

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3720

Appeal PA15-357

Ministry of Finance

April 7, 2017

Summary: The Ministry of Finance (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for non-public communications from the Insurance Bureau of Canada (IBC), as well as follow-up exchanges, meeting notes and agendas on automobile insurance topics. The ministry denied access to the records in full or in part, citing the mandatory Cabinet records exemption in section 12(1) and the discretionary advice or recommendations exemption in section 13(1). This order finds that the records are not exempt under these exemptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1) (introductory wording), 12(1)(b), and 13(1).

Orders Considered: Orders PO-2495 and PO-3353.

OVERVIEW:

[1] The Ministry of Finance (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for the following information:

From January 1, 2012 to present [the date of the request], non-public communications and non-public submissions, non-public representations made received from the Insurance Bureau of Canada (IBC), and follow up exchanges on [automobile] insurance topics. Include preparatory notes

for meetings with the [IBC] on [automobile] insurance topics and notes of the meetings and the meeting agendas.

[2] The requester indicated that he did not seek publicly available materials or duplicate records. In response to the request, the ministry issued an interim fee estimate decision and, subsequently, a time extension decision. Next, the ministry advised the requester that since disclosure of the requested records could affect the interests of a third party, (the IBC), the IBC was being notified pursuant to section 28(1)(a) of the *Act*.¹

[3] The IBC responded to the ministry's notification letter, stating its view that the mandatory third party information exemption in section 17(1) applies to all of the responsive records, except for certain ones. Using the index of records created by the ministry, the IBC identified the records that could be disclosed to the requester. Following receipt of the IBC's submissions, the ministry issued a final access decision to the requester (and to the IBC) granting partial access to the requested records. The ministry relied on sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 17(1), and 21(1) (personal privacy) of the *Act*. In addition, the ministry advised that some information in the records is not responsive to the request. The ministry subsequently issued a revised decision letter respecting Record 1 from the Communication Services Branch records because partial access was being granted to that record.

[4] Both the requester and the IBC appealed the ministry's decision to this office. Appeals PA15-357 and PA15-392 were opened, respectively, and the same mediator was appointed to explore resolution of the two appeals jointly.

[5] In his letter of appeal for Appeal PA15-357, the requester, referred to as the appellant in this order, confirmed that he is appealing the ministry's exemption claims of sections 12(1), 13(1) and 17(1), but not section 21(1). In Appeal PA15-392, the IBC confirmed its consent to the disclosure of the records specified in its response to the ministry and that it did not oppose the partial disclosure of some of the records. The IBC identified which specific records could be fully or partially disclosed to the appellant without challenge.

[6] At this point, the appellant advised the mediator that he had not yet received copies of the records to which the ministry had granted partial access. The IBC agreed that the mediator could provide its letter of appeal to the ministry in order to confirm which records which could be disclosed. The IBC also provided the ministry with copies of the redacted records to confirm its consent. Having confirmed the consent, the

¹ Section 28(1)(a) states that: "Before a head grants a request for access to a record, (a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information ... the head shall give written notice in accordance with subsection (2) to the person to whom the information relates."

ministry provided the appellant with copies of that information and an index of records.

[7] Following his review of the information disclosed, the appellant confirmed that he does not seek access to the non-responsive portions of the records. He then asked that this appeal proceed to adjudication to determine the application of sections 12(1), 13(1), and 17(1) of the *Act* to the remaining records. He also advised the mediator that he is raising the possible application of section 23 (public interest override) of the *Act*.

[8] Since further mediation was not possible, the two appeals were transferred to the adjudication stage to conduct an inquiry. The former adjudicator assigned to these appeals decided to address both appeals together and sent one combined Notice of Inquiry to the ministry and the IBC, initially, to seek representations.

[9] After receipt of the Notice of Inquiry, the IBC decided that it would withdraw its appeal of the ministry's access decision and confirmed that it would not oppose the release of the third party records described in the Notice of Inquiry. Accordingly, the application of section 17(1) to the records is no longer at issue.

[10] Representations were then exchanged between the ministry and the appellant on the remaining issues and records in accordance with section 7 of the IPC's² *Code of Procedure and Practice Direction 7*.

[11] The file was then transferred to me to complete the inquiry. In this order, I find that the records are not exempt under sections 12(1) and 13(1) and order the ministry to disclose them to the appellant.

RECORDS:

[12] The records at issue include emails, letters, agendas, and briefing notes, as follows:

- Financial Services Policy Division (the FSPD) records, Records F6, F8, F10, F13, F16, F17, F20, F22, F24, F25, F28 and F32 to F36; and
- Communication Services Branch (the CSB) records, Records C1, C3, C22, C32 and C37.

[13] The ministry has denied access to Records F6, F8, F10, F13, F16, F24, F33, F35 and F36 in full. It has denied access to the remaining records in part. The ministry relies on the application of sections 12(1) and 13(1) for all of the records.

² The Information and Privacy Commissioner, Ontario, Canada.

ISSUES:

- A. Does the mandatory Cabinet records exemption at section 12(1) apply to the records?
- B. Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?
- C. Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[14] The ministry states that its Financial Services Policy Division (FSPD) is responsible for providing policy analysis and advice in relation to key areas of the financial services sector including credit unions, co-operatives, mortgage brokers and the insurance industry.

[15] The ministry states that the specific issues discussed in the records relate to automobile insurance reforms, which are governed by insurance legislation and regulations in Ontario. It states that a major purpose of the automobile insurance reforms is to balance the need to keep automobile insurance affordable for Ontario's over 9.5 million drivers with the need to ensure that those injured in motor vehicle collisions receive proper treatment.

[16] The ministry states that in its work related to Ontario's automobile insurance system, the FSPD seeks advice from all stakeholders, including the IBC.

[17] The ministry also states that some of the records at issue were located within the CSB. It states that although the CSB does not directly work on the automobile insurance reforms, the CSB is in possession of some letters between the IBC and the ministry because the CSB is responsible for receiving and responding to correspondence to the ministry and the Minister, and at times participates in internal ministry meetings.

A. Does the mandatory Cabinet records exemption at section 12(1) apply to the records?

[18] The ministry relies upon the introductory wording of section 12(1) and section 12(1)(b). Therefore, the relevant parts of the section 12(1) exemption state:

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,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

[19] The ministry states that the records relate to several topics on which submissions (i.e. decision slide decks) were made to Cabinet and its committees at different times. It states that staff in the FSPD prepared the decision slide decks based on direction from the Minister's office. It states that:

Each decision slide deck submitted to Cabinet was unique; however, each deck had common elements. This includes an overview of the decision sought, an overview of government commitment, context around the issues the proposal tried to address, a set of options for decision-making, information on communications and implementation plans if the proposal was approved and the actual Cabinet Minute for approval...

The recommendations in the deck drew from the submissions from ministry stakeholders, including the IBC.

[20] The ministry provided a confidential chart listing the dates of the Cabinet or the Jobs and Economic Policy Committee of Cabinet meetings and the topic that was considered at each meeting. It also described where certain Cabinet or Policy Topics were located in the records.

[21] The ministry states that some of the records contain policy options and recommendations on topics which were not considered by Cabinet or its committees, but were considered by the ministry in the process of automobile insurance reforms but have not yet been submitted to Cabinet.

[22] The ministry submits that if the details in the records, which relate to topics submitted to Cabinet, are disclosed to the appellant, the appellant would be able to reasonably infer the substance of Cabinet deliberations. It states that this is because for some of the Cabinet Topics which were eventually passed into legislation, the appellant would be able to easily compare the legislation with these records, and determine which, if any, of the recommendations described in the records are reflected in the legislation.

[23] The ministry further submits that although some of the records contain recommendations on topics that were not submitted to Cabinet (the Policy Topics), these topics may be considered by Cabinet in the future, in part because reforms on automobile insurance are still ongoing.

[24] The appellant states that he applied only for IBC records and not for internal government decision slide deck records or memos or for Cabinet and Cabinet subcommittee records or for an outline of government future strategic proposals on matters of automobile insurance. He submits that the ministry arbitrarily decided to

classify the records as either "public", "policy" or "cabinet" "topic" records in its attempt to justify them as Cabinet-claimed records. He states that this classification scheme is erroneous and inconsistent with freedom of information legislation.

[25] The appellant states that the IBC's and other stakeholders' positions and views do not qualify as Cabinet records or become hidden because Cabinet has or could adopt stakeholder positions in budgets, or regulatory and legislative amendments. He states that to assert that important automobile insurance matters come before Cabinet and that some of the contents, issues or topics raised by IBC were distilled and discussed in Cabinet does not make IBC records Cabinet records. He states that:

If every third parties' records could be labelled as government records let alone Cabinet records, Ontario's whole system of democratic open government devoid of having any perceived conflict of interest would be rendered hollow, with success going to the most effective lobby group's efforts who influenced their internal decision making. These as well are not the records of a government mandated working group, or an advisory panel group funded by government but of a trade association lobby group...

Widening the Cabinet exemption in the manner proposed to independent third party stakeholders would set a dangerous unwarranted precedent. There is no previous Information Commissioner order that covers such an incredible widening of Cabinet privileges claims...

[26] In reply, the ministry agrees that the vast majority of the records at issue originate with, or were produced by, the IBC. It refers specifically to the introductory wording of section 12(1) to state that third party records are not necessarily excluded from the scope of the exemption.

[27] The ministry reiterates that although the records themselves were not submitted to, or used to brief, Cabinet, the topics discussed in the records were incorporated into briefing materials (decision slide decks) that were used to brief Cabinet or one of its committees.

[28] The ministry submits that the IPC has recognized the application of the section 12(1) exemption for Cabinet records in the past to third party records, provided that such records are not distributed outside of government without the appropriate confidentiality protections.³

[29] The ministry reiterates that the FSPD reviewed all of the records at issue and the content of the records was compared to the content in the decision slide decks to determine whether a reform related to a given topic was in fact submitted to Cabinet.

³ The ministry relies on Orders P-956, PO-2596, PO-2793, and PO-2053-F.

Analysis/Findings re: introductory wording

[30] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees [not just the types of records enumerated in the various subparagraphs of section 12(1)], qualifies for exemption under section 12(1).⁴

[31] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.⁵

[32] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.⁶

[33] Concerning the introductory wording of section 12(1), I note that previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;⁷ and
- "substance" generally means more than just the subject of the meeting.⁸

[34] In Order P-131, former Commissioner Sidney B. Linden, in referring to section 12(1), stated:

"Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (Black's Law Dictionary, 5th ed.), or "essential nature; essence or most important part of anything" (Oxford Dictionary). Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means".

[35] In Order 72, former Commissioner Linden considered the wording of section 12(1) and stated:

⁴ Orders P-22, P-1570 and PO-2320.

⁵ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

⁶ Order PO-2320.

⁷ Order M-184.

⁸ Orders M-703 and MO-1344.

Can records that are incorporated into a Cabinet submission or records that are used as a basis for developing a Cabinet submission, if disclosed, reveal the "substance of deliberations" of the Cabinet or its committees? In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet, as required by the wording of subsection 12(1). Documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary exemption provided by subsection 13(1) of the *Act*.

[36] The information at issue in the records consists of the IBC's position on automobile insurance reforms as set out in emails, letters, submission papers, briefing notes, and agendas exchanged between the IBC and the ministry.

[37] As stated in the disclosed portions of the records, the IBC is a national industry association representing Canada's private home, car and business insurers. Its member companies represent 90% of the property and casualty (P&C) insurance market in Canada. It provides submissions to the ministry to support the P&C industry and improve premium affordability for Ontario automobile insurance consumers.

[38] Many of the emails were exchanged between numerous individuals within the IBC and the ministry. As well, it appears that numerous individuals from both the IBC and the ministry were present at the meetings where some of the records were discussed.

[39] None of the records were prepared for Cabinet or one of its committees. As well, none of the records themselves were placed before these bodies.

[40] As well, based on my review of the records, the parties' representations and IBC's website, I find that I do not have sufficient evidence to determine that the records were not distributed outside of government without the appropriate confidentiality protections. The records set out the IBC's position on how it would like the government to take additional actions to support the insurance industry. There is no indication in the body of any of these documents that they are not to be distributed outside of government. I note also, as stated above, that the IBC withdrew its objections to disclosure and consented to disclosure to the appellant of all of the information at issue in the records.

[41] The IBC acts as a lobby group putting forward its proposals for suggested reform of the automobile insurance scheme in Ontario on behalf of its member insurance companies.

[42] Although certain topics contained in the records may have been ultimately considered by Cabinet or the committee, I find that considering a topic is not the same

as deliberating on the substance of the information contained in a record.

[43] The ministry's submissions to Cabinet were made in the form of decision slide decks, which included recommendations which drew from the submissions of ministry stakeholders, including the IBC. The ministry did not provide the IPC with a copy of slide decks placed before Cabinet. Instead it has provided a list of Cabinet and the committee dates and the topics considered at the meetings. For each meeting date, it has only provided between one and eight words for each topic,⁹ with the average being between 3 to 4 words per topic.

[44] I do not agree with the ministry that revealing the information set out or derived from the IBC's materials, which are the records at issue in this appeal, would reveal the substance of the deliberations of Cabinet. Nor do I agree that possibly revealing Cabinet's or the committee's discussion of a topic of a record reveals the substance of deliberations of Cabinet or the committee. As stated above, "substance" generally means more than just the subject of the meeting.

[45] The ministry relies on Order PO-2495. In that order, the IPC found that the recommendations and specific data in the record, a report of a branch of the Ministry of Health and Long-Term Care, was "directly incorporated into a report placed before Cabinet" and was exempt under the introductory words of subsection 12(1). In that order, the adjudicator had received confidential reply representations that satisfied her that the relevant portions of the report that constituted the record were *directly*¹⁰ incorporated into a report placed before Cabinet.

[46] In this appeal, I do not have sufficient evidence to find that the relevant portions of the records were directly incorporated into the slide decks provided to Cabinet or the committee. The ministry received input not only from the IBC, but also from other stakeholders. The ministry's position is that the topics discussed in the records were incorporated into briefing materials (decision slide decks) that were used to brief Cabinet. The ministry has stated that the recommendations in the slide decks drew from the submissions from ministry stakeholders, including the IBC.

[47] Although some of the information may have been, as submitted by the ministry, a "direct source" of the recommendations in the slide decks, I do not have sufficient evidence to determine what specific information in the records was deliberated upon by Cabinet or the committee. I find that deliberation on a topic of an item in the record is not the same as deliberating on the substance of the information on the records.

[48] I find that I do not have sufficient evidence to determine that disclosure of the information in the records would reveal the substance of deliberations of Cabinet or the committee. Therefore, I find that the introductory wording of section 12(1) does not

⁹ Excluding the words "and, of, for, in".

¹⁰ Emphasis in original order.

apply to exempt the records.

Analysis/Findings re: section 12(1)(b)

[49] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.¹¹

[50] Considering section 12(1)(b), I do not agree that the information identified by the ministry as "policy topics" is information that was submitted, or prepared for submission, to the Executive Council or its committees. The records were not submitted to Cabinet or the committee nor were they prepared for submission to these bodies.

[51] I find that the ministry's representations that recommendations from an outside body that may someday be the topic of a Cabinet or committee meeting is not information prepared for submission to Cabinet.

[52] I find the ministry's representations that the policy topics may be considered by the Cabinet in the future as the basis to make changes to the automobile insurance scheme in Ontario does not result in a finding that the exemption in section 12(1)(b) applies, as this section exempts from disclosure records submitted, or prepared for submission, to the Executive Council or its committees.

[53] I agree with the appellant's submission above that if every third parties' records could be labelled as

...Cabinet records, Ontario's whole system of democratic open government devoid of having any perceived conflict of interest would be rendered hollow, with success going to the most effective lobby group's efforts who influenced their internal decision making...

[54] I agree with Commissioner Linden's findings in Order 72 that it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet or one of its committees.

[55] In support of its section 12(1)(b) claim, the ministry states that stakeholders, such as the IBC, prepare briefing notes, policy papers and draft legislation for the purpose of the ministry subsequently submitting those same recommendations and policy options to Cabinet.

¹¹ Order PO-2320, PO-2554, PO-2677 and PO-2725.

[56] However, I note that certain IBC briefing notes¹² and IBC submissions, including an IBC's Pre-Budget submission¹³ have been disclosed in this appeal, either in part or in their entirety. Included in this disclosed information are some of the IBC's policy options and recommendations to the ministry.

[57] Concerning the IBC's Pre-Budget submission, only one small portion of this record was severed. Several policy options and recommendations in this record have been disclosed. According to the ministry's representations in Order PO-2919, the Budget is presented to Cabinet and to Cabinet committees (the Treasury Board/Management Board).¹⁴ Therefore, I do not accept the ministry's submission that section 12(1)(b) must apply to exempt IBC's policy options or recommendations in the records as they may be considered by the Cabinet in the future, as clearly the ministry has not claimed this exemption for all such information.

[58] Accordingly, based on my review of the records and the parties' representations, I find that section 12(1)(b) does not apply in this appeal.

Conclusion re: section 12(1)

[59] Based on my review of the records and the parties' representations, I find that I do not have sufficient evidence to determine that the introductory wording of section 12(1) or section 12(1)(b) applies. In particular, I do not have sufficient evidence to determine that disclosure of the records would reveal the substance of confidential deliberations of Cabinet or its committees. From my review of the ministry's representations, I find that although the topics of the records may have been deliberated upon, the substance of the deliberations would not be revealed by disclosure of the records.

[60] I find further support for this decision in the fact that currently the IBC on its website publishes copies of its recent briefing notes and submissions to the government.¹⁵ It states on its website concerning these submissions that:

The following is a series of links to key reports that IBC's Ontario region submitted to the provincial government. IBC believes that, in the spirit of transparency, these reports should be easily available and accessible to all.

[61] The IBC then provides links to its current briefing notes and submissions on its website. These current briefing notes and submissions are entitled:

¹² Record F20

¹³ Record C3

¹⁴ A committee of Cabinet, see <https://news.ontario.ca/committees/en>

¹⁵ See <http://www.ibc.ca/on/resources/reports-and-submissions>

- Cutting the Red Tape: IBC's Submission for Ontario's Red Tape Challenge
- Rate Regulation of Ontario Automobile Insurance - Briefing Note
- 2017 IBC Pre-Budget Submission

[62] These documents contain similar types of information to that in the records, including recommendations and advice from the IBC on changes to legislation. The information on the IBC website demonstrates the IBC's practice of making its briefing notes and submissions available to the public.

[63] As I have found that section 12(1) does not apply to exempt the records, it is not necessary for me to consider whether the exception in section 12(2)(b)¹⁶ to the exemption applies.

[64] I will now consider whether the discretionary exemption in section 13(1) applies to exempt the information at issue in the records.

B. Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?

[65] Section 13(1) states:

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

[66] The ministry submits that the IBC is a consultant retained by the institution and that it consulted with stakeholders including the IBC in its process of automobile insurance reforms.

[67] The ministry refers to Order PO-3365, where the IPC held that emails and reports arising from meetings and communications from an expert panel engaged by the Financial Services Commission of Ontario (FSCO) to advise on the Statutory Accident Benefits Schedule and an insurance regulation constituted advice or recommendations. It submits that similar to the advice provided by the panel in Order PO-3365, the volunteer advice coming from the IBC is invaluable expertise that assists the government in formulating and justifying its policies.

¹⁶ Section 12(2)(b) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[68] The ministry states that it sometimes receives volunteer advice from industry groups with specialized expert knowledge and that the IBC is an industry association that is similar to that of a ready-made expert panel that is knowledgeable in the area of insurance. The ministry submits that advice, which is provided by unpaid volunteers who are analogous to consultants, is exempt under section 13(1). It states:

[T]he IBC is volunteering its advice to the ministry on the Cabinet Topics and Policy Topics. This advice from the IBC originates from experts in the insurance industry who often make up expert panels...

[69] The ministry states that before making its ultimate recommendations on those topics, the records at issue provide analysis on the sources of the issues and problems with the current system. The ministry submits that the descriptions of the issues and the related analysis on them are "advice" as defined by the Supreme Court of Canada in *John Doe*,¹⁷ because this information "sets forth considerations to take into account by the decision maker in making the decision", and also "was prepared to serve as the basis for making a decision between the presented options."

[70] The ministry submits that in order to decide whether to adopt a given recommendation, it is necessary to understand the existing issues in the automobile insurance system.

[71] Concerning the exception in section 13(2)(a) for factual material, the ministry submits that this exception does not apply as any factual material in the records is either occasional assertions of fact or information from which inferences of advice or recommendations can be drawn.¹⁸

[72] The appellant states that the ministry is attempting to make the IBC either a consultant, a ready-made expert advisory panel or a very special expert group, "qualifying" the IBC records for the policy advice exemption. The appellant disputes the ministry's claim that disclosure could result in the IBC, an automobile insurance lobby group, becoming less active in routinely making its views known to the ministry and government. He points out that the IBC itself dropped its appeal in this case, and no longer claims that the records are protected either under sections 13(1) and 17(1).

[73] The appellant further states that not one of those IBC records has been identified as specifically marked as being "confidential". He states:

The key fact remains there is no evidence submitted that IBC was "retained" by the ministry. While paid commissioned consultants fall in the category along with public officials under section 13(1) offering policy advice, voluntary stakeholder groups do not...

¹⁷ *John Doe v Ontario (Finance)*, 2014 SCC 36.

¹⁸ The ministry relies on Orders 24 and PO-3365.

To extend the section 13(1) exemption claim to IBC makes a mockery of Ontario's democratic and conflict of interest system where stakeholder positions and views are not official policy advice within the government or paid by the government or the Minister or Premier for their positions and views.

The ministry [forgets] that the IBC records are not their records and that IBC efforts are there to influence policies, not to be the records of government and the makers of policy and doers deciding on government implementation programs.

Analysis/Findings

[74] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁹

[75] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[76] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁰

[77] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- 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.²¹

¹⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁰ See above at paras. 26 and 47.

²¹ Orders PO-2084, PO-2028, 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,

[79] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.²²

[80] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).²³

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

- factual or background information²⁴
- a supervisor's direction to staff on how to conduct an investigation²⁵
- information prepared for public dissemination²⁶

[82] The ministry relies on the findings in Order PO-3353 to support its submission that the IBC is a consultant retained by it under section 13(1). In this order, I find that the IBC is a fundamentally different organization than that of the expert panel in Order PO-3353.

[83] In Order PO-3353, the government directed the ministry's agency,²⁷ the FSCO, 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 (the Expert Panel) to review and make recommendations on both matters.

[84] The records in Order PO-3353 arose out of meetings with and communications from the Expert Panel members and stakeholders concerning the development and preparation of the Expert Panel Report. The records included advice arising out of

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.

²² *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²³ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

²⁴ Order PO-3315.

²⁵ 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.).

²⁶ Order PO-2677.

²⁷ FSCO is an institution under *FIPPA*.

proposals and comments submitted by, and discussions with, stakeholders.

[85] In that order, FSCO issued a request for proposals (RFP), resulting in the selection of the chair of the Expert Panel who, in turn, played an active role in selecting the expert academics and clinicians for the panel. FSCO provided the Expert Panel with terms of reference which set out, among other things, the purpose and functions of the panel. According to the terms of reference, the Expert Panel's deliverables consisted of two written reports containing specific recommendations.

[86] Further, in Order PO-3553, the Superintendent of FSCO selected the chair and the members of the Expert Panel, in consultation with the chair. The chair and other panel members signed nondisclosure agreements prior to commencing work on the panel. The confidentiality agreement stipulated that the ministry maintains control over information however recorded that is a record for purposes of the confidentiality agreement, and that the *Act* applies to all records, including those held or created by the panel members as well as those provided to the panel by the ministry.

[87] The agreement in Order PO-3353 between the ministry and the Expert Panel also contained a provision that all records were to be returned to the ministry, with no copy kept by the Expert Panel.

[88] In Order PO-3353, Adjudicator Cathy Hamilton found that each member of the Expert Panel fell within the scope of the words "a consultant retained by an institution" appearing in section 13(1). She found that where the ministry has specifically and directly convened a panel of experts to provide FSCO with advice and recommendations on a certain subject matter, it is inconsequential that the members were unpaid volunteers. She found that the Expert Panel members had been engaged or "retained" to provide their expert services.

[89] In this appeal, unlike the case in Order PO-3353, the ministry did not:

- directly convene a panel of experts to provide advice and recommendations on a certain subject matter,
- select the directors and the members of the IBC,
- require the IBC to sign nondisclosure agreements prior to commencing work on the papers and briefing notes,
- require the IBC to not retain copies of the records, and
- enter into a confidentiality agreement with the IBC that stipulated that the ministry maintains control over information that the IBC provided to it.

[90] Instead, the IBC is one of the stakeholders in the insurance industry that has provided its position and views to the government on automobile insurance reform. By

withdrawing its appeal, it has agreed to the disclosure of the records to the appellant.

[91] In Order PO-3353, the Expert Panel sought input from various stakeholders. The stakeholders in that order were not found to be consultants retained by the ministry. Rather, the Expert Panel in Order PO-3353 was convened and directed by the ministry with a mandate to consult with various stakeholders and to maintain confidentiality over its advice or recommendations.

[92] I find that Order PO-3353 does not apply in this appeal. The IBC, as a representative of private insurance companies, is one of the stakeholders consulted by the ministry in its consideration of automobile insurance reform. The IBC, as a stakeholder, is not an expert panel retained by the ministry as was the case in Order PO-3353.

[93] I find that the IBC is not a consultant retained by the ministry under section 13(1). Therefore, section 13(1) cannot apply to exempt any advice or recommendations provided by the IBC to the ministry. Accordingly, I find that the records are not exempt under section 13(1).

[94] As the records are not exempt under section 13(1), there is no need for me to consider whether the exception in section 13(2) applies or whether the public interest override in section 23 applies.

[95] As no mandatory exemptions apply to the records and no other discretionary exemptions apply, the records are not exempt and I will order them disclosed.

ORDER:

I order the ministry to disclose the records to the appellant **by May 15, 2017** but not before **May 9, 2017**.

Original Signed by: _____

Diane Smith
Adjudicator

April 7, 2017