Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4086-I

Appeal PA19-00070

Ministry of the Environment, Conservation and Parks

November 17, 2020

Summary: A request was submitted to the Ministry of the Environment, Conservation and Parks (the ministry) under the *Freedom of Information and Protection of Privacy Act* for access to records about the cancellation of Ontario's Cap and Trade Program.

The ministry denied access to the responsive records, relying on sections 12(1) (Cabinet records), 13(1) (advice or recommendations), and 19 (solicitor-client privilege).

In this order, the adjudicator orders ministry to exercise its discretion under section 12(2)(b) in deciding whether to seek the consent of the Executive Council to release two records that she finds qualify for exemption under the introductory wording of section 12(1) of the *Act*.

She finds that the remaining records are exempt by reason of sections 13(1) or 19. She finds the public interest override in section 23 does not apply to the record exempt under section 13(1). Finally, she finds that certain information is not within the scope of the request, because it was created after the appellant's request was received.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, sections 12(1), 12(2)(b), 13(1), 19(a) and (b), 23, and 24.

Orders Considered: Orders 82, P-931, MO-1483 and PO-3578.

OVERVIEW:

[1] The records at issue in this appeal were created during the transition of governments between the election in June 2018 and the swearing in of the new Ontario

government that month. The records concern the incoming government's proposal to cancel Ontario's cap-and-trade system. This system relates to the limit on the amount of greenhouse gas pollution industry can produce.

[2] A request was submitted to the Ministry of the Environment, Conservation and Parks (MECP or the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following information:

> Searchable, PDF copies of all reports, analyses, slide decks, briefing notes or explanatory notes, prepared since November 1, 2017, that assess or describe the potential impacts or risks of the Progressive Conservative Party of Ontario's proposals to cancel Ontario's cap-and-trade system and withdraw from the joint carbon market with Quebec and California.

[3] The ministry issued a decision denying access to approximately 200 pages of responsive records, consisting of emails, slide decks, notes, information summaries and memorandums, pursuant to sections 12(1) (Cabinet records), 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*.

[4] The requester (now appellant) appealed the ministry's decision.

[5] During the course of mediation, the appellant advised the mediator that he no longer wished to pursue access to the records for which the ministry claimed section 12 of the *Act*, namely Records 1 to 4.[1] The appellant confirmed that he would like to pursue access to the remainder of the records at adjudication.

[6] As mediation did not resolve the issues in this appeal, it was moved to adjudication for an inquiry.

[7] I sought the representations of the ministry and the appellant. These representations were shared between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] At adjudication, in its representations, the ministry advised that it was now claiming the application of the mandatory Cabinet records exemption in section 12(1) to records other than those it had originally claimed this exemption for, namely Records 9, 11, 12, 20, 22, 24, 26, 28 and 30.

[9] The ministry also made the decision to apply severances under the mandatory personal privacy exemption in section 21 to portions of Records 17, 21, 23, 25 and 27.

[10] In his representations, the appellant advised that he was not interested in the

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[1] Records 1 and 3 contain emails, Records 2 and 4 contain Implementation Notes.

personal information of private citizens. Therefore, the personal privacy exemption in section 21(1) is not at issue in this appeal. He did want to pursue access to the records for which section 12(1) was now being claimed.

[11] In this order, I find that Records 9 and 30 qualify for exemption under the introductory wording of section 12(1), and I order the ministry to exercise its discretion under section 12(2)(b) in deciding whether to seek the consent of the Executive Council to release those records. I order the ministry to provide the appellant and me with an explanation of the factors considered in exercising its discretion.

[12] I find that the remaining records are exempt by reason of sections 13(1) or 19. I also find that the public interest override in section 23 does not apply to the record exempt under section 13(1). Finally, I find that certain information is not within the scope of the request, because it was created after the appellant's request was received.

RECORDS:

[13] As set out in the ministry's index of records, the records at issue include emails, slide decks, notes, information summaries and memorandums.[2] The records at issue are numbered as Records 5 to 12, 12a, and 13 to 30 in the ministry's index of records.[3] However, as Record 26 is a duplicate of Record 22 and Record 28 is a duplicate of Record 24, I will not be considering Records 26 and 28 individually and have removed these from the scope of the appeal.

ISSUES:

A. What is the scope of the request? Are Records 11, 13 to 16, 17 (pages 90-104 and 140-153), 19 to 20, 21 (page 192), and 25 (page 229) responsive to the request?

B. Does the mandatory Cabinet records exemption at section 12(1) apply to Records 9, 12, 22, 24 and 30?

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[2] The ministry advised that there are gaps in page numbers due to the deletion of blank pages from the records that could not be fixed through pagination. I note that the following pages are missing from the records provided to the IPC: pages 73, 75, 77, 79, 81, 83, 85, 87, 89, 93, 95, 98, 99, 105, 111, 119, 123, 131, 13, 135, 137, 139, 143, 145, 147, 149, 151, 155, 157, 159, 161, 163, and 165 (all page numbers are preceded by 000). If a range of pages is referred to in this order, this range may include one or more of these blank pages.

[3] As noted, the appellant is not interested in receiving access to Records 1 to 4.

C. Does the discretionary solicitor-client privilege exemption at sections 19(a) or (b) apply to Records 5 to 8, 10, 12, 17 (pages 106-138), 18, 21 (pages 193-197), 22 to 24, 25 (pages 225-228 and 230-234), 27 and 29?

D. Does the discretionary advice or recommendations exemption at section 13(1) apply to Record 12a?

E. Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

F. Is there a compelling public interest in disclosure of Record 12a that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

Background:[4]

[14] As described in Order PO-3977, in November 2015, the Government of Ontario released its Climate Change Strategy, which set out the government's vision to 2050 and outlined the path "to a prosperous, climate resilient, low-carbon society where greenhouse gas reduction is part of Ontario's growth, efficiency and productivity."

[15] Part of this strategy included the creation of a Cap and Trade Program (the Program) under the *Climate Change Mitigation and Low-carbon Economy Act* (the *CCMLEA*).[5] The "cap" set a limit on the amount of greenhouse gas pollution industry can produce. Over time, the cap was lowered, reducing the allowable greenhouse gas pollution. The "trade" created a market for pollution credits where industries that do not use all their credits can sell or trade with those that are over the limit.

[16] According to the ministry:

> The records were created between the transition of governments (between the election [June 7, 2018] and the swearing in of the new Ontario government in 2018 [June 29, 2018]). The role of the ministry's Climate Change Directorate (now the Climate Change and Resiliency Division (the CCRD)), which was involved in drafting most of the records, was to review the data regarding the Cap and Trade Program participant

[4] The ministry's representations in this appeal included confidential portions. Although I will be considering the ministry's representations in their entirety, I will only be referring to the non-confidential portions of its representations in this order.
[5] The CCMLEA was repealed on November 14, 2018. See https://www.ontario.ca/laws/statute/16c07

> holdings of emissions allowances and identify the financial impacts of various options for cancelling the Program.
>
> Crown counsel in the ministry's Legal Services Branch was also involved in most of these records and prepared many of the records at issue in order to provide the ministry with legal advice. Legal advice was also sought and provided by other branches of the Ministry of the Attorney General, including Crown Law Office – Civil.
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> The ministry was responsible for preparing advice and materials for Cabinet consideration, which was a process that began prior to the formation of the new government. The materials were provided to Cabinet for consideration and decision-making on June 29, 2018.

Issue A: What is the scope of the request? Are Records 11, 13 to 16, 17 (pages 90-104 and 140-153), 19 to 20, 21 (page 192), and 25 (page 229) responsive to the request?

[17] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[18] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[6]

[19] To be considered responsive to the request, records must "reasonably relate" to

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[6] Orders P-134 and P-880.

the request.[7]

[20] The ministry described the records it has claimed as non-responsive as follows in its index of records:

Record Number:	**Document Page No(s):**	**Document:**	**Date of Record:**
R-11	42-65	"Ending Cap and Trade – MECP – DRAFT (Slide Deck)"	June 19, 2018
R-13	72-74	"E-mail Correspondence – MECP staff – LSB, ADMO (Climate Change and Resiliency Division (CCRD), Cap and Trade Branch"	June 25 and 27, 2018
R-14	76-80	"Draft Options Note – Orderly Wind Down of the Cap and Trade Program" – Options Note	June 25, 2018
R-15	82	"E-mail Correspondence – MECP staff – LSB, ADMO (CCRD), Cap and Trade Branch" [Duplicate of page 74]	June 25, 2018
R-16	84-88	"Draft Option Note – Orderly Wind Down of the Cap and Trade Program" [Duplicate of R-14]	June 25, 2018
R-17	90-104 and 140-153	"E-mail Correspondence – MECP staff – LSB, ADMO (CCRD), Cap and Trade Branch, CAB"	June 19 to 26, 2018
R-19	164-167	"E-mail Correspondence – MECP staff - LSB, ADMO, Cap and Trade Branch"	June 20, 2018
R-20	168-191	"Ending Cap and Trade – DRAFT (Slide Deck)"	June 19, 2019

[7] Orders P-880 and PO-2661.

R-21	192-197	"E-mail Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 19, 2018
R-25	229	"E-mail Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 19, 2018

Representations

[21] The ministry states that Records 11, 13 to 16, 17 (pages 90-104 and 140-153), 19 to 20, 21 (page 192), and 25 (page 229) fall outside of the date range for the request and so are clearly not responsive to the request and should not have been included in the responsive records.

[22] The ministry refers to Order MO-1483, where the IPC noted that, although ideally issues of responsiveness would be raised before the appeal stage, this requirement should not be applied rigidly, and the adjudicator allowed the issue of responsiveness of records to be raised at the appeal stage.

[23] The appellant states that his request asked for records "prepared since November 1, 2017" and did not specify an end date of the time period.

[24] The appellant submits that having failed to comply with the statutory deadline for responding to his request, it is now unreasonable for the ministry to adhere to timelines to justify the exclusion from the appeal of the more current records, including records that it previously deemed to be responsive.

[25] In reply, the ministry states that it understood the time-period for responsive records to be November 1, 2017 to June 18, 2018 (the date the request was received by the ministry).

[26] The ministry submits that the application of an end date/time-period for a request is well established by the IPC and the end date of a request was first interpreted by the IPC in Order 82 in 1989 in which, Commissioner Linden stated:

> Section 10 of the *Act* provides a right of access "to a record or a part of a record in the custody or under the control of an institution". The wording and definitions contained in the *Act* make it clear that this right of access is limited to recorded information that exists at the time that the request is received by the institution. The *Act* does not impose an obligation on an institution to make a decision with respect to a requester's right of access to records that do not exist at the time of the request.

Analysis/Findings

[27] I agree with the ministry, relying on Order MO-1483, that the issue of responsiveness can be raised at the appeal stage. I find that the responsive records in this appeal only include records that existed as of the date of the request. In Order P-931, the adjudicator relied on the above quote from Order 82, as referred to by the ministry, and stated:

> Should a requester wish to receive information that a government institution obtains subsequent to the date of the request, and where this information does not relate to the records produced or issued in a series, the only recourse is for the individual to file a new access request.

[28] I agree with and adopt these findings from Order P-931, and find that the responsive records in this appeal only include records that are dated up to and including the date the appellant's request was received. As Records 11, 13 to 16, 17 pages (90-104 and 140-153), 19 to 20, 21 (page 192), and 25 (page 229) are dated after June 18, 2018, they are not responsive to the request and I will not be considering them in this order.

[29] In making this finding, I understand that the appellant wants access to records that post-date the date his access request was received. In order for records post-dating his request to be responsive to his request, the appellant would have had to make a request for continuing access to records.

[30] Sections 24(3) and 24(4) of the *Act* relate to continuing requests and state:

> (3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.
>
> (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
>
> > (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
> >
> > (b) a statement that the applicant may ask the Commissioner to review the schedule.

[31] In this appeal, as the appellant did not request continuing access, the only records that are responsive to his request are those dated November 1, 2017 to June 18, 2018. The appellant can make a new access request for the later records should he wish to do so.

Record 12a

[32] The ministry provided me with conflicting evidence regarding Record 12a, a one-page record entitled, "Compliance Obligation based on Matching - January 2017 to June 30, 2018".

[33] In the ministry's index of records in its representations, it indicates that Record 12a is dated June 30, 2019. This record does not have a date on it.

[34] The June 30, 2019 date for Record 12a in the ministry's index of records post-dates the date the request was received, the decision letter date, and the date the appeal was filed. Even assuming the date of Record 12a should be June 30, 2018, this would bring this record outside the scope of the request as being created after the date the request was received. However, the ministry indicates in its representations that this record was created early on in the process for providing the advice in the records, which would make it a record created earlier in June 2018. My reading of the record appears to support this view as it indicates that the information in the record projects to June 30, 2018.

[35] Based on my review of Record 12a, I find that it is responsive to the appellant's request and I will, therefore, consider below whether the claimed exemption for this record, section 13(1), applies to this record.

Issue B: Does the mandatory Cabinet records exemption at section 12(1) apply to Records 9, 12, 22, 24 and 30?

[36] The ministry relies on the introductory wording of section 12(1), which reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including...

[37] The ministry described the records for which section 12(1) has been claimed as follows in its index of records:

Record Number:	Document Page No(s):	Document:	Date of Record:
9	3840	"Team Meeting Summary – Cap and Trade Program"	June 14, 2018
12	66-70	"Ontario's Cap and Trade Program – MECP –DRAFT (Slide Deck)"	June 15, 2018
22	198-209	"Ontario's Cap and Trade Program – DRAFT (Slide Deck)"	June 17, 2018

24	218-224	"Ontario's Cap and Trade Program – For Discussion Purposes (Slide Deck)"	June 15, 2018
30	266	"Allowances awarded to Ontario Cap and Trade Participants at Auction"	June 5, 2018

Representations

[38] The ministry states that in June 2018, it was preparing for the government transition following the June 2018 provincial election. The (then) Premier-designate had publicly announced that Cabinet's first act following the swearing-in would be in relation to ending Ontario's Cap and Trade Program. The ministry was responsible for preparing materials and advice for the new Cabinet on this and, in light of the anticipated Cabinet decision-making timelines, started preparing these materials prior to the formation of the new government.

[39] The ministry states that Records 12, 22 and 24 are drafts of a slide deck, the final version of which was provided to Cabinet for consideration on June 29, 2018.

[40] The ministry states that Records 9 and 30 consist of information put together to inform the development of advice on ending the Program. It states that Record 9 consists of a document entitled, "Transition Team Meeting – Cap and Trade Program", which was written on June 10, 2018 and Record 30 consists of a draft 'Allowances' chart summary that was put together by the former Director, Cap and Trade Branch and was used by CCRD. It states:

> The records at issue in this appeal include working material and drafts of advice provided to Cabinet on the termination of Ontario's Cap and Trade Program. These records were prepared by staff in support of the ministry's work developing analysis and recommendations to Cabinet.
>
> The ministry submits that because all of the work at this time in relation to ending Cap and Trade was for the purpose of providing advice and recommendations to Cabinet, disclosure of the records for which section 12 is claimed, in this context, would provide a reader with an accurate inference of matters deliberated by Cabinet.

[41] The ministry states that in Order PO-3839-I, the IPC held that "due diligence" records of the Premier's Advisory Council on Government Assets (the Advisory Council) were exempt under the introductory wording of section 12(1). It states:

> The "due diligence" materials represented the work that the Advisory Council on Government Assets conducted in order to make recommendations to the Executive Council. These records were prepared

> by staff in support of the Advisory Council's work developing analysis and recommendations to Executive Council. As such, all of this "due diligence" material directly related to the development and analysis of various options and recommendations under consideration by the Advisory Council, and in turn, the Executive Council.

[42] The ministry submits that the records in respect of which section 12(1) is claimed are similar to the "due diligence" materials in Order PO-3839-I. The records were prepared by ministry staff in order to make recommendations to Cabinet. As such, the ministry submits that the records directly relate to the development and analysis of various options and recommendations that were under consideration by Cabinet and disclosure of these records would therefore reveal the substance of deliberations of Cabinet.

[43] The appellant states that it is unreasonable for the ministry to now claim the section 12 exemption, months after his appeal was filed.

[44] The appellant argues, in the alternative, that the ministry has not met its burden of proof under section 53 to show that the section 12 exemption applies. He states that the purpose of section 12, like section 13, is to ensure that various "alternative courses of action" can be freely prepared and deliberated upon.[8] Nevertheless, he submits that the end of Ontario's cap-and-trade system was never one of various policy options offered for consideration by ministry staff to the incoming government. Ending cap-and-trade was a clear campaign commitment of the PC Party of Ontario, and was repeatedly affirmed before and after the election by its leader.

[45] The appellant submits that there is no evidence that Cabinet ever deliberated upon the question of whether to end cap-and-trade as opposed to pursuing some alternative option. He says the government's decision had been made before any of the records at issue had been prepared. He states that even if Cabinet did deliberate upon this question, there is no evidence that the records at issue would reveal the substance of those deliberations.

[46] In reply, the ministry states that:

> The appellant argues that the records could not reflect advice to government or Cabinet deliberations as the decision to end Ontario's cap-and-trade system was made as a campaign commitment. The ministry notes that winding down a complex program involves many decisions.

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[8] The appellant relies on *John Doe v. Ontario (Finance)*, 2014 SCC 36.

Analysis/Findings

[47] Firstly, I would like to address the appellant's argument that the ministry should not be allowed to claim section 12(1) at the adjudication stage of the appeal for records it had not originally claimed the section 12(1) exemption for. However, the section 12(1) exemption is a mandatory exemption and can be claimed after a decision letter has been issued by an institution. I agree with the ministry that mandatory exemptions are not subject to any time limits for claiming them, since, if the exemption applies, the record cannot be disclosed.[9]

[48] Regarding the section 12(1) exemption, the use of the term "including" in the introductory wording of this section 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).[10]

[49] 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.[11]

[50] 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.[12]

[51] There are two types of records for which the ministry has claimed section 12(1), Records 12, 22 and 24 slide decks (draft copies of the slide deck submitted to Cabinet), and Records 9 and 30, working materials for these slide decks. The ministry provided me in its confidential representations with a copy of the final slide deck that was placed before Cabinet on June 29, 2018. This slide deck was dated June 27, 2018[13] and, therefore, was created outside the time period of the request.

[52] I agree with the ministry that disclosure of the records at issue would reveal the substance of deliberations of Cabinet. Although these records were not placed before Cabinet or its committees, they still qualify for exemption under the introductory wording of section 12(1), as disclosure of these records would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the

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[9] See Order PO-3578.
[10] Orders P-22, P-1570 and PO-2320.
[11] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[12] Order PO-2320.
[13] The cover page of this slide deck was signed by the Deputy Minister on June 29, 2018.

drawing of accurate inferences with respect to these deliberations.

[53] As the final slide deck was placed before Cabinet, based on my review of the records at issue, which are drafts of the final slide deck and working materials used in the preparation of these slide decks, I accept the ministry's submission that these records were used to provide information to Cabinet about ending the Cap and Trade Program. I agree with the ministry that disclosure of the records for which section 12 is claimed would provide a reader with an accurate inference of the substance of Cabinet's deliberations.

[54] In regard to section 12(1), the appellant has raised section 13(2)(a), the exception to the discretionary advice or recommendations exemption in section 13(1) about factual information. However, what I am considering here is the application of the mandatory exemption in section 12(1), not section 13(1).

[55] Therefore, I find that section 12(1) applies to exempt Records 9, 12, 22, 24 and 30.

Section 12(2): exceptions to the exemption

[56] Section 12(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[57] The records are not more than 20 years old. Therefore, only the exception in section 12(2)(b) is potentially applicable.

[58] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.[14]

[59] I have no evidence that the ministry asked the Cabinet for which, or in respect of which, the records at issue have been prepared, whether or not it consents to disclosure of the records. Nor do I have evidence of what factors the ministry considered in exercising its discretion not to ask Cabinet whether or not it consents to disclosure of the records.

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[14] Orders P-771, P-1146 and PO-2554.

[60] I found above that section 12(1) applies to Records 9, 12, 22, 24 and 30. Other than Records 9 and 30, the ministry also claims that the records are exempt under sections 13(1) and 19. As I am not satisfied that the ministry has turned its mind to the issue of whether to seek Cabinet consent under section 12(2)(b), I will order the ministry to do so for Records 9 and 30. As will be seen below, Records 12, 22 and 24 are also exempt under sections 19(a) and (b), so I will not order the ministry to consider 12(2)(b) in relation to these records.

Issue C: Does the discretionary solicitor-client privilege exemption at sections 19(a) or (b) apply to Records 5 to 8, 10, 12, 17 (pages 106- 138) 18, 21 (pages 193-197), 18, 21 (pages 193-197), 22 to 24, 25 (pages 225-228 and 230-234), 27 and 29?

[61] Section 19 of the *Act* reads in part as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[62] I will consider whether this exemption applies to the information described in the ministry's index of records as follows:

Record Number:	**Document Page No(s):**	**Document:**	**Date of Record:**
5	07	"Email Correspondence – MECP staff – LSB (Legal Services Branch)"	May 14, 2018
6	18-21	"Ontario's Cap and Trade Program – MECP – Legal Services Branch (Slide Deck)"	May 16, 2018
7	22-23	"Email Correspondence – MECP staff - LSB"	June 14, 2018
8	24-37	"Memorandum"	June 14, 2018
10	41	"Decision Points – Regulation to Match Emissions and Allowances"	No date

12	66-70	"Ontario's Cap and Trade Program – MECP – DRAFT (Slide Deck)"	June 15, 2018
17	106-138	"E-mail Correspondence – MECP staff – LSB, ADMO[15] (CCRD), Cap and Trade Branch, CAB"	June 14 to 18, 2018
18	154-162	"Information summary – proposed approach (draft) – LSB"	June 15 to 17, 2018
21	193-197	"E-mail Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 17 and 18, 2018
22	198-209	Ontario's Cap and Trade Program – DRAFT (Slide Deck)"	June 17, 2018
23	215	"Email Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 17, 2018
24	218-224	"Ontario's Cap and Trade Program – For Discussion Purposes (Slide Deck)"	June 15, 2018
25	225-228, 230-234	"Email Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 14, 2018
27	247-254	"E-mail Correspondence – MECP staff - LSB, ADMO (CCRD), Cap and Trade Branch"	June 15 and 17, 2018
29	262-265	"E-mail Correspondence – MECP staff - LSB, ADMO, (CCRD), DMO, Cap and Trade Branch"	June 14, 2018

Representations

[63] At the outset, I note that the ministry obtained legal advice from its internal ministry counsel in its Legal Services Branch, as well as counsel with the Crown Law Office – Civil. Counsel with either office is "Crown counsel" for the purposes of section

[15] The Assistant Deputy's Minister's Office.

19, but to distinguish between them I will refer to the former as "ministry counsel" as to the latter as "Crown Law Office - Civil counsel".

[64] The ministry submits that the records at issue are protected by the common law solicitor-client communication privilege and exempt from disclosure under section 19(a) of the *Act.* Additionally, it submits that as these communications were prepared by Crown counsel in order to convey legal advice, the records are exempt from disclosure under subsection 19(b).

[65] The ministry states that all of the records at issue were clearly marked and communicated explicitly as confidential and subject to solicitor-client privilege.

[66] The ministry states that Record 5 consists of email correspondence from May 14, 2018 from the Director of the ministry's Legal Services Branch to the Assistant Deputy Minister's Office and Deputy Minister's Office providing Record 6, the earliest of the slide decks. This deck is titled, "Cap and Trade – Options Deck – Final for May 16.18" and was prepared by the Legal Services Branch to provide legal advice on ending Ontario's Cap and Trade Program.

[67] The ministry states that Records 12, 22 and 24 consist of versions of the slide deck in Record 6. The ministry states that the Legal Services Branch began generating the slide decks in order to provide the required legal advice regarding legal options for ending the Cap and Trade Program and that all of the slide decks contain legal advice throughout.

[68] The ministry states that Record 7 consists of an email correspondence chain from Crown Law Office - Civil, Ministry of the Attorney General and the legal director of MECP to senior management at MECP, providing a legal opinion, Record 8, in response to questions from the ministry.

[69] The ministry states that Record 10 consists of draft decision points/options written by Crown counsel regarding the wind up of the Cap and Trade Program to be provided to the Assistant Deputy Minister's Office and Deputy Minister's Office. This document was prepared for the purpose of providing legal advice and to assist in formulating instructions for the drafting of a regulation to wind up the Cap and Trade Program. It submits that solicitor-client privilege has been found to apply to communications related to the seeking, formulating or giving of instructions and legal advice in the legislative drafting process.[16]

[70] The ministry states that Record 18 consists of Legal Services Branch's comments and advice to the Climate Change and Resiliency Division on a draft information

[16] The ministry relies on Order PO-1663.

summary that includes legal advice, setting out a proposed approach to ending the Cap and Trade Program and a comparison of policy options for consideration. It states that Record 18 is the attachment to an email from ministry counsel within Record 17, and it provides review comments from Crown counsel.

[71] The ministry states that Records 17, 21, 23, 25, 27 and 29 consist of e-mail correspondence between ministry counsel and ministry staff, including CCRD's Assistant Deputy Minister and others. The correspondence is related to the seeking, formulating and giving of legal advice, including correspondence in which legal advice is sought, correspondence in which information is sought and provided to counsel to inform the formulation of legal advice, and correspondence in which legal advice is provided.

[72] The ministry further states that the legal advice in Records 23 and 25 is related to options for winding down the Cap and Trade Program, and the drafting and development of required legislation and regulations. It submits that the communications in these two records fall within the continuum in which Crown counsel tenders advice and it is therefore subject to solicitor-client privilege.

[73] The appellant submits that the ministry has not met its burden of proof under section 53[17] to show that the section 19 exception applies. His submission on section 19 reads:

> Just because a document may refer to a comment by a legal professional does not necessarily mean that comment is subject to solicitor-client privilege. For example, some of these documents appear to have been widely circulated within the government, thus undermining the expectation of confidence, the claim of solicitor-client privilege and the purposes for the exemption.

[74] In reply, the ministry states that the records withheld under section 19 consist of a continuum of communications in which legal advice and opinions were requested or provided. It further states that the communications in this case were shared in confidence among ministry staff working together with a common interest, namely to provide advice on options, considerations and recommendations for implementation of the incoming government's commitment to end Ontario's Cap and Trade Program. As such, it submits that the circulation within government of legal advice does not constitute a waiver of solicitor-client privilege

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[17] Section 53 reads:

> Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head.

Analysis/Findings

[75] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[76] The ministry claims that the records at issue contain both common law and statutory solicitor-client communication privileged information.

[77] Solicitor-client communication privilege under branch 1 protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[18] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[19] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[20]

[78] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[21]

[79] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[22] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[23]

[80] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[81] Records 12, 22 and 24 consist of versions of the slide deck in Record 6. All of these slide decks contain confidential legal advice provided by ministry counsel to the Deputy Minister about ending the Cap and Trade Program and I find that they are subject to both sections 19(a) and (b).

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[18] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[19] Orders PO-2441, MO-2166 and MO-1925.
[20] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[21] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[22] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[23] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[82] I agree with the ministry that Record 8 is a memorandum written by counsel at the Crown Law Office - Civil regarding the "Wind-Up of Cap and Trade Program". It consists of confidential legal advice that was sought from counsel at the Crown Law Office - Civil by the ministry's Legal Services Branch, and includes legal opinions and analysis. It clearly contains legal advice and is subject to both branch 1 and branch 2 solicitor- client communication privilege in sections 19(a) and (b).

[83] I find that Records 5 and 7 are subject to solicitor-client communication privilege as part of the continuum of communication between solicitor and clients for the purpose of giving and receiving legal advice. They are cover emails to Records 6 and 8 respectively.

[84] I agree with the ministry that Record 10 contains draft decision points/options written by ministry counsel regarding the wind up of the Cap and Trade Program, which was to be provided to the Assistant Deputy Minister's Office and Deputy Minister's Office. I find that Record 10 was prepared for the purpose of providing legal advice and to assist in formulating instructions in relation to the drafting of a regulation to wind up the Cap and Trade Program and that, accordingly, section 19 applies to it.

[85] Based on my review of Record 18, I also agree with the ministry that it contains the ministry's Legal Services Branch's comments and advice to CCRD on a draft information summary setting out a proposed approach to ending the Cap and Trade Program.

[86] I also agree with the ministry that the information at issue in Records 17, 21, 23, 25, 27 and 29 consists of email correspondence containing legal advice exchanged between ministry counsel and ministry staff, including CCRD's Assistant Deputy Minister and others.

[87] Therefore, I find that Records 5 to 8, 10, 12, 17 (pages 106-138) 18, 21 (pages 193-197), 18, 21 (pages 193-197), 22 to 24, 25 (pages 225-228 and 230-234), 27 and 29 are subject to sections 19(a) and (b) as containing solicitor-client communication privileged information. These records were circulated between ministry lawyers as counsel and Ontario government staff as clients and form part of the continuum of communication between them.

[88] Although some of these records were circulated between legal counsel and various Ontario government staff, I find that the privilege in these records has not been waived or lost. Under the common law, solicitor-client privilege may be waived. The statutory privilege in section 19 can also be lost through waiver.[24]

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[24] See discussion above under Branch 1, "Loss of Privilege." Also, see Order PO-3627 and *Ontario (Attorney General)* v. *Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[89] An express waiver of privilege will occur where the holder of the privilege,

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[25]

[90] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[26]

[91] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[27] However, in this case, the records that I have found subject to sections 19(a) and (b) were not disclosed to outsiders but circulated within the Ontario government to individuals involved in the process of ending the Cap and Trade Program.

[92] Records 5 to 8, 10, 12, 17 (pages 106-138), 18, 21 (pages 193-197), 18, 21 (pages 193-197), 22 to 24, 25 (pages 225-228 and 230-234), 27 and 29 are exempt under sections 19(a) and (b), subject to my review of the ministry's exercise of discretion.

Issue D: Does the discretionary advice or recommendations exemption at section 13(1) apply to Record 12a?

[93] The remaining record at issue is Record 12a, for which the ministry has claimed the application of section 13(1). This section reads:

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

Representations

[94] The ministry submits that section 13(1) applies to Record 12a as disclosure would reveal the substance of the advice or recommendations or policy options provided by its staff in the course of their duties. It submits that if these records were disclosed, they would permit the drawing of accurate inferences related to the advice and recommendations provided by the ministry's staff.

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[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[26] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[27] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

[95] The ministry states that Record 12a consists of a document written by the former Director, Cap and Trade Branch, that was used to support the Assistant Deputy Minister in a collaborative project with the Financial Instruments Policy Unit. It states that this document outlines policy options and considerations for the process of ending the Cap and Trade Program with respect to compliance obligations and, further, that the document was prepared early in the process of developing advice on this matter.

[96] The ministry submits that the exception to section 13(1) in section 13(2)(a) (factual material) does not apply to the record as it consists of an evaluative assessment of the possible options and considerations by ministry staff. It also submits that the record does not fall in the other categories of records excepted under section 13(2).

[97] The appellant states that the Supreme Court of Canada found in *John Doe v. Ontario (Finance)*[28] that the section 13(1) exemption applies to "policy options," which are defined as "lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made."

[98] He submits that the government's decision to end Ontario's cap-and-trade system was made long before the election and that there is no evidence that any alternative course of action was ever deliberated upon.

[99] The appellant disputes the ministry's that the record at issue "assess[es] or describe[s] the potential impacts or risks of the Progressive Conservative Party of Ontario's proposals to cancel Ontario's cap-and-trade system and withdraw from the joint carbon market with Quebec and California" and says that it cannot, therefore, be considered advice or recommendations. He submits that the record contains "factual material" or "impact studies" or other such types of documents whose disclosure is explicitly mandated to be disclosed under the exceptions to section 13(1) in section 13(2).

Analysis/Findings

[100] 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.[29]

[101] "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.

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[28] *John Doe v. Ontario (Finance)*, 2014 SCC 36.
[29] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[102] "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.[30]

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

[104] 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.[31]

[105] 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.[32]

[106] 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).[33]

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

- factual or background information[34]

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[30] See above at paras. 26 and 47.
[31] 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, 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.
[32] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[33] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[34] Order PO-3315.

- a supervisor's direction to staff on how to conduct an investigation[35]
- information prepared for public dissemination.[36]

[108] I agree with the ministry that Record 12a contains advice or recommendations as described by it in its representations. This record was prepared by ministry staff and outlines policy options and considerations for the process of ending the Cap and Trade Program with respect to compliance obligations. As set out above, 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.

[109] I find that the exceptions in section 13(2) to section 13(1) do not apply. In particular, I note that under section 13(2)(a), factual material is not exempt under section 13(1). However, I find that the information that I have found subject to section 13(1) is not background or factual information as claimed by the appellant. Therefore, this record is exempt under section 13(1), subject to my review of the ministry's exercise of discretion.

Issue E: Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[110] The sections 13(1) and 19 exemptions are discretionary and permit 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.

[111] 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.

[112] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however,

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[35] 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.).
[36] Order PO-2677.
[37] Order MO-1573.

substitute its own discretion for that of the institution.[38]

[113] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

- 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
- 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

[114] The ministry states that it understands that any decision to withhold information must conform to the "policies, objects and provisions" of the *Act*.

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[38] Section 54(2).
[39] Orders P-344 and MO-1573.

[115] Concerning section 13(1), the ministry notes that the purpose of the exemption is to protect information such that "persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure."[40] The ministry states that:

> [T]he information withheld is sensitive as the information is recent, the relative current timeframe of the records is from 2018. The sensitivity of the topic is evident from within these records and extends to the information that meets the criteria for exemption under section 13(1). There is a strong public interest in ensuring that ministry employees can provide advice freely and frankly. Application of the exemption in section 13(1) is especially important in protecting this interest when, as here, the advice is dealing with a high profile, contentious matter.

[116] Concerning section 19, the ministry states that it has chosen to exercise its discretion to respect the confidentiality of the solicitor-client privilege.

[117] Noting that the rationale for solicitor-client privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation, the ministry states:

> In this case, Crown counsel was providing highly sensitive legal advice in relation to complex and high profile issues. There is a high degree of public interest in permitting the government to freely seek legal advice and permitting legal advice to be sought and provided in a frank and candid manner. The ministry has therefore exercised its discretion to withhold these records pursuant to section 19 of the *Act* to maintain confidentiality of these internal communications and to protect the high public interest in maintaining the confidentiality of the solicitor-client relationship.

[118] The appellant submits that there is no evidence that MECP has exercised its discretion under sections 13(1) and 19 in a manner that is consistent with the purposes and principles of *FIPPA*.

Analysis/Findings

[119] Based on my review of the records and the parties' representations in their entirety, I find that the ministry exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[120] I find that the ministry properly considered the purpose of the sections 13(1) and 19 exemptions and the purposes of the *Act*. I am satisfied that the ministry did not

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[40] The ministry cites Orders P-1690 and PO-2554.

consider irrelevant factors or exercise its discretion in bad faith.

[121] Therefore, I am upholding the ministry's exercise of discretion. As the appellant has raised the application of the public interest override in section 23, I will consider whether this applies to Record 12a, which, if responsive to the appellant's request, I have found exempt under section 13(1).

[122] Section 19 is not listed as one of the exemptions that may be overridden by section 23. Therefore, I uphold the denial of access under section 19 to Records 5 to 8, 10, 12, 17 (pages 106-138), 18, 21 (pages 193-197), 18, 21 (pages 193-197), 22 to 24, 25 (pages 225-228 and 230-234), 27 and 29.

Issue F: Is there a compelling public interest in disclosure of Record 12a that clearly outweighs the purpose of the section 13(1) exemption?

[123] 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.

Representations

[124] The ministry states that Record 12a is an early draft of advice, produced early in the process of the ministry developing advice on this matter. It states:

> As the Supreme Court noted in *John Doe v. Ontario (Finance)* (2014 SCC 36), the nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. Preserving an effective and neutral public service requires protecting this draft advice in order to ensure that the process of developing advice can be done freely and frankly. It is the ministry's opinion that there is not a compelling public interest in the disclosure of this draft advice that clearly outweighs the purpose of the exemption.

[125] The appellant submits that there is a compelling public interest that clearly outweighs the purposes of the section 13(1) exemption. He states:

> The abrupt cancellation of cap-and-trade rendered billions of dollars worth of carbon allowances worthless, violated an international agreement with California and Quebec governing how Ontario could withdraw from the common carbon market, and disrupted investments and other plans of businesses participating in the cap-and-trade system. Legal action remains a possibility, depending on the outcome of the upcoming federal election

> and the provincial government's court challenge of the federal carbon tax backstop.
>
> On top of the financial risks, there are considerable environmental risks of cancelling a policy to mitigate the impacts of climate change, considered to be one of the biggest challenges facing the world, according to numerous public polls.

Analysis/Findings

[126] I have found that section 13(1) applies this record, which is a one-page document titled "Compliance Obligation based on Matching - January 2017 to June 30, 2018."

[127] 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.

[128] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[41]

Compelling public interest

[129] 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.[42] 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.[43]

[130] A public interest does not exist where the interests being advanced are essentially private in nature.[44] Where a private interest in disclosure raises issues of

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[41] Order P-244.
[42] Orders P-984 and PO-2607.
[43] Orders P-984 and PO-2556.
[44] Orders P-12, P-347 and P-1439.

more general application, a public interest may be found to exist.[45]

[131] A public interest is not automatically established where the requester is a member of the media.[46]

[132] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[47]

[133] Any public interest in *non*-disclosure that may exist also must be considered.[48] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[49]

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

- the records relate to the economic impact of Quebec separation[50]
- the integrity of the criminal justice system has been called into question[51]
- public safety issues relating to the operation of nuclear facilities have been raised[52]
- disclosure would shed light on the safe operation of petrochemical facilities[53] or the province's ability to prepare for a nuclear emergency[54]
- the records contain information about contributions to municipal election campaigns[55]

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

- another public process or forum has been established to address public interest considerations[56]

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[45] Order MO-1564.
[46] Orders M-773 and M-1074.
[47] Order P-984.
[48] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[49] Orders PO-2072-F, PO-2098-R and PO-3197.
[50] 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.).
[51] Order PO-1779.
[52] 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.) and Order PO-1805.
[53] Order P-1175.
[54] Order P-901.
[55] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[57]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[58]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[59]
- the records do not respond to the applicable public interest raised by appellant[60]

[136] Record 12a outlines policy options and matters to be considered in the process of ending the Cap and Trade Program and, according to the ministry, was produced early in the process of developing advice on this matter.

[137] The appellant has not submitted that there is a compelling public interest in the disclosure of the information contained in Record 12a, which contains options considered early on in the process to end the Cap and Trade Program. Nor can I ascertain the same from my review of Record 12a.

[138] I find that the appellant has not demonstrated that there exists a rousing strong interest or attention why there is a public interest in knowing these options considered early on in the process. Although the appellant is concerned about the abruptness of the cancellation of the Cap and Trade Program, I do not have sufficient evidence to find that Record 12a responds to this public interest raised by appellant. Therefore, I find that there is not a compelling public interest in disclosure of Record 12a.

[139] Accordingly, as I found that there is not a compelling public interest in disclosure of Record 12a, it is not necessary for me to consider whether there is a public interest in non-disclosure of this record, nor whether a compelling public interest in disclosure of Record 12a clearly outweighs the purpose of the section 13(1) exemption in this case.

[140] As the public interest override in section 23 does not apply, Record 12a is exempt under section 13(1).

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[56] Orders P-123/124, P-391 and M-539.
[57] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[58] Orders M-249 and M-317.
[59] Order P-613.
[60] Orders MO-1994 and PO-2607.

ORDER:

1. I order the ministry to exercise its discretion under section 12(2)(b) in deciding whether to seek the consent of Cabinet to release Records 9 and 30, which I have found qualify for exemption under the introductory words of section 12(1) of the *Act*. I also order the ministry to provide me and the appellant with an explanation of the factors considered in the exercise of discretion by **December 17, 2020**.

2. I uphold the ministry decision to deny access to the remaining records.

3. The timelines in order provisions 1 and 2 may be extended if the ministry is unable to comply in light of the Covid-19 situation. I remain seized to consider any resulting extension request and any outstanding issues relating to order provision 1.

Original signed by
Diane Smith
Adjudicator

November 17, 2020