Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1823

Appeal PA-000054-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to records relating to the profession of acupuncture and/or traditional Chinese medicine.

The Ministry acknowledged receipt of the request, but did not issue a decision letter within the required period of time. The appellant filed an appeal on that basis. That appeal was resolved during mediation when the Ministry issued an interim decision accompanied by a fee estimate and an index of records.

The appellant then appealed the Ministry's fee estimate and requested a fee waiver. The appellant also narrowed the scope of his request to include only Records 3, 4 and 29, as listed in the Ministry's index of records. That appeal was resolved during mediation when the Ministry decided to waive the fee. At that time, the Ministry also provided a final decision on access to Records 3, 4 and 29, granting partial access to Record 3, complete access to Record 4, while denying access to Record 29 in its entirety under the discretionary exemption in section 13(1) of the *Act* (advice or recommendations).

In its decision letter, the Ministry indicated that the information contained in Record 29 was similar to the information in the record that was the subject of Order PO-1709, which is currently the subject of an Application for Judicial Review by the Divisional Court. The Ministry indicated that it would reconsider its decision on access to Record 29 following the outcome of the judicial review of Order PO-1709.

The appellant appealed the Ministry's decision to deny access to Record 29 and parts of Record 3. During the mediation stage of this appeal, the appellant indicated that he was no longer pursuing access to the undisclosed portions of Record 3.

The Commissioner's office provided a Notice of Inquiry to the Ministry soliciting its representations on the application of the discretionary exemption in section 13(1) to Record 29. The Ministry was also invited to make submissions on the possible application of the mandatory exceptions to the exemption which are set forth in sections 13(2)(a)-(k) of the *Act*. In addition, the Ministry was requested to make direct reference to the findings made in Order PO-1709 with respect to the application of sections 13(1) and 13(2)(k) to Record 29.

The Ministry submitted representations in response to the Notice. In its submissions, the Ministry indicates that it is now prepared to disclose certain portions of Record 29 and provided me with a highlighted copy setting out those portions which it considers to be exempt under section 13(1). Because of the manner in which I will address the application of sections 13(1) and 13(2)(k) to Record 29, it is not necessary for me to seek the representations of the appellant in this appeal or address the proposed severances made by the Ministry to Record 29.

The only record remaining at issue in this appeal is Record 29, a report of the Health Professions Regulatory Advisory Council (HPRAC) to the Minister of Health entitled, "Advice to the Minister of Health, Acupuncture Referral" and dated December 1996.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

General Principles

Section 13(1) of the *Act* states:

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

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act* (Order P-233).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure 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 [Orders 24, P-1363 and P-1690].

Background to the Creation of Record 29

Record 29, entitled "Advice to the Minister of Health, Acupuncture Referral" was prepared by the Health Professions Regulatory Advisory Council (HPRAC) and forwarded to the Minister on December 19, 1996. HPRAC is established under section 7(1) of the *Regulated Health Professions Act*, S.O. 1991, c.18 (the *RHPA*) and its duties are outlined in section 11(1) of that statute. Section 12 of the *RHPA* provides that the Minister of Health may refer to HPRAC any issue included in sections 11(1)(a) to (d). Section 14 of the *RHPA* describes the function of HPRAC as being advisory only.

In the present circumstances, the issue of regulation/non-regulation of the Acupuncture profession was referred to HPRAC by the Minister along with a similar referral addressing the profession of Naturopathy and another pertaining to the practice of Traditional Chinese Medicine in conjunction with Acupuncture. HPRAC then undertook a lengthy and detailed review of each of these issues and

prepared reports to the Minister containing its advice based on its analysis of the submissions and comments which it received during the course of its review.

The report prepared by HPRAC with respect to the profession of Naturopathy was the subject of the appeal which gave rise to the issuance of Order PO-1709. As noted above, Record 29, the sole record at issue in this appeal, is the report prepared by HPRAC on the issue of the Acupuncture profession.

Ministry's representations on the Application of Section 13(1) to Record 29

The Ministry submits that Record 29 contains specific advice from HPRAC to the Minister on a course of action with respect to various aspects of the Acupuncture profession. In addition, it submits that portions of the record which do not refer specifically to advice or recommendations contain information whose disclosure would reveal the advice or recommendations. It argues that the disclosure of these portions of Record 29 would lead the reader to the conclusions which are contained in the actual advice section of the record. The Ministry urges that the disclosure of those portions of the record which discuss the pros and cons of various options available to the Minister would similarly reveal the advice and the final recommendations made in the report.

The Ministry indicates that the Minister ultimately neither accepted nor rejected the advice or recommendations contained in the record. Rather, in February 1999, the Minister requested the current HPRAC to reconsider the advice and recommendations which its predecessor had made in the report which is the record at issue. Accordingly, the Ministry urges that the deliberative process within the government on the steps to take (or not take) with respect to the Acupuncture profession is still in its intermediate stage. Responses to the original applicants in the referral were due to HPRAC in February 2000 and it is anticipated that HPRAC will again report to the Minister in January 2001.

The report which forms Record 29 in this appeal is currently being reviewed by HPRAC in conjunction with additional consultations. The Ministry suggests that the disclosure of Record 29 at this time would inhibit HPRAC from providing the broader advice to the Minister on acupuncture generally as set out in the referral letter and is required under the *RHPA*. Influence on HPRAC could also be brought to bear by stakeholders and public interest groups supporting or opposing the advice or recommendations contained in Record 29 (depending on their perspective) should it be dislcosed. The Ministry concludes its discussion of section 13(1) by adding that the policy making process of government could be inhibited if two sets of advice which are potentially conflicting were to become the subject of a public debate.

Findings

I have no difficulty in accepting the Ministry's position that HPRAC is statutorily created to act as an advisory body to the Minister on issues pertaining to the regulation of health professions. The record, on its face, clearly contains advice and recommendations to the Minister on the issue of regulation of the Acupuncture profession and its practitioners. Further, I find that the disclosure of other portions of Record 29 would reveal the substance of the advice and recommendations which are contained therein.

I am in agreement with the manner in which the Ministry separated the advice and recommendations from the other portions of the record in the severed version of the record which it provided to me. I find that those portions of Record 29 which were highlighted on the copy of it which it provided to me with its representations are properly exempt from disclosure under section 13(1). As no other exemptions have been claimed for the remainder of the record, and no mandatory exemptions apply to it, these portions of Record 29 are to be disclosed to the appellant.

EXCEPTIONS TO THE ADVICE OR RECOMMENDATIONS EXEMPTION

Generally

I will now consider whether any of the mandatory exceptions contained in section 13(2) of the *Act* apply to the record. In the circumstances of this case, section 13(2)(k) may be applicable. That section reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

Former Assistant Commissioner Irwin Glasberg in Order P-726 stated the following with respect to the exceptions at paragraphs (f) and (g) of section 13(2):

> Sections 13(2)(f) and (g) are unusual in the context of the *Act* in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the Ministry must still disclose the **entire** document if the record falls into one of the section 13(2) categories.

Although Order P-726 did not consider section 13(2)(k), in my view, former Assistant Commissioner Glasberg's statements are equally applicable here since each of sections 13(2)(f), (g) and (k) refer to discrete documents, whether they be "reports" or "studies". As a result, if I find that section 13(2)(k) applies, the entire record cannot qualify for exemption under section 13(1), despite the fact that I have already found that it contains "advice" and "recommendations".

In Order PO-1709, Senior Adjudicator David Goodis made a number of findings with respect to the application of section 13(2)(k) to a report prepared by HPRAC for the Minister on the issue of the regulation of the profession of Naturopathy. As noted above, the record at issue in the present appeal is very similar to the record in that appeal and was prepared on the basis of the same legislative mandate under the *RPHA*. I will address below each of the arguments raised by the Ministry to refute the Senior Adjudicator's findings. The analysis performed by the Senior Adjudicator in Order PO-1709 and the submissions of the Ministry in the present appeal address the

component parts of the exception contained in section 13(2)(k). I will take a similar approach in determining whether the exception properly applies to Record 29.

Ministry's representations

The Ministry agrees that Record 29 constitutes a "report" and that HPRAC is a "council" which has been established "for the purpose of undertaking inquiries and making reports or recommendations" within the meaning of section 13(2)(k). The Ministry takes issue, however, with the findings of Senior Adjudicator Goodis in PO-1709 with respect to whether HPRAC is "attached" to an "institution" for the purposes of the exception in section 13(2)(k) and urges that I not follow the reasoning contained in that decision in the present appeal.

Attached

The Ministry reiterates the arguments made in the appeal which gave rise to Order PO-1709, suggesting that HPRAC functions as an independent body whose duties are to advise the Minister regarding the regulation of health professions. The relationship is, accordingly, between HPRAC and the Minister, and involves the provision of policy advice to the political arm of government, rather than its operational arm, the Ministry. As there exists no statutory relationship between the **Ministry** (as opposed to the **Minister**) and HPRAC, the Ministry submits that HPRAC cannot be said to be "attached" to it for the purposes of section 13(2)(k). The Ministry also points out that members of HPRAC are Order-in-Council appointees and may not be employed in the Ontario Public Service or by a Crown Agency under sections 7(2)and 8(a) of the *RHPA* respectively.

In Order PO-1709, Senior Adjudicator Goodis made certain findings with respect to the question of whether an independent entity such as HPRAC could be "attached" to another entity, in this case the Ministry. He reviewed in detail the factors which would indicate that HPRAC is, in fact, attached to the Ministry. He concluded his analysis by finding that, although HPRAC maintains some degree of independence, it is attached to the Ministry for the purposes of section 13(2)(k).

The Ministry submits that the Senior Adjudicator misinterpreted the relationship between HPRAC and the Ministry to such a degree as to make his finding on this issue patently unreasonable. The Ministry refers to the "Profile" information contained in the HPRAC website which states:

> An agency of the Ontario Ministry of Health, HPRAC reports directly to the Minister of Health. Advice to the Minister is non-binding and **HPRAC's positions and recommendations do not necessarily reflect the Ministry's policies.** [emphasis by the Ministry]

It goes on the summarize its position on this issue by stating:

> The point is that the Minister receives policy advice on the issues under the HPRAC mandate from both HPRAC and employees within the Ministry. HPRAC requires a high degree of independence so that it may provide the Minister with a totally independent view on these matters, one that is not "tainted" by Ministry involvement; i.e. so that there is no Ministry influence over the positions taken and advice provided by HPRAC. This is why the "profile" clearly contains the "disclaimer" noted above.

To an Institution

The Ministry has made extensive representations on the issue of whether HPRAC provides advice to "an institution" within the meaning of section 13(2)(k). It again draws a distinction between the Ministry, the institution in this case, and the Minister, to whom HPRAC makes its recommendations. The Ministry argues that the Minister is **not** the Ministry, despite the fact that section 2(1) defines the "head" of an institution which is a Ministry of the Government of Ontario to be the Minister of the Crown who presides over that ministry.

The Ministry goes on to argue that the political arm of government, as represented by the Minister, is constitutionally separate and distinct from the operational arm, represented by deputy ministers and the public servants who report to them. The Ministry states:

> Moreover, the Senior Adjudicator's interpretation ignores the political model on which the provincial government is based. The province adopted a constitutional monarchy modelled on the Westminster system in Britain. This system differentiates between the political arm of government which is headed by the Prime Minister and his chosen ministers and the administrative/operational arm of government, which is headed by a cadre of deputy ministers whose work is carried out by public servants within the various ministries. The political arm is responsible for setting the policy direction of the government. The operational arm, on the other hand, is responsible for implementing those policy decisions. ...

For this reason, the Ministry submits that recommendations made directly to the "political arm" of government (the Minister) and not the "operational arm" (the Ministry) are not made to "an institution" for the purposes of section 13(2)(k). It further submits that the finding of the Senior Adjudicator in Order PO-1709 that it would be absurd to draw a distinction between the Minister and the Ministry for the purposes of section 13(2)(k), also

> . . . ignores the entire statutory context in which the exemption is found and directly contradicts the manifest intention, evident in the scheme of FIPPA, to exempt documents such as the Report (Record 29) from disclosure.
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> While section 1 of FIPPA states that the purpose of the Act is to provide the public with a right of access to information in the custody or under the control of an institution, this right is circumscribed by the exemptions to disclosure in the Act. These exemptions, such as section 13(1), were developed deliberately by the legislators who drafted and enacted the statute. They must be interpreted so that they are given real meaning and effect and so that they effect the statutory purpose that they were intended to serve. To do otherwise would defeat the reasons for their enactment, violate the Golden Rule [of statutory interpretation] and lead to an absurd result.

The Ministry also submits that previous decisions of the Commissioner's office have drawn a distinction between records which provide advice or recommendations on "operational" matters as opposed to those which address "policy" issues before the institution. It argues that:

> . . . the purpose of the exception in clause 13(2)(k) is to allow for the disclosure of documents dealing with operational matters of a Ministry as an institution. However, the effect given to this exception must be consistent with and respect the purpose of the exemption in subsection 13(1) which is to prevent disclosure of records whose release would inhibit the free flow of advice and recommendations within the deliberative process of government decision making and policy making. A government cannot function effectively without this essential deliberative secrecy. It allows for differing views to be presented without fear of premature opposition. In addition, it ensures that policy considerations are not released to the public prematurely before all relevant factors are considered.

The Ministry concludes its submissions by urging that the decision in Order PO-1709 gave such a broad interpretation to section 13(2)(k) as to have the effect of "reading out" the purpose of the *Act* as encoded in section 13(1), to protect advice and recommendations made in the process of developing policy options. It suggests that this interpretation is not in keeping with the Legislature's intention in drafting the *Act*; had the Legislature intended section 13(2)(k) to be read so broadly, it would not have enacted section 13(1).

Findings

In Order PO-1709, Senior Adjudicator Goodis found that HPRAC is attached to the Ministry for the purposes of section 13(2)(k). His reasons are set out here:

> The word "attached" is defined as follows:
>
> > A term describing the physical union of two otherwise independent structures or objects, or the relation between two parts of a single structure, each having its own function ... [emphasis added]
> >
> > Black's Law Dictionary, 6th ed. (St. Paul: West, 1990), p. 125
>
> In my view, the above definition indicates that two entities may be "attached" or joined in a "union", while still remaining "otherwise independent". Had the Legislature intended that section 13(2)(k) exclude bodies with some degree of independence, it could have used language to suggest this, such as referring to the body as a "department", "branch" or "part" of the institution (see, for example, section 2(3) of the Act's municipal counterpart).
>
> There are a number of factors which indicate that the Advisory Council is "attached" to the Ministry, although it maintains some degree of independence. These factors are listed below:
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> - the RHPA, the Advisory Council's enabling legislation, is administered by the Ministry [RHPA, section 1(1)];

- the Advisory Council's members are appointed by the Lieutenant Governor in Council on the Minister's recommendation [RHPA, section 7(2)];

- the Advisory Council reports directly to the Minister [RHPA, section 11; Advisory Council's World Wide Web site <www.hprac.org>];

- the Minister has a duty to notify the Councils of every health profession College where the Minister suggests an amendment to the RHPA, a health profession Act or a regulation under any of those Acts or a suggested regulation under any of those Acts; submissions in response to a suggestion are then made to the Advisory Council, as opposed to the Minister [RHPA, section 13];

- the Advisory Council appoints a Secretary, who carries out functions and duties assigned by the Minister or the Advisory Council [RHPA, section 17];

- the Advisory Council is a listed institution under the Act, whose designated head is the Minister [Ontario Regulation 460, Schedule item 84.1];

- the Government of Ontario Telephone Directory 1999, the Ontario Government's KWIC Index to Services 1999 and Management Board Secretariat's Directory of Records under the *Act* all list the Advisory Council under the main heading "Ministry of Health";

- the Advisory Council is listed as a "Schedule I" agency under the Ministry of Health by the Ontario Government's Public Appointments Secretariat; Schedule I agencies are "most closely associated with the government" and Aplay a direct role in achieving the government's policies and programs [A Guide to Agencies, Boards and Commissions 1992/19993; Secretariat's World Wide Web site <http://pas.mnr.gov.on.ca>];

- the Advisory Council is funded directly by the Consolidated Revenue Fund (Ministry's representations);

- the Advisory Council's employees are employed under the Public Service Act and paid by the Ministry [RHPA, section 16(1); Ministry's representations];

- the Advisory Council refers to itself as "an agency of the Ministry of Health" [Advisory Council's World Wide Web site <www.hprac.org>].

Thus, the above factors support the view that the Advisory Council, while it may maintain some degree of independence, is "attached" to the Ministry for the purpose of section 13(2)(k) of the Act.

> In addition, there is some doubt as to whether the Advisory Council has the degree of independence suggested by the Ministry. The notion of independence is not readily apparent from the RHPA, and it does not appear that there is a need for a high degree of independence. In this respect, the Advisory Council is unlike the Judicial Appointments Advisory Committee (as it then was) in Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.), where decisions regarding the recommendation for judges for appointment were required to be made "independently and at arm's length from the Ministry" (page 619), so as to avoid political influence over the selection of members of the judiciary. In the case at bar, there is no comparable need for independence. I note also that the relevant issue in Walmsley was whether the advisory body was a "part" of the Ministry, which implies a closer relation than does the word "attached".
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> In my view, the relation between the Ministry and the Advisory Council is exactly the type of relation that was intended to be captured by section 13(2)(k) of the Act.

In its submissions before me, the Ministry makes no specific comments or objections to the factors which the Senior Adjudicator relied upon in reaching his conclusion that HPRAC is attached to the Ministry. I adopt the Senior Adjudicator's conclusions. In my view, the factors which he considered in reaching this conclusion clearly indicate that HPRAC is "attached" to the Ministry within the meaning of the mandatory exception in section 13(2)(k).

For reasons discussed further below, I do not accept the Ministry's characterization of section 13(2)(k) as applying to reports containing advice to the operational arm of government represented by the institution, but not to the political arm of government, represented by the Minister. Nor do I accept the Ministry's related argument that because HPRAC has no statutory responsibility to the Ministry, it cannot be said to be attached to it. In his text *Constitutional Law of Canada*, Professor Hogg notes that "[a]ll acts of the department are done in the name of the Minister, and it is the Minister who is responsible to Parliament for those acts." [P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), p. 9-11]. Quoting from the Lambert Commission in their treatise *Administrative Law*, the authors Dussault and Borgeat note that A.... Departments >are the principal delivery arm of government: through them, the Government manages its programmes and delivers its services. They are instruments under the direction and management of ministers, and through which ministers discharge mandates conferred on them by Parliament, in departmental acts.' .... The Act constituting a Department never confers powers except upon the Minister who controls it as head of the department." [Dussault & Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1985) Vol. 1, p. 85]. As Senior Adjudicator Goodis points out in Order PO-1709, the Minister of Health presides over the Ministry and has charge of all of its functions pursuant to section 3(1) of the *Ministry of Health Act*.

In a related argument, the Ministry submits that HPRAC's report is made to the Minister, and not "to the institution" within the meaning of section 13(2)(k). By defining "institution" to include a "Ministry" and "head" to include a "Minister," it is argued that the Legislature intended section 13(2)(k) to distinguish between operational recommendations and reports made to a Ministry, which would be subject to the exception and could be disclosed, from policy recommendations and reports to a Minister, which would not qualify under section 13(2)(k) and could not be disclosed pursuant the section 13(1) exemption.

The defined terms "institution" and "head" are used throughout the *Act* to identify and distinguish between: (1) the particular government body which is subject to the *Act*, whether it be a Ministry or an agency, board, commission, corporation or other body designated as an institution by regulation; and (2) the individual in charge of the particular institution with the responsibility for decisions pertaining to rights of access, the application of the exemptions, and matters of process in the administration of the Act. The same terms are used in the *Municipal Freedom of Information and Protection of Privacy Act* to identify the several types of municipal bodies which are governed by that statute, such as municipal governments, school boards, police services boards, and public health and other commissions, on the one hand, and the person within the institution charged with decision-making responsibilities, on the other. As these terms are not used exclusively, or even primarily, in the legislation to distinguish Ministries from Ministers, principles of Westminster-style constitutional monarchy, differentiating between the operational functions of Ministries and the policy functions of Ministers, are of little or no assistance in ascertaining the intention of the Legislature with respect to the interpretation of the exception at section 13(2)(k). Moreover, there is nothing else in the language of section 13(2)(k) to suggest that the Legislature intended to distinguish between advice relating to the operational and policy functions of Ministries and Ministers.

Even assuming that some interpretive assistance could be derived from reference to our parliamentary model, there is nothing to indicate that the particular distinction which the Ministry asks me to make should be applicable here. In the passages from the Dussault & Borgeat text to which the Ministry has referred, the authors describe the responsibilities of a Minister of the Crown and recognize his/her dual administrative and political roles. It is clear from the following passage that, in relation to the operational functions of the Ministry, the Minister is the individual to whom powers are conferred and through whom responsibilities are exercised:

> A. The Minister and His Office
>
> The Act constituting a Department never confers powers except upon the Minister who controls it. As head of the Department, the Minister who binds the Crown by his signature, is accountable for all the acts of his subordinates as though they were his own acts. He is answerable at the same time to Parliament and to public opinion. This technique of personalization guarantees respect for society's democratic interests; it makes it easier to identify maladministration and, should the need arise, to discipline the person responsible. The Minister is the only element of the Department who is political in the strict sense of that word. He heads up the Department and makes decisions, assisted by public servants who work under his directives and who all, from the most senior to the most junior, retain their anonymity and may only act in his name. He brings with him the moral authority resulting from the fact that he belongs to a government derived from a party which holds a majority of seats in the Legislature due to its electoral success.
>
> The text of the Act upon which the powers of the Minister are based also determines their limits. Since these powers are of legislative origin, they will necessarily be restrained. The Minister is only able to act within the precise framework set forth by the Act. Lawmakers generally restrict the ambit of this limitation by conferring upon

> the Minister a wide enough mandate for direction and for administration and by leaving to his discretion the exercise of powers which are conferred upon him, the methods of discharging duties, as well as the administrative organization. Such a task cannot be fulfilled by the Minister alone.
>
> Just as the Prime Minister, for the ordinary discharge of his responsibilities, may count upon a competent and qualified team that is attached to him personally and devoted above all to his interests, each Minister also enjoys the services of an office which assists him in his duties. According to J.L. Seurin,
>
> > "The Minister's office is located at the pivot of two different realms, the political realm and the realm of administration . In the governmental machinery the Minister's office is the gear-box of the political and administrative wheels. It would be closer to reality to say that the Minister's office organically translates into concrete terms the duality of the Minister's role, which is at once both political and administrative" [Tr.]. [emphasis added]

Based on this model of government, a report to a Ministry would in the normal course be made to the Minister in any event. Further, there is nothing in the language of section 13(2)(k) to suggest that it was intended to include only reports to a Ministry per se, and exclude a report to a Minister as the controlling force of the Ministry under its constituting legislation and as head of that institution under the Act. Senior Adjudicator Goodis made this point the following way:

> While section 13(2)(k) refers to reports or recommendations "to an institution", I do not accept that this would not encompass a report or recommendation to the Minister, the individual who presides over and has charge of the institution and all its functions [Ministry of Health Act, section 3(1)]. Moreover, the Act describes the Minister as the "head" of the Ministry [paragraph (a) of the definition of "head" in section 2(1)], which supports the position that the Minister and the Ministry are not distinguishable for this purpose. In my view, the Ministry's interpretation would lead to an absurd result where, for example, a report was made to a Deputy Minister or other senior Ministry official and thus held not exempt under section 13(1), while a report of a similar nature would be exempt under section 13(1), simply by virtue of it being made to the Minister.

This interpretation is supported by reference to comments made by the former Attorney General of Ontario, The Honourable Ian Scott, in response to proposed amendments to section 13(1) put forward in the course of the Legislative Committee debates on the *Act* and recorded in Hansard on May 24, 1987. Another Committee member had proposed inserting the words "to a minister of the Crown" after the words "advice and recommendations" in the section 13(1) exemption. In explaining the intent of the proposed amendment (which was ultimately rejected), the former Attorney General stated:

> What it says is that any advice or recommendations that are made within the department will only be exempt from disclosure if they are made to a minister of the crown. **T**hat is to say that advice or recommendations made to a deputy minister

> would be required to be produced because they were not made to a minister. It seems to me that [Ms. Gignantes'] restriction is an important one that we have some difficulty with. The protection that is given to public servants in making their advice would shrink considerably if her amendment was adopted.

This passage demonstrates that the Legislature directed its collective mind to the distinction between a Minister of the Crown and the Ministry over which a Deputy Minister presides as chief civil servant. Where the legislature intended to distinguish between an institution or Ministry, on the hand, and a Minister of the Crown, on the other, it did so explicitly. This is made clear by the explicit use of "minister of the crown" and "minister" in the cabinet records exemptions at sections 12(1)(d) and 12(1)(e) of the Act. If the legislature had intended to include reports to Ministries within the ambit of section 13(2)(k), but to exclude reports to Ministers, it would have done so expressly by adding at the end of this provision the words "unless the report is to be submitted to a minister of the Crown", or words to similar effect. Indeed, wording of this nature was used by the legislature to qualify and narrow the application of the exceptions at sections 13(2)(i) and 13(2)(j) with respect to plans, proposals or reports "to be submitted to the Executive Council or its committees". In short, the Legislature cannot be taken to have intended to exclude reports to Ministers from the ambit of section 13(2)(k) by reference to the generic term "institution", which is meant to encompass all government bodies subject to the provincial and municipal Acts, and not just provincial government Ministries.

This interpretation is consistent with the context in which section 13(2)(k) is found in the *Act*. All of the types of information and records enumerated at section 13(2) relate to matters in respect of which the legislature has recognized a public policy interest in disclosure. The first and most commonly applicable exception is "factual material" at section 13(2)(a), which may be disclosed if it is a coherent body of fact separate and distinct from the advice or recommendations, but not if its disclosure would reveal the advice or recommendations contained in the record. Different considerations apply to many of the remaining types of records subject to the exceptions. Statistical surveys, valuation reports, environmental impact statements, consumer test reports, government efficiency reports, and feasibility studies relating to government programs, among other types of records, may not be withheld under section 13(1), even though this may result in disclosure of advice or recommendations to government.

The Legislature has similarly identified a public policy interest in the disclosure of the reports of bodies attached to institutions which are established for the very purpose of undertaking inquiries and making reports or recommendations to the institution. These exceptions to the section 13(1) exemption ensure that government remains accountable to the public in respect of specific types of activities where the Legislature has recognized a heightened degree of public interest in disclosure. [See *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 at 403, per LaForest J. (dissenting on other grounds) (S.C.C.)]

The duty to disclose records under section 13(2) is not qualified in any way, except at sections 13(2)(i) and 13(2)(j) to which I have referred above. These sections read as follows:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

[emphasis added]

These provisions indicate that final plans or proposals regarding changes to government programs or new government programs, and task force reports on particular topics, are also subject to disclosure under section 13(2) unless they are to be submitted to Cabinet or a Cabinet committee. In other words, the legislature has directed its mind to identifying a heightened level of protection for certain types of documents having a policy component, but only if there is an intention to submit such records for consideration at the cabinet level, and not at the level of an individual Minister outside the cabinet context. This qualification is entirely consistent with the substance of the exceptions at section 13(2)(i) and 13(2)(j), since major plans, proposals or reports of the nature described in these provisions would normally be submitted to a Minister for consideration in any event.

As an aside, I note that a plan, proposal or report which is prepared for submission to cabinet at first instance, or which is actually submitted to cabinet, would likely qualify for exemption as a record revealing the substance of cabinet deliberations within the meaning of section 12(1). On the other hand, sections 13(2)(i) and 13(2)(j) would apply where the record was not originally prepared for submission to cabinet, and has not yet been submitted to cabinet, but is proposed to be submitted. A record of this nature which is not, in fact, submitted to cabinet would be required to be disclosed, even if it would otherwise qualify for exemption under section 13(1). Former Attorney General Ian Scott spoke to this outcome and its importance to the notion of ministerial accountability in the following exchange in the Legislative Committee debates on June 25, 1986:

Ms. Gigantes On clauses 13(2)(i) and (j), I have a lot of trouble figuring out what all these words mean. Clause (i) reads, "A final plan or proposal to change a program of an institution . . ." This is the step that is to be revealed in spite of subsection 1.

Hon Mr. Scott Yes. It must be revealed.

Ms. Gigantes This stuff must be revealed. Clause (i) continues, " . . . or for the establishment of a new program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive council or its committees."

Hon Mr. Scott You can get from my ministry a plan or proposal which has been developed by the staff of my ministry, which I have refused to carry to cabinet. For example, if you are concerned that I have not been carrying to cabinet some proposal for - -

Ms. Gigantes The advancement of women?

Hon Mr. Scott If you are concerned about a proposal for the advancement of women - - wrong ministry, but we will correct your freedom of information request - - you then make a request for it. If it has gone to cabinet, you will not get it under subsection 12 if it reveals the deliberations of cabinet.

Ms. Gigantes Section 12.

Hon Mr. Scott But if it did not get there because the minister was no good, I presume it might be a plan or proposal under clause (i) and you would get it. You would then be able to say in the House: "You would not take this. This plan was developed in your very own ministry and you would not take it to cabinet for decision. Answer that for me. Your protestations, Scott, fall on deaf ears."

In my view, this exchange demonstrates that the Legislature clearly understood how the exemption in section 13(1) and the exceptions to that exemption in section 13(2) would operate. Where a record would otherwise be exempt under section 13(1) because it contains advice or recommendations, the entire record is subject to the exception in section 13(2)(i), for example, if it also contains a final plan or proposal to change a program, or for new program. The only qualification to the exceptions at sections 13(2)(i) and 13(2)(j) is if the records are to be submitted to Cabinet. I do not accept, as the Ministry argues, that I should read the section 13(2)(k) exception as if it contained the similar qualification that it does not apply if the report is submitted to a Minister. As I found earlier, such a result would require explicit language which is not present here. Indeed, as the above passage from Hansard demonstrates, these exceptions specifically contemplate the disclosure of reports to Ministers which they have refused to take forward to Cabinet. There is nothing in the language of section 13(2)(k) to suggest that these latter kinds of reports to Ministers should be treated any differently where they, too, are not taken forward to Cabinet.

With respect to the Ministry's remaining arguments, I accept that the Commissioner has recognized a purposive distinction between records reflecting deliberative processes relating to the "actual business of the Ministry", "policy considerations" and "the consideration of alternative courses of action", from records dealing with routine matters (e.g., a recommendation to purchase pencils) unconnected with the institution's actual business or the delivery of services. This focuses the application of the exemption on its true intent and purpose, which is to facilitate the formulation of advice and recommendations as part of the deliberative processes of government, and not to protect records relating to routine decision-making unrelated the actual business of a government institution. [See, for example, Orders 102, 396 and 434.] I do not accept, however, that I must introduce an additional distinction and limit the application of section 13(2)(k) to strictly operational but not policy related matters. The legislature does not typically establish a "committee, council or other body ... for the purpose of undertaking inquiries and make reports and recommendations" to an

institution on its purely operational matters. Such matters would normally be dealt with by an institution using its own personnel or consultants. External "councils or committees" are typically established to undertake inquiries and make reports having some policy component. Thus, if I were to adopt the Ministry's suggested interpretation, I would strip the section 13(2)(k) exception of much, if not all, of its meaning; and this would result in the withholding of records which the Legislature clearly intended should be accessible to the public.

Finally, I do not accept the Ministry's argument that the Commissioner's interpretation of section 13(2)(k) is inconsistent with the purpose of the *Act* or effectively "reads out" the protection afforded by section 13(1). The occasions upon which the Commissioner has applied the section 13(2) exceptions to order disclosure of documents are relatively rare compared with the multitude of occasions on which section 13(1) has been applied to exempt any number of types of records containing advice and recommendations. Like the other types of records or information enumerated at section 13(2), section 13(2)(k) describes a discrete category of records which the Legislature has determined should not be withheld from the public under section 13(1). In my view, it is clear that the report set out in Record 29 is the very type of report to which section 13(2)(k) was intended to apply.

Conclusion

Based on the above, I conclude that all of the required elements for the exception at section 13(2)(k) have been established. Accordingly, the record is not exempt under section 13(1) of the *Act*. As no other exemptions have been claimed and no mandatory exemptions apply, I order that it be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose Record 29 to the appellant in its entirety by **November 6, 2000**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: October 16, 2000
Donald Hale
Adjudicator