ORDER PO-1983

Appeal PA-000385-2

Ministry of the Solicitor General

BACKGROUND AND NATURE OF THE APPEAL:

On or about January 31, 2000, a fire occurred at a commercial property, apparently originating on the premises of one of the tenants. The fire resulted in extensive property damage. The Office of the Fire Marshal (the OFM) investigated the fire. This investigation was conducted primarily by an investigator and an engineer employed by the OFM. Their investigation pointed to two refrigeration units (the units) as the suspected point of origin of the fire. The appellant is an insurance adjuster representing the insurer of the company that manufactured the units. This company was identified as a "stakeholder" in the investigation conducted by the OFM, as were a number of other companies, including the tenant on whose premises the fire allegedly originated.

On September 5, 2000, the appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the findings of the named investigator and engineer at the OFM relating to the fire. On November 2, 2000, the Ministry denied access to the requested records on the basis of sections 14 (law enforcement) and 21 (invasion of privacy). The Ministry indicated that the matter "is currently under investigation". The appellant appealed this decision and Appeal PA-000385-1 was opened.

On December 13, 2000, following receipt of the Confirmation of Appeal, the Ministry wrote to this office to advise that "there are no responsive records". On January 16, 2001, the Ministry advised the mediator assigned to the file that it interpreted the appellant's request for "findings" as only encompassing the final reports prepared by the named OFM staff. The Ministry confirmed with the mediator that final reports had not been completed by these two individuals and therefore, the decision should be that no records exist. The Ministry indicated that it intended to issue a revised decision to the appellant to reflect this. The appellant disagreed with the Ministry's interpretation of his request, indicating that he was seeking any correspondence, field notes and any other records relating to the investigation. He did not accept that records relating to the OFM investigation into the fire did not exist.

During mediation of Appeal PA-000385-1, the Ministry issued a revised decision letter (undated but received at this office on January 18, 2001) to the appellant claiming that no records exist. The appellant subsequently agreed to submit a new request detailing those records he wished to receive and the appeal file was closed.

The appellant submitted his revised request to the Ministry on February 6, 2001. He requested access to "any and all records developed by the [Ministry] with respect to the February 2, 2000 fire…" In particular, he requested "a complete copy of the file, investigation results, correspondence, field notes, internal memoranda, and other data including but not limited to …" 11 categories of documentation.

The Ministry located 118 responsive records (consisting of 746 pages) and denied access to them in their entirety on the basis of the exemptions in sections 14(1)(a) and (b), 17(1) (third party information), 19 (solicitor-client privilege) and 21(1) (with reference to sections 21(2)(f) (highly sensitive) and 21(3)(b) (compiled as part of an investigation into a possible violation of law) of the *Act*.

The appellant appealed the Ministry's decision and the current appeal was opened.

During mediation, the Ministry disclosed two records to the appellant, namely:

- The report of the OFM Investigator dated April 23, 2001 (responsive to part 11 of the request). It does not appear that this record formed part of the records at issue as identified by the Ministry as it post-dated both the appellant's request and the Ministry's decision on access; and

- The engineering report prepared by the engineer dated December 7, 2000 (also responsive to part 11 of the request). This report is contained in pages 496-501 of Record 80. As a result, these six pages are no longer at issue.

Further mediation could not be effected and the appeal was moved into inquiry. On my initial review of the records at issue in this appeal, I noted that they contain a considerable amount of correspondence to and from the appellant as well as information relating to the insured company's product. Prior to the preparation of the Notice of Inquiry, an Adjudication Review Officer contacted the appellant to determine whether he was interested in pursuing this information. The appellant indicated that he does not wish to pursue access to any technical information pertaining to the insured company. Pages 536 - 555 consist of a document titled "Listing Report: Intertek Testing Services NA LTD." Pages 581 - 584 contain technical drawings for the insured company's unit. These documents all contain technical information relating to the unit manufactured by the insured company. Since the appellant has indicated that he is not seeking this information, these pages are not at issue. However, the appellant indicated that he does wish to pursue access to correspondence between himself and the Ministry for continuity purposes.

I decided to seek representations from the Ministry and five parties who may have an interest in disclosure of the records at issue (the affected parties), initially, and sent them a Notice of Inquiry setting out the facts and issues in the appeal. To be precise, I identified, as affected parties, four companies who had a direct interest in the product in which the fire allegedly originated. In addition to notifying these companies, I sent copies of the Notice of Inquiry to one or more of their solicitors, insurance adjusters, insurance companies and/or fire investigators where they were identified in the records as representing the interests of the affected parties during the investigation conducted by the OFM. I also notified a company that provides testing services as an affected party as one of the records consists of the results of technical tests it conducted on a product.

The Ministry submitted representations in response, as did three of the affected parties. In particular, representations were received from one company directly and the insurance adjuster for another company, both of which object to disclosure, as well as from the testing services company, which essentially objects to disclosure on behalf of its client.

In its representations, the Ministry identifies the Technical Standards and Safety Authority (the TSSA) as an additional affected party who may have an interest in one of the records at issue. I

decided to seek representations from the TSSA and sent it a Notice of Inquiry. The TSSA did not submit representations in response, but rather, wrote to the Ministry directly and consented to the disclosure of the "Incident Report" prepared by its Fuels Safety Division on February 18, 2000. Because this record (Record 77) may contain information related to other affected parties, I will consider whether section 17(1) applies to it.

During this part of the representations stage, a number of events occurred:

1. One of the affected parties (who did not submit representations to this office) contacted the Ministry directly and consented to the disclosure of pages 683 to 692 (Record 111) to the appellant;

2. The Ministry disclosed pages 683 to 692 as well as other information consisting primarily of correspondence between the Ministry and the appellant (which is information that the appellant had indicated that he was interested in receiving for continuity purposes). As a result, the following pages were disclosed in their entirety: pages 1, 100, 147 - 148, 151 - 154, 155 - 158, 163 - 164, 167 - 172, 194 - 195, 197, 208 - 212, 227, 244 - 246, 247 - 258, 259, 268, 304 - 306, 330, 364, 378, 379 - 381, 389 - 390, 396, 415 - 419, 474, 487 - 488, 495, 502, 513, 516, 517, 614 - 615, 616 - 617, 618 - 619, 633, 643 - 651, 657 - 658, 661, 665 - 666, 667 - 678, 679 and 701 - 702. The following pages were disclosed to the appellant, in part: pages 196, 215, 286 - 296, 397, 471 - 472, 654 and 706 - 713;

3. The Ministry withdrew its reliance on sections 14(1)(a) and (b) of the *Act*. Since the Ministry has claimed no other exemptions for pages 99 and 149, they must be disclosed to the appellant;

4. On the copies of the severed pages that the Ministry provided to the appellant, it noted that the portions which had been withheld were done so pursuant to the mandatory exemption in section 17. This exemption had originally been claimed for most of these pages, but had not been claimed for pages 215 and 286 - 296. In addition, the Ministry has only claimed the exemption in section 14 for pages 355 - 377 and 518 (which have been withheld in their entirety). However, consistent with the other severances made by the Ministry, it would appear that it should have also claimed the application of section 17 for these pages. Because section 17 is mandatory, I will consider whether it applies to these pages; and

5. The Ministry submits that it is of the view that various fax transmission verification reports (for example, pages 331 to 354) and routine administrative information relating to the processing of requests under the *Act* (such as page 470) are not responsive to the appellant's request. Given the Ministry's description of these types of records, it appears that pages 307, 314, 315, 319, 432 would also fall into this category of records which the Ministry believes is not responsive. The responsiveness of these records, therefore, is now an issue in this appeal.

I subsequently decided to seek representations from the appellant, but only with respect to certain records and exemptions. I attached to the Notice of Inquiry that I sent to the appellant, a copy of the Ministry's representations in their entirety.

The appellant requested, and was granted extensions for the receipt of his representations up to, but no later than December 7, 2001. I denied the appellant's request for a further extension after that date, but agreed to consider his representations if they were received before I had completed the order. The appellant's representations were not received on December 7 and I began, and had substantially completed the order on the date they were subsequently delivered to this office. Having essentially made my decisions in this order based on the representations of the other parties and my review of the records, I decided to consider the appellant's representations only insofar as they addressed records to which I had found the exemptions (or an element of an exemption) to apply. After considering the appellant's representations regarding these records or parts of records, I decided that it was not necessary to seek further representations from the other parties.

Finally, it should be noted that in identifying the records and exemptions on which I asked the appellant to submit representations, I did not include Record 16. The Ministry has claimed that section 17 applies to it. However, upon review, I have decided to consider the application of the mandatory exemption in section 21(1) to it. Although the appellant was not provided with an opportunity to specifically comment on this record, based on his submissions with respect to section 21 generally and the basis for my conclusions in this order, I decided that it would serve no useful purpose to permit further submissions regarding this record.

RECORDS:

The records at issue consist of correspondence, notes, witness statements, reports and supplementary information, literature, diagrams, memoranda and forms. In reviewing the file and the records at issue, it was apparent that there are numerous duplicates of records or parts of records. Because of the number of pages of records, I have decided to retain the records package as it was sent to this office by the Ministry, making reference to duplicate records only where it is pertinent to my decision.

In addition, it should be noted that each record does not necessarily represent a discrete document, but may contain a number of different documents. Also, pages 239 and 565 are blank pages, inserted as a result of the mis-numbering of the pages by the Ministry.

DISCUSSION:

NON-RESPONSIVE RECORDS

In its representations, the Ministry included the following submission:

> In addition, upon further review of the records remaining at issue, it is the view of the Ministry that the various fax transmission verification reports (for example pages 331 to 354) and routine administrative information relating to the processing of FIPPA requests (for example page 470) contained in the responsive records are not reasonably relevant to the appellant's request. It is the position of the Ministry that such information is non-responsive.

As I noted above, consistent with the position taken by the Ministry, the following portions of the records would fall into the category of records that are not responsive to the request: Records 52 (pages 307, 314, 315 and 319), 56 (pages 331 – 354), 70 (page 432) and 75 (page 470).

The Ministry does not make any attempt to explain why it has taken this position.

This request was made in February, 2001. The Ministry's decision was appealed to this office on March 28, 2001, and the appeal has since undergone extensive mediation. The Ministry has had ample opportunity to review the records during both the request and mediation stages and decide whether they are, indeed, responsive to the request. In my view, it is inappropriate for the Ministry to raise this issue at such a late date in the process. On this basis alone, I am inclined not to consider this issue.

In any event, based on my review of the appellant's request and the records that the Ministry claims are not responsive to it, I do not agree with the Ministry's position.

In Order P-880, former Adjudicator Anita Fineberg considered the issue of relevancy of records and responsiveness:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38,

> an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

As I indicated above, in his re-submitted request, the appellant has requested access to "a complete copy of the file" which is to include "any and all records". In items 5 and 6 of his request, the appellant specifically requests all correspondence to and/or from the OFM and certain named stakeholders as well as any other parties falling into that category that he has not mentioned. Most of the records identified by the Ministry in this discussion form part of the communication and/or confirm the date upon which the correspondence was sent. Based on the wording of the appellant's request (particularly in light of his previous experiences with the Ministry, as described in the Background section of this order), I am satisfied that he has clearly indicated that he is seeking any and all records relating to this matter, including those at issue in this discussion. Accordingly, I find that all of the records at issue in this appeal are responsive to his request.

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* as:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The representative for one affected party believes that the records may contain personal information relating to the employees or principals of this party, their engineers, insurers or adjusters, which, in his view, would be inappropriate to disclose.

The Ministry simply states that "parts of the records at issue consist of recorded personal information about witnesses and other identifiable individuals in accordance with [section 2(1)(a), (d), (e), (g) and (h) of the *Act*]".

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P-257, P-427, P-1412 and P-1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

For the most part, any references to identifiable individuals in the records at issue pertain to these individuals in their professional capacity, such as in representing the interests of the stakeholder companies during the investigation conducted by the OFM. Consistent with previous orders of this office, I find that this information does not qualify as "personal information" within the meaning of the *Act*.

Records 3 (pages 28 - 44), 4 (pages 49 - 96), 9 (pages 105 - 106), 10, (pages 107 - 113 as well as duplicate pages 530 - 535 and 556 of Record 89 and 557 - 560 of Record 90), 14 (page 135), 16 and 72 (page 435 and duplicate page 444 of Record 74) contain information about or provided by identifiable individuals who gave statements to the OFM investigator following the fire. In some cases, the home telephone numbers and addresses for these individuals is included in the records.

The appellant concedes that addresses, telephone numbers and dates of birth of individuals would constitute "personal information" but believes that their disclosure would not constitute an

unjustified invasion of privacy or, in the alternative, could be severed from the remaining portions of the records pursuant to section 10(2) of the *Act*.

He takes the position that since the information in the records relating to the fire was provided by employees of various companies, it was given in their professional capacity. He states further:

> The information contained in the documents is of a general nature, outlining individuals' observations made of the fire itself, circumstances surrounding the fire, or circumstances surrounding the manufacturing, assembly, inspection of the refrigeration units which is not personal in nature and does not fall within the definition of personal information…

The individuals referred to in the records are identified as employees of specific companies. However, I do not accept the appellant's interpretation of the information in the records as being "professional" in nature. In my view, in the context in which they were given, the comments these individuals made to the OFM would not be considered to be made in the course of their employment responsibilities, but are rather, their observations as witnesses to the event in their personal capacities. In addition, some of the information pertains to their own actions at the time of, or in connection to, the fire. In my view, these portions of the records are personal in nature and thus qualify as personal information within the meaning of the *Act*.

Record 16 contains a statement by an individual, which describes certain work performed by him. This information was provided to the investigator at his request, to be used by him in his investigation into the cause of the fire. Although relating to this individual's employment responsibilities, in the context in which it was provided to the OFM, I find that its character has changed and it thus becomes personal information.

In some cases, however, the personal information is severable from the remaining information in the records. Once removed, the remaining information neither contains, nor would it reveal any personal information. In particular, only the first paragraph of page 435 (duplicate page 444) contains personal information. In addition, pages 110 - 113 (duplicate pages 533 - 535), which consist of a named security company's log for the time period surrounding the fire, do not contain personal information, since any references to individuals in this record relate to them in their professional capacity. These pages form an attachment to a letter from a witness and can be readily severed from the statement portion.

None of the records contain the personal information of the appellant or any party represented by him.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the *Act* prohibits the disclosure of this information except

> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767].

Presumption against disclosure and factors favouring privacy protection

The Ministry submits that disclosure of the personal information in the records would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(b) of the *Act*. The Ministry submits further that the information is highly sensitive (section 21(2)(f)) stating:

> The Ministry is of the view that the exempt personal information may be viewed as highly sensitive personal information … that release of this information would cause the involved identifiable individuals personal distress.
>
> In Order P-1208, Inquiry Officer Holly Big Canoe considered the issue of section 21(2)(f) as it relates to the sensitivity of statements provided by named witnesses during the course of a criminal investigation and commented:
>
> > I am satisfied that disclosure of the personal information contained in this record would cause a number of individuals excessive personal distress. Accordingly, I find that the personal information is highly sensitive. This consideration weighs in favour of privacy protection.
>
> It is the position of the Ministry that there is a similar sensitivity with respect to statements and information provided by witnesses interviewed during an OFM fire investigation.

The Ministry goes on to outline its position relating to the "law enforcement" component of an OFM investigation in further support of the factor in section 21(2)(f) and in support of the presumption in section 21(3)(b). Implicit in the Ministry's representations, is that the witnesses would have an expectation of confidentiality with respect to information provided by them during an investigation (section 21(2)(h) of the *Act*).

Sections 21(2)(f), (h) and 21(3)(b) state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Section 21(3)(b)

With respect to the application of section 21(3)(b) (and of section 14 as well, although this exemption is no longer at issue in this appeal), I referred the Ministry to previous orders of this office (Orders PO-1833 and PO-1921) and asked it to comment on them in addressing this issue. In these orders, Senior Adjudicator David Goodis concluded that in conducting its investigation into the cause of a fire, the OFM is not carrying out the function of enforcing or regulating compliance with the law. Although recognizing that OFM investigations may reveal possible violations of law, the Senior Adjudicator noted in Order PO-1833 that any criminal investigation or prosecution would be conducted by the local police and the Crown Law Office - Criminal of the Attorney General for Ontario, not the OFM.

The Ministry's representations do not address either of these orders, although it is noteworthy that its representations in the current appeal parallel those submitted in the appeal, which resulted in Order PO-1921. I agree with the conclusions reached by Senior

Adjudicator Goodis, and in the absence of representations from the Ministry which respond to this issue, I find that they are similarly applicable to the facts in this appeal. On this basis, I find that the presumption in section 21(3)(b) has no application in the circumstances.

Sections 21(2)(f) and (h)

For information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual (Orders M-1053, P-1681 and PO-1736).

The appellant submits that disclosure of the personal information in the records would not cause excessive personal distress to the individuals who provided the statements. Referring to Order P-1208 (cited by the Ministry), the appellant notes that this order:

> [I]nvolved a boating accident resulting in two deaths, a criminal investigation wherein the police compiled 21 witness statements detailing the accident, the conduct of various individuals both prior and following the accident and naming suspects that may have contributed to the accident …

The appellant believes the facts in this case are distinguishable from those in the current appeal in that the incident, which gave rise to the OFM investigation, occurred at a commercial property, did not involve personal injury or death and did not involve a criminal investigation. The appellant reiterates his belief that the information does not relate to the personal conduct of other individuals. He submits that because the witnesses provided statements relating to a "fire which occurred at their workplace of which they were not involved nor affected (with the exception of being a witness)", their knowledge of the circumstances surrounding the fire were not "private", as opposed to other circumstances such as "information surrounding sexual harassment", for example, or as he implies, statements which may result in the identification of a suspect in a criminal investigation.

The appellant takes the position that the information was not provided in confidence, but rather, was simply provided by the witnesses in co-operating with the OFM's investigation into the cause of the fire.

The appellant also submits that although information such as addresses, telephone numbers and dates of birth may be personal information:

> Since this information is readily given almost daily in such common circumstances as applying for credit cards or subscribing to magazines and in our modern times, the general public accepts that their names, addresses and telephones are, to an extent, readily accessible to anyone seeking to obtain it, the disclosure of this information cannot be expected to cause excessive personal distress.

The appellant assumes that, because individuals provide information about themselves in order to obtain goods or services or simply as a function of everyday life, they have no privacy interests in this identifying information. Commenting on privacy concerns relating to the disclosure of the address of an individual to a party who had already been apprised of this person's name, I stated in Order M-1146:

> One of the fundamental purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)).
>
> In my view, there are significant privacy concerns which result from disclosure of an individual's name and address. Together, they provide sufficient information to enable a requester to identify and locate the individual, whether that person wants to be located or not. This, in turn, may have serious consequences for an individual's control of his or her own life, as well as his or her personal safety. This potential result of disclosure, in my view, weighs heavily in favour of privacy protection under the *Act*.
>
> This is not to say that this kind of information should never be disclosed under the *Act*. However, before a decision is made to disclose an individual's name and address together to a requester, there must, in my view, exist cogent factors or circumstances to shift the balance in favour of disclosure.

The fact that an individual may choose to provide his or her personal information in some contexts does not support a conclusion that the individual, thereafter, does not have a privacy interest in it. In the circumstances of this appeal, the witnesses provided information to an "official" representative of the OFM, perhaps because they wished to be of assistance or, perhaps because they felt compelled to respond. As I indicated above, their statements contain their observations as witnesses to the event. In addition, some of the information pertains to their own actions at the time of, or in connection with, the fire. In this context, I accept the Ministry's submission that these statements were provided to assist the OFM investigator in determining the cause of the fire.

It does not necessarily follow that co-operation during the investigation should be taken to imply that these individuals would expect that their identities and comments could then be shared with other parties. In my view, it is reasonable to expect the contrary. Accordingly, I find that the individuals who gave statements to the OFM investigator would likely have had an expectation of confidentiality at the time and the factor in section 21(2)(h) is, therefore, relevant.

Disclosure of their names and other identifying information, particularly in connection with their statements, would permit the appellant to contact the witnesses, regardless of whether this contact was welcome or necessary. In these circumstances, I find that disclosure of the personal information of the individuals referred to in the records in the absence of their consent would

cause extreme personal distress. Accordingly, I find that the factor favouring privacy protection in section 21(2)(f) is relevant.

In making these findings, I recognize that it may not be reasonable for an individual to expect "absolute" confidentiality in providing statements during an investigation, whether by the OFM or a law enforcement agency, particularly where there is the potential for the laying of criminal charges in connection with it. In this case, however, the Ministry indicates that the OFM investigation concluded that the cause of the fire could not be determined, and that no criminal charges were laid in respect to the fire. In these circumstances, I find that there is a more heightened privacy interest with respect to this information in that the potential involvement of these individuals in any government initiated action appears to have concluded, thus making it less likely that they might be called upon as witnesses. In my view, these interests are such that disclosure after the fact would have greater significance to them. On this basis, I find that the factors in sections 21(2)(f) and (h) weigh heavily in favour of privacy protection.

Factors favouring disclosure

The appellant refers to the remaining factors in section 21(2) that favour privacy protection and explains why he believes that they are not relevant in the circumstances of this appeal. He suggests that the fact that these factors do not apply is itself a factor favouring disclosure. I do not agree. As I noted above, one of the fundamental purposes of the *Act* is the protection of personal privacy. Section 21 is a mandatory exemption, which requires that, unless it can be shown that disclosure of the personal information in a record would not constitute an unjustified invasion of privacy, the exemption will apply. The factors in section 21(2) are intended to be used as guidance in determining whether disclosure of personal information would constitute an unjustified invasion of privacy. If they are found to be relevant in the circumstances, then they would weigh in favour of privacy protection or disclosure, respectively. To accept the converse would, in my view, undermine the importance of this fundamental principle of the *Act*, and is not supportable in light of the legislative scheme as a whole.

The appellant also submits that the factor in section 21(2)(d) (fair determination of rights) is relevant and that this factor favours disclosure. This section reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request.

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant submits:

> [A]s this fire was suspected to have originated near or in the refrigeration units manufactured by the appellant and the damage caused exceeds $3.5M affected over a dozen parties, the appellant submits litigation arising from this incident is imminent and the names, addresses and telephone numbers of witnesses with knowledge of [the] incident is crucial to the appellant's ability to successfully defend itself in these eventual lawsuits.

In Order M-592 Tab 23, Inquiry Officer, Fineberg, stated the following with respect to the need to disclose personal information to ensure fair determination of a parties' rights:

> The appellant claims that he requires access to the names of the tenants in order that they may be named in a civil action to be commenced by the insurance company. I am satisfied that the appellant is seeking the information to exercise its common law rights and statutory rights under the *Insurance Act* to pursue a legal claim against the individuals who are allegedly responsible for the fire. The names of the tenants are crucial to a determination of this right. I therefore conclude that the appellant has established that section 14(2)(d) [the municipal *Act* equivalent to section 21(2)(d)] is a relevant consideration.

Similar findings have been made in other orders of this office (see Order M-746, for example). These orders should be contrasted, however, with subsequent decisions which have determined that the Rules of Civil Procedure and court practices of the Superior Court of Justice with respect to the commencement of civil actions, may provide an alternate means of accessing the name and address of a party (see, for example, Orders M-1146 and PO-1728).

In Order PO-1833, Senior Adjudicator Goodis considered the appellant's argument that it required the records at issue because they "are important to [the appellant's] defence in the litigation." In that case, the appellant was the insurer, which issued the policy on a house that had been destroyed by fire. The fire in that case was investigated by the OFM and the police, with the police subsequently charging an individual (the accused) with arson and with intent to defraud the insurer of the property under section 435(1) of the *Criminal Code*. The owner of the house commenced civil proceedings in the Superior Court of Justice against the insurer, seeking payment for the loss. The insurer had denied coverage on the basis of the alleged arson and alleged fraudulent misrepresentations relating to the insurance policy, and had commenced a counterclaim against both the owner and the accused. Senior Adjudicator Goodis concluded:

> [W]hile some of the personal information in the records may be relevant to the issues to be determined in the civil litigation, the appellant has not provided a sufficient basis for me to conclude that this information is required in order to prepare for the proceeding or to ensure an impartial hearing. The appellant has retained specialized insurance litigation counsel for the purpose of those proceedings, and I am not convinced that discovery mechanisms available to the appellant would be insufficient to ensure a fair hearing.

In my view, the circumstances of the current appeal are not dissimilar to those considered in Order PO-1833. In PO-1833, the appellant was seeking information primarily about the parties to the litigation in which it was involved, whereas in the current appeal, the appellant is seeking both the names of, and information about, witnesses. However, in this case, the appellant has knowledge of the identities of all of the stakeholders and any other companies that he might wish to contact in preparing for any litigation. The appellant also has sufficient information with respect to the general identities of the witnesses to be able to rely on the discovery mechanisms that would be available to him in the litigation in order to prepare for the proceedings or in order to ensure a fair hearing. On this basis, I am not persuaded that section 14(2)(d) is relevant.

I have considered the other factors, which favour disclosure and all of the circumstances of this appeal, and find that there are no factors or circumstances that weigh in favour of disclosure.

Balancing the factors and considerations

I found above that the factors in sections 21(2)(f) and (h) are relevant in the circumstances of this appeal, and that they weigh significantly in favour of privacy protection. On the other hand, I found that the factor favouring disclosure in section 21(2)(d) was not relevant in the circumstances. In addition, I found that no other factors favouring disclosure of personal

information apply in this case. As a result, the exception at section 21(1)(f) does not apply, and the personal information in the records is therefore exempt under section 21.

THIRD PARTY INFORMATION

Introduction

The Ministry claims that the following records are exempt pursuant to the mandatory exemption in section 17(1) of the *Act*: Records 2, 3, 5, 8, 10, 11, 13, 15 - 18, 20, 22, 23, 25, 29, 30, 31, 33 (in part), 34 - 37, 41, 43, 45, 46, 47, 49, 50, 52, 53, 54, 59, 61, 62 (in part), 63, 64, 65, 67, 68, 69, 71 - 74, 75 (in part), 77, 79, 81, 82, 83, 86 - 94, 96, 97, 99 - 101, 103, 104, 106, 108 (in part), 110, 112, 113, 115, 116 (in part), 117 and 118. In addition, consistent with the Ministry's application of this exemption, I will also consider whether section 17(1) applies to Records 40 (in part), 48 (in part) and 85.

I found above that Records 3 (pages 28 - 44), 4, 9, 10 (pages 107 - 109, plus duplicate pages 530 - 532, 556, 557 - 560), 14, 16 and part of Record 72 (plus duplicate Record 74) are exempt under section 21(1), and I will not consider these portions of the records in this discussion.

Section 17(1) of the *Act* reads, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. In its decision upholding Order P-373, the Court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board)* cited above.

Part One: Type of Information

Relying on the content of the records as providing the evidentiary basis for its position, the Ministry submits that: "the records at issue reveal trade secrets, technical and commercial information relating to items, equipment and processes examined in relation to the circumstances of the fire in question."

One affected party submits in its representations that during the course of the OFM investigation, it submitted material to the OFM that was "confidential, proprietary, of a technical nature" with an expectation of confidentiality. This affected party refers specifically to engineering documentation.

The representative of another affected party also submits that any information regarding the products provided by this affected party and/or the engineers retained by their insurance carrier and/or adjusters would have been disclosed to the OFM on a confidential basis in order to assist in its inquiry. The representative states that this information is proprietary, the disclosure of which could result in loss of competitive position. The representative also notes that from the outset of the OFM investigation, it was clear that litigation would ensue. The representative submits that the affected party would suffer harm if this information were released other than in the appropriate litigation forum.

The testing services company indicates that all information pertaining to it is more appropriately considered to be that of its clients. This affected party states that "all information related to a client file is confidential and cannot be revealed to any third party without the written permission of the client". As it turns out, the majority of the information identified in connection with this company pertains to the company insured by the appellant's client and is not at issue in this appeal. The only other affected party with an interest in these records did not submit representations.

Although not claimed by any of the parties, I have also considered whether the records contain financial information.

The terms trade secret and technical, financial and commercial information have been defined in previous orders of the Commissioner's office.

Trade Secret

"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[Order M-29]

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Financial Information

This term refers to information relating to money and its use or distribution and must contain or refer to specific data, for example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

The appellant's representations focus on whether the records consist of trade secrets. Although he goes into considerable detail on this issue, it is not necessary for me to recite them since I have already determined that none of the records contain this type of information.

The records fall into three general categories of information:

Category one

This group of records consists of correspondence and other similar types of records relating to: the attendance at the examination of the unit and/or which identify the stakeholders; requests for information about the examination or requests for information about the investigation generally; and communications among or between the OFM staff and other parties generally regarding the investigation. This information is found in Records 8, 13, 15, 17, 18, 20, 22 (page 159), 23, 25, 30, 31, 33, 37, 40, 41, 43, 45, 47, 48, 50, 53, 56, 59, 61, 62, 63, 64, 68, 70, 82, 87, 97, 99, 104, 106, 108, 110, 113, 115 and 116.

These records all have a connecting theme in that they reflect, in some way, the communications between the OFM and the various stakeholders relating to the OFM investigation. In particular, the focus of the communications is confirmation of the date for testing and/or examination of the suspected point of origin of the fire (the units) and the expression of interest in attending at the examination. Other records, such as facsimile cover sheets, differing only in the addressee line, tend to confirm the distribution of communications from the OFM to the various stakeholders. Some of the records contain lists of the various stakeholders and/or their representatives who would be attending the examination, including the appellant and/or record the fact that they did attend on the dates selected. Some of the records contain similarly worded requests for copies of the videotape of the examination and/or photographs of the fire scene and the OFM's standard response which is that these items will be produced, upon request and the production of the required proof of interest in the matter, when they are available. It is also noteworthy that the appellant has been involved in a similar capacity as the other stakeholders (or their representatives), he has been copied on some of the withheld records, and references to him in other records indicate that he has been in communication with at least some of the other stakeholders with respect to the issues of concern.

Previous orders of this office have found that the names (and addresses) of commercial entities would not normally qualify as "commercial information" (see: Orders P-373, P-1574 and PO-1802). In Order P-373 (upheld by the Ontario Court of Appeal in *Ontario (Workers' Compensation Board*, cited above), Assistant Commissioner Tom Mitchinson stated:

> Records 4 and 5 contain only the names and addresses of the employers who have been assessed the highest penalties under the WORKWELL and SECTION 91(7) programs. These records do not contain the amounts of surcharge, payroll, or the nature and volume of accidents; nor would disclosure of the names and addresses reveal this information. In my view, disclosure of Records 4 and 5 would not permit the drawing of accurate inferences as to any information supplied to the Board on the aforementioned forms, with the exception of the names and addresses of the listed employers.

> Disclosure of Records 4 and 5 would reveal that the employers on the list were the subject of levies or fines under the *WCA* in 1990. In addition, because the list is arranged in descending order based on the amount of penalty, disclosure would also reveal the rank of an employer relative to others on the list with respect to amounts of surcharges for 1990. However, in my view, it is not accurate to characterize the names and addresses contained in Records 4 and 5 as commercial, financial or labour relations information, or a trade secret, as those terms are used in section 17(1) of the *Act*.

This line of orders can be contrasted with other decisions (see, for example, Orders MO-1237 and PO-1816) where the name of a business or commercial entity is linked with other information in such a way that the combined information qualifies as "commercial information".

In general, I agree with both approaches, although I find the former line of reasoning to be applicable in the circumstances of this appeal. The submissions of the parties do not address this issue, and thus fail to make a connection between the names of the stakeholders and the types of information listed in section 17(1). Moreover, there is no apparent link from my review of the records between the names of the stakeholders and any of the type of information defined above that could possibly bring this information within the definitions. Accordingly, I find that the records, which identify the various stakeholders, do not contain "commercial information" on the basis of this identification.

I find that none of the information in these records is remotely connected to the types of information in section 17(1), as these terms have been defined by this office. Accordingly, these records do not qualify for exemption under section 17(1) of the *Act*. With the exception of Records 31, 64 and 68, no other exemptions have been claimed for these records and they should be disclosed to the appellant.

Category two

This category of records contains diagrams and other information descriptive of the product manufactured by, or relating to the affected parties that was provided to the OFM by the stakeholders or their representatives. This information is contained in Records 10 (pages 110 - 113, duplicate pages 533 - 535 in Record 89), 11, 22, 28, 29, 35, 54, 65, 67, 69, 71, 79, 81, 83 (page 515), 85, 88, 90, 91, 93, 96, 100, 101, 103 and 117.

Records 11, 85, 88 and 117 consist of promotional information relating to a product provided to the OFM by the party on whose premises the fire appeared to have originated. On their face, it is apparent that these records contain information relating to the engineering design and technical/electronic components of the product and as such contain technical information.

Similarly, Records 22 (page 161), 96, (pages 586 - 610) and 101 (pages 627 - 628 and 630 - 632) contain information relating to the technical/electronic components produced by two other affected parties (both of whom responded to the Notice of inquiry and objected to disclosure).

Pages 413 and 414 of Record 65 comprise the partial terms of an insurance policy relating to an affected party. Clearly this record does not contain technical information. Nor, in my view, does it relate to the buying, selling or exchange of merchandise or services. Rather, it is a service that has already been purchased. Therefore, I find that it does not contain commercial information. However, this record details the amount of insurance coverage that the affected party has obtained, which qualifies as financial information within the meaning of the *Act*.

Record 71 contains drawings of the floor plan of the building in which the fire occurred, which shows the location of each business. In my view, this information is simply factual information about the composition of the businesses in the building, and as such, does not fall within any of the definitions noted above, and thus fails to meet the first part of the test.

Record 93, consists of a number of copies of an unexecuted, sample confidentiality agreement created by one affected party. Although it is possible that such an agreement might form part of a commercial transaction as contemplated by the definition, in the circumstances of this appeal, there is nothing on the face of the document to suggest that it is connected to the buying, selling or exchange of merchandise or services. Accordingly, I find that this record does not meet the first part of the test.

Pages 110 - 113 of Record 10 (duplicate pages 533 - 535 of Record 89), as noted above, comprise the log kept by the security company for the affected party on whose premises the fire began. This document records the various events, checks, contacts and attempts to contact parties that occurred over a specified period of time. Although this record reflects the provision of a service, it does not relate to the buying, selling or exchange of that service. Therefore, it does not qualify for exemption under section 17(1).

The remaining records and parts of records in this category consist of correspondence, primarily from the affected party on whose premises the fire allegedly began or its solicitor (Records 28, 29, 35, 54, 67, 69, 79, 81, 83 (page 515), 90, 91 and 103) or from other parties (Records 22 (page 160), 65 (pages 410 - 412), 96 (page 585), 100 and 101 (pages 625 - 626 and 629). This correspondence is in the nature of covering memoranda or communications about the investigation. None of this information accords with the type of information referred to in section 17(1). Accordingly, it fails to meet the first part of the test and is not exempt pursuant to this section of the *Act*.

With the exception of Records 28, 29, 35,54, 67, 69 and 103, no other exemptions have been claimed for the remaining records and parts of records, and they should be disclosed to the appellant.

Category three

This category of records comprises information about the stakeholders contained in records created by OFM staff or other parties. This information is found in Records 2 (duplicate page

514 of Record 83), 3 (pages 5 - 27 and 45 - 48), 5 (duplicate Record 86) 27, 34, 36, 46, 49, 52, 72 (duplicate Record 74) in part, 73, 75, 77, 92, 94, 103, 112 and 118.

Record 2 (duplicate page 514 of Record 83) is entitled "Fire Investigation Report - Red Book Entry". This record contains basic information about the nature and location of the fire, including the estimated damage. Because it lists the loss in dollar amounts, I find that this record contains financial information.

Record 77 is the "Incident Report" prepared by TSSA (which has consented to its disclosure). This record contains information about the fire scene. Although quite general, this report describes the investigation undertaken by the inspector for the Fuels Safety Division and on its face appears to have been prepared by a professional in the engineering or related field and describes his investigation into the construction, operation or maintenance of a structure, process, equipment or thing. On this basis, I find that Record 77 contains technical information.

Record 118 comprises the notes made by one of the named engineers while watching the videotapes of the examination of the unit. The Ministry confirms that these are the videotapes referenced at pages 211 and 380 (duplicate page 330) of the records. I accept that the information on the tape is "technical" in the sense that the tape records the examination of the mechanical/electrical components and design of the unit by a professional in the engineering field.

Record 3 (pages 5 - 27) are the notes made by the fire investigator of his observations at the fire scene. I am satisfied that this record contains technical information as it contains the examination of the construction, operation or maintenance of various structures, process, pieces of equipment or things by a professional in the engineering or a related field.

Pages 45 - 48 of Record 3, however, contain photocopies of business cards of individuals involved in the matter, such as stakeholders, their representatives and others participating in the investigation. None of this information meets the definitions described above.

Record 5 (duplicate Record 86) contains the investigator's notes of a conversation with two stakeholders. This record refers to technical information in general terms. However, it is not sufficiently descriptive of the technical aspects of the items discussed to qualify as "technical" information within the meaning of section 17(1) of the *Act* (See: Orders PO-1707 and PO-1825). None of the other types of information are applicable to this record.

Record 49 is a handwritten note to the investigator directing him to take a particular action with respect to an affected party. This record does not contain any information as described above.

Record 92 is entitled "Fire Evaluation Exhibit Control Form". This record simply identifies the OFM staff involved in the investigation, the exhibit (in this case, the unit) and the manufacturer's name and address. This record does not contain any detail of a technical nature, nor does it

contain information falling within the other categories, and, therefore, does not qualify under part one of the test.

Record 94 is an internal memorandum, which refers to the product manufactured by one of the affected parties (who objected to disclosure). Although references are made to the product, the record does not contain any details of a technical nature. Similarly, mere reference to a product is insufficient to bring the information in this record within the definition of commercial as it does not relate to the buying, selling or exchange of the product. I find that it does not fall within the definition of technical or commercial information, nor does it qualify as any other type of information, as these terms have been defined.

Record 112 contains notes made by the investigator. In these notes, there are references to contacts for some of the affected parties, or other companies, and the directions to the OFM. Clearly, this record does not contain any of the types of information described in section 17(1).

Records 27, 34, 46, 52, 72 (duplicate Record 74) and 103 consist of correspondence from the OFM investigator or other OFM staff to the solicitor for the affected party on whose premises the fire allegedly originated. Most of these letters are in response to those identified in category two, or otherwise relate to the conduct of the investigation. I find that they do not contain the type of information contemplated by section 17(1).

Record 36 is an internal Ministry memorandum relating to correspondence sent to the Ministry's solicitor from the solicitor for this same affected party. Records 73 and 75 also contain internal memoranda with attachments. These three records all relate to the administrative aspects of the OFM investigation, and as such do not contain the type of information listed in section 17(1).

Based on the above, I find that Records 3 (pages 45 - 48), 5 (duplicate Record 86), 27, 34, 36, 46, 49, 52, 72 (duplicate page 74), 73, 75, 92, 94, 103 and 112 do not contain the types of information contemplated under section 17(1). As no other exemptions have been claimed for Records 3 (pages 45 - 48), 5 (duplicate Record 86), 92, 94 and 112, these records should be disclosed to the appellant.

Part Two - Supplied in Confidence

I found above that Records 2 (duplicate page 514 of Record 83), 3 (pages 5 - 27), 11, 22 (page 161), 65 (pages 413 and 414), 77, 85, 88, 96 (pages 586 - 610), 101 (pages 627 - 628 and 630 - 632), 117 and 118 contain the type of information set out in section 17(1) and thus satisfied the first part of the test.

Supplied

In order to satisfy the second requirement, the Ministry and/or the affected parties must show that this information was supplied to the Ministry, either implicitly or explicitly in confidence. In addition, information contained in a record will be said to have been "supplied" to an

institution, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-179, P-203, PO-1802 and PO-1816).

The Ministry states that it is of the view that the information was implicitly submitted in confidence to the Ministry for the purposes of the OFM fire investigation.

Records 3 (pages 5 - 27) and 118 both contain notes made by OFM staff and were clearly not supplied to the Ministry. Record 3 records the independent observations of the fire investigator at the fire scene. In my view, this record neither contains, nor would its disclosure reveal information "supplied" by any other party. As no other exemption applies to these pages of Record 3, they should be disclosed to the appellant.

The notes in Record 118 were made by the engineer as he reviewed the videotapes of the examination of the unit. The videotape was made by OFM staff of an examination conducted by its staff, and the information contained on it was, therefore, not directly supplied to the OFM. I accept, however, that the unit itself was supplied to the OFM and that disclosure of the information in the record would reveal information about the unit.

Record 2 (duplicate page 514 of Record 83) is also an OFM record. Although it is not clear, and the parties' representations do not indicate how the information contained in this record was obtained, I accept that it is possible that information relating to the amount of loss might have been "supplied" to the investigator by a third party, and that disclosure of this record might reveal information supplied to the OFM.

Record 77 was prepared by TSSA. The Ministry states in its representations simply that "this type of report is normally made available by the originating agency upon payment of a fee". Absent any other submissions regarding this record, I accept that it was supplied by TSSA to the OFM. The record contains only the observations of the TSSA inspector and/or information directly produced by him, including photographs. This record does not contain, nor would its disclosure reveal any information supplied by any other party, in particular, the stakeholders or other party affected by the fire.

As I noted above, TSSA has consented to the disclosure of Record 77. Since this record does not contain information supplied by any other party, in the face of the TSSA's consent, there is no basis to conclude that this record is exempt under section 17(1) [See section 17(3)]. Accordingly, as no other exemptions have been claimed for this record, it should be disclosed to the appellant.

It is apparent that the remaining records and parts of records were "provided" to the OFM by the affected parties or their representatives.

The appellant submits, however, that Records 11, 22, 96, 101 and 117 were not supplied to the OFM by the affected parties, but were, rather, received by it pursuant to statutory authority (under the *Fire Protection and Prevention Act* (the *FPPA*)). The appellant submits that the term

"supplied" under section 17(1) of the *Act* requires that the documents be voluntarily given and not ordered under the statutory authority. The appellant refers to Orders P-952 and PO-1889 in support of this position.

In Order P-952, former Adjudicator Fineberg found that certain records obtained by the institution pursuant to a search warrant were not supplied within the meaning of the *Act*. In this regard, she stated:

> The fact that they were received by virtue of a search warrant, in my view, makes them more analogous to information obtained by an institution itself, through investigation or inspections, than to information provided to an institution pursuant to a mandatory reporting requirement.

She also found that certain records "were obtained by the Ministry through inspections required by statute" and were, therefore, not supplied.

Adjudicator Donald Hale found, in Order PO-1889, that information "discerned by the [institution], in the course of its inspection of financial records of the charities under investigation cannot be said to have been 'supplied'…"

In each of these cases, the conclusion that the records were not supplied within the meaning of the *Act* was based on the fact that the institution went out and collected or obtained the information itself as opposed to the third party providing it (as is the case with respect to Record 3). This factor distinguishes these orders from others of this office, which have found that information provided to the institution in accordance with certain reporting requirements or further to requests that information be provided, was supplied to the institution by the third party (see: Orders P-314, P-345, P-359 and P-400).

In this case, it is apparent, from the records themselves, and the overall circumstances, that the information in Records 11, 22 (page 161), 65 (pages 413 and 414), 85, 88, 96 (pages 586 - 610), 101 (pages 627 - 628 and 630 - 632) and 117 was provided to the OFM at its request by the affected parties and was thus "supplied" within the meaning of the *Act*.

In confidence

In addition to the "supplied" requirement, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient to demonstrate simply that the organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly (Order M-169).

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure (Order P-561).

As I indicated above, the Ministry submits that the records were implicitly submitted in confidence. The Ministry notes that one of the records (Record 93) is a proposed confidentiality agreement that was submitted by one of the affected parties, which by implication suggests that this party had an expectation that any information provided by it was done so in confidence.

This affected party did not submit representations. However, based on Record 93 and the correspondence between the OFM and this affected party's solicitor contained in the records, I am satisfied that this party would have had at least an implicit expectation that technical information provided by it was being supplied in confidence (Records 11, 85, 88 and 117).

Page 624 of Record 100 is a letter from one affected party (who objected to disclosure in its representations) in which it indicates that the information it is providing to the OFM is being done so with an expectation that it will be maintained in confidence. On this basis, I find that this affected party submitted information to the OFM with an explicit expectation that it would be maintained in confidence. This information is found in Records 22 (page 161), 65 (pages 413 and 414) and 96 (pages 586 - 610).

Record 101 (pages 627 - 628 and 630 - 632) was submitted to the OFM by another affected party (who also objected to disclosure). This party's representative indicates that this information "would have been disclosed to the OFM on a confidential basis in order to assist in its inquiry". Consistent with the expectations of the other parties, I accept that this company had an implicit expectation that the information it was providing to the OFM would be maintained in confidence.

As I indicated above, Record 2 (duplicate page 514 of Record 83) is an OFM document which simply records basic information about the fire, including its location and the estimated damage. The record contains a confidentiality statement on it indicating that the record and the information contained therein is being provided in confidence and that it is not to be disclosed

"without the express written consent of the Fire Marshal". In my view, this is not sufficient to establish that the information in this record was supplied to the OFM in confidence. As a result, I am not satisfied, based on my own review of the nature of this record and the submissions of the parties that any information contained in it was communicated to the institution on the basis that it was confidential and that it was to be kept confidential, that it has been treated consistently in a manner that indicates a concern for its protection from disclosure, that it has not been otherwise disclosed or that it was prepared for a purpose which would not entail disclosure. On this basis, I find that Record 2 (duplicate page 514 of Record 83) fails to meet the second part of the test.

Record 118 contains the notes of the engineer relating to the examination of the unit. Record 55 (page 330), which was disclosed to the appellant, is a "Notice" of the examination. It sets out the procedure to follow in order to request attendance at the examination (which is reflected in a number of the records referred to above under the discussion relating to Category one records). It is apparent from the records that this examination was attended by most, if not all, of the stakeholders. Moreover, as I noted above, the Ministry confirms that the videotapes from which the notes were made are the very same as referenced at page 380 (duplicate page 330). It is also clear from the records that the videotapes were intended to be made available to the stakeholders upon request. I am unable to see a qualitative difference between observing the testing in person and/or watching the videotape and reading the notes made by the engineer. In the circumstances under which the examination was conducted, I do not accept that any party with an interest in the unit being examined could have a reasonable expectation of confidentiality with respect to the unit. Accordingly, I find that, since the unit was not provided to the OFM with an expectation of confidentiality, the notes that would reveal its design and technical components do not qualify for exemption under section 17(1).

As no other exemptions have been claimed for Records 2 (duplicate page 514 of Record 83) and 118, these records and part of the record) should be disclosed to the appellant.

Part Three - Reasonable Expectation of Harm

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In the present appeal, the Ministry and the affected parties, as the parties resisting disclosure, must provide detailed and convincing evidence to establish a reasonable expectation of probable

harm, in this case one or more of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act* should Records 11, 22 (page 161), 65 (pages 413 and 414), 85, 88, 96 (pages 586 - 610), 101 (pages 627 - 628 and 630 - 632) and 117 be disclosed.

The Ministry submits that the release of the records may be advantageous to the competitors of the affected stakeholders (section 17(1)(c)). In addition, the Ministry notes that unrestricted disclosure of this information has the potential to undermine the business interest of the affected stakeholders (section 17(1)(a)). The Ministry does not address these harms further, but rather, indicates that the stakeholders who were notified are in a position to provide more detailed comments about the application of section 17(1) to their own specific information and records.

The Ministry suggests, however, that disclosure of the information may result in similar information no longer being supplied to it (section 17(1)(b)). In this regard, the Ministry states:

> The OFM and the stakeholders maintain a co-operative relationship in which information has been freely exchanged in order to resolve issues of mutual interest in a timely manner. The Ministry believes that disclosure of the records exempted in accordance with section 17(1) may compromise this relationship. It is in the public interest that the OFM and the stakeholders continue to exchange information with respect to issues that may impact on public safety.

Of the two affected parties that submitted representations relating to the application of section 17(1), one did not indicate what harm, if any, could reasonably be expected to result from the disclosure of its information. The representative for the other affected party stated, as I noted above, that this information is proprietary, the disclosure of which could result in loss of competitive position. The representative also notes that from the outset of the OFM investigation, it was clear that litigation would ensue. The representative submits that the affected party would suffer harm if this information were released other than in the appropriate litigation forum.

As noted above, the Ministry and affected parties are required to provide me with "detailed and convincing evidence" that the disclosure of the information contained in the records could reasonably be expected to result in one or more of the harms described in sections 17(1)(a), (b) or (c). The representations submitted by the Ministry and affected parties in support of withholding the records pursuant to section 17(1) simply assert that the disclosure of the information contained in the records could result in one of these harms.

Previous orders of this office have addressed similar situations where the party with the onus failed to provide the kind of detailed and convincing evidence required to establish the harm alleged (see, for example, Orders MO-1312, MO-1319 and PO-1791). Adjudicator Sherry Liang's comments on this issue in Order PO-1791, although addressing different types of records are, in my view, similarly applicable:

> A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.
>
> In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

In the present appeal, I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to make a finding that any of the information remaining at issue is exempt under section 17(1)(a), (b) or (c). One affected party did not submit representations. The other two affected parties have failed to explain in a detailed and convincing manner how the disclosure of this information could reasonably be expected to result in harm to their competitive position or commercial interests. Similarly, the Ministry has failed to describe in any meaningful way how the harm in section 17(1)(b) is reasonably likely to result from the disclosure of these records. As a result, I find that the Ministry and affected parties have not met their evidentiary burden under section 17(1) and the information contained in Records 11, 22 (page 161), 65 (pages 413 and 414), 85, 88, 96 (pages 586 - 610), 101 (pages 627 - 628 and 630 - 632) and 117 is not exempt under section 17(1). As no other exemptions have been claimed for these records and parts of records, they should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has applied the discretionary exemption in section 19 of the *Act* to Records 27, 28, 29, 31, 34, 35, 36, 46, 49, 52, 54, 64, 67, 68, 69, 72 - 74, 75 (in part) and 103.

Section 19 of the *Act* 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.

The Ministry's submissions on this issue consist of the following:

> The Ministry has applied section 19 to confidential communications between Legal Counsel for the Ministry and OFM staff and to confidential communications between Legal Counsel for the Ministry and Legal Counsel representing one of the stakeholders. The Ministry is of the view that this exempt information falls within Branch 1 and Branch 2 of section 19.
>
> The exempt information reflects confidential communications between the Legal Counsel for the Ministry and OFM staff. The exempt information consists in part of communications that directly relate to the seeking of legal advice by the OFM. The exempt information also consists in part of communications to the Ministry from Legal Counsel representing one of the stakeholders. Release of this information would reveal legal advice. The Ministry submits that the content of records exempted under section 19 is supportive of this position.
>
> In addition, the Ministry submits that the exempted information was prepared by or for Crown counsel for use in giving legal advice, in contemplation of litigation and for use in litigation that my arise as a result of the circumstances of the February 2, 2000, fire. In this regard, it should be noted that the responsive records contain direct references to the possibility of litigation. The Ministry submits that the content of the records exempted under section 19 supports this position.

In discussing the facts and circumstances it took into account in exercising its discretion not to disclose the records, the Ministry states that the information:

> is considered very sensitive and release of it has the potential to compromise the Ministry's position in any future litigation relating to the January 31, 2000 fire. Normally, such information is not disclosed unless the client (in this case, the Ministry or the affected stakeholder) waives solicitor-client privilege.

Communication privilege

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

This privilege has been described by the Supreme Court of Canada as follows:

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

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

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

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

The appellant submits that the exemption in section 19 has no application in the circumstances of this appeal. Commenting specifically on Record 75, the appellant submits that, based on the legal principles established in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3rd) 321 (C.A.) with respect to adjudicating claims of solicitor-client privilege in the context of litigation, the Ministry's claim of privilege must fail. In this regard, the appellant sets out what he believes to be the contents of this record and states that the OFM did not create the documents for the purpose of obtaining legal advice. Further, the appellant is of the view that this information relates to an investigation and is otherwise discoverable. Moreover, he believes that the attachments were created during the OFM's investigation, which he indicates does not entail obtaining legal advice, and was simply forwarded to its solicitors.

Record 73 (pages 436 - 443) is an internal OFM correspondence plus attachments. This document must be read with Record 75 (pages 445 - 473), which consists of correspondence to the Legal Services Branch from the OFM with attachments (although it should be noted that pages 471 and 472 have been disclosed in part). Specifically, Record 73 contains a memorandum from a fire investigator to his supervisor setting out the factual circumstances upon which he is requesting legal assistance relating to an issue that arose during the investigation by the OFM into the circumstances of the fire. Record 75 contains a request to the Legal Services Branch from the Fire Investigation Co-ordinator for legal advice based, in part, on the information in Record 73, which also forms part of the package of background information attached to Record 75. I am satisfied that these two records, taken together, comprise a confidential communication between a solicitor and his client made for the purpose of seeking, formulating and giving legal advice. In my view, the principles enunciated in *Chrusz*, referred to by the appellant, are not applicable outside of the litigation context and thus have no bearing on whether the Ministry has established the requisite elements of solicitor-client communication privilege under the *Act*. On this basis, I find that these two records qualify for exemption under section 19 of the *Act*.

Records 35 and 36 (pages 200 - 206) contain internal correspondence between the OFM and the Ministry's Legal Services Branch (each with an attachment consisting of a letter from a solicitor for one of the stakeholders). Although these records are clearly communications between a solicitor and client (the OFM), there is nothing on the face of them to suggest that they are confidential, nor does the subject matter of the correspondence (or the attachment) support a finding that there is any reason to expect that they would be confidential. In my view, these communications were not made for the purpose of seeking, formulating of giving legal advice. Nor could they reasonably be seen to fall within a continuum of communications within the meaning of *Balabel*. Rather, these communications are more appropriately characterized as dealing administratively with the routine routing of correspondence. Accordingly, I am not persuaded by the Ministry's representations or the records themselves that Records 35 and 36 are

subject to solicitor-client communication privilege or that they were prepared by or for Crown counsel for use in giving legal advice.

Records 27, 28, 29, 34, 46, 52, 54, 64, 67, 68, 69, 72, 74 and 103 consist of correspondence between the OFM, in particular, either the fire investigator or his supervisor and various stakeholders, including the solicitor for one of them. Record 31 is a letter sent to a lawyer employed by the Ministry of the Solicitor General by the solicitor for one of the stakeholders. Clearly, these records do not contain communications between a solicitor and client. In all cases, these communications are between the OFM (and in one case the Ministry's legal services department) and a party outside of the government. It is not clear from the Ministry's representations what it is basing its claim on. However, it appears that the basis for this claim may relate to either communications between a Ministry lawyer and a party outside of that institution or to the solicitor-client relationship that exists between the stakeholders and their lawyers.

In Order MO-1338, Senior Adjudicator David Goodis commented on the purpose of the solicitor-client privilege exemption (in the context of a claim that the principle of common or joint interest applied to them). In my view, his comments are applicable generally to the types of records I have described here:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything

> you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter.

The Ministry has not claimed, nor do the records suggest, that there may be a joint interest in these records. Based on the Ministry's representations and my review of these records, I find that the Ministry has failed to establish that Records 27, 28, 29, 31, 34, 46, 52, 54, 64, 67, 68, 69, 72, 74 and 103 qualify for exemption under the solicitor-client communication aspect of section 19.

Record 49 is a handwritten note to the fire investigator directing him to take a particular action with respect to an affected party. The note makes reference to the solicitor for this party. There is nothing on the face of this note to indicate that a Ministry lawyer is connected to it in any way. The record is contained in the file entitled "field operations" records. The Ministry does not specifically address this record. In my view, the Ministry has failed to establish that this record falls within the communication aspect of solicitor-client privilege.

As I noted above, the records are contained in two files. One is entitled "field operations" and the other is labelled as "fire evaluation branch". These file names are consistent with the type of routine work performed by the OFM in investigating the cause of a fire. The records are consistent with this type of work. There is no indication from the files or the records that these records were prepared by or for Crown counsel or, other than in Records 73 and 75, that legal advice was sought or provided. Other than making a bald assertion, unsupported by the records, the Ministry has failed to establish that the records were prepared by or for Crown counsel for use in giving legal advice.

Litigation Privilege

As I noted above, the Ministry also takes the position that the exempted information was prepared by or for Crown counsel in contemplation of litigation and for use in litigation that may arise as a result of the circumstances of the February 2, 2000, fire. In this regard, the Ministry notes that the responsive records contain direct references to the possibility of litigation.

It is apparent from the records, from the representations of one of the affected parties and from comments made by the appellant that litigation arising from the fire is likely to occur. It is also apparent that this litigation would involve the stakeholders. There is no basis upon which I can conclude that the OFM would be involved in this litigation as a party. It is possible that OFM staff may be involved as expert witnesses in connection with their investigation. However, in my view, this type of involvement is not sufficient to engage the litigation privilege aspect of this exemption. As I noted above, the records are contained in the "field operations" file and a file in the "fire evaluation branch". Both the file names and the records generally are consistent with the type of routine work performed by the OFM in investigating the cause of a fire. There is no indication from the files or the records that these records were prepared by or for Crown counsel in contemplation of litigation and for use in litigation. Similar to my conclusions above under communication privilege, other than making a bald assertion, unsupported by the records, the Ministry has failed to establish that the records are exempt under the litigation privilege aspect of section 19.

Accordingly, I find that with the exception of Records 73 and 75, none of the records at issue qualifies for exemption under section 19 of the *Act*. After considering the Ministry's representations as a whole,. I find nothing improper in its exercise of discretion in withholding Records 73 and 75 from disclosure. As a result, Records 73 and 75 are exempt under Section 19 of the *Act*.

SUMMARY

In summary, I found that Records 3 (pages 28 - 44), 4 (pages 49 - 96), 9 (pages 105 - 106), 10 (pages 107 - 109 and duplicate pages 530 - 534 and 556 of Record 89 and 557 - 560 of Record 90), 14, 16, part of Records 72 (duplicate Record 74), 73 and 75 are exempt from disclosure. The remaining records and parts of records do not qualify for exemption under sections 17(1), 19 and/or 21(1) and should be disclosed to the appellant.

For greater certainty, I have highlighted on the copy of Record 72 (duplicate Record 74), which I am sending to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, the portion of this record that should not be disclosed

ORDER:

1. I uphold the Ministry's decision to withhold Records 3 (pages 28 - 44), 4 (pages 49 - 96), 9 (pages 105 - 106), 10 (pages 107 - 109 and duplicate pages 530 - 534 and 556 of Record 89 and 557 - 560 of Record 90), 14, 16, the highlighted portion of Records 72 (duplicate Record 74), 73 and 75 from disclosure.

2. I order the Ministry to disclose the remaining records and parts of records by providing the appellant with a copy of these records by January 31, but not earlier than January 24, 2001.

3. In order to verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records and parts of records which are disclosed to the appellant.

Original Signed By: December 24, 2001
Laurel Cropley
Adjudicator