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

Reconsideration Order R-970003

Appeal P-9600352

Order P-1406

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This order supersedes Order P-1406 which was rescinded on November 19, 1997.

BACKGROUND AND NATURE OF THE APPEAL:

The Ontario Native Affairs Secretariat (ONAS) received an 18-part request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of records relating to the Point Grondine #3 land claim, part of the Robinson Huron Treaty of 1850. ONAS proceeded to respond to the request by breaking it into two parts; records which were created by members of the Ontario Government negotiating team or other staff of ONAS, and records which were generated by persons outside ONAS or the Ontario negotiating team. This appeal relates to the first group of records only.

ONAS granted access in full to some of the records, partial access to others, and denied access in full to most of the records, totalling approximately 3640 pages. For those records to which access was denied either in whole or in part, ONAS claimed exemptions pursuant to sections 12(1), 13(1), 15(a) and (b), 17(1), 18(1)(a), (d), (e), and (g), 19 and/or 21 of the Act.

The appellant appealed this decision.

ONAS divided the responsive records into 13 categories (Records 506 to 515, 517, 521 and "Other Documents"), and the individual pages of each responsive record are numbered. For example, page 576 of Record Category 506 is described as Record 506: 576. I will use this record numbering system in my order.

During mediation, the appellant advised the Appeals Officer that he did not require any personal information contained in the records, or any third party information for which the section 17(1) exemption had been claimed. Because section 21 of the Act was the only exemption claimed to exclude information from 32 of the records (122 pages), these records are no longer at issue in this appeal. In addition, any portions of the remaining records for which only sections 17(1) and/or 21 were claimed are also no longer at issue, as well as several records which the parties agreed were not responsive to this part of the request.

Further mediation was not productive, and a Notice of Inquiry was sent to both parties, asking them to provide representations on the all remaining issues. In addition, because the interests of Indian and Northern Affairs Canada (Canada), on behalf of the federal government, and the Wikwemikong First Nation (the First Nation) may be affected by the outcome of this appeal, they were provided with a copy of the Notice, and given the opportunity to submit representations.

In its representations, ONAS advised that it had located five additional responsive records totalling 13 pages, and provided copies to this office. They are Records 506: 183, for which ONAS claimed sections 15(a) and (b), and 506: 712 to 719, 506: 1088-1089, 506: 1095-1096 and 514: 462-463 for which ONAS claimed sections 13(1), 15(a) and 19. In addition ONAS claimed additional discretionary exemptions under sections 13(1), 15(a) and (b), 18(1)(d) and 19 for several of the records, as well as the mandatory exemption found under section 12(1)(e) of the Act for one record.

Following a review of all representations and the records, Inquiry Officer Donald Hale issued Order P-1406, in which he found that many of the records, either in whole or in part, did not qualify for the exemptions claimed and ordered them disclosed to the appellant.

At the time Order P-1406 was issued, ONAS was unable to provide this office with copies of Records 508: 441-442, 508: 593-595 and 508: 871-876, which had been identified as being responsive to the appellant's request. ONAS had not located these records at the time of the order, nor had it provided any explanation as to their whereabouts. Inquiry Officer Hale ordered ONAS to provide an affidavit with respect to the nature and extent of the search which it had undertaken for these three records. Order P-1406 stipulated that a final order with respect to whether the searches were reasonable would follow the receipt of the requested affidavit.

ONAS subsequently provided this office with an affidavit with respect to the three records. ONAS explained that it had located Records 508: 441-442 and 508: 871-876, but that Record 508: 871-876 was, in fact, only three pages in length and, therefore, should be re-numbered to 508: 871-873. ONAS further explained that Record 508: 593-595 had been previously provided to this office as 507: 593a-595, but that it should be properly categorized as the former and, therefore, should not be listed as 507: 593a-595. In addition to the exemptions already listed, ONAS claimed that the mandatory section 12(1)(e) exemption was being claimed for Record 508: 871-873, and the discretionary exemption under section 15(a) applied to Record 508: 593-595. The information provided by ONAS fully responded to the requirements set out by Inquiry Officer Hale in Order P_1406 with respect to these three records. Therefore, the issue of whether the search for these records by ONAS was reasonable has been resolved.

Shortly after the issuance of Order P-1406, the Attorney General (the Minister Responsible for Native Affairs) made an application to Divisional Court for judicial review of the order. Upon receipt and review of the submissions of the Attorney General set out in its factum, Inquiry Officer Hale determined that, in applying the Commissioner's interpretation of sections 15(a) and (b) to records he had ordered disclosed, he committed a fundamental error going to his jurisdiction to make the Order. Consequently, he concluded that he failed to conduct the inquiry required under section 54(1) of the Act, and determined that this was an appropriate case to rescind and reconsider the decisions in the order in their entirety. It was agreed that the judicial review hearing would be adjourned pending the outcome of the reconsideration. I assumed responsibility for this reconsideration.

In a letter dated November 19, 1997, Inquiry Officer Hale advised the parties that this appeal was to be reconsidered and advised them that they could either rely on their original representations, or could provide new or additional representations. A new Notice of Inquiry was sent to all of the parties. Additional representations were received from ONAS and the First Nation. I will be relying on these as well as the original representations of the other parties. ONAS also provided this office with a number of supporting documents containing background information on the land claim resolution process in general, as well as information respecting the Point Grondine land claim negotiations which gave rise to the creation of the records at issue in this appeal.

In its representations, ONAS claimed additional discretionary exemptions for several records pursuant to sections 13(1), 15(a) and (b), 18(1)(d) and 19 of the Act, but withdrew the section

18(1)(g) exemption claim. ONAS also withdrew the section 12(1)(a) claim for record 507: 591_592a, and the section 19 claim for page 1055 of Record 506: 1052-1059. I have reviewed these records and because no other discretionary exemptions have been claimed and no mandatory exemptions apply, they should be disclosed to the appellant. Finally, ONAS identified four records (508: 781-783, 508: 643-647, 514: 227-233 and 521: 70-81) which it originally indicated had been fully disclosed but in fact were only partially disclosed, and five additional records which were not previously identified as responsive to the request. Therefore, these records are also at issue in this appeal.

There are 494 records at issue (94 in part and 400 in full) totalling approximately 2700 pages. They consist of notes, letters, correspondence, memoranda, briefing notes, draft correspondence and documents, "e-mails", working documents, and various other related documents.

PRELIMINARY MATTER:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

When the appeal was first received, this office provided ONAS with a Confirmation of Appeal, indicating that it had 35 days from the date of the Notice to raise additional discretionary exemptions not claimed in its original decision letter. No additional exemptions were raised during this period.

Subsequently, in its original representations submitted in March and May, 1997, as well as in its most recent representations, ONAS raised sections 13(1), 15(a) and (b), 18(1)(d) and 19 as new discretionary exemption claims for several of the records.

It has been determined in previous orders that the Commissioner has the power to control the process by which an inquiry is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter (Orders P-345 and P-537).

ONAS was asked in the Notice of Inquiry to provide reasons for raising these exemptions after the 35-day period had expired. ONAS stated that, in some cases the head considered the exemptions in deciding not to disclose the records but, due to the large volume of records, an administrative error was made in not listing the exemption claims in the indices. In other cases, ONAS explains that during the preparation of its representations it discovered that the exemptions should have been claimed with respect to records which are similar to other records which had been exempted. ONAS submits that in light of the nature of the request and the total number of records involved, this type of administrative error is understandable.

ONAS argues that the discretionary exemptions have been applied to these additional records in a manner consistent with the treatment of similar records for which the same exemptions have already been claimed. For example, ONAS suggests that it would be inappropriate to disclose a record which qualifies for exemption under section 15 but for which this exemption had not been originally claimed, since all of the concerns with respect to the impact on the negotiations process would apply equally to that record.

ONAS further submits that raising the new exemption claims would not likely prejudice the appellant, since these claims are consistent with the original exemptions claimed for similar records and, therefore, would have little if any impact on the submissions of all of the parties. Finally, ONAS submits that the concerns underlying the 35-day policy should be considered in relation to the prejudicial impact that disclosure would have if the exemptions are not considered.

In Orders P-658 and P-883, former Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision maker has the authority to decline to consider it. This authority was confirmed by the Ontario Divisional Court in dismissing an application for judicial review of Order P-883 [See Ontario (Minister of Consumer and Commercial Relations) v. Fineberg, Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]. I agree, and find that I have the authority to decline ONAS's request.

However, based on the representations from ONAS, the nature and complexity of the records, and the potential prejudice to the land claims negotiations process, I consider this to be an appropriate case to depart from the normal practice of this office. Accordingly, I will consider the application of the discretionary exemptions in sections 13(1), 15(a) and (b), 18(1)(d) and 19 of the Act to the additional records for which they have been claimed.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

ONAS claimed the application of the exemptions in sections 15(a) and (b) to the vast majority of records. These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution:
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

Section 15(a)

In order for a record to qualify for exemption under section 15(a), ONAS must establish that:

1. the relations must be intergovernmental, that is relations between ONAS and another government or its agencies; and

2. the disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

Part One

ONAS states that the records for which this exemption is claimed reveal or reflect the interaction, discussions, negotiations and exchange of information and positions between Ontario, Canada and the First Nation within the Point Grondine Land Claim negotiations. ONAS further states that all the parties negotiate the often difficult and complex issues with the assurance that the negotiations will remain confidential. Any breach of this expectation of confidentiality by any of the parties or through the appeal process would have a serious chilling effect upon the open and free conduct of the negotiations. Canada and the First Nation make similar submissions.

ONAS submits that the relations which exist in the course of the settlement of a land claims agreement with an Ontario First Nation, where Canada is also a party to the negotiations, are intergovernmental in nature.

ONAS states that Ontario has been involved in discussions with the First Nation generally through the entire period of the negotiation, while Canada was not always actively involved. Although Canada's participation in these discussions was not always active throughout this period, the federal government conducted its own review of the claim to determine its position, following which the three parties were able to establish the terms on which they would negotiate. ONAS submits that the negotiations and the conduct of intergovernmental relations among the three parties has occurred over the entire time span, from receipt of the land claim through to settlement, as each party has developed and presented its position. In short, ONAS submits that relations directly between Ontario and the First Nation prior to the active participation of Canada are "intergovernmental" for the purposes of section 15(a) because they existed in the context of these "tripartite" negotiations.

I accept these submissions. In Orders 210, P-630, P-908, P-949 and P-961, it was held that relations between Canada and Ontario which are reflected in records relating to a land claims settlement are "intergovernmental" in nature for the purposes of section 15(a). In my view, the fact that the First Nation is recognized as a full partner with Ontario and Canada in the tripartite negotiations of this land claim settlement is sufficient to satisfy the first part of the section 15(a) test for records relating to the entire period of the negotiations.

In the Notice of Inquiry I requested representations on the issue of whether a First Nation is a government. However, in view of my finding above, it is not necessary for me to make a determination on this issue.

On reviewing the records, I find that the first part of the section 15(a) test has been satisfied for all records, with the following exceptions:

> Pages 749 and 750 of Record 506: 748-750, Pages 1121 and 1122 of Record 506: 1118-1124 (disclosed in part), Record 506: 1125 and Record 506: 1144-1145 are all handwritten notes of communications among Ontario staff about responding to an access to information request under the Act. Record 508: 45 (disclosed in part)

> is a memorandum referring to an attached order-in-council, and the information severed from it (3 lines) relates to the process by which the order should be signed. Page 67 of Record 508: 67- 72 is a memorandum between Ontario staff regarding further distribution of an attached letter (Pages 68-72) which has been disclosed to the appellant. Record 508: 515 is a communication among Ontario staff, and the information severed from the record (two lines) refers to another document being enclosed. The only information severed from Record 513: 62-64 is on Page 62 and is an ONAS account number. Record 514: 540 is a table, internal to Ontario, which lists Cabinet Submission Target Dates. The only information severed from Record OTHER 29-35 is on Page 30 (a draft letter) and is a handwritten note seeking direction as to who should sign the letter. Record OTHER: 167-168 is a memorandum internal to Ontario, and the severed information relates to legal advice in regards to responding to an access to information request under the Act.

In my view, none of these records are sufficiently connected to relations between ONAS and another government or its agencies to satisfy the first part of the section 15(a) test.

ONAS also claimed section 15(a) as one basis for exempting Records 508: 50 and 508: 51; however, I will defer my decision on the disclosure of these records to the discussion under the heading "Cabinet Records" which follows.

Part Two

ONAS states that because Canada is primarily responsible for native Canadians pursuant to section 91(24) of the Constitution Act, 1867, it is important to Ontario and necessary to the process that Canada be involved in land claims negotiations and in any settlement package. Ontario prefers that Canada's involvement remain in the forum of negotiation rather than litigation.

ONAS submits that disclosure of the subject records would be considered by both the First Nation and Canada to be a breach of the confidentiality of the negotiations and would lead to a less frank discussion and reduced co-operation in the implementation of the land claim agreement. Full and frank discussion on a confidential basis is necessary for the parties to understand and resolve the complex issues that need to be addressed. ONAS argues that the assumption of confidentiality increases the level of understanding between the parties with respect to their positions and perspectives, all of which fosters a greater likelihood that the claim will be resolved. ONAS adds that it's experience in such negotiations is novel and, therefore, each experience that Ontario gains through negotiated resolutions, and in working co-operatively with Canada and the First Nations, is invaluable in assisting Ontario to deal with ongoing and future land claim negotiations.

ONAS also submits that disclosure of these records will jeopardize the integrity of Ontario's negotiations with Canada and other First Nations in the 16 other land claims currently being conducted, as well as the 46 land claims presently in the pre-negotiation stage of settlement. It says that disclosure of both Ontario's and Canada's negotiating strategies, as reflected in many of the records, would have a "chilling effect" on future land claims negotiations. It is important

to both Ontario and Canada that land claims be resolved through a negotiation process, rather than through litigation. ONAS suggests that the successful settlement of many of these claims may be jeopardized by the disclosure of information about strategies and negotiating tactics employed by Ontario and Canada in the Point Grondine negotiations. It argues that disclosure of these records could compromise the integrity of these negotiations with Canada and the First Nations, and that this gives rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations with Canada in the field of native land claim settlements.

Canada submits that it has consistently opposed the disclosure of any records revealing the substance of confidential land claim negotiations and that disclosure would be considered a breach of the confidentiality of negotiations and would have a chilling effect upon the negotiations process. Canada further submits that this would result in prejudice to the conduct of intergovernmental affairs, and that it would be less willing to share material which is related to native land claims with Ontario if such information is made public. It submits that, in future, all such material would have to be carefully reviewed prior to being released to Ontario.

Similarly, the First Nation submits that it was the understanding of all the parties, throughout the negotiations, that unless otherwise agreed or arranged, the information produced by any of the parties by their researchers or lawyers was to be treated as confidential. The ability to negotiate among the three parties in confidence is a crucial factor which enables land claim resolutions to be achieved. These negotiations can only be expected to achieve any concrete results if the negotiations amongst the three parties, and all of the documentation supporting the positions of each of the parties can be maintained in confidence.
Given the sensitive and complex nature of land claim negotiations generally and the particular circumstances in this appeal, including the need for ongoing negotiations to implement the agreement which was reached, I am persuaded that disclosure of the bulk of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada, including the tripartite discussions between Ontario, Canada and the First Nation, as well as relations involving future land claim negotiations.

Therefore, with the exception of the records which I have found do not satisfy Part 1 of the section 15(a) test, above, I find that the rest of the records to which section 15(a) has been applied, either in whole or in part, qualify for this exemption and should not be disclosed, with the following further exceptions:

> Records OTHER: 11 and 508: 26 are identical e-mails internal to Ontario requesting expenses for a Ministry of Natural Resources employee who was involved in the negotiations. Record OTHER: 184 (disclosed in part) is a typewritten note of a meeting with provincial opposition critics and the information severed from one line on the record relates to the approach Ontario should take in the negotiations. Documents 3, 4 and 5 of the additional records located by ONAS and submitted with its representations are three draft letters. ONAS states that Document 3 in its final version was disclosed to the appellant as Record 513: 231, but adds that it is unclear if the final versions of Documents 4 and 5 were disclosed.

Although I accept that all of these records were created in the context of the land claims negotiation process, I am not persuaded that their disclosure could reasonably be expected to interfere with the conduct of this or any future land claim negotiations or otherwise prejudice the conduct of intergovernmental relations, and do not qualify for exemption under section 15(a).

Record 508: 128-129 is identical to Record 508: 585-586. The former was withheld in its entirety whereas the latter was partially disclosed with only six lines of text severed from the bottom of the first page. Although technically Record 508: 128-129 could be treated similarly, the appellant has already received Record 508: 585-586 and I will not order ONAS to disclose the same record again.
Finally, ONAS claimed section 15(a) of the Act for part of Record 506: 240-254, and I upheld this claim in my findings above. ONAS also claimed section 13(1) of the Act for only two lines of text on Page 242 of this record, but later withdrew this claim. Accordingly, the two lines on Page 242 should be disclosed to the appellant.

The test under section 15(a) of the Act which I described at the beginning of this discussion was previously developed by this office as the standard for determining the application of this exemption. Having considered that test and its application to the records and circumstances of this appeal, it is my view that it would be more appropriate to re-state the test as follows:

> In order for a record to qualify for exemption under section 15(a), the parties resisting disclosure must establish that:
>
> 1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
>
> 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

While I have made my findings above in accordance with the standards of the previously articulated section 15(a) test, I have also reviewed the records in light of the restated test, and my findings under section 15(a) are the same in either case.

Section 15(b)

In order for a record to qualify for exemption under section 15(b), ONAS must establish that:

1. the records reveal information received from another government or its agencies; and

2. the information was received by ONAS in confidence.

ONAS claims that following records all qualify for exemption under section 15(b) of the Act: 749 and 750 of Record 506: 748-750, the information severed from pages 1121 and 1122 of Record 506: 1118-1124, Records 506: 1125, 506: 1144-1145, 508: 45, page 67 of Record 508: 67-72 , Records 508:26, 508: 515, the information severed from page 62 of Record 513: 62-64,

Record 514: 540, the information severed from page 30 of Record OTHER: 29-35, Records OTHER: 167-168, OTHER: 11 and OTHER: 184.

I have described these records in the preceding discussion and, having reviewed them in relation to section 15(b), find that they do not contain, nor would they reveal, information received in confidence from another government. Accordingly, they do not qualify for exemption under section 15(b) of the Act.

Because section 15 of the Act was the only exemption claimed for Record OTHER: 184, and no mandatory exemptions apply, this record should be disclosed to the appellant.

To summarize, I have found that section 15(a) of the Act applies to the majority of records for which this exemption was claimed, and that section 15(b) does not apply to any of the remaining records for which it was claimed. I have ordered disclosed those records to which neither section nor any other exemption applies, or for which ONAS has withdrawn its exemption claims.

The records remaining at issue in this appeal are Records 506: 749-750, 506: 1058, 506: 1121-1122, 506: 1125 and 506: 1144-1145, Records 508: 45, 508: 50, 508: 51, 508: 67-72, 508: 515, 508: 526, Records 513: 62-64, 513: 296, 513: 307, Records 514: 540, 514: 652-653, Record 521: 70-81, Records OTHER: 11, OTHER: 29-35 and OTHER: 167-168, and Documents 3, 4 and 5 of the new responsive records.

CABINET RECORDS

ONAS claims that Records 508: 50, 508: 51 and Record 514: 540 are exempt from disclosure under the introductory wording of section 12(1) of the Act, and that Record 514: 540 is exempt under subsection (a) of section 12(1). This section states:

> 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,
>
> > an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees.

ONAS submits that Records 508: 50, 508: 51 and 514: 540 refer to matters which were the subject of deliberations of the Executive Council and that the disclosure of these records would reveal the substance of these deliberations. I agree with this submission with respect to Records 508: 50 and 508: 51 which, therefore, are properly exempt under the introductory wording to section 12(1).

Record 514: 540 is a one-page document entitled "Cabinet Submission Target Dates". In my view, disclosure of this record would not reveal the substance of a Cabinet submission with respect to the land claim, nor does it qualify as an agenda, minute or other record of the deliberations or decisions of the Executive Council or one of its committees within the meaning

of section 12(1)(a). Accordingly, I find that Record 514: 540 does not qualify for exemption under section 12(1) of the Act.

Because this record does not qualify for exemption under section 12(1) or 15 of the Act, and as no other exemptions have been claimed and no other mandatory exemptions apply, Record 514: 540 should be disclosed to the appellant.

ADVICE OR RECOMMENDATIONS

This exemption is found in section 13(1) of the Act, which 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.

It is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act.

In Order 94, former Commissioner Sidney B. Linden commented on the 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".

ONAS claims that the following records qualify for exemption under section 13(1): Records 506: 749-750, 506: 1121, 506: 1122, 506: 1125 and 506: 1144-1145, Records 508: 45, 508: 67-72, 508: 515 and 508: 526, Record 513: 296, Record 521: 70-81, Records OTHER: 11, OTHER: 29-35 and Documents 3, 4 and 5 of the new responsive records. ONAS also claims this exemption for Record OTHER: 167-168; however, as I will be dealing with this record under the heading "Solicitor Client Privilege", I will not consider it here.

ONAS has provided me with extensive background information regarding the nature of government decision making in the land claims process and the environment within which advice is given. ONAS has also provided detailed representations on the application of section 13(1) to each of the records for which it is claimed.

I have reviewed these records in detail and I find that the disclosure of Records 506: 749-750, 506: 1121, 506: 1122, 506: 1125 and 506: 1144-1145, Record 508: 67-72, Record 513: 296, and Record 521: 70-81 would clearly reveal advice and/or recommendations of a public servant which may be accepted or rejected by its recipient. Therefore, these records qualify for exemption under section 13(1) of the Act. I also find that none of the exceptions listed under section 13(2) apply.

With respect to the remaining records, all of which I have previously described in this order, I find that section 13(1) does not apply for the following reasons. Record 508: 45 (disclosed in part) simply gives a direction regarding the process to follow in obtaining signatures for an order-in-council, and Records 508: 515, 508: 526 and OTHER: 11 neither contain nor would reveal advice or recommendations that would be considered part of the deliberative decision-making process. Record OTHER: 29-35 seeks rather than provides advice and recommendations. Finally, Documents 3, 4 and 5 of the new records are all draft letters that neither contain nor would reveal advice or recommendations.

Because no further exemptions have been claimed for Records 508: 515, 508: 526, Records OTHER: 11, OTHER: 29-35, and Documents 3, 4 and 5 of the new records, and no mandatory exemptions apply, they should be disclosed to the appellant.

VALUABLE GOVERNMENT INFORMATION

ONAS claims that a portion of Record 513: 62-64 is exempt under section 18(1)(a) of the Act. In order to qualify for exemption under section 18(1)(a), ONAS must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value.

[Order 87]

The undisclosed part of the record consists of nothing more than the account number from which payments from Ontario to the First Nation were to be made.

ONAS submits that the account number belongs to the Government of Ontario and that disclosure of it could potentially be used by individuals to gain access to Ontario's financial accounts.

Although I accept that this number belongs to the institution as part of its accounting system, I find that it is not properly characterized as any of the types of information listed in section 18(1)(a), nor am I persuaded, based on the representations provided by ONAS, that this number has monetary value or potential monetary value.

Therefore, I find that the first and third requirements of the test for exemption under section 18(1)(a) have not been established, and because no other exemption claims apply, the undisclosed parts of Record 513: 62-64 should be provided to the appellant.

SOLICITOR-CLIENT PRIVILEGE

ONAS submits that Records 506: 1058, 508: 45, 513: 307, 514: 652-653 and OTHER: 167-168 are subject to the exemption in section 19 of the Act, which states:

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

Section 19 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), ONAS must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

ONAS states that it is relying on Branch 1 for all of these records and on Branch 2, as well, for Records 506: 1058, 508: 45 and 514: 652-653.

Records 513: 307 and OTHER: 167-168 are memoranda that clearly contain confidential, written communications between a solicitor and his or her client directly relating to seeking, formulating or giving legal advice. Therefore, these two records are exempt from disclosure under Branch 1 of the section 19 exemption.

Record 514: 652-653 is a handwritten note made by ONAS's senior counsel with an excerpt from a reported case attached. ONAS submits that the note was prepared by counsel to assist him in formulating and giving legal advice to his client and to assist him in speaking to the issue of a competing interest regarding part of the lands in the settlement negotiations. In my view, while this record does not represent a direct communication between a solicitor and a client, I find that it would reveal legal advice and qualifies for exemption under Branch 1.

The undisclosed portion of Record 508: 45 neither contains nor would reveal legal advice, and in fact does not even relate to the provision of legal advice. It is simply an administrative document directing the process for obtaining the proper signatures on an order-in-council. Therefore, this record does not qualify for exemption under either Branch 1 or Branch 2.

Record 506: 1058 is a handwritten note made by ONAS's senior counsel, which ONAS submits is a note to file of a conversation between senior counsel and counsel for the Ministry of Natural Resources regarding a change to the text of the settlement agreement. In my view, this record contains factual information and does not relate to the provision of legal advice. Therefore, this record also does not satisfy either Branch 1 or Branch 2 of the section 19 test.

To summarize, I find that Records 513: 307, 514: 652-653 and OTHER: 167-168 qualify for exemption under section 19 of the Act, and that Records 506: 1058 and 508: 45 do not.

Because no other exemptions have been claimed and no mandatory exemptions apply to Records 506: 1058 and 508: 45, they should be disclosed to the appellant.

ORDER:

1. I order ONAS to disclose to the appellant, Records 506: 1055 and 506: 1058, Record 507: 591_592a, Records 508: 45, 508: 515 and 508: 526, Records OTHER: 11, OTHER: 29-35 and OTHER: 184, and Documents 3, 4 and 5 of the new additional records all in their entirety; the two lines from page 242 of Record 506: 240-254 for which section 13(1) had been claimed; the one line of information relating to the Point Grondine land claim from Record 514: 540; and the account number contained in Record 513: 62-64. Disclosure is to be made by sending the appellant copies of these records no later than **June 25, 1998** but not before **June 22, 1998**.

2.. I uphold the decision of ONAS to deny access to the remainder of the records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require ONAS to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: May 21, 1998
Tom Mitchinson
Assistant Commissioner