

# INTERPRETATION BULLETIN

## Advice or Recommendations

This interpretation bulletin outlines the elements to consider when determining if a record falls under the advice or recommendations exemption, as set out in **section 13(1)** of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and **section 7(1)** of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). This document defines key terms of the exemption and addresses the exceptions to the exemption.

Section 13(1) of FIPPA states:

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

Section 7(1) of MFIPPA states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

### What is the purpose of the discretionary exemption for advice or recommendations?

Sections 13(1) of FIPPA and 7(1) of MFIPPA exempt certain records containing advice or recommendations given to an institution. This exemption aims to maintain an effective and neutral public service by ensuring that people



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employed or retained by institutions can freely and openly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>1</sup>

To have an effective public service, public servants must be able to provide “full, free and frank advice,” in confidence.<sup>2</sup> Failing to keep such information confidential could result in advice and recommendations that are less open and complete.<sup>3</sup>

Sections 13(1) of FIPPA and 7(1) of MFIPPA are discretionary exemptions. The institution bears the responsibility to show that the exemption applies and that the institution head or delegate has exercised their discretion to apply it.

## What is meant by “advice” and “recommendations” under FIPPA/MFIPPA?

“Advice” and “recommendations” have separate meanings.

“Recommendations” are a suggested course of action that will eventually be accepted or rejected by the person being advised. Recommendations can be express or inferred.

“Advice” has a broader meaning than “recommendations.” It includes “policy options,” which are the public servant or consultant’s identification of alternative possible courses of action. “Advice” includes the views or opinions of a public servant or consultant as to the extent of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>4</sup>

“Advice” involves an evaluative analysis of information. Neither “advice” nor “recommendations” include “objective information” or factual material.<sup>5</sup>

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information;<sup>6</sup>
- a supervisor’s direction to staff on how to conduct an investigation;<sup>7</sup>
- information prepared for public distribution.<sup>8</sup>

1 [John Doe v. Ontario \(Finance\), 2014 SCC 36](#), at para. 43.

2 [John Doe v. Ontario \(Finance\), 2014 SCC 36](#).

3 [John Doe v. Ontario \(Finance\), 2014 SCC 36](#).

4 See above at paras. 26 and 47.

5 Orders [PO-3614](#), [MO-3289](#), [MO-3864](#), [MO-4349](#).

6 [Order PO-3315](#).

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

8 [Order PO-2677](#).

Sections 13(1) of FIPPA and 7(1) of MFIPPA apply if disclosure would “reveal” advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the making of accurate inferences as to the nature of actual advice or recommendations.<sup>9</sup>

## Under what conditions will the “advice or recommendations” exemption apply?

The relevant time for assessing the application of sections 13(1) of FIPPA and 7(1) of MFIPPA is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Sections 13(1) of FIPPA and 7(1) of MFIPPA can also apply if there is no evidence of an intention to communicate, since that intention is essential to the job of policy development, whether by a public servant or consultant.<sup>10</sup>

The advice or recommendations included in draft policy papers form a part of the deliberative process leading to a final decision and are protected by sections 13(1) of FIPPA and 7(1) of MFIPPA.<sup>11</sup> This is the case even if the content of the draft is not included in the final version.

Simply classifying information as confidential advice or recommendations is not enough.<sup>12</sup> It must be shown that the record contains confidential information that constitutes advice or recommendations.<sup>13</sup>

Given the purpose of the exemption is to protect the free flow of advice in government decision-making and policy-making,<sup>14</sup> there must be a relationship of advisor and decision-maker, because the decision-maker must be in a situation to accept or reject the advice.<sup>15</sup>

The advice or recommendations exemption exists to protect the interests of public institutions.<sup>16</sup> Accordingly, a third party, such as a company, cannot claim the section 13(1) FIPPA exemption, because it is not a public institution.<sup>17</sup>

Furthermore, the advice and recommendations by individuals who are not public servants, employees or consultants, are also not covered by the exemption.

9 Orders [PO-2084](#), [PO-2028](#), upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also [Order PO-1993](#), upheld on judicial review in [Ontario \(Ministry of Transportation\) v. Ontario \(Information and Privacy Commissioner\)](#), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

10 [John Doe v. Ontario \(Finance\)](#), cited above, at para. 51.

11 *John Doe v. Ontario (Finance)*, cited above, at paras. 50–51.

12 Orders [PO-2432](#) and [PO-3315](#).

13 Orders [PO-2432](#) and [PO-3315](#).

14 Order [MO-4411](#).

15 Order [MO-4411](#).

16 Order [PO-4416](#).

17 Order [PO-4416](#).

This includes non-consultant third parties who are in a contract with the institution, and non-consultant third parties who provided advice, but not to the public institution itself.<sup>18</sup>

## What are the exceptions to the exemption?

Sections 13(2) and (3) of FIPPA and 7(2) and (3) of MFIPPA create a list of mandatory exceptions to the “advice or recommendations” exemption. If the information falls into one of these categories of exceptions, it cannot be withheld as advice or recommendations and must be disclosed (subject to other possible exemptions).

Sections 13(2) and (3) of FIPPA state:

- (2) 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

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<sup>18</sup> Order [PO-3292](#).

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 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) 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.

Sections 7(2) and 7(3) of MFIPPA are similar but not the same. They state:

- (2) 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;
  - (d) an environmental impact statement or similar record;
  - (e) a report or study on the performance or efficiency of an institution;
  - (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
  - (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
  - (h) 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;
  - (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
  - (j) a report of a 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;
  - (k) the reasons for a final decision, order or ruling of an officer or an employee 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.
- (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if the record is more than twenty years old.

The word “report” is included in several paragraphs of sections 13(2) of FIPPA and 7(2) of MFIPPA. The Office of the Information and Privacy Commissioner of Ontario (IPC) has defined “report” as a formal statement or account of the results of the gathering and consideration of information. This does not include mere observations or recordings of fact.<sup>19</sup>

If a report, as a whole, falls into one of the previously stated exceptions, then the entire report falls outside the advice or recommendations exemption, save for where another exemption applies.

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<sup>19</sup> Order [PO-2681](#); Order [PO-1709](#), upheld on judicial review in [Ontario \(Minister of Health and Long-Term Care\) v. Goodis, \[2000\] O.J. No. 4944 \(Div. Ct.\)](#).

## **Factual material: sections 13(2)(a) FIPPA and 7(2)(a) MFIPPA**

Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations included in the record.<sup>20</sup> Factual material falling within this exception must be disclosed, subject to other possible exemptions.

Where, however, the factual information is inextricably mixed with the advice or recommendations, the exception at sections 13(2)(a) of FIPPA and 7(2)(a) of MFIPPA will not apply and the record may be withheld under the advice or recommendations exemption.<sup>21</sup>

## **Statistical survey: sections 13(2)(b) FIPPA and 7(2)(b) MFIPPA**

If a record contains a statistical survey, it cannot be withheld as advice or recommendations and must be disclosed under these subsections, subject to other possible exemptions.

## **Report by a valuator: sections 13(2)(c) FIPPA and 7(2)(c) MFIPPA**

Under these sections, if the record contains a report by a valuator, it must be disclosed as an exception to the advice or recommendations exemption, unless other exemptions apply.

For example, the IPC has found that an appraisal report, prepared by a real estate appraisal and evaluation company, fell within the section 7(2)(c) MFIPPA exception.<sup>22</sup> The report identified the current market value for the subject-property.<sup>23</sup> The report also identified the appraiser's methodology and provided their opinion of the current fair market value of the property.<sup>24</sup>

## **Environmental impact statement: sections 13(2)(d) FIPPA and 7(2)(d) MFIPPA**

Sections 13(2)(d) of FIPPA and 7(2)(d) of MFIPPA refer to a documented review of major expected environmental consequences of a proposal, prepared or obtained by the proponent under guidelines established by a panel or the government.<sup>25</sup> Environmental impact assessments must be disclosed under these subsections.

An environmental impact statement has been defined as the following:

“1. A document required of federal agencies by the National Environmental Policy Act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. 2. A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. 3. An environmental impact assessment report required

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20 Order [P-24](#).

21 Order [PO-2097](#).

22 Order [MO-3362-F](#).

23 Order [MO-3362-F](#).

24 Order [MO-3362-F](#).

25 Order [PO-1852](#).

to be prepared under [Alberta’s Environmental Protection and Enhancement] Act. 4. A detailed written statement of environmental effects [appellant’s emphasis] as required by law.”<sup>26</sup>

### **Product test report: section 13(2)(e) FIPPA only**

If the record contains a report of a test conducted on a product for the purpose of government equipment testing or a consumer test report, it must be disclosed under this subsection even if it contains advice or recommendations, unless other exemptions apply.

Note, this exception exists only in FIPPA, there is no equivalent exception in MFIPPA.

### **Performance or efficiency report: sections 13(2)(f) FIPPA and 7(2)(e) MFIPPA**

Sections 13(2)(f) of FIPPA and 7(2)(e) of MFIPPA are not limited to reports or studies about institutions as a whole but may also apply to reports or studies about one or more discrete program areas within an institution.<sup>27</sup>

Whether the record is a performance or efficiency report doesn’t turn on the reasons as to why the report was ordered. It is the content of the report that determines whether the report concerns performance or efficiency.<sup>28</sup>

For example, the IPC has found that a consultant’s review of a transit project fell within the scope of this exception.<sup>29</sup> The IPC determined that the records evaluated the performance of the public transport agency, project staff and the contractor site teams in making these recommendations.<sup>30</sup> Accordingly, the IPC concluded that it was a report on the performance or efficiency of a part of the agency and ordered its disclosure.<sup>31</sup>

### **Feasibility or other technical study: sections 13(2)(g) FIPPA and 7(2)(f) MFIPPA**

If the record contains a feasibility study or other technical study relating to a government policy or project, including a cost estimate, it will qualify as an exception to the advice or recommendation exemption, and must be disclosed subject to other possible exemptions.

### **Field research report: sections 13(2)(h) FIPPA and 7(2)(g) MFIPPA**

“Field research” is a systematic investigation, conducted away from the laboratory and in the natural environment, for the purpose of establishing facts and reaching new conclusions.<sup>32</sup>

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26 Orders **PO-1852** and **PO-3560-I**.

27 Orders **M-941** and **P-658**.

28 Order **MO-3347**.

29 Order **MO-3347**.

30 Order **MO-3347**.

31 Order **MO-3347**.

32 Order **P-763**

If the record includes a report covering the results of field research started before the formulation of a policy proposal, it must be disclosed under these subsections.

### **Plan or proposal to change or establish a program: sections 13(2)(i) FIPPA and 7(2)(h) MFIPPA**

If the record contains a final plan or proposal to change a program of an institution, or to establish a new program, including a budgetary estimate for the program, it must be disclosed under these subsections, subject to other possible exemptions. To qualify for this exception, the plan or proposal must be final.

### **Committee report: sections 13(2)(j) FIPPA and 7(2)(i) MFIPPA**

If the record contains a report of a committee or similar body that has been created to prepare a report on a particular topic, it must be disclosed under these subsections, unless other exemptions apply.

### **Report of body attached to an institution: sections 13(2)(k) FIPPA and 7(2)(j) MFIPPA**

For the exceptions in sections 13(2)(k) of FIPPA and 7(2)(j) of MFIPPA to apply, they must meet three requirements:

- (1) the record must be a “report” of a “committee, council or other body”;
- (2) the committee, council or other body must be “attached to” an institution;
- (3) the committee, council or other body must have been established “for the purpose of undertaking inquiries and making reports or recommendations to the institution.”<sup>33</sup>

As stated previously, a “report” is a formal statement or account of the results of the gathering and consideration of information. This does not include mere observations or recordings of fact.<sup>34</sup>

A committee, council or other body may be considered “attached” to an institution, even if it maintains some level of independence from the institution.<sup>35</sup>

Making reports or recommendations to the “institution”, includes its Minister.<sup>36</sup>

If this exception to the advice or recommendation exemption applies, the report must be disclosed, subject to other possible exemptions.

33 Order [PO-2681](#).

34 Order [PO-2681](#); Order [PO-1709](#), upheld on judicial review in [Ontario \(Minister of Health and Long-Term Care\) v. Goodis, \[2000\] O.J. No. 4944 \(Div. Ct.\)](#).

35 Orders [PO-2681](#) and [PO-1823](#); also, [PO-1709](#), upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, cited above.

36 Order [PO-2681](#).

## Reasons for a decision, order or ruling: sections 13(2)(l) FIPPA and 7(2)(k) MFIPPA

These sections look at whether the record contains the reasons for a final decision, order or ruling of an officer or an employee of an institution in line with the exercise of a discretionary power under an act or scheme administered by the institution. Note, that the exception under section 13(2)(l) of FIPPA contains certain further qualifications that do not appear in section 7(2)(k) of MFIPPA.

The IPC has found that the exception in 7(2)(k) of MFIPPA did not apply to email correspondence because it was not a final decision, order or ruling of an officer or an employee of an institution made during or at the conclusion of the exercise of a discretionary power.<sup>37</sup>

## Record more than twenty years old: sections 13(3) FIPPA and 7(3) MFIPPA

Even where an institution has properly withheld a record as constituting advice or recommendations, the protections under this exemption do not exist in perpetuity. When the record is 20 years or older, the protections under the advice or recommendation exemption are no longer valid and the record must be disclosed.

Section 13(3) of FIPPA further provides that where the head of the institution has publicly cited the record as the basis for making a decision or formulating a policy, the record cannot be withheld under the advice or recommendations exemption and must be disclosed (subject to other possible exemptions). There is no equivalent provision under MFIPPA.

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<sup>37</sup> Order [MO-3949-F](#).