Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4261-F

Appeal PA17-494

Ministry of the Environment, Conservation and Parks

Order PO-4178

May 10, 2022

**Summary:** In Reconsideration Order PO-4214-R the adjudicator decided to reopen appeal PA17-494 because of a defect in the adjudication process leading to Order PO-4178. Following the receipt of additional representations from the ministry, in this final order, the adjudicator finds that the public interest applies to override the section 13(1) exemption and orders the ministry to provide the records at issue to the appellant.

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

**Orders and Investigation Reports Considered:** Orders PO-1688, PO-2054-I, PO-2172 and PO-2557.

**Cases Considered:** *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3.

## OVERVIEW:

[1] This appeal concerns a request by the appellant, a lawyer at a public interest environmental law group, to the Ministry of the Environment and Climate Change, now the Ministry of the Environment, Conservation and Parks (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was subsequent to the ministry's review under the *Environmental Bill of Rights*, 1993 (the

*EBR*) relating to Ontario Regulation 903 (Wells).[1] The appellant requested:

1. The 2014 gap analysis/risk assessment prepared by ministry staff to identify and prioritize the 32 issues that were brought forward for consideration during the ministry's review of Regulation 903.

2. The completed surveys, questionnaires and workbooks prepared by ministry staff in relation to the Regulation 903 gaps/risks identified in the above-noted document and considered during the ministry's review of Regulation 903.

[2] On August 20, 2021, I issued Order PO-4178 where I upheld the ministry's decision that the withheld information is exempt under section 13(1). However, I also found that the public interest override provision in section 23 of the *Act* applied to that same information and ordered the ministry to disclose it to the appellant.

[3] After Order PO-4178 was issued, the ministry contacted the IPC and it became apparent that the ministry had not been provided with a copy the appellant's representations and an opportunity to respond to the same during the inquiry. In Reconsideration Order PO-4214-R, I found that there had been a defect in the adjudication process. I then provided the ministry with an opportunity to respond to the appellant's representations on the issue of whether there was a compelling public interest that outweighs the purpose of the section 13(1) exemption.

[4] In this final order, I find that there is a compelling public interest in disclosure of the information withheld under section 13(1) that outweighs the purpose of that exemption. Accordingly, I order that the information be disclosed to the appellant.

## RECORDS:

[5] The records relate to the ministry's gap analysis/risk assessment concerning the issues considered during the ministry's review of the Regulation. They include the risk analysis and 12 workbooks relating to the review.

[6] Records 3 to 24 contain the severed information that the ministry claims is exempt under section 13(1) with the remainder of the information being disclosed, except for information that is identified as personal information that is not at issue in this appeal.

## DISCUSSION:

[7] The sole issue remaining in this appeal is whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section

[1] See background reproduced below from Order PO-4178.

13(1) exemption.

## Background

[8] Both the ministry and the appellant provided a background to the request which I set out here to provide context for the public interest discussion below.

[9] In 2013, the appellant submitted to the ministry an application for a review under the *Environmental Bill of Rights*, 1993 (the *EBR*) relating to Ontario Regulation 903, Wells (the Regulation). In the application, the appellant indicated that the current wells framework is "incomplete, outdated, and inadequate to protect the environment and public health and safety," citing issues related to licensing, definitions, exemptions, consistency of requirements, and the need for additional requirements.

[10] The ministry notes that under section 67 of the *EBR*, following an application for review, the minister is required to decide whether to undertake a review and to give notice of the decision to the applicant. The ministry submits that in order to determine whether the public interest warrants a review, all 32 issues raised by the appellant were considered in accordance with the *EBR*. Ultimately, the ministry confirms that it advised the appellant that it would instead undertake a focused review of 24 issues. According to the ministry, the purpose of the focused review was to assess the selected issues raised by the appellant in Ontario's existing wells legislative and regulatory framework, and identify preliminary options for addressing key gaps, if required.

[11] The ministry submits that the review included participation from five divisions of the ministry, including a technical and policy working group experienced in delivering the wells program. The ministry submits that it engaged seven other ministries, twenty-two key stakeholder organizations, Source Protection Committee Chairpersons, the Ontario Drinking Water Advisory Council, First Nations organizations, the well industry and interested organizations to inform them of the review and seek their input on the issues under review.

[12] The ministry submits that its staff working groups conducted technical reviews of the 24 issues, recording their work in 12 workbooks, including such matters as experience or evidence of the issue by ministry staff, advice and recommendations on gaps if any, priorities and preliminary options to address any gaps.

[13] The ministry submits that it completed the review of the Regulation and related sections of the *Ontario Water Resources Act* (the *OWRA*) and advised the appellant of the results by notice of outcome, as required under the *EBR*. The ministry notes that the review found that there are opportunities to enhance Ontario's existing wells program through potential improvements to regulatory and non-regulatory components of the wells program for some of the issues raised by the appellant.

[14] The ministry notes that some program improvements were made but it did not move forward with proposing any amendments to the Regulation.

[15] The appellant provided an affidavit sworn by the executive director and counsel of the organization, a public interest law group that represents vulnerable communities in the courts and before tribunals on a wide variety of environment issues. In the affidavit the director states that the appellant made an original *EBR* application in 2003. However, the director submits that the ministry did not conduct the requested review of the Regulation. The director states that at the time, the ministry referred her organization's concern about insufficient well disinfection requirements to the Ontario Drinking Water Advisory Council (ODWAC) for consideration. The director notes that in its annual report filed with the Ontario Legislature, the independent Environmental Commissioner of Ontario (the ECO) was highly critical of the ministry's refusal to revise the Regulation as requested by the appellant as illustrated in the following excerpt:

> The well regulation should require best construction practices, as recommended by Mr. Justice O'Connor. However, concerns have been raised (for example, through an EBR application ... ) that the new well regulation, as currently drafted, does not meet those intentions, especially with respect to private domestic wells. For instance, there are concerns that the regulation does not require well constructors to verify, through water testing, that new wells have indeed been disinfected. Nor is there a requirement that well contractors disinfect private wells after carrying out repairs ...
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> RECOMMENDATION 11: The ECO recommends that MOE ensure that key provisions of the Wells Regulation are clear and enforceable, and that the ministry provide a plain language guide to the regulation for well installers and other practitioners.[2]

[16] The director notes that in subsequent annual reports, the ECO has expressed concern about the ministry's "continuing failure to update and improve the 'severely flawed' Regulation 903, which 'endangers public health and impedes environmental protection.'" In the 2005/06 annual report, the ECO stated:

> The ECO is very disappointed that MOE has shown itself unable or unwilling to resolve widespread and well-founded concerns about a regulation that is so vital to Ontario's environmental protection and drinking water safety.[3]

[17] The director states that in light of the ministry's continuing inaction on disinfection and other significant issues, the appellant filed its second EBR application for review of the Regulation. The director states that when the ministry informed the appellant of the outcome of the review, it indicated that it would not pursue the various legislative and regulatory improvements identified in the application for review. The

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[2] Environment Commissioner of Ontario 2003/04 annual report, page 115.
[3] Environment Commissioner of Ontario 2005/06 annual report, pages 53-54.

director states that the ministry's preference was to propose some minor changes to its non-binding guidance manual for water wells.

[18] The director indicates that it advised the ministry that the notice of outcome was inadequate and non-responsive to the issues raised in the application and a meeting was scheduled to further discuss the matter. The director submits that it was at the meeting that the ministry revealed the existence of certain records (e.g. Regulation 903 gap analysis, workbooks, surveys etc.). The director submits that the ministry initially agreed to provide this information but ultimately provided only some of the requested records resulting in the access request which is the subject of this appeal.

[19] In Order PO-4178, I found the information at issue was exempt under the advice and recommendations exemption at section 13(1) of the *Act*. As I found the information at issue exempt, I must also consider the application of the public interest override raised by the appellant. The ministry has now received the appellant's representations on the public interest issue and has had the opportunity to make its own responding representations on that issue.

### ***Public interest override***

[20] 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.

[21] 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.

[22] 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. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[4]

[23] A public interest does not exist where the interests being advanced are essentially private in nature.[5] Where a private interest in disclosure raises issues of

[4] Order P-984.
[5] Orders P-12, P-347, P-1439.

more general application, a public interest may be found to exist.[6]

[24] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[7]

[25] Any public interest in *non*-disclosure that may exist also must be considered.[8] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[9]

[26] 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[10]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[11]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[12]
- the records do not respond to the applicable public interest raised by appellant.[13]

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

[28] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[14]

## Representations

### *The appellant's representations*

[29] The appellant submits that the two-part test for 23 is satisfied. First, he submits that there is a compelling public interest in disclosure of the records, particularly because they identify substantive problems under the Regulation that, according to the

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[6] Order MO-1564.
[7] Order P-984.
[8] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[9] Orders PO-2072-F, PO-2098-R and PO-3197.
[10] Orders P-123/124, P-391, M-539.
[11] Orders P-532, P-568.
[12] Order P-613.
[13] Orders MO-1994 and PO-2607.
[14] 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.).

ministry's own technical staff, pose significant risks to environmental quality and public health and safety. The appellant submits that disclosure of the withheld information will serve the *Act*'s central purpose of shedding public light on the operations of the ministry, particularly its land and water policy branch. The appellant submits that enabling public scrutiny of the information contained in the records will assist Ontarians in expressing their opinions in relation to this provincially significant matter.

[30] Second, the appellant submits that the overwhelming public interest in disclosing the withheld information clearly outweighs the "administrative" purpose of the section 13(1) exemption, which is to facilitate free and frank discussions between public servants and governmental decision makers. The appellant submits that the desire to shield bureaucratic deliberations about regulatory issues does not trump the paramount objective of safeguarding Ontarian's health against risks known to ministry staff, but not publicly disclosed. The appellant submits that if he receives the withheld information, he intends to utilize and publicly disseminate the information as part of his law group's ongoing efforts to improve and strengthen the Regulation, and to educate Ontarians about significant gaps in the Regulation.

[31] The appellant refers to Order PO-2557 where the adjudicator found that a compelling public interest exists regarding the disclosure of records pertaining to water quality. The appellant submits that the same reasoning in that appeal should be applied in this instance and sets out the following from that order:

> I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in this appeal, because they also deal with the safety of public drinking water.

[32] The appellant submits that the withheld information clearly deals with well water quality, environmental risks and public health and safety under the *OWRA* and the Regulation, and therefore should be disclosed to ensure that the "maximum amount of information with respect to programs to deliver safe drinking water" is provided to Ontarians.

[33] The appellant also submits that disclosure of the withheld information will shed considerable light on how (or on what basis) ministry staff decided to "scope" the EBR review and why it is refusing to implement long-overdue legislative and regulatory reforms to the Regulation. The appellant submits that disclosure is necessary to achieve the governmental accountability objective of the EBR, as well as the public right of access to governmental records pursuant to the *Act*.

[34] The appellant also submits that disclosure of the withheld information would help address public health and safety concerns by alerting well owners about the substantive

shortcomings in the Regulation identified by the ministry's own technical staff, particularly in relation to well disinfection requirements. The appellant submits that armed with this information, well owners can then determine if they need to take further or better steps to protect themselves from well-related risks to human health or the environment.

[35] In the affidavit provided by the appellant from its executive director and counsel, the director states that for decades their law group has advocated the timely implementation of effective laws, regulations and policies to protect drinking water sources within Ontario and across Canada. The director states that she and the appellant were co-counsel for the Concerned Walkerton Citizens at parts one and two of the Walkerton Inquiry. The director also states that their law group has a lengthy history of involvement in the development of *Ontario's Safe Drinking Water Act*, 2002, *Nutrient Management Act*, 2002, and *Clean Water Act*, 2006, including the numerous regulations, policies, manuals and guidelines under these provincial laws.

[36] The director states that their law group's water-related work has identified the need to improve and strengthen the Regulation. The director states that the Regulation, administered by the ministry, is intended to protect the environment and public health by establishing provincial standards for the drilling, construction, cleaning, maintenance, and decommissioning of wells throughout Ontario. The director submits that millions of Ontarians who use or rely upon domestic wells for drinking water and these private wells are not covered by the source protection plans approved under the *Clean Water Act* to safeguard municipal water supplies. The director states that the Regulation is therefore the only line of regulatory defence for Ontarians who are wholly dependent upon private wells for potable water.

[37] The director notes that the application for review raised serious environmental and public health concerns about the ongoing inadequacy of key provisions of the *OWRA* and the Regulation, thereby posing considerable risks to the numerous Ontarians who used domestic wells. The director states that upon completion of the ministry's review, it informed their organization that it would not pursue the various legislative and regulatory improvements identified in the application. The director states that the ministry's general preference was to merely propose some minor changes to the ministry's non-binding guidance manual for water wells.

### *The ministry's initial representation*

[38] The ministry submits that, in the circumstances of this appeal, there is no public interest that clearly outweighs the purpose of the section 13(1) exemption. It submits that the withheld information reflects the opinions and advice of ministry staff including technical, policy, operational and field staff. Referring to the workbooks, the ministry submits that their purpose was to solicit candid opinions and advice from staff regarding potential gaps between what the regulatory regime provides and what is needed from the regulatory regime and potential solutions.

[39] The ministry reiterates that the advice in the withheld information remained in draft form as it did not go through an approval process. It submits that it therefore represents the perspective and advice of the collective of public servants noted in the record. The ministry submits that the policy branch responsible for the Wells EBR Review together with senior management in the ministry, used this advice to develop a recommendation to the minister on the ministry's response to the Wells EBR Review. It submits that the outcome of the Wells EBR Review on a particular issue is not necessarily the same as the advice contained in these records, which was considered, and as with any policy and program development, there were different perspectives and considerations that needed to be weighed in developing the outcome of the Wells EBR Review.

[40] The ministry submits that it is imperative that staff have space to critically consider the issues and to provide full and frank advice and not simply advice that they think will be well received. It submits that protecting records such as these, which have as their purpose soliciting such advice from front-line staff, is essential to ensuring that candid advice can continue to be obtained.

[41] In its reply to the ministry's initial representations, the appellant reiterates that the information identifies substantive problems under the Regulation that, according to the ministry's own technical staff, pose significant risks to environmental quality and public health and safety.

***The ministry's reply representation***

[42] The ministry submits that, in the circumstances of this appeal, there is no compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption. The ministry notes that in his representations, the appellant characterizes Regulation 903 as the only line of regulatory defence for Ontarians who rely on private wells. The ministry submits that this statement ignores that the Regulation exists within an array of legislation and regulations that provide for the protection of water resources in Ontario, including the *Ontario Water Resources Act*, the Record of Site Condition Regulation (O.Reg. 153/04), *Environmental Protection Act*, *Clean Water Act*, 2006, *Nutrient Management Act, 2002*, *Pesticides Act*, Provincial Policy Statement, *Planning Act*, *Municipal Act, 2001*, and *Building Code Act, 1992*. In reviewing the issues under the EBR review of the Regulation, the ministry submits that it considered this array of laws and policies.

[43] The ministry refers to the appellant's submission that the records at issue (i.e. workbooks) were used to scope the issues that were examined in the EBR review and that disclosure of the records would shed light on how the ministry staff decided to scope the EBR review. This ministry submits that this is not accurate because of the records at issue in relation to the application of section 23, only record 3 actually relates to the decision on scoping the issues that would be examined in the EBR review. It submits that the majority of the records at issue consist of advice contained in

workbooks. The ministry refers to its earlier submission that these records were produced after the decision under section 67 of the EBR was made to undertake a review on 24 of the 32 issues raised by the EBR Application for Review and relate to the 24 issues identified for the scoped review.

[44] The ministry acknowledges that there is generally a compelling public interest in information respecting drinking water and potential for impacts to drinking water, but notes that in Order PO-2557, referenced by the appellant, the adjudicator found a compelling public interest in programs to deliver safe drinking water, while the records at issue here relate to private wells rather than public drinking water. The ministry refers to Order PO-2054-I, where it submits that the adjudicator held that a broad public interest in disclosing records relating to a particular topic does not necessarily mean that the compelling public interest extends to any and all records or information in any way connected to that topic. The ministry submits that in Order PO-2054-I, the adjudicator noted that there was a well-established public interest in disclosing records concerning events that took place at Ipperwash in September 1995, however found that there was not a compelling public interest in the disclosure of a number of related records.

[45] The ministry submits that in this case there is not a compelling public interest in disclosure of the particular records at issue as the information in the records, taken out of context, could be misleading. It submits that the advice in the records is in draft form and was not intended for public consumption and, therefore, was not fully factually vetted and statements not fully contextualized. It submits that these records were intended to be internal documents and consist of one input into the review. It submits that the workbooks also, therefore, do not reflect subsequent analysis and findings. For example, the ministry submits that a workbook may refer to something as a regulatory gap based on an example of where a compliance issue was encountered, however on a full review, it was found that this purported gap was not a systemic issue. The ministry submits that as a regulatory ministry it sees a wide range of facts on the ground and those working on preparing the workbooks may have identified a challenge that they had run into with compliance, and labelled it a regulatory gap. However, when viewed at a program level, the ministry submits, the issue is better understood as a compliance challenge arising out of certain facts, rather than a regulatory gap.

[46] The ministry submits that it is aware of past orders in relation to section 17(1) (third party information) where the IPC has suggested that the potential for misunderstanding is not a reason for non-disclosure, as supplemental information could be provided to counter such concerns (e.g. Order PO-3567). However, the ministry submits that was in the context of the application of specific exemptions, not section 23, which seeks to balance public interest against the purpose of the exemption. The ministry submits that this is a relevant consideration under section 23, particularly in light of the appellant's intended use of the records.

[47] The ministry notes the appellant's intention to use the records to publicly

disseminate the information to educate the public about the purported gaps in the regulatory regime identified by the ministry's own technical staff. The ministry submits that while disclosure under Part II of the *Act* is considered disclosure to the world, the intended use amplifies the above concern with disclosure of the records. The ministry submits that statements in the records would be presented as the opinions of ministry technical staff, however, may be misleading without the contextualization, recognition of limitations and careful wording to ensure the message is not misunderstood that staff might have thought necessary if the reader were someone other than their colleagues who share an understanding of the context.

[48] The ministry submits that while it could counter misunderstandings with supplemental information, that engages concerns about a chilling effect on provision of candid and frank written advice within government. The ministry points to the purpose of the section 13(1) exemption and notes that the intended use of the records, stated by the appellant in its representations, is to serve as the basis of public conversation. As such, the ministry submits that it would be in the position of publicly countering or disagreeing with what was said by an identified group of public servants.

[49] The ministry submits that staff involved in the workbooks might be led to feel that their ministry is publicly criticizing or undermining them. It submits that this can lead to divisions between colleagues who work in this area, as other public servants are put in the position of publicly disagreeing with their colleagues. The ministry submits that a safe space for frank and candid discussions is essential for allowing colleagues to work together on issues where there may be disagreement. The ministry submits that confidentiality is essential to having such spaces for discussion.

[50] The ministry submits that disclosure of these records and the subsequent use of the records can be anticipated to discourage public servants from documenting discussions and writing down critical analyses, out of fear that their comments may become public, leading to embarrassment, criticism by the ministry or reprisals. The ministry refers to the Supreme Court of Canada in *John Doe v. Ontario* where it commented that "[t]he advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship."[15] The ministry submits that confidentiality of advice to government ensures that these public servants have the ability to speak freely and provide meaningful feedback which is essential to enabling the civil service to carry out its duties.

[51] The ministry also notes that disclosure of the workbooks may unfairly attribute conclusions or statements in the workbooks to all of the public servants listed in the record, whereas some of the individuals may have been part of the work group for only part of the discussions. It also submits that differences in how the work groups operated also means that the workbooks may reflect varying levels of consensus within

[15] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, [2014] 2 S.C.R. 3.

the group of identified public servants.

[52] The ministry notes that the application of section 23 calls for the balancing of interests.[16] It submits that in light of the above risks associated with disclosure of the records at issue, together with the information already provided respecting the review of the Regulation, any public interest in disclosure of the records does not clearly outweigh the purpose of the exemption.

[53] The ministry points to significant risks with the disclosure of the records at issue, suggesting it would undermine the ability of public servants to engage in essential critical analysis and provide free and candid advice. It submits that the potential for the records to be misleading reduces the value of disclosure of the records, as disclosure unnecessarily risks misunderstanding of the issues and potentially detracting from public discourse on this topic. The ministry submits that these risks are unnecessary to take because of the information that has already been released respecting the conclusions of the review of the Regulation and the reasons for those conclusions.

[54] The ministry submits that the IPC has found that a significant factor in determining the application of section 23 is the degree to which public disclosure concerning the matter in issue has already taken place (e.g. Order M-381). It acknowledges the importance of conversations raised by the appellant respecting the regulatory regime for issues like wells which may have implications on human health. However, the ministry submits that the notice of outcome already provides a basis for these conversations which strikes the appropriate balance in facilitating public discussion of the government's decision making, while not undermining the ability of public servants to engage in full and frank discussion of policy issues.

[55] It submits that it is important to note that this is not a case where the ministry proposed a course of action and provided comments only in support of that proposed course of action. It refers to the notice of outcome that was prepared and provided to stakeholders, including the appellant.

[56] The ministry submits that the notice of outcome addresses each one of the issues for which a review was undertaken, identifying the results of the review. It submits that some issues were found by the review to already be addressed in the wells program; indicating that those conclusions and the rationale are set out in the notice of outcome.

[57] The ministry refers to a specific issue raised by the appellant concerning bacteriological sampling and submits that the notice of outcome indicates that there is no gap because: bacteriological sampling is a Best Management Practice in the wells manual, the Well Owner Information Package encourages bacteriological sampling and public health units offer free bacteriological testing and recommend testing at least

[16] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance v. Ontario (Information and Privacy Commissioner*), 1999 CanLII 1104.

three times/year. The ministry submits that it clearly explains its findings in respect of the purported gap, which enables the appellant and other stakeholders to engage in discussion with the ministry and the public regarding the ministry's decision on the review.

[58] The ministry submits that where the review identified an opportunity to enhance the wells program, that information was identified in the notice of outcome. It submits that the notice of outcome candidly identified areas where the review identified opportunities for improvement; these results were identified regardless of whether the ministry would subsequently propose changes to the Regulation or guidance material in response. The ministry submits that this enables the appellant and other stakeholders to engage in discussion with the ministry and the public regarding the ministry decision as to steps taken or not taken by the government to address these opportunities for improvement.

[59] The ministry submits that this detailed response provides transparency respecting its decision making on the review, facilitating public discussion of the government's decision making.

### *Sur-reply representations*

[60] The appellant was provided with the ministry's representations and invited to provide sur-reply representations. The appellant provided sur-reply representations and after reviewing them, I determined that they were mostly repeating earlier submissions and they will not be set out here in detail.

[61] The appellant submits that the ministry's reply representations regarding section 23 are not materially different from its initial representations. In particular, it submits that the ministry has not provided any persuasive legal, factual or policy grounds to justify the non-disclosure of the records. The appellant further submits that the ministry's reply representations do not dispute any of the facts set out in the affidavit the appellant provided with its initial representations. In the circumstances, he submits that this affidavit evidence should be accepted and relied upon in this appeal.

[62] The appellant submits that the ministry's reply representations fail to rebut the appellant's position that the public interest in disclosing the records clearly outweighs the purpose of the subsection 13(1) exemption. He submits that this is particularly true since the requested records deal with serious environmental risks and the safety of drinking water sources used by millions of Ontarians.

## Analysis and finding

[63] I have considered the representations of the parties, including the ministry's reply representations, and have reviewed the records at issue. In my view, and for the following reasons, I find that there is a compelling public interest in the disclosure of the withheld information in these records that outweighs the purpose of the section

13(1).

[64] As noted above, in considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government.

[65] The information at issue in Record 3 captures comments made by ministry staff during their risk analysis sessions concerning the 32 issues raised by the appellant in its EBR application. As noted by the ministry, the parts of this record that were withheld under section 13(1) consist of staff opinions and the evaluative analysis of the 32 issues and contains advice from ministry staff, experienced in delivering the wells program, to help guide the ministry's ultimate decision to undertake a focused review of 24 of the 32 issues.

[66] The remainder of the information withheld under section 13(1) (records 4 to 24) consists of the withheld information from 12 workbooks used by ministry staff over a period of time where they recorded their work concerning the technical review of the 24 issues identified to be reviewed. As noted by the ministry, each of the 12 workbooks identified the issues under review, team membership, context, jurisdictional and scientific scan information, identification of and options for any legislative/regulatory gaps, linkages to other issues and references. The parts of the information that the ministry withheld consist of advice or recommendations specifically related to legislative/regulatory gaps and policy options to address them.

[67] In its reply submissions the ministry submits that only record 3 relates to the decision on scoping the issues that would be examined in the EBR review and the majority of the records (the workbooks) were produced after the decision to undertake a review on 24 of the 32 issues raised by the appellant in the EBR application. I accept that record 3 relates to the decision on scoping the issues that would be examined in the EBR review and that the remaining information in the records consist of advice contained in workbooks produced after the decision under section 67 of the EBR was made, as submitted by the ministry.

[68] Although the appellant's EBR application identified what it viewed as 32 deficiencies in Regulation 903, the ministry undertook a review of 24 of these issues, and the records represent the ministry staff's review. Despite the ministry's submission that the advice remained in draft form without going through an approval process, it also submits that its policy branch, responsible for the EBR review, together with senior management, used this advice to develop a recommendation to the ministry on the response to the EBR review. I note the ministry's submission that it made some program improvements but did not amend any legislation or regulation following its review. I find that disclosure of the withheld information would serve the central purpose of shedding light on the operations of government because the ministry used this advice to develop its response to the EBR review.

[69] As noted by the appellant, the adjudicator in Order PO-2557 considered whether section 23 applied to records relating to the treatment of water in Wiarton, Ontario. The adjudicator states:

> … In May 2000, the drinking water system in the town of Walkerton became contaminated with deadly bacteria. Seven people died, and more than 2,300 became ill. The Ontario government subsequently appointed the Honourable Justice Dennis O'Connor to lead a Commission of Inquiry into the circumstances that led to the tragedy in Walkerton and to make recommendations with respect to the safety of public drinking water in Ontario.
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> After conducting his inquiry, Justice O'Connor released two reports that were widely praised and that led to the strengthening of the statutory regime governing public drinking water in Ontario. In the second part of his report, he emphasized the importance of transparency and providing citizens with access to information relating to the safety of public drinking water:
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> > … because of the importance of the safety of drinking water to the public at large, the public should be granted external access to information and data about the operation and oversight of the drinking water system. In my view, as a general rule, all elements in the program to deliver safe drinking water should be transparent and open to public scrutiny.
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> In short, I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in this appeal, because they also deal with the safety of public drinking water.

[70] In its reply representations, the ministry submits that Order PO-2557 found a compelling public interest in programs that deliver safe drinking water, while the records at issue in this appeal related to private wells rather than public drinking water.

[71] However, as referenced by the appellant in his initial representations, millions of Ontarians rely on private wells for their drinking water. After considering the ministry's submission, I do not agree with its distinction that since the records at issue relate to private wells, there is no public interest similar to one connected to a public drinking system, given the number of Ontarians who rely on private wells and their importance to the environment.

[72] In, Order PO-2172, the adjudicator considered the environmental and health and safety issues relating to the practice of underwater logging, in applying section 23 in the circumstances of that appeal. He wrote:

> A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues. In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:
>
> > … I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
> >
> > I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. …

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

> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.
>
> …

> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added in original]

[74] The ministry refers to Order PO-2054-I, where it submits that the adjudicator held that a broad public interest in disclosing records relating to a particular topic does not necessarily mean that the compelling public interest extends to any and all records or information in any way connected to that topic. In PO-2054-I, the adjudicator stated the following:

> Quite clearly, there is a well-established compelling public interest in disclosing records concerning the events that took place at Ipperwash in September 1995. However, it does not necessarily follow that this compelling public interest extends to any and all records or information that is in any way connected to these events. For example, the public interest in disclosing information that is only peripherally connected to the occupation itself, information already widely known or otherwise readily available to the public, or information created a significant time before or after the termination of the occupation may not be compelling, depending on their content and relationship to the actual incidents of September 1995. In my view, the information contained in each record must be examined to determine whether there is a compelling public interest in its disclosure, and the nature of the public interest may vary depending on the circumstances.

[75] I agree that any public interest in a record must be examined by looking at the record itself to determine whether there is a compelling public interest in its disclosure. In this appeal, I have reviewed the withheld information in the records and given the nature of the information, I find that it is not already widely known or otherwise available to the public and was created contemporaneously with the ministry's review.

[76] In considering the case law set out above, I agree that records that relate to the environment and specifically water safety, by their very nature, raise a public safety concern. Further, when considering the maximum disclosure principle established by the Walkerton Inquiry, the representations of the parties and the substance of the records themselves, I find that there is a compelling public interest in the disclosure of the withheld information to the appellant. Although the ministry submits that the Regulation exists within an array of legislation and regulations that it considered in its *EBR* review, it does not dispute the appellant's assertion that private wells in Ontario

are not covered by the Source Protection Plans under the *Clean Water Act*. Therefore, I accept that the Regulation is an important line of defence for Ontarians who are wholly dependent upon private wells for potable water.

[77] In making this finding, I also considered whether there is any public interest in non-disclosure of the information. In its reply representations, the ministry submits that the records are in draft form and were not intended for public consumption and therefore not fully factually vetted and statements not fully contextualized. The ministry submits that the potential for misunderstanding is a relevant consideration when considering the public interest, particularly in light of the appellant's intended use of the records. The ministry takes this position even though, it submits, the IPC has suggested that the potential for misunderstanding is not a reason for non-disclosure.[17]

[78] While the potential for misunderstanding may in some circumstances be a factor to consider when assessing whether a compelling public interest applies, I find that it is not a factor that should be given any weight in the present circumstances. The ministry has confirmed in its reply representations, its ability to correct any misinformation or misunderstanding that may result from the disclosure of the records. Further, the appellant has submitted, and I accept, that he is a staff lawyer at a public interest organization that specializes in environment law, and has extensive experience in drinking water safety generally and Regulation 903, in particular, and I find that in this circumstance there is less of a chance for misunderstanding.

### *Purpose of the exemption*

[79] I have found that there is a compelling public interest in disclosure of the records at issue. However, for section 23 to apply, it must also be shown that this compelling public interest outweighs the purpose of the exemption that has been claimed.

[80] The ministry submits that the purpose of the section 13(1) exemption is not outweighed by any potential public interest in the records. It submits that disclosure of the withheld information may be misleading as ministry staff thought the reader would be their own colleagues who share an understanding of the context. It submits that without contextualization and recognition of limitations the message may be misunderstood without careful wording. Since the appellant intends to disseminate this information publicly, the ministry submits that it will be in a position where it would have to clarify or publicly counter or disagree with what was said by an identified group of public servants. The ministry refers to the harm that staff involved in the workbooks may encounter as they may be led to feel that the ministry is publicly criticizing or undermining them and refers to the purpose of the exemption which is to permit the free and frank discussion of public servants.

[81] However, section 13(1) is subject to the public interest override at section 23. In

[17] Order PO-3567.

my view, if the Legislature did not intend information that qualifies for the section 13(1) to be disclosed in the public interest, it would not have included section 13(1) as one of the enumerated exemptions. Also, despite the ministry's representations, it has provided no factual basis upon which I can find or infer that harm will result from disclosure of the requested records. I also note that in *John Doe v. Ontario,*[18] referenced by the ministry, the issue of the public interest override was not before the Court.

[82] The ministry also submits that the notice of outcome that was prepared a result of the review addressed each of the issues undertaken in the review and identified the results of the review. In its reply, it further submits that this notice provides transparency respecting its decision making on the review, facilitating public discussion regarding the government's decision making. According to the ministry, the notice of outcome explains the review and findings including:

- A summary of the application
- The review process
- An overview of the wells program
- Proposed actions as a result of the review.

[83] However, in the affidavit provided by the appellant, the executive director of the appellant's organization states that it was the "incomplete, unintelligible and unacceptable nature" of the notice of outcome that originally prompted the appellant to file the request for the records at issue in this appeal. After receipt of same, the appellant attended a meeting with ministry staff where the existence of the records at issue in this appeal was revealed leading to the appellant's access request.

[84] I am not convinced that the notice of outcome adequately addresses each one of the issues undertaken in the review, as suggested by the ministry. In my review of the notice of outcome (provided by the appellant with his initial representations), it lists the issues identified by the appellant and provides limited discussion on the "opportunities to enhance regulatory and non-regulatory components of the Wells program." In my view, this notice of outcome does not sufficiently address the review and address the public interest considerations that the records at issue before me do.

[85] Despite my finding that the exemption at section 13(1) applies to the information at issue, in the circumstances of this appeal, I find that the compelling public interest outweighs the purpose of the exemption. The purpose of section 13(1) 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

[18] Cited above.

deliberative process of government decision-making and policy-making.[19] Although one of the central purposes of the Act is to shed light on the operations of government, section 13(1) serves to limit disclosure of advice or recommendations of public servants in this context. However, in my view, the information withheld under section 13(1) is clearly of considerable interest to the residents of Ontario and Regulation 903 has significant implications on the environment and the health and safety of a great number of Ontario residents. The appellant has indicated that if he receives the withheld information, he intends to utilize and publicly disseminate the information as part of his organization's ongoing efforts to improve and strengthen the Regulation, and to educate Ontarians about significant gaps in the Regulation. In my view, in the circumstances of this appeal, the public interest considerations in disclosure outweighs the purpose of the section 13(1) exemption.

[86] Therefore, I find the compelling public interest in disclosure of the information withheld under section 13(1) outweighs the purpose of the section 13(1) exemption.

[87] Accordingly, I will order that this information be disclosed to the appellant.

## ORDER:

1. I find that the public interest override in section 23 applies to the information in records 3 to 24 that the ministry withheld under section 13(1). Accordingly, I order the ministry to disclose this information to the appellant by **June 14, 2022**.

2. In order to ensure compliance with paragraph 1, I reserve the right to require the ministry to send me a copy of the pages that I have ordered to be disclosed to the appellant.

Original signed by: May 10, 2022
Alec Fadel
Adjudicator

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