of this record and the representations as set out above, I am satisfied that this record qualifies for exemption under section 17(1)(b).

As an additional note, affected party D has also identified that FSCO-AID record 112 contains information which may apply to it. I address the application of the section 17(1) exemption to this record below.

***Records relating to Affected party C:***

Affected party C's representations are set out above, and I will apply the findings I have made (above) to the records relating to affected party C.

The Ministry's representations on those records are as follows:

*FSCO-AID - Record 56*

The Ministry states:

Record 56 is an e-mail message from [affected party C] to the Ministry and FSCO staff referring to changes it has made to its “Driver’s Choice” custom auto policy proposals and contrasting and discussing relative savings associated with its two models presented to the Ministry on auto insurance reform. Section 17 has been claimed in relation to this record. The Respondent relies upon the submissions of the third party in regard to application of the section 17 tests to this record.

*Records 125 and 126*

The Ministry states:

Records 125 and 126 are submissions from a third party stakeholder containing descriptions of various auto insurance reform options, including cost estimates, assumptions and other detailed financial, commercial and technical information relating to these options. Record 125 also includes two appendices relating to the reform options (Records 158 and 159).

... [The Ministry] relies upon the submission of the third party with respect to the applicability of the section 17 tests to the records.

*Records 155 and 156*

The Ministry states:

Records 155 and 156 are a discussion guide and report respectively, provided by a third party stakeholder in relation to market research commissioned by the third party. Section 17 has been claimed in relation to these documents. The Respondent relies upon the submissions of the third party with respect to the applicability of the section 17 tests to the records.

On my review of these records, I find that they do not qualify for exemption under section 17(1)(b). As set out above under the heading “General Findings”, affected party C is a trade association whose purposes include, *inter alia*, lobbying government on matters which would impact its members, and providing input to government. In these circumstances, I find that information contained in records which reflect the input provided by affected party C on behalf of its members (and which does not otherwise reveal information supplied in confidence by its members), cannot reasonably be expected to no longer be provided to the government. On my review of the records referred to above, I find that their disclosure would not reveal information supplied in confidence by its members; rather, these records contain only information provided

by affected party C to the Ministry. Accordingly, these records do not qualify for exemption under section 17(1) and I will order that they be disclosed.

*Numerous affected parties*

*FSCO-AID*

*Records 110 and 112*

The Ministry states:

Records ... 110 and 112, as severed, contain information on rate filings that insurers and [an affected party] have filed with FSCO requesting changes to their rates charged to consumers, pursuant to the Automobile insurance Rate Stabilization Act, 2003 (referred to in the records as “Bill 5”).

These records have been released to the Appellant, except for information related to proposed auto insurance rate changes filed by the individual insurers named (records 110 and 112) ....

Rate filing information of this type is exempt under section 17. The position of [the Ministry] is that while rate changes that are ultimately approved by FSCO are considered public information, the actual proposals submitted by the insurers are not.

On my review of Record 110 and 112, they are charts containing summary information relating to proposed rate changes for a number of identified companies. Portions of these records have been disclosed. The portions which have not been disclosed contain or would reveal the proposed rate changes submitted by each identified company. Based on the information provided by the Ministry and the affected parties, I am satisfied that this information qualifies for exemption under section 17(1).

*Record 142*

The Ministry states:

Record 142 is an options paper for a customized auto insurance policy. It has been released to the appellant, excluding the name of stakeholders associated with particular options whose position is that the information they have provided to the Government is confidential third party information.

On my review of this record, I note that the only information severed from this record are the names of the parties who provided the specific input (which was disclosed). In keeping with my

finding set out above, I am satisfied that these identifiers qualify for exemption under section 17(1)(b) of the *Act*.

*Minister's office: Record 24*

The Ministry states:

Record 24 is an issue note regarding [an identified finance charge]. The information that has been severed relates to whether or not the insurers listed charge [an identified amount] and their respective policies regarding the premium. The information was obtained through a telephone survey conducted by FSCO. As there was no legal requirement for this information, third parties were advised that information was provided on a voluntary basis and would be kept confidential. As it was voluntary, not all insurers agreed to provide the requested information. The information that was received was used in the Ministry's review of finance charges. The disclosure of the information could result in similar financial and commercial information no longer being supplied to the Ministry for review for the purpose of developing future auto insurance policies. As a result, it is the position of the Ministry that the severed portion is exempt under s. 17(1).

The only information remaining at issue in this record is specific information relating to specific companies, voluntarily provided by them. In keeping with my finding set out above, I am satisfied that this information qualifies for exemption under section 17(1)(b) of the *Act*.

#### **PERSONAL INFORMATION/INVASION OF PRIVACY**

The Ministry takes the position that portions of Record 88 and 154 (FSCO-AID Records), portions of Records 20 and 49 (Minister's Office Records) and portions of Record 40 (Minister's Office third party Records) contain the personal information of identifiable individuals and are exempt under the mandatory exemption in section 21(1).

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Section 2(1)(d) states that this includes the address or telephone number of the individual.

Once it has been determined that a record contains personal information, section 21(1) of the *Act* prohibits the disclosure of this information except in certain circumstances. One of these circumstances is found in section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Ministry's representations on this issue as relates to specific records are set out below. The appellant takes the position that the personal information exemption should not apply to auto insurance industry representatives and lobbyists who deal with FSCO as the Regulator.

***FSCO-AID:***

***Record 88***

The Ministry states:

Record 88, as severed, is a recommended list of stakeholders for customized auto policy consultations. It has been released to the Appellant, except for personal information relating to two individuals named in the record that is exempt under section 21.

The severed information which was not disclosed appears to be the personal home address and telephone number of two named individuals. In the circumstances, I am satisfied that this information qualifies for exemption under the mandatory exemption in section 21(1).

***Record 154***

With respect to this record the Ministry states:

Record 154, is a letter from an individual stakeholder on auto insurance reforms. The name and address have been severed on the basis that this is personal information that is exempt under section 21.

On my review of the severed portion of Record 154, which consists of an individual's personal name and address, I am satisfied that it contains personal information for the purpose of section 2(1). Furthermore, in the absence of any representations in support of the disclosure of this information, I am satisfied that it qualifies for exemption under the mandatory exemption in section 21(1).

***Minister's Office: Records 20, 49***

The Ministry states:

Record 20 is a list of stakeholders to be contacted with respect to the Government's proposal for customized policies. The information redacted is the personal email address of an individual and the personal telephone number of another's. An individual's name and email address has been found to be personal information not subject to disclosure (PC-010009-1) while the telephone number falls within the definition of "personal information" in section 2(1). Accordingly, this information is properly exempt from disclosure.

Record 49 is a contact list of auto insurance stakeholders. The information that has been severed is the personal contact information for those respective individuals and not the professional contact information where they can normally be reached. As they are the personal telephone numbers of the named individuals, they fall within the definition of "personal information" in section 2(1) and are also exempt from disclosure.

On my review of the severed portions of Records 20 and 49, and based on the Ministry's representations, I am satisfied that the severed information contains the personal telephone numbers and e-mail addresses of identifiable individuals. In the circumstances, I am satisfied that this information qualifies for exemption under the mandatory exemption in section 21(1).

***Minister's Office Third Party records: Record 40***

The severed portion of Record 40 consists of the names and home telephone numbers of two individuals identified as "customers". I am satisfied that this is personal information for the purpose of section 2(1) and, in the absence of representations in support of the disclosure of this information, I find that this information qualifies for exemption under the mandatory exemption in section 21(1).

Accordingly, I am satisfied that the undisclosed portions of Records 88 and 154 (FSCO-AID), Records 20 and 49 (Minister's Office) and Record 40 (Minister's Office – Third Party Records) qualify for exemption under section 2(1).

**PUBLIC INTEREST**

As I indicated above, the appellant takes the position that the public interest override at section 23 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemptions in sections 13(1), 17(1), 18(1) and 21(1).

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 this appeal, I have found that some of the information at issue does not qualify for exemption under the *Act*, and I have ordered it disclosed. In particular, I have found that the exemption in section 18(1) does not apply to any of the records. There are also portions of the records which I have found qualify for exemption under sections 12 and 19 of the *Act*.

Section 23 of the *Act* does not refer to sections 12, 14 or 19, however, in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. The Court was silent regarding section 12. Even so, I note that the appellant does not argue that section 23 should be applied to those records that I have found to be exempt under sections 12 or 19, and I will not consider this aspect of the public interest override further.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, 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].

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. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

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

- 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]

### *The appellant's representations*

Referring to the Ministry's representations, the appellant points out that the Ministry recognizes "that the role of FSCO is to provide regulatory services and in particular to regulate the collective monopoly enjoyed by the Auto Insurance Industry and to do so in the public interest, so that the public has confidence that its interests are protected when consumers are required to purchase compulsory automobile insurance." He states further:

There is however a strong public belief that the Automobile Insurance Industry is unduly influencing public policy and the course of conduct of FSCO as a Regulator. There is a further strong public belief that the "regulated" are controlling the "regulator" by way of privileged access to public servants and by submitting statistical, costing and other hidden actuarial evidence, upon which decisions [are] made, but which is never made available to be examined and challenged by the public.

The appellant then refers to a number of newspaper articles which he attaches to his representations and which he states challenge "the integrity of the rate setting system and the reduction of benefits and access to the Courts." He states that, in his view, the insurance industry has earned "huge profits", that benefits have been reduced, and that additional barriers were created by regulation to prevent access to the courts by innocent pedestrians, drivers and owners involved in car crashes. He then refers to the "significant changes to the automobile insurance rules were created in 2003" and how, in hindsight, different decisions ought to have been made. He also states that, although the gap between premiums and costs continues to grow, FSCO and the Ministry have taken "no steps" to "restore benefits and to restore access to justice."

The appellant then refers to the information contained in a number of the records that have been released, and gives examples of excerpts from those records which he states confirm "that a very close ... relationship exists between the insurance industry and FSCO and the Ministry."

The appellant then reviews the definition of "compelling public interest", and states:

The information being sought would and does serve the purpose of informing the citizenry about the activities of their government in dealing with a compulsory commodity that every driver of a motor vehicle must have. It will make available to the public various records and information allowing the citizens of Ontario to effectively express opinion or to make political choices. The reasons for this are

simple. Records are the raw material of information and only with information is the public provided with insight and context to understand why it is compelled to pay increased premiums for reduced insurance benefits....

The appellant submits that the public interest “in protecting the economic interests of the insurance industry” is clearly outweighed by the public interest in disclosure of these records for the purposes of scrutinizing the activities of FSCO and the Ministry in respect to fixing compulsory insurance premiums and setting insurance benefits. He also states that disclosure will promote the interest of protecting the public from “overcharging”, and will shed light on “the true monetary reasons for the removal of fundamental rights of indemnity historically provided in every automobile insurance policy.”

The appellant also refers to articles and information in support of his position that issues regarding insurance rates have been “a major feature of Ontario politics and public debate and discussions during and between provincial elections,” and refers to information in the Ministry’s representations which suggest that this is a very public matter. He then states:

... the current Liberal government when seeking election in 2003 stated that insurance rates and benefits were of great public interest and issued twenty-two (22) promises in respect thereof... In particular, the Liberals promised the appointment of an independent “Consumer Watchdog” who would take the lead responsibility for data collection and reporting. This promise reflects the compelling public interest in insurance financial data and its application to insurance rates and benefits. The Consumer Watchdog has not been appointed.

The [Ministry] is in error too if it believes that the issue is simply a regulatory and economic rate setting one with no major public health and safety aspects to it. Auto insurance has a great impact on those involved in accidents and unfortunately auto crashes are a leading cause of injuries and deaths in Ontario. The way auto insurance benefits are determined by [the institution] can affect both the health care and livelihoods of the citizens of Ontario as well as their fundamental rights to hold wrongdoers accountable for conduct causing injury.

Finally, the appellant takes issue with the Ministry’s characterization of him, stating:

There is a public interest research and consumer protection component to Ontarians knowing exactly how in reality their regulator is regulating and how the influence of certain auto insurance representatives and lobbyists changes what is in the public interest for fair and equitable and safe auto insurance practices and benefits.

### *Findings*

I have carefully reviewed the appellant's representations on the public interests override, as well as the attachments to his representations and the records at issue in this appeal.

Generally speaking, and based on the information provided by the appellant, I accept that there is a public interest in issues relating to rates and premiums for automobile insurance in Ontario, as well as profits made by automobile insurance companies. The numerous articles and commentaries provided by the appellant clearly show the media and public interest in matters of this nature. However, I must determine whether, in the circumstances, there is a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions in sections 13(1), 17(1) and 21(1).

With respect to small portions of five records which I found qualify for exemption under section 21(1), and which I have found to be the personal information of identified individuals, I am not satisfied that there exists a compelling public interest in the disclosure of this information. The representations of the appellant do not support any such finding, and I find that the section 23 override does not apply to this information.

Regarding the information which I have found qualifies for exemption under section 17(1), it is significant that I have found this exemption to apply solely to information relating to identifiable insurance companies, and to information voluntarily provided by them to the Ministry. In that regard, this information was found to qualify for exemption under section 17(1)(b), and I note that, in finding that section to apply, I also made a finding that it is in the public interest that similar information continue to be provided. Previous orders have established that, in determining whether the public interest override in section 23 applies to a record, any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. On my review of the nine records or portions of records which I have found qualify for exemption under section 17(1)(b), I am not satisfied that a compelling public interest exists to override the application of the exemption to those records.

Finally, with respect to the records or portions of records which I have found qualify for exemption under section 13(1), I note that the purpose of the section 13(1) exemption 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. 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.)].

I have examined the records which I have found qualify for exemption under section 13(1). In many of these records, large portions of the records have been disclosed to the appellant, either

by the Ministry in the course of responding to the request, or by this order, where access to information such as “pros and cons” or “options” is ordered disclosed. The remaining information I have found qualifies for exemption, as it constitutes the advice or recommendations of staff or others. Although the appellant’s representations on the public interest override confirm that there exists a public interest in information relating to the rate and premiums for automobile insurance, I am not satisfied that sufficient evidence was provided to persuade me that this public interest extends to the records which I have found qualify under section 13(1).

Accordingly, I find that there does not exist a compelling public interest in disclosure of the records that outweighs the purpose of the exemptions claimed.

## **ORDER:**

1. I order the Ministry to disclose a copy of the responsive portions of the following records to the appellant:

*FSCO-AID:* Records 56, 87, 97 (pages 3 & 4), 108 (portions), 125, 126, 133, 155, 156, and the responsive portions of 165, 167, 169, 171, 173, 174 and 175.

*Minister’s Office:* Records 15 (portions on pages 6, 8 and 10), 25 (paragraphs 1-4), 27, 40, 93 (remaining portions), 107 and 108.

*Minister’s Office - Third Party:* Record 3.

I order the Ministry to disclose these records by **July 24, 2009** but not before **July 17, 2009**. I have provided the Ministry with a highlighted copy of certain records, highlighting those portions which are not to be disclosed.

2. I remain seized of this matter in order to address outstanding issues relating to the following records:

*FSCO-CEO:* Records 1, 4, 7 (in part) and 33

*FSCO-AID:* Records 40 (in part), 101 (in part), 109 (in part), 117 (in part), 119 (in part), 131, 139 (in part), 144, 148 (in part) and 149 (in part)

*Ministry Office:* Records 3, 43 (in part) and 117

*Ministry Office – Third Party:* Records 20-23, 25, 26, 28, 44, 46, 48, 50-52, 56-59, 61-63, 66, 68, 69, 73, 76, 77, 80, 85 and 87.

3. I uphold the Ministry’s decision to deny access to the remaining records or portions of records.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, upon request.
5. I remain seized of this matter with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original signed by: \_\_\_\_\_

Frank DeVries  
Adjudicator

\_\_\_\_\_ June 19, 2009