

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3315

Appeal PA12-422

Ministry of Finance

March 6, 2014

Summary: The requester sought access to records relating to a review conducted by the Financial Services Commission of Ontario (FSCO) on potential changes to the definition of catastrophic impairment for purposes of automobile insurance. FSCO granted access to some records and denied access to other records or parts of records, relying on the discretionary exemption in section 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator partly upholds the decision to deny access, and orders disclosure of some of the information. The adjudicator rejects the application of the public interest override in section 23 of the Act.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13 and 23.

OVERVIEW:

[1] This appeal arises from a request for records about reforms to the automobile insurance scheme in Ontario.

[2] In 2009, the Government of Ontario announced automobile insurance reforms including a review of the definition of the term "catastrophic impairment" appearing in the *Statutory Accident Benefits Schedule*, a regulation under the *Insurance Act*.¹ This

¹ R.S.O. 1990, Chapter I.8. The information about the Catastrophic Impairment Project in this section is taken from the representations of Ministry of Finance in this appeal and publicly-available material on the

regulation is incorporated by reference in the standard form of automobile insurance policy issued by all Ontario-licensed automobile insurers, and prescribes the accident benefits to which automobile accident victims are entitled.

[3] As part of this review, the government directed the Financial Services Commission of Ontario (FSCO), an arm's-length agency of the Ministry of Finance (the ministry), to consult with the medical community and make recommendations on amendments to the statutory definition of catastrophic impairment, and on the qualifications and experience requirements for health professionals who conduct catastrophic impairment assessments. FSCO established a Catastrophic Impairment Expert Panel to review and make recommendations on both matters.

[4] The Expert Panel released its observations and recommendations in two parts: a Phase I Report containing recommendations for changes to the definition of catastrophic impairment (originally released in April 2011), and a Phase II Report containing recommendations for training, qualifications and experience for catastrophic impairment assessment (released in June 2011). As part of the public consultation component of the project, FSCO conducted a public information session on the Expert Panel's work and recommendations and solicited public feedback on the Phase I Report.

[5] Following the consultation process, the Superintendent of FSCO made recommendations to the Minister of Finance based on his review of the Expert Panel reports and stakeholder submissions. These recommendations are contained in the Superintendent's Report on the Definition of Catastrophic Impairment in the Statutory Accident Benefits Schedule, issued to the Minister of Finance in December 2011. The report was released publicly in June 2012 and is available on the project website, along with the Expert Panel's Phase I and II Reports, stakeholder submissions and other public materials relating to the Catastrophic Impairment Project.

[6] In January 2012, a requester made the following request to FSCO under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Provide from January 1, 2010 until present internal FSCO records concerning the catastrophic impairment redefinition work underway as it affects auto vehicle coverage and services, namely:

- a) decision records to limit the catastrophic impairment expert panel (as announced late 2010) to experts drawn from the medical field only

- b) options initially considered in 2010 (other than convening an expert panel) to reviewing and tackling the catastrophic impairment redefinition work
- c) internal FSCO analysis, if any, of the term "catastrophic" as used by other provincial agencies (e.g., at the Ministry of Health, Workman's Compensation)
- d) internal FSCO reviews on, reactions to the Catastrophic Impairment Expert Panel 2011 report findings, and impact such recommendations would have
- e) internal FSCO assessments of the mid-summer to fall, 2011 followup submissions requested following the Expert Panel report release
- f) internal FSCO fall, 2011 to present discussions of potential resulting options arising from the Expert Panel report and submissions
- g) briefings and directions provided to the Minister of Finance on catastrophic impairment issues and actions required, including those from the Superintendent of Financial Services
- h) internal memos, reports (or commissioned FSCO consultant reports, if done), that analyse and document how the existing catastrophic impairment definition has been working for car accident victims including claims and health outcomes analysis; or on how the Expert Panel's recommendations, or other suggestions drawn for followup submissions to the Expert Panel report, would impact on accident victims and benefits and services received.

[7] In its decision letter, the ministry advised of the results of a search conducted within FSCO²:

No records were located in response to parts (a), (b), (e) or (f) of your request. As such, access is denied as no records exist.

² The Minister of Finance is designated as the "head" for FSCO for purposes of the *Act*; the Superintendent makes recommendations to the Minister regarding access requests and is the *de facto* head.

Six hundred twelve (612) pages were located in response to parts (c), (d), (g) and (h) of your request. Partial access is granted to these records. Access is denied to some records, or portions thereof, under Sections 13(1) – Advice to Government, 15(a), 15(b) – Relations with other governments, 19(a) & (b) – Solicitor-Client Privilege and 22 – Information soon to be published. This information has been severed from the records. Please note that some information contained in the records which is not responsive (NR) to your request has been excluded and identified as such. Access is granted in full to the remaining records.

[8] The ministry provided the requester with indices of records reflecting its decisions on access and the exemptions claimed for each of the records withheld in whole or in part. It also set out the final fee for processing the request and asked the requester to forward the fee balance in order to receive the records.

[9] The requester, now the appellant, appealed the ministry's decision to this office. The appellant took the position that the ministry had too broadly applied the section 13 exemption to the records. As well, he raised the application of the public interest override at section 23 of the *Act*. He also sought to appeal the ministry's claim that some portions of records are not responsive to his request.

[10] The parties were able to narrow the issues on appeal during the mediation stage of the appeal process. As the appellant did not take issue with the ministry's reliance on sections 15, 19 and 22 of the *Act* to withhold certain records, they were accordingly removed from the scope of the appeal. The appellant also advised the mediator that he does not seek access to any withheld draft copies of the Superintendent's Report that merely reflect editorial changes in versions preceding the final report. Based on the mediator's review, a number of draft versions of the report, reflecting only editorial changes, were removed from the scope of the appeal. The appellant continued to seek access to any draft versions reflecting substantive and not merely editorial changes; those versions of the report accordingly remain at issue.

[11] As no further mediation was possible, the appeal was transferred to the adjudication stage. As part of my inquiry, I first invited the ministry to make representations on the issues in the appeal. The ministry made representations in the appeal, and then also issued a revised decision in which it disclosed additional records to the appellant. As part of its additional disclosure, the ministry released records that it had claimed were non-responsive to the appellant's request. As a result, the issue of responsiveness of records is no longer at issue in this appeal.

[12] I shared the ministry's representations with the appellant in accordance with this office's Practice Direction Number 7 and section 7.07 of its *Code of Procedure*, and sought the appellant's representations on the issues remaining in the appeal. The

appellant's representations were then shared with the ministry, which made representations in reply.

[13] In the discussion that follows, I uphold the ministry's application of the exemption at section 13 to certain records or portions of records, but not to others. I uphold the ministry's exercise of discretion under section 13 for those records or portions of records for which I have found the exemption applies. I also find that the public interest override at section 23 does not apply.

RECORDS:

[14] The 27 records at issue in this appeal are those withheld by the ministry in whole or in part under section 13 of the *Act*. They are identified in the indices provided to the appellant as: D2, D4, D5, D7, D9, D10, D11, D12, D13, D15, D20; G1, G2, G3, G4; and H1, H2, H3, H4, H5, H6, H7, H8, H9, H10, H11, H12.

[15] These records include various draft versions of the Superintendent's Report on the Definition of Catastrophic Impairment in the Statutory Accident Benefits Schedule (Superintendent's Report), briefing notes and memos, summaries of Catastrophic Impairment Expert Panel recommendations, PowerPoint presentations, a draft report by an actuarial firm retained by FSCO, and emails.

ISSUES:

- A. Does the discretionary exemption at section 13(1) apply to the records at issue?
- B. Did the ministry exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

A. Does the discretionary exemption at section 13(1) apply to the records at issue?

[16] The ministry relies on the discretionary exemption at section 13(1) to withhold all or parts of each record at issue in this appeal.

General principles

[17] Section 13(1) of the *Act* states:

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

[18] 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.³

[19] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.⁴

[20] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.⁵

[21] Advice or recommendations may be revealed in two ways:⁶

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.

[22] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above in footnote 5) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.⁷

³ Orders 24 and 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.).

⁴ Order PO-2681.

⁵ Orders PO-2028 and 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 Order PO-1993, upheld on judicial review in *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.

⁶ Orders PO-2028 and PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁷ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[23] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.⁸

[24] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:⁹

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

[25] 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.

General representations

[26] The ministry describes the records at issue in this appeal as having been generated as part of the Catastrophic Impairment Project described above, including "analyses by FSCO staff in preparation for and in contemplation of providing advice and recommendations to the Superintendent in respect of his development and finalization of the policy recommendations in his Report," as well as "advice arising out of proposals submitted by, and discussions with, interested stakeholders, in connection with the consultation process" for the project.

[27] The appellant argues that the ministry has too broadly, and thus erroneously, applied section 13 to withhold information under certain headings such as "Discussions" and "Analysis" in the records without considering whether it constitutes advice within the meaning of section 13. He submits that "tombstone data," such as headings, dates

⁸ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁹ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); 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.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

and authorship, and “staff’s examination of facts and facets” of the project constitute factual data that should be released. He argues generally that the ministry has taken an overbroad approach to the application of section 13 and has not properly severed material that should be disclosed pursuant to section 10(2).

[28] Both the ministry and the appellant also provide more detailed representations on each record or group of records where appropriate. I have set out below the parties’ representations and my findings on the records under the headings used by the parties.

D-Records

[29] The ministry seeks to withhold parts or all of Records D2, D4, D5, D7, D9, D10, D11, D12, D13, D15 and D20.

[30] They consist of charts and other material prepared by FSCO staff summarizing and/or analyzing the changes to the catastrophic impairment definition recommended by the Expert Panel.

Records D2, D20 and pages 8 to 13 of Record D5

[31] Records D2, D20 and pages 8 to 13 of Record D5 are charts entitled “Summary of Catastrophic Impairment Expert Panel Recommendations.” The ministry describes these records as being similar, and for each record released most portions of the chart except for the text under the headings “Implications” and “Expected Reactions.”

[32] The ministry characterizes the information withheld under these headings as being descriptions of the implications of each change to the catastrophic impairment definition recommended by the Expert Panel, and the expected stakeholder reactions to each change. It states that the information “is such that inferences may readily be drawn concerning FSCO staff’s advice as it was being developed for the Superintendent concerning suggested courses of action available to him in respect of each of the Expert Panel’s recommendations,” and it directs my attention to the Ontario Court of Appeal’s statements concerning the meaning of the word “advice” as it appears in section 13.¹⁰

[33] The appellant submits that the information under the “Implications” column in the charts is simply very brief comparisons between existing standards against the more restrictive definitions recommended by the Expert Panel. He notes that the ministry has already released information under the same heading in another record (the “Implications” section in pages 2 and 3 of Record D5), and that information was not considered advice.

¹⁰ In *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, cited above at footnote 7.

[34] The appellant submits that the "Expected Reactions" column sets out the reactions of shareholders to the catastrophic impairment redefinition exercise, which are already known as the stakeholder submissions were released publicly. In both cases he characterizes the withheld information as "short statements of the obvious" that do not constitute advice.

[35] The withheld information consists of brief descriptions of the implications of and the expected stakeholder reactions to each of the Expert Panel's recommended changes to the catastrophic impairment definition. I find that the information appearing under both headings is factual or descriptive in nature. The withheld information does not itself suggest a preferred course of action, nor is it material from which inferences about a suggested course of action may be drawn.

[36] I also agree with the appellant's observations that the brief summaries under the "Expected Reactions" column are drawn from publicly-available stakeholder submissions, and that the information withheld under the "Implications" column is similar to the information appearing under the same heading that the ministry decided to disclose in Record D5. In neither case would disclosure of the withheld information reveal advice or recommendations concerning the Expert Panel recommendations summarized in the chart.

[37] The information in these records is thus not exempt under section 13.

Pages 1-3 of Record D4 and pages 3-4 of Record D5

[38] The ministry describes Record D4 as a draft of an April 13, 2011 briefing note prepared by FSCO staff for the ministry, with handwritten notes of a FSCO staff member appearing throughout. Pages 1 to 4 of Record D5 comprise a subsequent draft of Record D4, with no handwritten notes. For both records the ministry disclosed information in an appendix to the briefing note setting out specific recommendations of the Expert Panel, which it characterizes as factual information.

[39] The ministry submits that the remainder of Record D4 constitutes advice within the meaning of section 13, and that the factual information in the record and the handwritten notes are inextricably tied to the advice in a manner that does not make the record amenable to redaction.

[40] The ministry released portions of the subsequent draft of the briefing note comprising Record D5. The withheld portion is text appearing under the headings "Implementation" and "Contentious Issues" on pages 3 and 4 of Record D5, which the ministry characterizes as advice of FSCO staff to the ministry.

[41] The appellant states that handwritten notes on a draft briefing note do not necessarily constitute advice. He also submits that the draft briefing note comprising

Record D4 cannot be withheld in its entirety when parts of the similar note comprising Record D5 have been released. In respect of Record D5, he submits that much of the information withheld under the headings "Implementation" and "Contentious Issues" sets out operational and substantive issues that are publicly known; he thus submits that severances can be applied to the record.

[42] I accept the ministry's submission that Record D4, a draft briefing note containing handwritten notes and comments throughout, contains the advice or recommendations of a FSCO staff member concerning the contents of a briefing note prepared for the ministry. This is in line with previous orders of this office that have found the section 13 exemption applies to records containing advice from one public servant to another in the course of a deliberative process, such as developing the proposed wording of a document.¹¹

[43] I do not accept the appellant's suggestion that the ministry's disclosure of portions of Record D5 prevents it from withholding Record D4. Record D4 is distinguishable from the portions of D5 that have already been disclosed to the appellant, which are part of a subsequent draft of Record D4 and do not contain any recommendations for changes to the note's contents. I also accept the ministry's submission that the factual material in Record D4 is inextricably linked with the advice or recommendations in a manner that does not permit severance.

[44] By contrast, I do not uphold the application of the exemption to any of the withheld portions of the subsequent draft of the note comprising pages 1 to 4 of Record D5. The portions of the note withheld on pages 3 and 4 under the headings "Implementation" and "Contentious Issues" contain information about steps required to implement the Expert Panel's recommendations, if accepted, and potential implications of some of the recommendations. The text under the "Implementation" heading amounts to background information of an operational rather than policy nature, and does not itself contain advice or recommendations about how the Expert Panel's recommended changes are to be implemented. Similarly, the text under the "Contentious Issues" heading contains background information about the expected reactions of some stakeholders to some of the Expert Panel's recommended changes. It does not contain any advice or recommendations, and is comparable to the information described in other records under the heading "Expected Reactions," which I have elsewhere found not to be exempt.

[45] I thus uphold the application of the exemption to the withheld portions of Record D4, but not to the portions sought to be withheld in Record D5.

¹¹ See for example Order PO-2061.

Pages 2-5 of Record D7

[46] Record D7 is an April 26, 2011 draft briefing note entitled "Catastrophic Impairment Interim Benefits." This record was partially disclosed to the appellant, with the exception of portions of pages 2 and 3, and all of pages 4 and 5. The withheld portions comprise text appearing under the sub-heading "Discussion" under each of four distinct topic headings. Each "Discussion" section is followed by a component labelled "Recommendations;" under two of the topic headings, there is also a component labelled "Options" that precedes the recommendations section.

[47] The appellant argues that information appearing under the "Discussion" sub-heading for each topic is not advice. He concedes that the "Recommendations" components in follow-up portions to the discussion sections "could possibly be protected if not publicly available under the [Expert Panel] and [Superintendent's Report] recommendations." He argues that severances can be applied to this record.

[48] This briefing note describes the findings of the Expert Panel on several topics relating to the issue of catastrophic impairment interim benefits. All but the final topic is followed by the sub-headings "Background" and "Discussion," with a bolded recommendation or recommendations following the discussion. The last topic contains only the "Discussion" sub-heading and recommendation, with no background section.

[49] The ministry has disclosed to the appellant all the information under the "Background" sub-heading for each topic except the last, which does not have a background section. It withholds all the information under the "Discussion" sub-heading for each topic, including the recommendation or recommendations appearing after each discussion.

[50] On my review I find that, with one exception, the withheld portions of the briefing note under each topic heading qualify for exemption under section 13. These portions set out a FSCO staff member's consideration of the Expert Panel's findings on each topic, and include his evaluation of various options in relation to the Expert Panel's findings before making his own specific recommendations on each topic. Disclosure of this information would reveal the specific advice or recommendations of the FSCO staff member in relation to the Expert Panel's findings. I therefore accept that most of the withheld portions of this briefing note are exempt under section 13.

[51] I reach a different conclusion for a portion of the note withheld under the "Discussion" sub-heading for the last topic. Unlike the others, this final topic contains no "Background" sub-heading, and as a result no information for this topic, save the topic heading, has been disclosed to the appellant. On my review, I find the first withheld paragraph under the "Discussion" sub-heading for this topic simply sets out the Expert Panel's recommendations on this topic, without further analysis or

evaluation. As such, it is comparable to the type of the information that is disclosed elsewhere in the note under the "Background" sub-headings for the various topics.

[52] As noted in previous orders of this office, the label applied to information is not determinative of whether it is advice or recommendations; what is important is whether the information sought to be withheld actually advises the decision-maker on a suggested course of action or permits the drawing of accurate inferences about the advice or recommendations.¹² In this case, I find that only the second paragraph under the "Discussion" sub-heading for the final topic contains the FSCO staff member's evaluation and own advice concerning the Expert Panel findings on this topic. The second paragraph under this sub-heading therefore qualifies for exemption under section 13. By contrast, the first paragraph under this sub-heading provides only background information, and does not reveal the advice or recommendations of the FSCO staff member contained in the following paragraph. This first paragraph is thus not exempt under section 13, irrespective of the sub-heading under which it appears.

[53] In summary, I uphold the ministry's application of the exemption to all the withheld portions of this record, except for the first paragraph under the "Discussion" sub-heading on page 4.

Records D9 and G4

[54] Records D9 and G4 are the same record, a June 21, 2011 briefing note entitled "Catastrophic Impairment Definition Project – Stakeholder Reactions." This record was partially disclosed to the appellant, with the exception of portions of each page appearing under the headings "Reactions," which the ministry submits constitute advice and recommendations.

[55] The appellant argues that summaries of stakeholder reactions should not be exempt when the stakeholder submissions are available publicly in their entirety, including on the FSCO website.

[56] The withheld portions of this briefing note are summaries of stakeholder reactions to certain findings in the Expert Panel's Phase I Report. These portions are merely descriptive, and do not provide any analysis or evaluation of the stakeholder reactions, or otherwise offer any input amounting to advice or recommendations. The stakeholder submissions from which these summaries are drawn are publicly available and this information is generally known. On these bases, I do not find the withheld information to be exempt under section 13.

¹² Order PO-2400.

Records D10, D11, D13 and D15

[57] These records are draft versions of the Superintendent's Report. Record D10 is dated June 24, 2011 and marked as a draft copy; Record D11 is a marked-up copy dated the same day. Record D13 is dated July 6, 2011, and Record D15 is dated September 13, 2011. Records D11, D13 and D15 are marked confidential and indicate they are prepared for the purpose of giving advice to the Minister.

[58] The ministry submits that these draft reports, withheld in their entirety, represent FSCO staff's advice to the Superintendent, as developed to that point, concerning the content of his report to the Minister. The ministry explains that the Superintendent reviewed each draft and instructed FSCO staff on his acceptance or rejection of the advice provided to him in the draft, and that successive drafts repeated this iterative process.

[59] The appellant submits that as staff input to editing drafts does not constitute advice in most instances, draft reports reflecting this input should not be exempt. He states that draft reports are regularly released in response to freedom-of-information requests. He also notes that the final version of the Superintendent's Report has been completed and publicly released.

[60] While draft documents are not merely by their nature advice or recommendations,¹³ and I accept that recommendations for editorial changes may not be captured within the section 13 exemption, on my review I find these draft reports contain advice or recommendations developed by FSCO staff as part of the process of finalizing the Superintendent's Report, and qualify for exemption under section 13.

[61] I reject the appellant's suggestion that publication of the final Superintendent's Report means that draft versions of the same report cannot be withheld. Draft versions may be exempt where they reflect the "internal evolution" of policies or positions of public servants during the deliberative process, as revealed in the advice and recommendations they provide in particular records.¹⁴ I accept that these records reflect the advice and recommendations of FSCO staff developed to that point for approval or rejection by the Superintendent as part of the deliberative decision-making and policy-making process, and are distinct from the final Superintendent's Report that has been publicly released.

[62] Furthermore, although the draft reports contain factual material, I find that the factual components of these records do not comprise a "coherent body of facts separate and distinct from the advice and recommendations contained in the record."¹⁵

¹³ Order P-434.

¹⁴ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)* (cited above) at paras. 26-27, citing *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 168 FTR 49.

¹⁵ Order 24.

Instead, the factual information is so intertwined with the advice and recommendations as to make the exception at section 13(2)(a) inapplicable in these circumstances.¹⁶ In light of the above, I uphold the ministry's decision to exempt these records in their entirety.

Record D12

[63] This record is a June 27, 2011 briefing note entitled "Catastrophic Impairment Expert Panel Phase II Report." The ministry withholds portions of the note appearing under the headings "Analysis," "Expected Reactions," "Recommended Actions" and "Implementation."

[64] The appellant acknowledges that the information appearing under the heading "Recommended Actions" may be exempt from disclosure if it is advice, unless these are the same recommendations that appear in the publicly-available Expert Panel Phase II Report or in the final Superintendent's Report. He does not accept that information appearing under the other headings is exempt under section 13.

[65] The portions of the briefing note withheld under the headings "Analysis," "Expected Reactions" and "Recommended Actions" contain a FSCO staff member's analysis and evaluation of the Expert Panel's recommendations in its Phase II Report, as well as that staff member's own recommendations based on her evaluation of the Expert Panel's recommendations. Although I recognize that the information under the "Expected Reactions" heading is similar to information that I found was not exempt under the identical heading in other records, I find the information in this record consists of more than mere summaries of the sort I found not exempt elsewhere. The information in this record is more evaluative of potential stakeholder reactions, and it reveals the FSCO staff member's own advice on this topic. As such, it qualifies for exemption under section 13.

[66] By contrast, I find that the portion of the note withheld under the heading "Implementation" merely sets out general information on how the Expert Panel's recommendations would be implemented, if adopted, and does not reflect any analysis or evaluation on the part of the note's author. The information under this heading is not exempt.

G-Records

[67] The ministry seeks to withhold Records G1, G2, G3 and G4 in their entirety.

[68] Records G1, G2 and G3 are copies of PowerPoint presentations. Record G4 is the same as Record D9.

¹⁶ Order PO-2097.

Records G1, G2 and G3

[69] Records G1 and G2 are slides for PowerPoint presentations dated April 15 and May 20, 2011, respectively, which the ministry states were used in connection with a briefing of ministry staff by the Chair of the Expert Panel. As the Chair was retained for the purpose of making recommendations to the Superintendent on the Catastrophic Impairment Project, the ministry submits that he qualifies as a "consultant retained by an institution" within the meaning of section 13.

[70] Record G3 is a copy of Record G2 that includes the handwritten notes of a FSCO staff member.

[71] The appellant submits that section 13 cannot apply to wholly exempt PowerPoint presentations made by the Expert Panel Chair when the final reports of that panel have been completed and publicly released. He also submits that the FSCO staff member's handwritten notes on Record G3 comprise "factual inputs" and are not advice.

[72] I recognize that the final reports of the Expert Panel have been released publicly, and that its Phase I Report was originally posted on FSCO's website on the same day as the presentation at issue in Record G1. However, I do not accept the appellant's suggestion that the records are not exempt on this basis.

[73] Records G1 and G2 are presentations by the Expert Panel Chair to ministry staff on the Expert Panel's work. Although these presentations appear to have been made after the release of the first Expert Panel report, they do not appear to have been intended for public consumption. The presentations are distinct from the Expert Panel's published final reports, and provide some apparently more frank insight into the Expert Panel's recommendations shared by the panel Chair with ministry staff. I find these records reveal advice or recommendations concerning the Expert Panel's work, and qualify for exemption under section 13.

[74] Record G3, which is a duplicate of Record G2, is exempt for the same reasons. It also contains handwritten notes of a FSCO staff member that summarize and provide additional detail about the Chair's presentation to ministry staff. Although the comments alone may not qualify as advice or recommendations of that staff member within the meaning of section 13, I am satisfied that disclosure of these notes would reveal the advice or recommendations to which they refer, and are exempt on that basis.

[75] I therefore find these records are exempt in their entirety.

Record G4

[76] This is the same record as Record D9, discussed above, and the withheld portions are not exempt for the reasons outlined above.

H-Records

[77] The ministry seeks to withhold parts of Records H1, H2 and H5, and Records H3, H4, H6, H7, H8, H9, H10, H11 and H12 in their entirety.

[78] These are records that correspond to the appellant's request for records that "analyse and document how the existing catastrophic impairment definition has been working for car accident victims ... or on how the Expert Panel's recommendations ... would impact on accident victims and benefits and services received."

Record H1

[79] Record H1, dated May 13, 2011, is a memo entitled "Catastrophic Claimant Survey Summary." While most of this record has been disclosed to the appellant, the ministry withholds the final three sentences on page 2 of the record as being advice or recommendations.

[80] The appellant submits that if the withheld portion is drawn from the publicly-available Expert Panel reports, then they cannot be exempt. He notes that he has received numerous Expert Panel survey input notes from the ministry as a result of a separate access request.

[81] I find the first withheld sentence in this record may, if disclosed, be used to infer a FSCO staff member's advice with respect to the adoption or rejection of the Expert Panel's proposed changes to the catastrophic impairment definition. It therefore qualifies for exemption under section 13.

[82] By contrast, the final two sentences of the note contain only factual information that does not itself contain advice or recommendations or from which advice or recommendations may be revealed. These two sentences do not qualify for exemption under section 13.

Record H2

[83] This record is a memo entitled "Standing Committee on Estimates, Tuesday, May 31, 2011." The ministry has disclosed the first two paragraphs, recording a question posed to the Minister of Finance by a member of the Ontario Legislature, and the minister's one-sentence response. The ministry withholds the remainder of the record,

which it describes as the advice of public servants to senior government officials concerning an appropriate further response to the question posted to the minister.

[84] The appellant objects to the withholding of a suggested reply to an oral question posed to the minister. He states that he regularly obtains information of this nature through access requests, and he notes that Records D6, D7 and D8 also contain "suggested responses" sections which have been released to him.

[85] The withheld information is the text of a proposed response from the Minister of Finance in answer to a question posed to him at a public committee hearing. This information is similar to the "response" type of information that this office has previously found not to be exempt when provided by staff to a minister to assist in responding publicly to questions on a particular issue.¹⁷ The withheld information in this record was provided by staff to the minister for the purpose of making it available to the public through the committee hearing process. It is factual in nature and responds to a request for certain factual information. I find that it neither contains advice or recommendations, nor does it permit the drawing of inferences about any advice or recommendations, and is therefore not exempt under section 13.

Records H3, H4 and H5

[86] The ministry describes these records as email exchanges between FSCO staff members for the purpose of developing advice and recommendations for the Superintendent and the ministry concerning the catastrophic impairment definition.

[87] The appellant argues that entire email strings, including identities of email senders and recipients, are not exempt simply because they reflect communications between FSCO staff about catastrophic impairment work.

[88] On my review of these records I accept that they are emails exchanged by FSCO staff in preparation of the proposed response of the minister, and reflect the advice or recommendations of staff in developing the content of that response. Although I have found H2 exempt, I am satisfied that Records H3, H4 and H5 would reveal the deliberative process of arriving at the proposed response in H2.

[89] I also find that severing the records in the manner suggested by the appellant, to disclose only the identities of email senders and recipients, would result in revealing only "disconnected snippets" and otherwise meaningless information, such that severances cannot reasonably be applied.¹⁸ I therefore find these records are exempt in their entirety.

¹⁷ See, for example, Orders PO-1678 and PO-2677.

¹⁸ Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 102 O.A.C. 71 (Div. Ct.).

Records H6 and H10

[90] The ministry describes these records as having been prepared by FSCO staff for the purpose of advising senior government officials and recommending an appropriate response to a question posed at the May 31, 2011 session of the Standing Committee on Estimates.

[91] The appellant repeats his submissions made for Record H2, noting that he regularly obtains anticipated oral questions and suggested replies through the access process and that it is "difficult to believe a follow up question on medical or related subject matters is exemptable."

[92] As with Records H3, H4 and H5, I find these records reflect the advice or recommendations of FSCO staff in preparing a suggested response by the minister to a question posed at a committee hearing. These records therefore qualify for exemption under section 13.

Record H7

[93] Record H7 is a June 23, 2011 report entitled "Proposed Catastrophic Impairment Changes and Related Cost Savings," marked "Draft." The ministry describes this record as a draft of a report prepared for FSCO by an actuarial firm retained by FSCO and thus a report of a "consultant retained by an institution" within the meaning of section 13.

[94] The appellant describes the record as a consultant's report on reputed cost savings related to changes to the catastrophic impairment definition. He objects to the ministry's decision to withhold the record in full when, he says, it has publicly taken the position that the catastrophic impairment redefinition exercise will reduce costs. While he acknowledges that recommendations contained in the report might be exempt, he argues that the exemption cannot apply to the whole report. He also provided a copy of a briefing note he obtained through a separate access request, which he suggests is indicative of the ministry's reluctance to disclose this record to him.

[95] This record is a report of an actuarial firm's costing of potential savings from adopting the Expert Panel's recommendations and its methodology in arriving at its estimates. On my review I do not accept the ministry's characterization of this record as constituting advice or recommendations. While the report contains background information on the basis of which the Superintendent or minister may make decisions, the information is factual in nature. It does not recommend a course of action or options that can be accepted or rejected by its recipient. Although the record is marked as "draft", the representations and material before me do not indicate that the data it contains was subject to revision by the Superintendent or minister. I find this report is not exempt under section 13.

Records H8, H9, H11 and H12

[96] These records are email exchanges between the author of the report comprising Record H7 and members of FSCO staff. The ministry describes these emails as summarizing the advice provided in Record H7.

[97] The appellant questions whether all the email exchanges between the report's author and FSCO staff regarding his report constitute advice, particularly if the body of the report is not itself exempt.

[98] These records are part of an email chain attaching for circulation and briefly describing the essential factual conclusions of the report comprising Record H7. These emails do not themselves contain any advice or recommendations. I also found above that the attached report does not contain any advice or recommendations; the references to the report's conclusions in these emails similarly do not reveal any advice or recommendations, as none are contained in the report. These records are not thus exempt under section 13.

Summary of findings

[99] To summarize, subject to my findings on the ministry's exercise of discretion, I uphold in full the ministry's application of section 13 to the following records or parts of records for which it has claimed the exemption: Records D4, D10, D11, D13, D15, G1, G2, G3, H3, H4, H5, H6 and H10.

[100] Also subject to my findings on its exercise of discretion, I partially uphold the ministry's application of the exemption to portions of the following records: Records D7, D12 and H1.

[101] I do not uphold the ministry's application of section 13 to the following records or parts of records for which it claimed the exemption: D2, D5, D7 (in part), D9/G4 (which is the same record), D12 (in part), D20, H1 (in part), H2, H7, H8, H9, H11 and H12. I will order these records or portions of records disclosed.

B. Did the ministry exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?

[102] The section 13 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[103] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[104] In any of these cases this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office may not, however, substitute its own discretion for that of the institution.²⁰

[105] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²¹

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

¹⁹ Order MO-1573.

²⁰ Section 54(2).

²¹ Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[106] The ministry submits that it reviewed all the records at issue and exercised its discretion to withhold certain portions only where it felt there is a legitimate public interest in withholding information constituting advice and recommendations of public servants or consultants retained by FSCO, generated in furtherance of FSCO's statutory mandate. The ministry notes that a significant number of records have been released to the appellant, and it submits that the remaining records are properly withheld in accordance with the exemption's purpose of ensuring the free flow of advice and recommendations necessary for government decision-making. It notes that particularly in the context of a highly-regulated sector like automobile insurance, it is important that FSCO be able to rely on the confidential and candid advice of public servants. It thus submits that it exercised its discretion in good faith in respect of the records at issue.

[107] The appellant points to the length of time between his initial request and the ministry's decision on access, and between the ministry's decisions to disclose and the disclosure of information to him, as evidence of an "indiscreet effort aimed at stifling broad and quick disclosure" and its "strategic" concessions regarding disclosure. He submits that the ministry's revised access decision demonstrates that it did not use sound judgment in its initial exercise of discretion because the disclosed information should not originally have been treated as being exempt.

[108] The appellant argues that the ministry's failure to apply the public interest override to release the requested information "adds to its questionable exercise of discretion." He complains that "the most significant parts of records" are withheld, and he alleges that the ministry's exercise of discretion was based predominately on "internal concerns" about disclosing the records rather than a proper consideration of the public interest in disclosure. He states that records "should not be hidden on grounds of embarrassment or because not all stakeholders agree with the Ministry/FSCO or its consultants' CI reviews."

[109] In reply, the ministry disputes the appellant's allegation that it initially "sought to hide" contentious or embarrassing material from the appellant that it later disclosed to him.

Analysis and findings

[110] Upon consideration of the parties' submissions, I am satisfied that the ministry exercised its discretion under section 13 in a proper manner. I am satisfied the ministry considered relevant factors, including the nature of the withheld information, the importance of the exemption, and the purposes of the *Act*, including the appellant's right of access, in exercising its discretion. I am also satisfied the ministry did not consider irrelevant factors. Although the appellant has alleged improper bases for the ministry's decision to withhold certain records, the evidence does not support any inference of the kinds of motives he describes. For example, I am not persuaded by his argument that statements in a ministry briefing note that a requester "may be interested in" a particular report and that disclosure of certain records "may receive [negative] media coverage" demonstrate that the ministry hid records from him in order to avoid embarrassment or public scrutiny, or for any other improper "subjective" or "internal concerns."

[111] I also do not agree that the ministry's additional disclosure of records to the appellant is indicative of an improper exercise of discretion in first instance. The issuance of a revised decision does not by itself lead to this conclusion and there is nothing more in the material before me to support such a suggestion. In respect of the appellant's complaint about the length of time between filing his request and the ministry's initial decision, I note that the ministry sent the appellant a notice of time extension explaining that it required more time to process his request for reasons including the large number of pages at issue. Although the ministry advised the appellant that he could appeal the time extension to this office, he did not do so. I also note the ministry issued its decision on access within the extended time period set out in its notice of extension. I am not persuaded that the length of time in processing his request or in providing him with the disclosure set out in its access decisions supports the appellant's allegations of improper exercise of discretion.

[112] Finally, I do not agree that the ministry's failure to apply the public interest override to disclose the records signals a "questionable" exercise of discretion. The ministry provided representations on the application of section 23 to the records at issue, which I will consider later in this order. I do not accept the appellant's suggestion that the ministry's failure to disclose records on public interest grounds raises questions about the adequacy of its exercise of discretion under section 13. I also note that the ministry has already disclosed a large number of records to the appellant in response to his request.

[113] In light of the above, I uphold the ministry's exercise of discretion under section 13.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

[114] The appellant claims there is a public interest in disclosure of the records at issue that should override the application of the discretionary exemption at section 13.

[115] Section 23 states:

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

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

[117] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²² 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 or enlightening the citizenry about the activities of their government or its agencies, 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.²³

[118] A public interest does not exist where the interests being advanced are essentially private in nature.²⁴ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁵

[119] A public interest is not automatically established where the requester is a member of the media.²⁶

[120] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."²⁷

[121] Any public interest in non-disclosure that may exist also must be considered.²⁸ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."²⁹

²² Orders P-984 and PO-2607.

²³ Orders P-984 and PO-2556.

²⁴ Orders P-12, P-347 and P-1439.

²⁵ Order MO-1564.

²⁶ Orders M-773 and M-1074.

²⁷ Order P-984.

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

- the records relate to the economic impact of Quebec separation³⁰
- the integrity of the criminal justice system has been called into question³¹
- public safety issues relating to the operation of nuclear facilities have been raised³²
- disclosure would shed light on the safe operation of petrochemical facilities³³ or the province's ability to prepare for a nuclear emergency³⁴
- the records contain information about contributions to municipal election campaigns.³⁵

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

- another public process or forum has been established to address public interest considerations³⁶
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations³⁷
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding³⁸
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter³⁹

²⁸ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

²⁹ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁰ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

³¹ Order PO-1779.

³² Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

³³ Order P-1175.

³⁴ Order P-901.

³⁵ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

³⁶ Orders P-123/124, P-391 and M-539.

³⁷ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

³⁸ Orders M-249 and M-317.

³⁹ Order P-613.

- the records do not respond to the applicable public interest raised by appellant.⁴⁰

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

[125] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁴¹

Representations

[126] While the ministry concedes it is possible that some of the records may be of some interest to persons with a particular interest in automobile insurance design, it submits it is unlikely that these are matters of compelling interest to the public so as to outweigh the purpose of the section 13 exemption. There is no compelling public interest in the records merely because the process described involves a significant consultative component. Even if there were a public interest, the ministry argues, it would not reach the threshold of compelling public interest of the sort found in previous orders of this office upholding the application of the public interest override. The ministry also notes that a large portion of the requested records has already been released to the appellant, and is sufficient to address any public interest considerations that may exist. It argues there is no obvious reason why the release of additional records would outweigh the important policy goals of the section 13 exemption.

[127] The appellant argues that there is a public interest in the records as the treatment of catastrophic impairment in the context of auto insurance affects the health and safety of Ontario residents, and particularly affects the treatment and health of those severely injured in vehicle accidents. The appellant submits that the ministry has already recognized there is a public interest in these matters by issuing public reports and holding public consultation sessions. He also notes that the catastrophic impairment redefinition issue has been a matter of consideration by the Ontario Legislature and has attracted both media interest and the attention of the public, as reflected in the number of public submissions on these matters.

[128] The appellant also argues that the public interest outweighs the purpose of the section 13 exemption. He submits that the records at issue affect the future health and well-being of those individuals with the most severe auto injuries, which is not merely a private interest. He states that automobile accidents are a leading cause of premature deaths in Ontario and the debate on how Ontario applies its auto insurance catastrophic

⁴⁰ Orders MO-1994 and PO-2607.

⁴¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

impairment provisions “deeply affects many in Ontario, and the records sought assist public discussion” on the redefinition issue. He also refers again to a record released to him through a separate access request, which he suggests provides evidence of the ministry’s reluctance to disclose information on these matters due to the potential for negative coverage.

Analysis and findings

[129] The records at issue in this appeal were generated in the course of work on the Catastrophic Impairment Project, including stakeholder consultations on proposed amendments to the catastrophic impairment definition. As the ministry notes, much of the output resulting from this project has been released publicly, including the final reports of the Expert Panel struck to make recommendations to the Superintendent of FSCO, the full text of stakeholder submissions made in response to the Expert Panel’s findings, and the Superintendent’s Report to the Minister containing his final recommendations after consideration of the submissions of the Expert Panel and stakeholders.

[130] The records remaining at issue are those which I have found the ministry properly withheld on the basis they would reveal the advice or recommendations of FSCO staff and others on these matters. For these records, I find that any public interest that exists in these records does not meet the threshold of “compelling public interest” to trigger the application of the public interest override.

[131] I accept that there is a public interest in the general issues around the definition of catastrophic impairment for automobile insurance purposes. The question is whether there is a compelling public interest in disclosure of the information I have found exempt. In considering this question, I have regard to the amount of information which has either been released to the appellant through this request, or made available to the public through the consultation process. Given these prior disclosures, I am not convinced that the release of the remaining information adds meaningfully to the information the public requires in order to make political choices or engage in political debate on these issues.

[132] I also do not find any support in the material for the appellant’s submissions concerning an ulterior motive on the part of the ministry in refusing to apply the section 23 public interest override.

[133] As I have found the public interest override does not apply in the circumstances of this appeal, I uphold the ministry’s application of section 13 to withhold the records I have found to be exempt under this section.

ORDER:

1. I order the ministry to disclose the following records or portions of records to the appellant by providing him with a copy of them **on or before April 11, 2014:**

- The withheld portions of Records D2, D5 and D20;
- Part of the withheld portion on page 4 of Record D7;
- The withheld portions of Record D9/G4 (which is the same record);
- Part of the withheld portion on page 3 of Record D12;
- Part of the withheld portion on page 2 of Record H1;
- The withheld portions of Records H2; and
- Records H7, H8, H9, H11 and H12 in their entirety.

For greater certainty I have enclosed a copy of Records D7, D12 and H1, highlighting the information that is **not** to be disclosed.

2. I uphold the ministry's decision to withhold the remaining records or portions of records from disclosure.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with proof of disclosure to the appellant in accordance with order provision 1.

Original Signed By:
Sherry Liang
Senior Adjudicator

March 6, 2014