

**** Preliminary Version ****

Case Name:

John Doe v. Ontario (Finance)

John Doe, Requester, Appellant;

v.

Minister of Finance for the Province of Ontario, Respondent.

And between

**Information and Privacy Commissioner of Ontario (Diane Smith,
Adjudicator), Appellant;**

v.

**Minister of Finance for the Province of Ontario, Respondent,
and**

**Attorney General of Canada, Attorney General of British
Columbia, Information and Privacy Commissioner of Alberta,
Freedom of Information and Protection of Privacy Commissioner
[Review Officer] for Nova Scotia, Information and Privacy
Commissioner of Prince Edward Island, British, Columbia
Freedom of Information and Privacy Association, Information
and Privacy Commissioner of British Columbia and Canadian
Civil Liberties Association, Interveners.**

[2014] S.C.J. No. 36

[2014] A.C.S. no 36

2014 SCC 36

[2014] 2 S.C.R. 3

[2014] 2 R.C.S. 3

457 N.R. 40

320 O.A.C. 135

373 D.L.R. (4th) 601

2014EXP-1471

J.E. 2014-826

EYB 2014-236837

69 Admin. L.R. (5th) 289

239 A.C.W.S. (3d) 1048

2014 CarswellOnt 5920

File No.: 34828.

Supreme Court of Canada

Heard: November 6, 2013;

Judgment: May 9, 2014.

Amended judgment: May 9, 2014.

**Present: McLachlin C.J. and LeBel, Abella, Rothstein,
Cromwell, Karakatsanis and Wagner JJ.**

(55 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Government Law -- Access to information and privacy -- Access to information -- Governmental or public information -- Legislation -- Provincial and territorial -- Inspection of public documents -- Documents subject to inspection -- Requests for disclosure -- Bars and grounds for refusal -- Confidential information -- Consultations or deliberations by government officials -- Appeals and judicial review -- Privacy and information commissioners -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Statutes -- Appeal from an Ontario Court of Appeal judgment setting aside a decision of the Superior Court which affirmed a decision of the Information and Privacy Commissioner dismissed -- A tax lawyer requested access to records pertaining to the retroactivity and effective date of amendments to the Ontario Corporations Tax Act -- The records constituted drafts of policy options and were prepared to serve as the basis for making a decision between the presented options -- They were "advice" within the meaning of s. 13(1) of the Act -- Protection from disclosure would be illusory if only a communicated document was protected and not prior drafts -- **Freedom of Information and Protection of Privacy Act, s. 13.***

Appeal from a judgment of the Ontario Court of Appeal setting aside a decision of the Superior Court which affirmed a decision of the Information and Privacy Commissioner (Commissioner). The

Appellant, a lawyer practising in the area of tax law, made an access to information request after the Ministry of Finance (Ministry) amended a provision of the Ontario Corporations Tax Act. The Appellant requested the records in the Ministry of Finance and the Ministry of Revenue which considered the issue of retroactivity and the effective date of the amendments. The Ministry located six undated drafts of a policy options paper examining possible effective dates for the amendments. The records included express statements regarding which options were not recommended. According to the Ministry, the records were versions of a paper that formed part of the briefings of the Minister, Deputy Minister, Assistant Deputy Minister of Finance and the Office of Budget and Taxation. The Ministry denied access to the records on the basis of the exemption set out in s. 13(1) of the **Freedom of Information and Protection of Privacy Act (Act)**, which provided that a head could refuse to disclose a record where the disclosure would reveal advice or recommendations. The Commissioner ordered disclosure of the requested records on the basis that most of their contents did not reveal a suggested course of action. The Superior Court denied the Ministry's application for judicial review. The Court of Appeal found that the disclosure order was unreasonable, allowed the appeal and remitted the matter to the Commissioner.

HELD: Appeal dismissed. The records constituted drafts of policy options for purposes of a decision as to when amendments to eliminate a loophole for tax haven corporations should take effect, in particular to what extent the amendment should have retroactive effect. The policy options in the records presented both an express recommendation against some options and advice regarding all the options. Although only a small section of each record recommended a preferred course of action for the decision maker to accept or reject, the remaining information in the records set forth considerations to take into account by the decision maker in making the decision. The information consisted of the opinion of the author of the record as to advantages and disadvantages of alternative effective dates for the amendments. It was prepared to serve as the basis for making a decision between the presented options. These constituted policy options and were part of the decision-making process. They were "advice" within the meaning of s. 13(1) of the Act. No words in s. 13(1) expressed a requirement that the advice or recommendations be communicated in order to qualify for exemption from disclosure. A public servant could engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process was to draft and redraft advice or recommendations until the writer was sufficiently satisfied that he or she was prepared to communicate the results to someone else. All the information in those earlier drafts informed the end result even if the content of any one draft was not included in the final version. Protection from disclosure would be illusory if only a communicated document was protected and not prior drafts. There was no suggestion that the exercise of discretion by the Ministry was questionable.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1, s. 21(1)(a), s. 21(1)(b)

Corporations Tax Act, R.S.O. 1990, c. C.40,

Freedom of Information Act, 5 U.S.C. 552 (1970),

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 10(2), s. 13(1), s. 13(2), s. 13(3), s. 15(a), s. 18(1)(d), s. 23

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Access to information -- Exemptions -- Advice or recommendations of public servant -- Government institution applying exemption for advice or recommendations at s. 13(1) of Freedom of Information and Protection of Privacy Act and denying access to information request -- Information and Privacy Commissioner ordering disclosure -- Whether Commissioner's disclosure order reasonable -- Whether s. 13 (1) exemption for advice or recommendations applies to policy options that do not suggest course of action -- Whether s. 13(1) exemption applies to information that is not communicated -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 13(1).

Court Summary:

After the Ministry of Finance amended a provision of the *Corporations Tax Act*, R.S.O. 1990, c. C. 40, John Doe made an access to information request for its records about the issue of retroactivity and the effective date of the amendments. The Ministry determined that disclosure of the records would reveal advice or recommendations of a public servant and denied John Doe access to them under s. 13(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). An Adjudicator in the Office of the Information and Privacy Commissioner of Ontario ("IPC"), however, ordered their disclosure and denied the Ministry's application for reconsideration. While the Superior Court later dismissed the Ministry's subsequent application for judicial review, the Court of Appeal found the disclosure order was unreasonable, allowed the appeal and remitted the matter to the IPC.

Held: The appeal should be dismissed.

The records in this case present the opinions of public servants on the advantages and the disadvantages of alternative effective dates of legislative amendments. The records served the Ministry in making a decision between the dates. These policy options, whether communicated or not to anyone, constitute "advice" within the meaning of s. 13(1), and thus qualify for exemption from disclosure.

The Adjudicator's disclosure order was based on the fact that most of the records' contents did not reveal a suggested course of action. However, this definition only applies to "recommendations". In exempting "advice or recommendations" from disclosure, the legislative intention must be that advice has a broader meaning than recommendations. Otherwise, it would be redundant. By leaving no room for advice to have a distinct meaning from recommendations, the Adjudicator's decision was unreasonable.

Interpreting s. 13 (1) in its entire context and according to its grammatical and ordinary sense, harmoniously with the scheme and object of the *FIPPA* and the intention of the legislature reveals that "advice" includes policy options. One cannot infer that policy options are excluded simply because the Ontario legislature did not amend the section when other provinces subsequently chose to draft their access to information legislation to include policy options. Nor can one assume that the Williams Commission Report accurately reflects the legislative intent as to the scope of "advice" in s. 13(1), given the substantive and contextual differences, as well as intervening events, between that report and the *FIPPA*. Indeed, had the legislature intended to exclude policy options from the s. 13(1) exemption, it

could have included them in the s. 13(2) exceptions.

Interpreting "advice" as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective and neutral public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All of those drafts inform the end result even if the content of any one draft is not included in the final version. Protection from disclosure would be illusory if only a communicated document was protected and not prior drafts.

Further, in order to achieve the goal of providing for full, free and frank advice, the applicability of s. 13(1) must be ascertainable at the time the public servant prepares the advice. At that time, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1), nor can evidence of an intention to communicate as that intention is inherent to the job.

Cases Cited

Approved: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421; *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245; **referred to:** *Ontario (Minister of Transportation) v. Cropley* (2005), 202 O.A.C. 379; *Ontario (Minister of Northern Development and Mines) v. Information and Privacy Commissioner* (2005), 203 O.A.C. 30; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2.

Statutes and Regulations Cited

Access to Information Act, R.S.C. 1985, c. A-1, s. 21(1)(a), (b).

Corporations Tax Act, R.S.O. 1990, c. C.40.

Freedom of Information Act, 5 U.S.C. s. 552 (1970).

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 10(2), 13, 15(a), 18(1)(d), 23.

Authors Cited

Ontario. Commission on **Freedom of Information** and Individual Privacy. *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*.

Toronto: The Commission, 1980.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis 2008.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg and Feldman JJ.A. and Swinton J. (*ad hoc*)), 2012 ONCA 125, 109 O.R. (3d) 757, 289 O.A.C. 61, 347 D.L.R. (4th) 740, [2012] O.J. No. 815 (QL), 2012 CarswellOnt 2498, setting aside a decision of Aston, Linhares de Sousa and Lederer JJ., 2011 ONSC 2030, [2011] O.J. No. 1464 (QL), 2011 CarswellOnt 2204, affirming a decision of the Information and Privacy Commissioner, Order PO-2872, 2010 CanLII 7691. Appeal dismissed.

Counsel:

Alex D. Cameron, Alan M. Schwartz, Q.C., and Kevin H. Yip, for the appellant John Doe.

William S. Challis, for the appellant the Information and Privacy Commissioner of Ontario.

Sara Blake, Malliha Wilson and Kisha Chatterjee, for the respondent.

Sharlene M. Telles-Langdon, for the intervener the Attorney General of Canada.

Richard M. Butler and John Tuck, for the intervener the Attorney General of British Columbia.

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Brent B. Olthuis and Andrea A. Glen, for the intervener the British Columbia **Freedom of Information** and Privacy Association.

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Ryder Gilliland and Nickolas Tzoulas, for the intervener the Canadian Civil Liberties Association.

[Editor's note: A corrigendum was published by the Court May 9, 2014. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of the Court was delivered by

ROTHSTEIN J.:--

I. Introduction

1 Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to

enable public debate on the conduct of government institutions.

2 However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.

3 The present appeal centers on a limitation of the right of access to government information in Ontario. **Section 13(1)** of the 1988 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("Act" or "FIPPA"), provides that a head of a government institution "may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant ...". The Court is now called upon to determine whether a record containing policy options falls within the terms "advice" or "recommendations" in s. 13(1) and qualifies for exemption from disclosure. An Adjudicator in the Office of the Information and Privacy Commissioner of Ontario ("IPC") ordered disclosure of the government records at issue in this appeal. The Adjudicator found that they did not qualify as advice or recommendations under s. 13(1). In my respectful opinion, the Adjudicator's decision was unreasonable and cannot stand.

II. Factual Background

4 John Doe is a lawyer practising in the area of tax law. He made an access to information request after the Ministry of Finance ("Ministry") amended a provision of the Ontario *Corporations Tax Act*, R.S.O. 1990, c. C.40, to eliminate the loophole created by Ontario's legislation for tax haven corporations. The legislation was partially retroactive. On behalf of certain taxpayers concerned about the impact of such retroactivity on their tax liability, Mr. Doe requested

[all] records or parts of records in the Ministry of Finance and the Ministry of Revenue which consider the issue of retroactivity and the effective date of the amendments to subsections 2(1) and (2) of the *Corporations Tax Act*, which was effective May 11, 2005, including all records which provide the reasons for not deciding to make subsections 2(1) and (2) retroactive.

(Commissioner's decision, Order PO-2872, 2010 CanLII 7691 ("IPC Order"), at p. 1)

5 The Ministry located six records, five of which are at issue in the present appeal ("Records"). The Records are undated drafts of a policy options paper examining the possible effective dates of the amendments. Records I through IV are entitled "Draft Option Paper: Tax Haven Corporations -- Timing of Implementation" and set out options regarding when the amendments could take effect. All the Records except Record IV include express statements regarding which options are not recommended. Record V, entitled "Note on Tax Avoidance Strategy", lists three options and contains a statement from which the author's recommended option can be easily inferred (Court of Appeal decision, 2012 ONCA 125, 109 O.R. (3d) 757, at paras. 4-5; IPC Order, at p. 5).

6 According to the Ministry, the Records were versions of a paper that formed part of the briefings of the Minister, Deputy Minister, Assistant Deputy Minister of Finance and the Office of Budget and Taxation. One of the options was eventually enacted, resulting in the amendments that imposed partially

retroactive tax liability (C.A. decision, at para. 7; IPC Order, at p. 5).

7 The Ministry located and denied access to Records I through V on the basis of the s. 13(1) exemption:

13. (1) [Advice to government] 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.

Access to Records I through IV was denied also on the basis of the exemption to disclosure under ss. 15(a) (prejudice to intergovernmental relations) and 18(1)(d) (injury to financial interests or management of the economy). These provisions are not at issue in this appeal. Record VI was disclosed in part.

III. Procedural History

A. *Information and Privacy Commissioner of Ontario, Order PO-2872, 2010 CanLII 7691*

8 IPC Adjudicator Diane Smith ordered disclosure of the requested records. She concluded, based on the decisions of the Ontario Court of Appeal in *Ontario (Minister of Transportation) v. Cropley* (2005), 202 O.A.C. 379 ("MOT"), at para. 29, and *Ontario (Minister of Northern Development and Mines) v. Information and Privacy Commissioner* (2005), 203 O.A.C. 30, at para. 8, that to qualify for the advice or recommendations exemption under s. 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised" (p. 4). Further, she found that there was no "clear" evidence that the information in the Records was communicated to any other person. The Ministry's search revealed no final version, suggesting to her that the information was never used in its deliberative or decision-making process (p. 8).

9 For these two reasons, the s. 13(1) exemption was found not to apply. Even if the information in the Records had been communicated to a person being advised, the Adjudicator found that only the portions indicating which option was not preferred would be exempted from disclosure. The remaining information had to be disclosed as it did not reveal a preferred course of action either expressly or by inference (p. 9).

B. *Information and Privacy Commissioner of Ontario, Reconsideration Order PO-2899-R, 2010 CanLII 38808*

10 The Ministry applied for reconsideration of the IPC Order on the basis that it was unable to make full representations at the initial proceeding. Adjudicator Smith denied this application. She found no fundamental defect in the adjudication process. Moreover, even if she did reconsider her decision in light of additional evidence presented by the Ministry regarding communication of the information in the Records, she stated that she would have reached the same conclusion. The Ministry did not seek judicial review of the Reconsideration Order.

C. *Ontario Superior Court of Justice, 2011 ONSC 2030 (CanLII)*

11 In brief reasons, the Divisional Court dismissed the Ministry's application for judicial review of the initial IPC Order. The Divisional Court agreed with the Adjudicator that the information contained in the record -- not the record itself -- must have been communicated at some point to the decision maker. The Adjudicator's conclusion that the Ministry did not demonstrate that the information in the Records was ever communicated, and thus was not part of the deliberative process, was held to be reasonable (paras. 6 and 8). It also held that the Adjudicator's conclusion that the Records contained no recommended course of action was reasonable (para. 7).

D. *Ontario Court of Appeal, 2012 ONCA 125, 109 O.R. (3d) 757*

12 The Court of Appeal found the IPC Order to be unreasonable, allowed the appeal and ordered the matter remitted to the IPC.

13 In Rosenberg J.A.'s opinion, the Adjudicator made two fundamental errors in her interpretation of s. 13(1): first, that s. 13(1) requires evidence that the information in the Records actually went to the final decision maker, and second, that s. 13(1) only applies to information that recommends a *single* course of action to the decision maker (para. 25).

14 In his opinion, s. 13(1) does not require the Ministry to prove that the document at issue went to the ultimate decision maker (para. 26). The advice or recommendations contained in draft policy papers will invariably form a part of the deliberative process leading to a final decision, and are thus protected by s. 13(1) (para. 27).

15 Further, limiting s. 13(1) to situations where only a single course of action is considered would be unreasonable, and would "all but denude s. 13(1) of any real meaning" (para. 29). It therefore applies to advice on a range of different options, even if it does not include a specific recommendation on which option to take. For these reasons, the appeal was allowed.

IV. Issues

16 There are two issues:

1. Was the interpretation by the IPC of advice and recommendations in s. 13(1) reasonable?
2. Was it reasonable for the IPC to require communication of the Records to qualify for the s. 13(1) exemption?

V. Analysis

A. *Standard of Review*

17 The parties agree, and the case law supports, that the applicable standard of review is reasonableness. The IPC is owed deference in interpreting and applying its enabling statute (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; see also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30 and 39; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 13; and *Canada (Canadian Human Rights Commission) v.*

Canada (Attorney General), 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 24).

B. *Interpretation of Section 13(1): Advice and Recommendations*

18 The modern approach to statutory interpretation requires the words of s. 13(1) to be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

19 The Records in question constitute drafts of policy options for purposes of a decision as to when amendments to Ontario legislation to eliminate a loophole for tax haven corporations should take effect -- in particular, to what extent the amendment should have retroactive effect. The question is whether policy options such as these constitute advice or recommendations, and thus qualify for exemption from disclosure under s. 13(1).

(1) Text

20 "[A]dvice" and "recommendations" are not defined in the Act.

21 In *MOT*, the Court of Appeal was confronted with the same issue as is now before this Court. In that case, he canvassed various dictionary definitions of the terms "advice" and "recommendations". As he noted, the term "advice" could be defined as a "recommendation regarding a decision, as well as simply information or intelligence" (para. 24). However, he concluded that interpreting the term "advice" as information or intelligence would be so broad as to be inconsistent with the purpose of the *FIPPA*. Nonetheless, he did recognize that room should be left for the terms "advice" and "recommendations" to have distinct meanings (para. 29).

22 The Court of Appeal also found that "'[a]dvice' may be construed more broadly than 'recommendation'" (para. 29). However, he distinguished these terms by finding that "'recommendation' may be understood to 'relate to a suggested course of action' more explicitly and pointedly than 'advice'", while "'[a]dvice' ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation" (*ibid.*). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while "recommendation" is an express suggestion, "advice" is simply an implied recommendation (transcript, at pp. 52 and 57).

23 In this case, the IPC Adjudicator applied *MOT*. She found that to qualify as "advice" and "recommendations" under s. 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised" (p. 4). I accept that material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of "recommendations" in s. 13(1).

24 However, it appears to me that the approach taken in *MOT* and by the Adjudicator left no room for "advice" to have a distinct meaning from "recommendation". A recommendation, whether express or inferable, is still a recommendation. "Advice" must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 ("*Telezone*"), that in exempting "advice and recommendations" from disclosure, the legislative intention must be that

the term "advice" has a broader meaning than the term "recommendations" (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for "advice" to have a distinct meaning from "recommendation", the Adjudicator's decision was unreasonable.

(2) Context

25 The question remains: should the term "advice" in s. 13(1) be construed as including or excluding a record containing policy options prepared by a public servant, any other person employed in the service of an institution or a consultant retained by an institution? Answering this question requires that policy options be defined before turning to the context of s. 13(1) and the *FIPPA*, followed by their legislative history and purpose.

26 Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

27 Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option, as do the Records here. But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

28 In *Telezone*, Evans J.A. found that policy options constitute advice under the analogous provision in the federal *Access to Information Act*, R.S.C. 1985, c. A-1 (paras. 61-64).

29 Some guidance as to whether policy options constitute advice in Ontario under s. 13(1) is provided by ss. 13(2) and (3). (The relevant statutory provisions are set forth in the Appendix.) The opening words of s. 13(2) state: "Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains ..." followed by a list of 12 types of information. These opening words indicate that the potentially broad scope of the term "advice" under s. 13(1) was in the mind of the legislature and was the reason for s. 13(2). I do not suggest that the opening words of s. 13(2) provide proof that "advice" in s. 13(1) includes all conceivable information not listed in s. 13(2). But they are an indication that the legislature was aware that "advice" was open to being broadly construed.

30 Greater insight into what the legislature intended with the term "advice" in s. 13(1) is provided by considering the nature of some of the exceptions listed in s. 13(2). The exceptions in s. 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice and recommendations.

31 The first four paragraphs in s. 13(2) are (a) factual material, (b) a statistical survey, (c) an evaluator's report, and (d) an environmental impact statement. These are examples of what might be

considered objective information. In *Telezone*, Evan J.A. distinguished this type of objective information seen in s. 13(2) from a public servant's opinion pertaining to a decision that is to be made, which he concluded would fall within the scope of "advice" in the analogous federal exemption. At paragraph 63, he stated:

[A] memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made... . They cannot be characterized as merely informing the Minister of matters that are largely factual in nature.

The fact that the legislature saw fit to include four categories of objective information in s. 13(2) suggests that it was aware that "advice" could otherwise be construed as covering such materials, and should therefore be expressly limited.

32 The remaining exceptions in s. 13(2), paragraphs (e) to (l), require reports, plans, studies and decisions that fit into very specific and precisely defined categories to be disclosed even if they contain advice or recommendations. For example, (i) final plans to establish or change a program, (j) and (k) reports of committees if the purpose of the committee was to prepare such reports, and (l) reasons supporting a final decision based on an exercise of discretionary power, are some of the records that must be disclosed. Such records will not always contain advice or recommendations, but when they do, s. 13(2) ensures that they are not protected from disclosure by s. 13(1).

33 The implication of these precisely defined exceptions to the s. 13(1) exemption is that the legislature had regard for the circumstances under which advice or recommendations might be included in such records but should nevertheless be disclosed. It is telling that the legislature, having turned its mind in s. 13(2) to the specific types of records that should be disclosed even though they might contain "advice or recommendations", did not include policy options as a discrete category.

34 Section 13(3) provides that despite s. 13(1), disclosure shall not be refused "where the head [of the institution] has publicly cited the record as the basis for making a decision or formulating a policy". The necessary implication is that where a record that does contain "the basis for making a decision or formulating a policy" has not been publicly cited, disclosure may be refused under s. 13(1). The basis for making a decision or formulating a policy is the foundation or support for the decision or policy. It is not necessarily an express or implied recommendation but could include policy options. This suggests that "advice" in s. 13(1) would include the public servant's view of policy options to be considered by the decision maker.

35 The appellants argue that since the term "policy options" is expressly included in the s. 12(1)(b) exemption for Cabinet records, the absence of that term in s. 13(1) means that policy options, such as the Records at issue here, were not intended to be included in the s. 13(1) exemption. With respect, I cannot agree. The term "advice" is broad enough to include "policy options". I find it more significant that "policy options" was *not* included in the s. 13(2) exceptions to s. 13(1) than that it *was* included in s. 12(1)(b). Had the legislature wanted to exclude records containing policy options from the s. 13(1) exemption, it could have included them in the s. 13(2) exceptions. Mere use of the term "policy options"

in s. 12(1)(b) does not preclude the broader term "advice" in s. 13(1) from including policy options.

(3) Legislative History

36 The IPC argues that the Williams Commission Report indicates that policy options were not intended to qualify for exclusion from disclosure under s. 13(1) (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the "Williams Commission Report")). The report was prepared by a commission established in 1977 by the government of Ontario to study and make recommendations concerning access to information and personal privacy in the governmental context (p. 53). Although the report is admissible as legislative history, I would assign it limited weight with respect to defining the scope of s. 13(1) (Sullivan, at pp. 612-14).

37 This Court has recognized that the *FIPPA* is based on the Williams Commission Report (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 ("*Ontario v. CLA*"), at para. 55). However, the enacted words of s. 13 were not proposed in that report. Nor did the report recommend what was enacted as ss. 13(2) and 23 (*Ontario v. CLA*, at paras. 26-27 and 55; Williams Commission Report, at pp. 289-93). Both of these provisions affect the application of s. 13(1). As discussed above, s. 13(2) provides numerous exceptions to the s. 13(1) exemption. With respect to s. 23, by providing that the s. 13(1) exemption can be overridden "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption", s. 23 limits the application of the s. 13(1) exemption in a manner not discussed or otherwise recommended by the Williams Commission Report. I would infer that the balance chosen by the legislature between the right of access and the exemption for "advice" was achieved by the inclusion of ss. 13(2) and 23 rather than by some unstated limitation on the term "advice" in s. 13(1).

38 In addition to the substantive differences between the Act and the Williams Commission Report, the context in which the report was written and intervening events between the issuance of the report and the enactment of the *FIPPA* also cause me to be hesitant to assign it much weight in determining the legislative intent regarding the scope of s. 13(1). The report was submitted in 1980, eight years before enactment of the *FIPPA*. In the early 1980s, an access to information bill had been introduced into the legislature but was never enacted. The *FIPPA* was brought in by a different government some years later.

39 Further, at the time the report was written, the U.S. federal *Freedom of Information Act*, 5 U.S.C. s. 552 (1970), was the main enacted **freedom of information** statute available for consideration. The Williams Commission Report discusses the American experience at length in its section on the advice or recommendations exemption. It only briefly mentions the Canadian Parliament's bill that was a precursor to the federal *Access to Information Act*. It is significant that s. 13(1) does not resemble any U.S. provision considered by the Williams Commission Report (pp. 290 and 292-93). Instead, it is substantively similar to the advice or recommendations provision in both the earlier federal bill and the federal Act enacted after the report was published (*Access to Information Act*, s. 21(1)(b)). Accordingly, in my respectful view, the report cannot be assumed to accurately reflect the legislative intent with respect to the scope of "advice" in s. 13(1) of the *FIPPA*.

40 It was argued that the access to information statutes of eight other provinces have provisions that are similar to s. 13(1) but that explicitly exempt "policy options" from disclosure (see citations for

provincial provisions in John Doe factum, at para. 80). Mr. Doe submits that inclusion of policy options in the legislation of these other provinces indicates that "advice" as used in the Ontario statute must be interpreted to exclude policy options. Although interpretation of a statute may be informed by reference to similar statutes in other jurisdictions, such comparative analysis is not conclusive (Sullivan, at p. 419). This is particularly true here where the inclusion of the term "policy options" in the statutes of the other provinces occurred after the enactment of s. 13(1) of the *FIPPA*. I cannot infer that policy options are excluded from "advice" in s. 13(1) simply because the Ontario legislature did not amend the section in response to how other provinces subsequently chose to draft their access to information legislation.

(4) Purpose

41 Section 1 sets forth the purpose of the *FIPPA*. Reflecting the public interest in access to information, it establishes a presumption in favour of granting access. Chief Justice McLachlin and Justice Abella explain in *Ontario v. CLA*:

Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society.

...

Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions. [Emphasis added; paras. 1 and 37.]

However, s. 1 also recognizes that the presumption must be rebuttable in a limited number of specific circumstances according to the mandatory or optional exemptions provided for in the Act.

42 The scheme of the Act reflects its purpose. The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their release, has the primary responsibility for determining whether one of the exemptions applies to the requested records. In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked. However, the Act gives the ultimate power over releasing the information to the IPC, subject to judicial review.

43 The purpose of exempting advice or recommendations within government institutions was addressed in the Williams Commission Report and later jurisprudence. It is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. The report discussed the concern that failing to exempt such material risks having advice or recommendations that are less candid and complete, and the public service no longer being perceived as neutral. Although the report suggested that some of these concerns were exaggerated, it acknowledged that "it is difficult to weigh accurately the force of these arguments and predict with confidence the precise results of greater openness with respect to the deliberative decision-making processes of government" (pp. 289-90). Although I would not give the report much weight in defining the scope of s. 13(1), I accept that its discussion of the purpose of s. 13(1) is accurate.

44 In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada*

(*Minister of Finance*), [1994] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:

To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.

It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]

45 Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 44-45). The 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. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

46 Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

(5) Application: the Information in the Records Constitutes "Advice"

47 The policy options in the Records in this case present both an express recommendation against some options and advice regarding all the options. Although only a small section of each Record recommends a preferred course of action for the decision maker to accept or reject, the remaining information in the Records sets forth considerations to take into account by the decision maker in making the decision. The information consists of the opinion of the author of the Record as to advantages and disadvantages of alternative effective dates of the amendments. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).

C. *Advice or Recommendations Do Not Have To Be Communicated*

48 The second issue in the present appeal is whether a record must be communicated in order for s. 13(1) to apply. The IPC Adjudicator answered this question in the affirmative. She found there was "no clear evidence of communication of the information in Records I to V from one person to another" (p. 8). She concluded that it was "not apparent that the information in these five records ... was communicated to the person being advised and, therefore, used in the Ministry's deliberative processes" (*ibid.*).

49 Rosenberg J.A. found that the requirement of the Adjudicator for communication was unreasonable. In his view there was no requirement "that the information in the records actually went to the final decision-maker" (para. 25). He explained by way of example that it would be "absurd and unreasonable" to protect a record from disclosure because there was evidence it was communicated to the decision maker but to not protect earlier drafts of similar content. Protecting the communicated version would provide an "illusory and meaningless" protection if earlier drafts were not also protected, whether there was evidence they were communicated or not (para. 28). In any event, he found that "[t]he circumstantial evidence in this case [was] overwhelming that all six records were part of the deliberative process that led to a decision by the Minister ..." (para. 27).

50 No words in s. 13(1) express a requirement that the advice or recommendations be communicated in order to qualify for exemption from disclosure. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.

51 Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution, that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer.

D. *Exercise of Discretion*

52 It is important to emphasize that s. 13(1) is a discretionary decision and that heads of institutions must be careful to exercise their discretion lawfully (*Telezone* at paras. 45, 100, 102, 107-9 and 112-16; *Ontario v. CLA*, at paras. 66, 69 and 71). The Court noted in *Ontario v. CLA*:

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an

improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations. [para. 71]

There is no suggestion here that the exercise of discretion by the head of the institution was questionable.

VI. Conclusion

53 It was unreasonable for the IPC Order to require disclosure of the Records on the basis that most of their contents did not reveal a suggested course of action. This decision was based on definitions of "advice" and "recommendations" that left no room for the terms to have distinct meanings. It was also unreasonable for the IPC Order to require that there be evidence that information in the Records at issue in this case had been communicated in order to qualify for the s. 13(1) exemption. Policy options prepared in the course of the decision-making process such as those contained in the Records here, whether communicated or not, are within the meaning of "advice or recommendations" in s. 13(1) and qualify for exemption from disclosure.

54 Under s. 10(2) of the *FIPPA*, "as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions" *must* be disclosed. In the IPC Order, the Adjudicator noted that had the Records been communicated, she would have severed the Records and only exempted "information which suggests a course of action that will ultimately be accepted or rejected by the person being advised" (p. 9). However, the Adjudicator was applying an unreasonable definition of "advice". These reasons have interpreted "advice" as including policy options. Because the Records constitute policy options in their entirety, they are not amenable to being severed. Accordingly, they qualify for exemption from disclosure in their entirety.

55 The Records contain "recommendations" and "advice" and are eligible for exemption under s. 13(1) of the *FIPPA*. The appeal should be dismissed. No useful purpose would be served by remitting the matter to the IPC for redetermination. As agreed by the parties, no costs are awarded.

* * * * *

APPENDIX

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

1. [Purposes] The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and

- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

**[PART II: FREEDOM OF INFORMATION
Access to Records]**

10. -- ...

(2) [Severability of record] If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[Exemptions]

12. -- (1) [Cabinet records] A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

...

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

...

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

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

13. -- (1) [Advice to government] 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.

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

- (a) factual material;

- (b) a statistical survey;
- (c) a report by a valuator, whether or not the valuator is an officer of the institution;
- (d) an environmental impact statement or similar record;
- (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
- (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
- (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
- (h) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (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;
- (k) 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;
- (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
 - (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
 - (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

(3) [Idem] Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

23. [Exemptions not to apply] 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.

Access to Information Act, R.S.C. 1985, c. A-1

2. (1) [Purpose] The purpose of this Act is to extend the present laws of Canada to provide a right

of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

21. (1) [Advice, etc.] The head of a government institution may refuse to disclose any record requested under this Act that contains

- (a) advice or recommendations developed by or for a government institution or a minister of the Crown,

...

if the record came into existence less than twenty years prior to the request.

Freedom of Information Act, 5 U.S.C. s. 552 (1970)

- (a) Each agency shall make available to the public information as follows:

...

- (b) This section does not apply to matters that are --

...

- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Appeal dismissed.

Solicitors:

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Solicitor for the appellant the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

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Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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* * * * *

Corrigendum, released May 9, 2014

Please note the following changes in the English version of *John Doe v. Ontario (Finance)*, 2014 SCC 36, released May 9, 2014:

Paragraph 21 should read: "In *MOT*, the Court of Appeal was confronted with the same issue as is now before this Court. In that case, it canvassed various dictionary definitions of the terms "advice" and "recommendations". As it noted, the term "advice" could be defined as a "recommendation regarding a decision, as well as simply information or intelligence" (para. 24). However, it concluded that interpreting the term "advice" as information or intelligence would be so broad as to be inconsistent with the purpose of the *FIPPA*. Nonetheless, it did recognize that room should be left for the terms "advice" and "recommendations" to have distinct meanings (para. 29)."

Paragraph 22 should read: "The Court of Appeal also found that "'[a]dvice' may be construed more broadly than 'recommendation'" (para. 29). However, it distinguished these terms by finding that "'recommendation' may be understood to 'relate to a suggested course of action' more explicitly and pointedly than 'advice'", while "'[a]dvice' ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation" (*ibid.*). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while "recommendation" is an express suggestion, "advice" is simply an implied recommendation (transcript, at pp. 52 and 57)."