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

# ORDER PO-1995

## Appeal PA-990283-2

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request from the appellant, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to records relating to Help Line, an association of former students from St. Joseph's Training School for Boys and St. John's Training School for Boys. Specifically, the appellant requested copies of records relating to the settlement agreements that were initially negotiated by the independent Reconciliation Process Implementation Committee (RPIC). The RPIC was made up of representatives of the victims of abuse, the Government of Ontario, the Roman Catholic Church and the Christian Brothers. The appellant was a member of RPIC.

The Ministry identified a number of responsive records in the following four categories, and issued a response to the appellant denying access:

(a) a signed copy of the Helpline reconciliation agreement and companion agreement;

(b) records relating to the negotiation and implementation of the companion agreement, including correspondence and memoranda between several listed individuals and organizations, including the Premier of Ontario;

(c) the apology which allegedly was introduced in the Ontario Legislature pursuant to the terms of the companion agreement; and

(d) all records between the appellant and the Government of Ontario regarding the issue of apologies in relation to the companion agreement.

The appellant appealed the Ministry's decision and, following an inquiry, Senior Adjudicator David Goodis disposed of a number of issues regarding access in Order PO-1864. In that order, Senior Adjudicator Goodis upheld the Ministry's decision to exempt certain records under sections 19 or 49(a), and ordered the disclosure of a number of records and portions of records including "complete, signed copies of the reconciliation agreement and the companion agreement." He also ordered the Ministry to conduct further searches and to "issue a decision to the appellant, in accordance with Part II of the *Act*, respecting any additional records responsive to part (b) of the request it may have located at its Records Centre or any other location."

The Ministry complied with Order PO-1864 by disclosing the required records and issuing a new decision to the appellant regarding the additional responsive records it had located. The Ministry denied access to these records on the basis of one or more of the following exemptions in the *Act*:

- section 12 - Cabinet records
- section 13(1) - advice and recommendations
- section 17(1) - third party commercial information
- section 19 - solicitor-client privilege
- section 21(1) - invasion of privacy
- section 49(a) - refusal to provide requester's personal information

The appellant appealed the Ministry's access decision. He also stated that the agreements provided to him by the Ministry were not final copies and alleged that the minutes of meetings in which he was a participant were not included among the records disclosed. He also continued to question whether all responsive records had been located.

During mediation of this second appeal, some issues were resolved:

- the appellant accepted that he has been provided with the final signed copies of the agreements (part (a) of the original request)
- the appellant accepted that all issues regarding records responsive to parts (c) and (d) of the original request have been addressed to his satisfaction.

Although the Ministry did undertake additional searches for responsive records, the appellant continued to maintain that other records responsive to part (b) of the request should exist that had not yet been identified.

Mediation was not successful in resolving the remaining issues, and the appeal was transferred to the adjudication stage. A Notice of Inquiry was sent to the Ministry, initially, summarizing the facts and issues in this appeal. The Ministry provided representations, together with an index of all responsive records and the corresponding exemption claims. The index indicates that one record should be disclosed (Record B1) and that another record has previously been provided to the appellant (Record A2).

The Ministry's index and representations make no reference to the section 17(1) exemption claim. Because it is a mandatory exemption, I independently reviewed the records in the context of the requirements of section 17(1) and determined that this exemption was not relevant in the circumstances of this appeal.

The appellant received a copy of the Ministry's representations and index in their entirety, along with a Notice, and returned a response.

### RECORDS:

There are 60 records at issue in this appeal. They fall into two broad categories: (1) Category A - records located in the Ministry's Policy Branch; and (2) Category B - records located in the Ministry's Criminal Law Division. The records consist of memoranda, correspondence, briefing notes, draft agreements, minutes of meetings, fax cover sheets and other settlement-related documents, and are described in greater detail in the attached Appendix A.

## DISCUSSION:

### REASONABLE SEARCH

In cases where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request.

The *Act* does not require the institution to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (see order PO-1744).

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (see Order M-909).

In his representations the appellant states that he believes there are other records which he has not received. He submits:

> ... my original request for documents, including section (b), has not been acted upon by the Ministry of the Attorney General. I see no reference to documents destroyed by the Premier's Office, which the Premier's Office indicated might be in the Ministry of the Attorney General's file … .
>
> The Ministry's failure to look for these records and provide me with copies of them shows that they have not conducted a reasonable search of their records and have not responded to my FOI request.

The appellant also maintains that the Ministry has not searched for possible responsive records at the Records Centre.

The Ministry submits that it has conducted a reasonable search for responsive records. It states:

> Staff looked at the relevant files held by the Policy Branch pertaining to the subject matter of the request to identify records. A second search for records, taking into account the requester's letter of clarification, was also conducted after the IPC issued Order PO-1864.
>
> The relevant files held by the Office of the Assistant Deputy Attorney, Criminal Law Division were reviewed pertaining to the subject matter of the request to identify records.
>
> The Ministry retrieved records from the Records Centre in response to this request. A review of these records was conducted by Counsel from Crown Law Office-Civil and it was determined that no records are responsive to the request.

At the close of the mediation stage of this appeal, a Report of Mediator was provided to the Ministry and the appellant. This Report stated that all issues relating to parts (a), (c) and (d) of the request had been resolved to the appellant's satisfaction. The appellant was provided with a draft copy of this Report and permitted 10 days in which to advise the Mediator of any errors or omissions. He did not do so, and the Report was finalized. However, in his representations, the appellant appears to raise issues regarding the search for records relating to parts (a), (c) and/or (d) of his request. I am not prepared to re-open issues that were resolved during mediation, and will restrict my discussion to records and search activities relating to part (b) of the appellant's request.

The appellant states that he has not received records from the Premier's Office or Cabinet Office. Senior Adjudicator David Goodis addressed this issue in Order PO-1864, where he concluded that any such records were covered in the portion of the appellant's request that had been transferred by the Ministry to Cabinet Office under the *Act*. I will not re-visit this issue here.

During the course of dealing with the appellant's request, the Ministry has undertaken a number of searches for responsive records. Senior Adjudicator Goodis was not satisfied that all reasonable searches had been undertaken at the time he issued Order PO-1984, and ordered new searches of the Records Centre and other relevant locations. Contrary to the position put forward by the appellant, the Ministry's representations confirm that records were retrieved from the Records Centre and searched by counsel familiar with the request. Although no responsive records were located, I accept that reasonable search efforts were undertaken in this regard. Based on the information provided by the appellant, and the evidence and representations provided by the Ministry regarding various search activities, I am satisfied that the searches undertaken by the Ministry for records responsive to part (b) of the appellant's request were adequate and reasonable in the circumstances.

**SOLICITOR-CLIENT PRIVILEGE**

The Ministry claims section 19 as the basis for denying access to the following records:

> A1, A5, A8, A10, A14, A16 (A16 is a duplicate of A10), A17, A18, A19, A20, A21, A23, A24, A26, A28, A29, A30, A31, A32, A35, A36, A38, A39, A40, A46, A47, A50 and A52.
>
> B2-9, B10-12, B13-16 (B16 is a duplicate of B15), B17-21, B22, B23-24, B25, B26-27, B28-31, B32, B33-44, B45-78, B79-141, B142-176, B177-210, B211-215, B216-217, B218-227, B228-230, B231-232, B233-237, B238-240 (B240 is a duplicate of B239), and B250-252.

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

The Ministry submits that these records qualify for exemption under both solicitor-client privilege and litigation privilege, and claims that privilege attached to these records has not been waived. I shall first consider the application of solicitor-client communication privilege.

**Solicitor-client communication privilege**

***Introduction***

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The Supreme Court of Canada has described this privilege as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

***Representations***

The Ministry submits that solicitor-client communication privilege applies to the following categories of records:

- legal opinions provided by ministry counsel
- briefing notes summarizing the substance of opinions by counsel
- mediation and settlement proposals
- correspondence between ministry counsel
- other memos and documents dealing with legal advice

It also submits:

> The records constitute direct communications of a confidential nature between ministry counsel and management. The records were generated as a result of negotiations for compensation to victims of abuse at two schools. Parties involved in the negotiations were the provincial government, some religious organizations, insurance companies and an association representing victims. Lawyers retained by the parties participated in the process with the expectation that confidentiality was maintained.
>
> The contents of the records demonstrate that this common law privilege applies to documents that were essentially a "continuum of communications" between ministry counsel and management.

In his representations, the appellant states:

> The Solicitor Client [exemption claim] might apply to some records, however I find it difficult to fathom how minutes of meetings I attended; material from myself, my solicitors, my fellow executive members, and others; other similar documents from other individuals groups and groups not covered by this privilege. Most of the material I have requested was not direct communications of a confidential nature between solicitor and client. It was shared with six organizations and dozens of individuals unrelated to the Ontario Government [five named organizations] and with other groups occasionally. There have been several books and articles written which drawn heavily on some of the material I have requested and have been quoted in various media outlets – print, radio and television. …

He goes on state that "most of the materials were not produced for the purpose of obtaining legal advice" but for other purposes, and that "much of the material was not just from legal counsel to their client but in many cases was to multiple individuals and groups outside government."

I have decided to deal with Record A50 in my discussion of section 12(1) of the *Act* later in this order.

**Records A23, A26, A28, A31, A38, A39**

Records A23, A26, A28, A31, A38 and A39 consist of drafts of, or changes to minutes of meetings that were attended by representatives of Help Line, the Roman Catholic Church and the Ministry, and were copied to all relevant parties. In my view, these records are not accurately characterized as confidential communications between a solicitor and a client, and therefore do not fall within the scope of solicitor-client communication privilege.

**Record A1**

Record A1 is titled "House Note Book" and was prepared by legal counsel with respect to liability issues raised by the appellant personally and on behalf of others in the organization he represents. In the particular circumstances of this appeal, I am satisfied that this record can accurately be characterized as counsel's working papers relating to the giving of legal advice [*Susan Hosiery*], and thereby satisfies the requirements of the solicitor-client communication privilege component of section 19.

**Records B10-12, B238-240, B250-252**

Record B10-12 comprise a "Critical Issues Notes", consisting of two parts. Pages 10 and 11 were prepared by the Ministry's General Counsel and appear to be briefing notes in response to a newspaper article (attached to page 11). Page 12, also a briefing note, refers to the status of the settlement agreement. Record B238-240 is a memorandum to the Deputy Attorney General from the Assistant Deputy Attorney General for the Criminal Law Division concerning proposed actions to be taken by the government regarding the settlement. Record B250-252 is a memorandum from legal counsel to the Director of Policy Development, in which Legal Counsel raises issues about the final terms of the settlement and identifies areas requiring clarification. The memorandum also refers to the positions of the various third parties and includes the appellant's name in this context.

I am satisfied that Records B10-12, B238-240 and B250-252 all consist of confidential communications between a lawyer and his/her client which were prepared for the purpose of giving or seeking legal advice. Accordingly, I find that they qualify for exemption under the solicitor-client communication privilege portion of section 19.

**Records A5, A8, A10, A14, A16, A17, A18, A19, A21, A20, A24, A29, A30, A32, A35, A36, A40, A46, A47, A52; and Records B2-9, B13-16, B17-21, B22, B23-24, B25, B26-27, B28-31, B32, B33-44, B45-78, B79-141, B142-176, B177-210, B211-215, B216-217, B218-227, B228-230, B231-232 and B233-237.**

Records A10 and A16 are draft minutes of a meeting of the Help Line Insurance Meeting. Records A17, A18, A24 and A30 are correspondence from the appellant's legal counsel to the Ministry or a third party. Record A32 is a memorandum from a third party counsel to the appellant's lawyer. Record A21 is a "Draft Proposal to Meet the Immediate Needs of the Members of Help Line". Record B233-237 is a memorandum from Ministry counsel to several lawyers, including the appellant's counsel. Record A5 is entitled "Information Package", dated April 1996, and appears to have been prepared for members of the RPIC by a consulting

company. Record A8 is entitled "An Analysis of St. Joseph's and St. John's Survivors of Child Abuse Survey and Assessment of Needs", dated February 1992, which was prepared for the "Help Line Reconciliation Model Process". Included at page 60 of Record A8 are notes prepared by the appellant. Record A14 is a letter from Ministry counsel to a third party counsel concerning the settlement negotiations. Record B216-217 is a letter from an Assistant Deputy Attorney General to one of the parties involved in the settlement negotiations. Record A20 is a letter from an outside law firm to a number of other lawyers, including Ministry legal counsel, attaching draft correspondence concerning the settlement negotiations. Record A29 is a letter from third party counsel to the Deputy Attorney General concerning the settlement discussions.

The Ministry's representations do not deal specifically with any of these records. Many of these records clearly on their face are not confidential communications between a solicitor and client. Based on their content, the circumstances surrounding their creation, and the absence of sufficient evidence or representations from the Ministry to establish the requirements of solicitor-client communication privilege, in my view, these records cannot accurately be described as confidential communications between a solicitor and client, nor do they fall under the rubric of "lawyer's working papers" as described in *Susan Hosiery*. Accordingly, I find that records A5, A8, A10, A14, A16, A17, A18, A20, A21, A24, A29, A30, A32, B216-217 and B233-237 do not qualify for exemption under the solicitor-client communication privilege component of section 19 of the *Act*.

Records A19, A35, A36, A40, A46, A47, B13-16, B17-21, B22, B23-24, B25, B26-27, B28-31, B32, B33-44, B211-215, B218-227, B228-230 and B231-232 consist of memoranda or briefing notes, some with related attachments, exchanged by Ministry lawyers and staff involved in the settlement negotiations. These records include legal advice on damages, liability and the reconciliation settlement. I am satisfied that they are either confidential communications between a lawyer and a client made for the purpose of providing or obtaining legal advice, or fall under the category of "lawyer's working papers" described in *Susan Hosiery*. Accordingly, I find that all of these records qualify for exemption under the solicitor-client communication privilege component of section 19 of the *Act*.

Records A52, B2-9, B45-78, B79-141, B142-176 and B177-210 consist of partial or complete copies of the reconciliation agreement and/or companion agreement, some with related attachments. These records are in draft form and were created during the course of negotiations. Given the circumstances in which these records were created, as well as their content, I am satisfied that they constitute confidential communication between a lawyer and a client made for the purpose of providing advice on the negotiations taking place at that time, and I find that all of these records qualify for exemption under the solicitor-client communication privilege component of section 19 of the *Act*.

**Litigation Privilege**

The Ministry claims that some records qualify for exemption under common law litigation privilege.

In Interim Order MO-1337-I, I discussed the scope of common law litigation privilege, particularly in light of a recent landmark decision of the Court of Appeal for Ontario in *General*

*Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321. After reviewing the Court's discussion, I found that in order to qualify for common law litigation privilege, records must have been prepared for the dominant purpose of existing or reasonably contemplated litigation. This privilege at common law is time sensitive. Even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

The Ministry submits:

> The records include surveys, notes and minutes of meetings. The documents were prepared in the course of negotiation undertaken by Ontario and other parties to deal with compensation claims for victims of abuse in two schools. There was a reasonable contemplation of litigation in that the negotiations were conducted with the understanding that lack of agreement on the compensation would result in lawsuits.
>
> The dominant purpose of these records was to assist in the task of providing legal advice to the Ministry in negotiations for compensation by victims of abuse. They were prepared for use in giving legal advice in relation to the compensation talks.
>
> The Ministry submits that litigation privilege is not lost because the policy reasons underlying the privilege still remain, even though negotiations for compensation had been concluded.

In my view, based on the records themselves and the surrounding circumstances, I find that the dominant purpose for preparing the records was to negotiate a settlement agreement, not for contemplated litigation. In addition, even if the dominant purpose was contemplated litigation, *General Accident* makes it clear that common law litigation privilege "only lasts as long as there is reasonably contemplated or actual litigation". The Ministry acknowledges in its representations that negotiations for compensation have been concluded, and I find that none of the records at issue in this appeal qualify for exemption under the common law litigation privilege component of section 19 of the *Act*.

## CABINET RECORDS

### Introduction

The Ministry claims that section 12(1) applies to a number of records, some of which I found to be exempt under section 19. The remaining records, which I will consider under section 12(1), are records A3, A34, A49 and A50, and B241-249. The Ministry does not specify the paragraphs on which it is relying; however, based on the representations it appears to claim that sections 12(1)(a), (b) and (c) may apply. The relevant portions of section 12(1) read as follows:

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

> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of an Executive Council or its committees (not just the types of records listed in the various parts of section 12(1)), or permit the drawing of accurate inferences with respect to the actual deliberations, qualifies for exemption under section 12(1) (Orders 22, P-293 and P-331).

The Ministry submits:

> … These records qualify as Cabinet documents because their disclosure would reveal the substance of deliberations of the Executive Council and its committees [Order P-905, P-946, P-987].
>
> The records contain either policy options and recommendations or background explanations or analyses and were submitted to Cabinet or Cabinet Committee on Justice for consideration in making decisions. Some of the records were prepared for ministers of the Crown, in particular the Attorney General, to aid deliberation of a matter before Cabinet [Orders P-323, P-726, P-901].

Record A34 is titled "Cabinet Submission Analysis and Policy Options" and deals with the allegations of abuse at the two training schools. Record A49 is a memorandum from the Attorney General to the Premier as Chair of the Policy and Priorities Committee of Cabinet, dealing with the content of Record A34. This record includes the Attorney General's recommendations for the Cabinet Committee's consideration. I find that Records A34 and A49 both fall within the scope of section 12(1)(b) and qualify for exemption on that basis.

Record A50 is a "Cabinet Submission Outline" concerning the Record A34 Cabinet Submission, which was prepared by Ministry counsel. I am satisfied that Record A50 contains information relating to the matter that was the subject of discussion and deliberation by Cabinet, and that Record A50 qualifies for exemption under section 12(1)(c).

Record B241-249 consists of extracted minutes from a meeting of the Cabinet Committee on Justice, which outline decisions made by the Committee on various aspects of the allegations of abuse at the two training schools. I find that this record falls within the scope of section 12(1)(a) and qualifies for exemption on that basis.

Record A3 consists of a series of questions and answers, dated June 24, 1996. It is not clear from the face of the record who prepared this document, nor do the Ministry's representations establish the requirements of the section 12(1) exemption claim. Absent the necessary evidence or representations from the Ministry in this regard, there is no indication that disclosure of this record would reveal the substance of deliberations of Cabinet, and I find that Record A3 does not qualify for exemption under section 12(1) of the *Act*.

## ADVICE AND RECOMMENDATIONS

### Introduction

The Ministry claims section 13(1) as the only basis for denying access to Record A4, and as an alternative exemption for a number of other records. A number of these records have already been dealt with in my discussion of section 19 and 12(1), so I will restrict my discussion of section 13(1) to Records A3, A4, B216-217 and B233-237, which do not otherwise qualify for exemption.

Section 13(1) reads:

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

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].

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 [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order 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.)].

In Order P-434, I made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants that relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

The Ministry submits:

> The records contain advice or recommendations to the Minister and senior management. The deliberative process of decision-making in this instance was Ontario's response to claims for compensation made by victims of abuse in two schools. The records prescribe a course of action in that they contain recommendations and options to be considered by the Ministry in discussions with other parties on liability and terms of settlement of the claims.
>
> The Ministry contends that the appellant's request in essence is a request for disclosure of the advice and recommendations and related documents upon which the Ministry formulated its position.
>
> It is evident that most of the records contain express and specific advice and recommendations prepared by public servants. In some records, there is factual and background information that could permit the drawing of accurate inferences as to the nature of the actual advice or recommendations given to the government. All these documents qualify for exemption under section 13.
>
> The Ministry has withheld the records to protect the free-flow of advice and recommendations within the government deliberative process. To do otherwise is to discourage public servants from providing the government with full and frank advice on issues that affect the province. Without uninhibited flow of advice to government on the settlement discussions that arose as a result of compensation claims, Ontario's financial interests in the matter could be compromised.

Record A3, as noted earlier, is a series of questions and answers. The record is dated June 24, 1996, and deals with various aspects of the settlement agreement and its implementation. The author of the document in not identified by the Ministry, nor is the recipient. It would appear from the content of this record that it was most likely prepared to assist the recipient, as a representative of the Ministry, to respond to questions raised in some type of public forum.

Record A4 is dated June 5, 1996, and consists of a chronology of certain events that took place in the March-May 1996 time period on issues relating to one aspect of the government's

responsibilities under the settlement agreement. The author of the document is not identified by the Ministry, nor is the recipient.

The Ministry bears the onus of establishing the requirements of the section 13(1) exemption claim, and it has failed to do so with respect to Records A3 and A4. Based on their content, Records A3 and A4 are factual in nature, summarizing steps taken by the government in implementing the settlement agreement and related issues (A3), and describing events that took place involving a number of the participants in the settlement negotiations (A4). No advice or recommendation is apparent on the face of these records, and in the absence of sufficient evidence or representations from the Ministry, I am not persuaded that any advice or recommendations would be revealed through disclosure of Records A3 or A4. Accordingly, I find that section 13(1) does not apply to either or these records.

As previously described, Records B216-217 and B233-237 are correspondence sent by Ministry counsel to various outside parties involved in the settlement negotiations. Clearly, these records do not contain information relating to a suggested course of action that will ultimately be accepted or rejected by the recipient during the deliberative process, nor do they fall within the purpose and scope of the section 13(1) exemption claim outlined in Order 94. Accordingly, I find that these records do not qualify for exemption under section 13(1) of the *Act*.

**PERSONAL INFORMATION/INVASION OF PRIVACY**

The Ministry claims that Records B25 and B35-36 contain personal information of individuals other than the appellant, and that Records A26, A38, A39, B10-12, B238-240 and B250-252 contain the appellant's personal information.

Because I have determined that Record B25 and B35-36 qualify for exemption under section 19, I will not consider them further here.

As far as the appellant's personal information is concerned, previous orders have determined that information which is associated with a person in his/her professional capacity is not considered to be "about the individual" within the meaning of section 2(1) (Orders P-427, P-1412 and P-1621). This office has also found that the names and other information about individuals who appear in their capacity as representatives or spokespersons of an association do not constitute "personal information" (Orders 16, 113, P-300 and P-1413). A number of records at issue in this appeal contain the names of individuals representing parties to the settlement negotiation process, including the appellant and other individuals representing his organization. Consistent with past orders, I find that the names, titles and other information about the appellant and other similar individuals contained in the records do not qualify as their "personal information" under section 2(1) under the *Act.*

Because section 21(1) and 49 of the Act only apply to records containing "personal information", neither of these exemption claims is relevant in this appeal.

## ORDER:

1. I order the Ministry to disclose the following records: A3, A4, A5, A8, A10, A14, A16, A17, A18, A20, A21, A23, A24, A26, A28, A29, A30, A31, A32, A38, A39, B1, B216-217 and B233-237 to the appellant by **March 27, 2002**.

2. I uphold the Ministry's decision not to disclose all other records not covered by Provision 1.

3. In order to verify compliance with Provisions 1, I reserve the right to require the Ministry to provide me with copies of the material provided to the appellant in accordance with these provisions, upon request.

Original signed by: March 6, 2002
Tom Mitchinson
Assistant Commissioner

# Appendix A

[Extrapolated from index provided by the Ministry]

| Record Number | Policy Branch Records | Exemption |
|---|---|---|
| A1 (2 pages) | Confidential House Note 1996 | 13, 19 |
| A2 (5 pages) | Hansard 1996 | Previously Released |
| A3 (7 Pages) | Qs and As 1996 | 12, 13 |
| A4 (2 pages) | Chronology 1996) | 13 |
| A5 (11 pages) | Information Package 1992 | 19 |
| A8 (69 pages) | Survey 1992 | 19 |
| A10 (15 pages) | Fax Cover Sheet and Minutes of Meeting 1992 | 19 |
| A14 (2 pages) | Correspondence 1992 | 19 |
| A16 (16 pages) | Minutes of Meeting 1992 | 19 |
| A17 (2 pages) | Correspondence 1992 | 19 |
| A18 (1 page) | Correspondence 1992 | 19 |
| A19 (10 pages) | Briefing Note with Attachment 1992 | 19 |
| A20 (6 pages) | Fax Sheet with Attachments 1992 | 19 |
| A21 (6 pages) | Proposal 1992 | 19 |
| A23 (17 pages) | Minutes of Meeting 1992 | 19 |
| A24 (4 pages) | Correspondence 1991 | 19 |
| A26 (23 pages) | Cover Memo with Draft Minutes of Meeting 1991 | 19, 49(a) |
| A28 (1 page) | Memo 1991 | 19 |
| A29 (2 pages) | Correspondence | 19 |
| A30 (6 pages) | Correspondence with Attachment 1991 | 19 |
| A31 (16 pages) | Fax Cover Sheet with Draft Minutes 1991 | 19 |
| A32 (18 pages) | Memorandum with Draft Plan 1991 | 19 |
| A34 (34 pages) | Cabinet Document | 12, 13 |
| A35 (9 pages) | Memorandum from Counsel 1991 | 13, 19 |
| A36 (19 pages) | Memorandum from Counsel 1991 | 13, 19 |
| A38 (22 pages) | Memorandum with Attachment 1991 | 19, 49(a) |
| A39 (26 pages) | Memorandum with Attachments 1991 | 19, 49(a) |
| A40 (3 pages) | Memo and Correspondence 1991 | 12, 13, 19 |
| A46 (22 pages) | Proposal and Attachments | 12, 13, 19 |
| A47 (2 pages) | Memo | 12, 13, 19 |
| A49 (4 pages) | Memorandum | 12, 13 |
| A50 (2 pages) | Cabinet Document | 12, 19 |
| A52 (6 pages) | Portion of the Agreement | 19 |

| Record Number | Description | Exemption |
|---|---|---|
| | **Criminal Law Division Records** | |
| B1 | News Release 1992 | Release |
| B2-9 | Draft Copy of the Companion Agreement | 13, 19 |
| B10-12 | Critical Issues Notes 1992 | 13, 19, 49(a) |
| B13-16 | Memorandum from Counsel 1996 | 13, 19 |
| B17-21 | Memorandum with Attachments | 13, 19 |
| B22 | Memorandum from Counsel 1996 | 13, 19 |
| B23-24 | Memorandum from Counsel 1996 | 13, 19 |
| B25 | Memorandum from Counsel 1996 | 13, 19, 21 |
| B26-27 | Facsimile Transmission Sheet with Memorandum from Counsel 1996 | 13, 19 |
| B28-31 | Handwritten Notes with Attachment 1996 | 13, 19 |
| B32 | Memorandum from Counsel 1996 | 13, 19 |
| B33-34 | Memorandum from Counsel | 19 |
| B35-36 | Correspondence to Individual | 13, 21 |
| B37-41 | Letters 1996 | 13, 19 |
| B42-44 | Draft Document | 13, 19 |
| B45-48 | Facsimile Transmission Sheets | 13, 19 |
| B49-78 | Memorandum with Copies of Various Draft Documents 1992 | 13, 19 |
| B79-141 | Draft Reconciliation Model Agreement 1992 | 13, 19 |
| B142-176 | Fax Cover Sheet with Covering Memo and Attachments of Draft Model Agreement and Companion Agreement 1992 | 19 |
| B177-210 | Draft Copies of Agreements | 19 |
| B211-215 | Memorandum and Attachment 1992 | 13, 19 |
| B216-217 | Correspondence 1996 | 13, 19 |
| B218-227 | Draft Agreement | 13, 19 |
| B228-230 | Memorandum with Attached Draft Statements | 13, 19 |
| B231-232 | Memorandum to File 1992 | 13, 19 |
| B233-237 | Memorandum from Counsel with Attachments 1992 | 13, 19 |
| B238-240 (B240 is a duplicate of B239) | Correspondence from Counsel 1992 | 13, 19, 49(a) |
| B241-249 | Cabinet Document | 12, 13 |
| B250-252 | Correspondence from counsel 1992 | 13, 19, 49(a) |