

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3150

Appeal PA10-334

Ministry of Natural Resources

December 27, 2012

Summary: The appellant made a request to the Ministry of Natural Resources for records relating to an administrative decision the ministry had made in regard to the opening and operation of a quarry. The ministry issued a decision granting access to some records, either in whole or in part. Access to other records, in their entirety, was denied. The ministry claimed the application of the exemptions in sections 13 (advice or recommendations), 17 (third party information), 18 (economic and other interests), 19 (solicitor client privilege) and 21 (personal privacy). In this order, the adjudicator upholds the ministry's decision in part, and orders the ministry to disclose a number of records, either in whole or in part, to the appellant. The adjudicator also upholds the ministry's exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 13, 18(1)(d), 18(1)(e), 19 and 21(1).

OVERVIEW:

[1] The appellant is a company which owns land it sought to develop as an aggregate quarry. In order to open and operate a quarry, certain approvals must be obtained. In 2010, the Ministry of Municipal Affairs and Housing (MMAH) issued a Minister's Zoning Order (MZO), which limits the range of land uses to both existing uses and permitted uses under the applicable municipal by-law.

[2] Under the Planning Act, the appellant submitted an application to the MMAH to revoke the MZO and requested that the MMAH refer the application to revoke the MZO to the Ontario Municipal Board (OMB). The matter is now before the OMB.

[3] In April 2011, the Minister of the MMAH notified the OMB that the issues in the case involved matters of provincial interest.¹ The effect of this notice is that any decision of the OMB regarding the MZO is not final or binding.

[4] The appellant subsequently commenced an application for judicial review of the MZO and the DPI. The judicial review application remains before the Divisional Court and has not concluded.

[5] The appellant's position is that the MZO was issued for purposes not authorized by the *Planning Act*, but was issued for "political purposes" and to assist individuals opposed to the quarry who previously worked for the provincial government.

[6] In addition to the above matters, litigation has arisen relating to a Permit to Take Water, which is required in order for the appellant to conduct a series of pumping tests on the land. On two occasions, the appellant applied to the Ministry of the Environment (MOE) for a permit to carry out the pumping tests. The MOE denied the application in both instances and the appellant has appealed the second refusal to the Environmental Review Tribunal (ERT). The matter is now before the ERT.

[7] This order arises out of an access decision made by the Ministry of Natural Resources (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

All records, including correspondence, memoranda, notes, studies, emails, reports (the "records") in the possession or control of the Minister or the Ministry of Natural Resources, or their representatives, relating in any way to the issuance of the Minister's Order.

Without limiting the generality of the foregoing, we request any records of the Minister or the Ministry of Natural Resources, or their representatives, relating to the applications of [a named company] for approvals for its proposed quarry project in the City and any request for or records dealing with the necessity for, advisability of, or potential impact of the issuance of the Minister's Order or requesting any other alternative form of provincial intervention in the said applications of [a named company].

Included in this request, without limiting the generality of the foregoing, is a request for copies of all records of the nature described above sent to,

¹ See section 47(13.1) of the *Planning Act*. The notice is a Declaration of Provincial Interest (DPI).

or received by Ministry of Natural Resources' representatives or the Minister or her representatives from any other provincial representative including all Ministers, M.P.P.s, and the Premier or sent to or received from the City of Hamilton or the Town of Milton or the Region of Halton or their representatives, including the Region Chair, the Mayors or members of the Councils or sent to or received from [a named organization] or their representatives or other member of the public, which relate in any way to the issuance of the Ministers' Order or the statement set out in the Ministry news release attached, which states, "We have responded to Hamilton and Halton Councils, which have asked the province not to let this proposal proceed."

[8] After discussing its request with ministry staff, the appellant amended the second paragraph of its access request to read:

Without limiting the generality of the foregoing, we request any records dealing with the necessity for, advisability of, or potential impact of the issuance of the Minister's Order or requesting any other alternative form of provincial intervention in the said applications of [a named company].

[9] The ministry located 842 pages of responsive records and issued a decision letter that provided the appellant with partial access to them. It denied access to some records, either in whole or in part, claiming the application of the discretionary exemptions in sections 13(1) (advice and recommendations), 18(1)(e) (economic and other interests) and 19 (solicitor-client privilege), and the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The ministry also sent the appellant an index of records that indicated the date of the record, a brief description of each record, whether the record was withheld or disclosed, and the exemptions claimed for each.

[10] The requester (now the appellant) appealed the ministry's decision to this office. This appeal was not resolved during mediation and moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the ministry and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[11] As a preliminary matter, the ministry confirmed with staff of this office that it was no longer relying on the mandatory exemption in section 21 with respect to records A0108677 and A0108687. As no other exemptions were claimed by the ministry with respect to these records, I will order the ministry to disclose the severed portions of these records to the appellant.

[12] In addition, I note that the ministry claimed the application of the mandatory exemption in section 17 in its decision letter to the appellant, but did not provide representations on this section, or indicate in the index of records which records it was claiming to be exempt under section 17. Accordingly, given the absence of representations and the fact that there is no third party whose interests would be affected by the disclosure of the records, as the appellant is seeking information about itself, I find that there is no evidence to substantiate a section 17 claim and I will not be considering its application in this order.

[13] For the reasons that follow I uphold the ministry's decision, in part. I order the ministry to disclose some records in their entirety and others in part. I also uphold the ministry's exercise of discretion.

RECORDS:

[14] There are 842 pages of records consisting of emails, presentation slides, maps and correspondence.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the personal information at issue?
- C. Does the discretionary exemption at section 19 apply to the records?
- D. Do the discretionary exemptions at sections 18(1)(d) and 18(1)(e) apply to the records?
- E. Does the discretionary exemption at section 13(1) apply to the records?
- F. Did the institution exercise its discretion under sections 13(1), 18(1)(e) and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[15] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"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 if 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;

[16] Section (2.1) also relates to the definition of personal information and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[17] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.²

[18] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[20] The ministry submits that seven records contain personal information, such as individuals’ names, home addresses, telephone numbers, and email accounts, as well as work status and employment or educational history. It argues that this information falls under the scope of the definition of “personal information” set out in section 2(1) of the *Act*.

[21] The appellant states that it is seeking only the names of the individuals who met with, attempted to meet with, or made representations to the government about the proposed quarry, and is not seeking other information, such as telephone numbers, addresses and email addresses. In addition, the appellant states that since only the name of the individuals is being sought, other information relating to the individual can be severed. As the appellant has narrowed the request to include only the individuals’ names with respect to the records for which the ministry is claiming the exemption in section 21, any order I make will be in reference to that information only.

[22] The appellant further submits that the definition of “personal information” in the *Act* does not include an individual’s name and that a proper interpretation of the *Act* excludes it. An individual’s name, the appellant argues, only becomes personal information under paragraph (h) of the definition of the term, where the individual’s name appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about that person.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[23] I have reviewed the records carefully. The following records contain the personal information of individuals, because the disclosure of the names of the individuals would reveal other personal information about them; specifically that they commented to the ministry about the appellant's quarry application. This information falls under the ambit of paragraph (h) of the definition of personal information in section 2(1) of the *Act*:

- A0109713
- A0109726
- A0109881
- A0109935

[24] In addition, records A0109726 and A0109881 contain the personal views about the quarry of two identifiable individuals, and represents their personal information under paragraph (e) of the definition of personal information in section 2(1) of the *Act*. As well, record A0109935 contains the views or opinions of another individual of an identifiable person, falling under the ambit of paragraph (g) of the definition of personal information.

[25] I find that a portion of record A0109819 also constitutes personal information. Although the information relates to an individual in their professional capacity, a portion of the record reveals something of a personal nature of that individual, which this office has held to be personal information. I will consider the application of the exemption in section 21(1) to this personal information. However, the remaining portions of this record do not contain personal information and the ministry has not claimed any other exemptions to it. I will order the ministry to disclose the remaining portions of the record that do not contain personal information to the appellant.

[26] However, with respect to record A0109951, I find that the information at issue, which consists of only the names of certain individuals, does not constitute their personal information. The record contains the names of a number of individuals, but does not reveal any other personal information about them or contain any other personal information relating to them.

[27] In past orders, this office has held that a name alone cannot be considered "personal information" according to the subsection 2(1) definition; it alone is not "recorded information about an identifiable individual." This interpretation is supported by paragraph (h) of the definition of personal information which includes the name of an individual within the definition of personal information "...where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual." In addition, as of April 1, 2007 the definition of personal information was amended to exclude the name of an individual that identifies the individual in a business, professional or official capacity.

[28] Consequently, I find that the information at issue in record A0109951 does not constitute personal information and, therefore, cannot be exempt under section 21(1). As no other exemptions have been claimed by the ministry with respect to this record, I will order the ministry to disclose only the responsive information to the appellant, which are the individuals' names.

[29] I will now consider whether the personal information in the remaining records for which the ministry claims section 21(1) is exempt.

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[30] As previously stated, I have found that records A0109713, A0109726, A0109881, A0109935 and A0109819 contain personal information. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The ministry takes the position that the release of the information at issue would constitute an unjustifiable invasion of other individuals' privacy.

[31] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[32] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. I find that in the circumstances of this appeal, section 21(4) does not apply.

[33] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁵

[34] The ministry has claimed the presumptions in sections 21(3)(d) (employment history) and 21(3)(g) (personal evaluations/personnel evaluations) to exempt A0109819. This record, the ministry submits, is an email from the Assistant Deputy Minister to two staff members offering her personal compliments on work done by them. I find that the two presumptions relied upon by the ministry do not apply to this record. First, the record does not contain any information about anyone's employment history. Second, while the record contains a compliment paid to staff members about the work they completed on a particular project, past orders of this office have defined

⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

the terms "personal evaluations" or "personnel evaluations" as applying to assessments made according to "measurable standards."⁶ This record does not include such information.

[35] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁷

[36] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).⁸

[37] The ministry has not claimed any further presumptions, but has made representations on the various factors in section 21(2). The ministry submits that it balanced the factors in sections 21(2)(a) and (d) to (h), as well as other relevant circumstances, such as the context in which the personal information appeared in the records and the circumstances of the request, and found that the balance favoured the protection of the individuals' privacy because it was of the view that disclosure would constitute an unjustified invasion of privacy. There is no evidence, the ministry argues, to suggest that the release of the information at issue would not be an unjustified invasion of privacy.

[38] The appellant submits that the factors in section 21(2)(a) and (d) are applicable and favour the disclosure of the information at issue. These sections state:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[39] With respect to section 21(2)(a), the appellant submits that it is challenging the issuance of the MZO by the government on the grounds that it was issued for purposes not authorized by the Planning Act, namely for political purposes and to assist individuals opposed to the quarry who previously worked for the provincial government.

⁶ Order PO-2176.

⁷ Order P-239.

⁸ Order P-99.

Consequently, the appellant submits, the disclosure of the information at issue is desirable for the purpose of subjecting the activities of the government and its agencies to public scrutiny. The appellant states:

The names of the individuals who met with, or made representations to, the government are important to the determination of whether the government acted properly issuing the MZO.

[40] Section 21(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁹ As previously stated, the names of individuals who commented to the ministry about the appellant's quarry application constitutes their personal information. I am not persuaded by the appellant's argument that revealing this type of personal information is desirable for the purpose of subjecting the activities of the government and its agencies to public scrutiny. In fact, disclosing this type of personal information would not subject the government's activities to public scrutiny, but would, instead, subject the individuals' personal views to public scrutiny. In addition, the personal information in record A109819 is unrelated to the quarry project and would not assist in subjecting the government's activities to public scrutiny. Accordingly, I find that this factor favouring disclosure is not relevant in the circumstances of this appeal.

[41] Turning to the factor in section 21(2)(d), the appellant submits that the disclosure of the names is relevant to the fair determination of its rights to a proper hearing on the merits of its quarry application. The appellant states:

If individuals connected in some fashion to the government or Liberal Party are meeting with the government and trying to influence a decision of the government that affected [the appellant], it is only fair that [the appellant] knows about it, so that [the appellant] can have a fair determination of its rights. Clearly scrutinizing whether government action has been influenced by people with connections to the government and whether the government acted improperly is in the public interest.

[42] For section 21(2)(d) to apply, the appellant must establish that:

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

⁹ Order P-1134.

- 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
- the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[43] I am unable to find that the appellant has established the application of the factor favouring disclosure in section 21(2)(d) as I am not satisfied that the personal information at issue is relevant to the fair determination of the appellant's rights before the OMB, the ERT and/or the Divisional Court.

[44] In addition, as previously noted, the appellant indicates in its representations that it is seeking only the names of the individuals who provided comments to the ministry or consulted with the ministry. However, the appellant has received partial disclosure of four of the five records at issue,¹¹ in which the only information that has been withheld is the names of the individuals. The disclosure of the names, in conjunction with the information already disclosed to the appellant, would reveal a significant amount of personal information about these individuals. In the circumstances, it was a reasonable expectation of the individuals who provided comments to the ministry regarding the proposed quarry that their personal information would remain confidential and would not be disclosed to the appellant for its private purposes. I find that this expectation of confidentiality is a factor which favours the non-disclosure of the personal information at issue.¹²

[45] With respect to record A0109819, I have already found that the personal information in this record would not assist in subjecting the activities of government to scrutiny, as the personal information is unrelated to the quarry project. For the same reason, I find that the disclosure of this personal information is not relevant to the fair determination of the appellant's rights before the OMB, the ERT and/or the Divisional Court. However, as previously stated, the personal information in the record can be severed and I will order the ministry to disclose the remaining information, which I have found not to be personal information.

[46] As section 21(1) is a mandatory exemption and there are no factors favouring disclosure, I find that the disclosure of the individuals' personal information at issue is an unjustified invasion of their privacy and I uphold the ministry's decision to withhold this information from disclosure.

¹⁰ Order PO-1764; see also 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.).

¹¹ The exception being record A0109819.

¹² See section 21(2)(h).

C. Does the discretionary exemption at section 19 apply to the records?

[47] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[48] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies. The ministry claims that branch 1 of the section 19 exemption applies, as the information at issue falls within the ambit of the common law definition of solicitor-client privilege.

[49] The ministry cites a number of cases in support of its position that:

- legislation that interferes with the confidentiality arising from solicitor client privilege should be interpreted restrictively;¹³
- there is a high public interest in maintaining the confidentiality of the solicitor client relationship;¹⁴
- solicitor client privilege belongs to the client, not the lawyer;¹⁵
- where information is passed by the solicitor or client to the other as part of the continuum of communication aimed at keeping both informed so that advice may be sought and given as required, privilege will attach;¹⁶

¹³ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* [2008] S.C.J. No. 45 at p. 55 and *Descoteaux v. Mierzwinski* [1982] 1 S.C.R. 860 at p. 875 (*Descoteaux*).

¹⁴ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815.

¹⁵ *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at p. 173.

¹⁶ *Balabel v. Air India* [1988] 2 W.L.R. 1036 (Eng. C.A.) (*Balabal*).

- the privilege applies equally to government, corporations and individuals who demonstrate an intention to keep solicitor client communications confidential;¹⁷ and
- the lawyer or the client may communicate with one another through an intermediary without impairing privilege.¹⁸

[50] In addition, the appellant states:

[F]acts may also be subject to solicitor client privilege, if they are a part of a communication that satisfies the criteria for the privilege.¹⁹ In other words, to the extent that factual information is provided to legal counsel for the purpose of providing such counsel with the necessary facts upon which to apply the law and provide legal advice, such facts will fall within the scope of solicitor client privilege. This includes all working papers directly relating to the advice or assistance.²⁰

Solicitor client privilege may extend to communications on a fairly wide range of subjects, even where communications between a solicitor and client may be made on an on-going and protracted basis. Any one particular aspect of this communication may not seem, at first glance, to be subject to solicitor client privilege. However, when it is considered in light of the "continuum" concept of legal advice, as set out in *Balabel v. Air India*, it becomes apparent that such communications fall within the scope of the privilege. This type of continuum or protracted nature of legal advice is particularly prevalent in the case of "in-house" legal advisors such as government Crown counsel. . .

[51] The ministry then goes on to describe each record for which section 19 is claimed. It indicates that they consist of email communications and a slide deck.

[52] The appellant submits that given that the documents are unavailable for review, it is not possible to make representations on whether the claim for privilege is properly made, with a few exceptions. The appellant argues that three of the records are not privileged, as they are not communications with legal counsel. One record, the appellant states, does not appear to have been prepared for legal counsel and another simply refers to the fact that counsel was involved.

¹⁷ *Minter v. Priest* [1930] A.C. 558 at p. 581.

¹⁸ *Lyell v. Kennedy* (1884) 27 Ch.D, 1; *Descoteaux*, see note 13; *Susan Hosiery Ltd. v. M.N.R.* [1969] 2 Ex. C.R. 27; Order 135 (*Susan Hosiery*).

¹⁹ *Susan Hosiery, ibid*; *British Columbia (Minister of the Environment) v. British Columbia (Information and Privacy Commissioner of British Columbia)* (1995), 16 B.C.R.R. (3d) 64 (S.C.).

²⁰ *Ibid*.

[53] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.²¹

[54] 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 or giving professional legal advice.²²

[55] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.²³

[56] The privilege applies to “a continuum of communications” between a 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.²⁴

[57] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.²⁵

[58] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.²⁶

Findings

[59] As a preliminary matter, I note that the ministry did not make representations with respect to record A0108599, but has noted in the index of records that a portion of the record was withheld, relying on the exemption in section 19. The withheld portion of this record consists of one sentence. Having reviewed the sentence carefully, I find that it is, in fact, not responsive to the request, as it relates to a different matter altogether. Therefore, I will not order the ministry to disclose this sentence to the appellant.

²¹ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

²² *Descôteaux*, see note 13.

²³ Orders PO-2441, MO-2166 and MO-1925.

²⁴ *Balabel*, see note 16.

²⁵ *Susan Hosiery*, see note 18.

²⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[60] Record A0107446 – I am satisfied that this record, which consists of an email and an attached draft document, is exempt from disclosure under section 19, as it is a confidential communication in which a staff member from the ministry is seeking legal advice on the draft document from its counsel.

[61] Record A0109887 – I am satisfied that the portion of this email which has been withheld, consisting of a ministry staff member directing another to seek legal advice on a particular issue, is exempt under section 19, as it forms part of the continuum of communication between staff and legal counsel and also reveals the issue for which the advice was sought.

[62] Record A0109929 – I am satisfied that portions of this record, which consist of a request for legal advice by staff to counsel and the legal advice provided by counsel, are exempt from disclosure under the solicitor-client communication privilege aspect of both branch 1 and 2 of section 19. However, other portions of the record are not exempt, and have, in fact, already been disclosed to the appellant as part of record A0109887. As no other exemptions have been claimed for this record, I will order the ministry to disclose to the appellant the portions I have found not to be exempt.

[63] Record A0107449 – I am satisfied that this record, which consists of email communications between staff and legal counsel in which staff requests legal advice from counsel, who in turn provides such advice, is exempt from disclosure under the solicitor-client communication privilege aspect of both branch 1 and 2 of section 19.

[64] Record A0109815 – I am satisfied that this record, which consists of an email communication between staff and legal counsel in which staff requests legal advice from counsel, who in turn provides such advice, is exempt from disclosure under the solicitor-client communication privilege aspect of both branch 1 and 2 of section 19.

[65] Records A0107447 and A0107448 - I am satisfied that these records, which consists of email communications between staff and legal counsel in which staff requests legal advice from counsel, who in turn provides such advice, is exempt from disclosure under the solicitor-client communication privilege aspect of both branch 1 and 2 of section 19.

[66] Record A0110002 – I am satisfied that this record, which consists of an email from staff to legal counsel, seeking legal advice in regard to a draft slide deck, is exempt from disclosure under the solicitor-client communication privilege aspect of both branch 1 and 2 of section 19.

[67] Record A0110003 – I am satisfied that this record, which is the draft slide deck referred to above, is exempt from disclosure under section 19, as it was sent to legal counsel for the purpose of having legal counsel review it and provide legal advice about it. The draft slide deck contains information about a legal issue.

[68] Record A0109812 - I am satisfied that this record, which consists of an email with draft options, is exempt from disclosure under section 19, as it is communication in which a staff member from the ministry is seeking legal advice on the draft options from its counsel.

[69] Record A0109986 – I am satisfied that this record, which consists of an email and an attached draft slide deck, is exempt from disclosure under section 19 for the same reasons as discussed under record A0110003, as it is communication in which a staff member from the ministry is seeking legal advice on the draft slide deck from its counsel.

[70] Record A0109998 – I am satisfied that this record, which consists of an email from staff to legal counsel, seeking legal advice, is exempt from disclosure under section 19.

[71] Record A0109837 – I am satisfied that this record is properly exempt under section 19. It consists of an email chain regarding a house note for which legal advice was sought and received, and a revised draft version of the house note. In the email chain, revisions are made to the house note and there is a discussion about obtaining further legal advice. This record forms part of the continuum of communication between staff and legal counsel and also reveals the issue for which the legal advice was sought. Therefore, this record is exempt under section 19.

[72] Records A0109814, A0109980 and A0109982 – The ministry's representations state that record A0109814 is a series of emails for which section 19 is claimed because of the references to the involvement of counsel and instructions to vet the options contained in the record. The appellant submits that this record is not a communication with legal counsel and a simple reference to the fact that counsel was involved does not render the communication privileged. With respect to record A0109980, the ministry states that it is a partial duplicate of the email exchange. No representations were made with respect to record A0109982. Having reviewed these records carefully, and taking the representations into consideration, I find that they are not exempt under section 19. The records are not communications between staff and legal counsel, were not prepared by or for legal counsel, do not form part of a continuum of communications between staff and legal counsel; nor do they contain any legal advice. I note that the ministry has also claimed the application of the exemptions in sections 13 and 18 to these records, which I will consider later in this order.

[73] In sum, I find that most of the records for which section 19 is claimed are exempt from disclosure with the exception of portions of record A0109929 and records A0109814, A0109980 and A0109982. As no other exemptions have been claimed for record A0109929, I will order the ministry to disclose to the appellant the portions I have found not to be exempt, subject to my finding in regard to the ministry's exercise of discretion.

D. Do the discretionary exemptions at sections 18(1)(d) and 18(1)(e) apply to the records?

[74] The ministry is claiming the application of the discretionary exemption in sections 18(1)(d) and/or 18(1)(e) with respect to 28 records. These sections state:

A head may refuse to disclose a record that contains,

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[75] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[76] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.²⁷

[77] For section 18(1)(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.²⁸

²⁷ Order MO-2363.

²⁸ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[78] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.²⁹

[79] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.³⁰

[80] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.³¹

[81] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.³²

[82] The term "plans" is used in section 18(1)(e). Previous orders of this office have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."³³

[83] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.³⁴

[84] In its representations, the ministry relies on Order P-1026, in which the request was for records that would allow the requester to determine how the government negotiated an operating agreement with Windsor Casino Ltd. Access was denied under section 18(1)(c) on the basis that the negotiation of a permanent agreement had yet to be conducted and since there would be more casinos established in Ontario, future

²⁹ Orders MO-1947 and MO-2363.

³⁰ Order PO-2064.

³¹ Orders PO-2064 and PO-2536.

³² Orders PO-2034 and PO-2598.

³³ Orders P-348 and PO-2536.

³⁴ Order PO-2034.

negotiations of operating agreements would be prejudiced. This office upheld the decision, stating that the reasonable expectation of probable harm involves some speculation. The ministry argues that the decision in that appeal:

[A]ccepted the argument presented by the OCC [Ontario Casino Corporation] that the records disclose a complete picture of the positions and strategies it adopted during the negotiations. The OCC provided a number of examples of positions it initially took which changed during the negotiation process and discussed the harms which would occur if an adversary in negotiations was in possession of the background material.

[85] The ministry submits that, in this appeal, the records, or portions of records for which sections 18(1)(d) and/or 18(1)(e) has been claimed, identify options of negotiations to deal with the quarry application. In this case, the ministry states, there are two separate streams of litigation arising from the application before the OMB and the ERT. The ministry further submits that based on the request for an adjournment before the OMB, further litigation in other venues is more than likely, as the basis for the adjournment was that the appellant was going to pursue other legal avenues. As courts and tribunals press litigants before them to attempt to settle their disputes, the ministry argues, any attempts by the appellant to find other legal redress will include some negotiations between the government and it. As such, the ministry submits, the positions set out in the records are options considered by the government in these negotiations.

[86] With respect to the particular records for which the exemptions are claimed, the ministry states:

A0107450, A0107451, A0109816, A0109984, A0109999 and A0110001 are all records that contain a slide deck prepared for the Minister. All of these records have been released with the exception of one page in each that sets out some details of possible strategies for arriving at a negotiated settlement. It was our view that, given the likelihood of litigation (whether before the OMB or elsewhere) and the continued possibility of negotiating a settlement with the proponent, to disclose the basis upon which the Province might be prepared to settle with the proponent would meet the tests for s. 18(1)(d) and/or 18(1)(e).

As set out in the slide deck records, two of the negotiating possibilities were a land exchange and exploring current licensed aggregates sites suitable for expansion. A0108596, A0108598, A0108601, A0108652, A0108653, A0108654, A0108655, A0108656, A0109710 and A0109991 are all emails relating to the location and identification of Crown Lands in the vicinity of Mountsberg (near the proponent's quarry) and relate directly to the potential land exchange referred to in the slide deck. A0108658 is an

actual map of the Mountsberg area. Disclosing these records, particularly because of the significance of their dates and the senders and recipients, would allow an assiduous requester to determine that the province was considering some sort of possible land exchange with the proponent and would, therefore, also meet the tests of ss. 18(1)(d) & (e).

A0108595 is an email of a similar nature but speaks to a potential aggregate site in Kennebec Township. A0109896 and A0109933 are also email exchanges again referring to aggregates mapping but are not restricted to Mountsberg. The timing of the emails and the identity of the senders and recipients would again engage ss. 18(1)(d) & (e). A0109941 is an email that makes reference to a request for aggregates mapping and the same rationale would apply.

A0109923 is an email exchange that makes specific reference to the option of a negotiated settlement with the proponent and that it could be a possible trade of aggregate resources on Crown Land.

A0109813 and A0109987 are both emails and are actually duplicates of A0109923 and, therefore, should simply be subject to the section 18 claim set out for Item 5.

A0109814 is a series of emails. All of the email exchanges were exempted because of the references to the mapping of prime aggregate sites in the emails and the references to the ETA for the map on the same rationale as set out before in respect of the negotiated settlement option portion of the slide deck.

A0109980 is a partial duplicate of the email exchange contained in A0109814 and the same arguments for section 18 and 19 would apply to the duplicated portion. The two additional emails at the beginning of A0109980 make further references to the "map," "potential sites on crown land," and "map of the greater Golden Horseshoe regarding aggregate resources."

[87] The appellant submits that since the records are unavailable for its review, it is not possible to respond to the ministry's representations.

Findings

[88] To establish a valid exemption claim under section 18(d), the ministry must demonstrate a reasonable expectation of injury to its financial interests or to the ability of the Government of Ontario to manage the economy of Ontario, and must do so by providing "detailed and convincing" evidence to establish the reasonable expectation of

harm. The ministry has not provided sufficiently detailed and convincing evidence to establish how disclosure of the records would be injurious to its financial interests or to the ability of the province to manage its economy. Consequently, I find that section 18(1)(d) has no application in this appeal.

[89] Turning to the exemption in section 18(1)(e), generally speaking, section 18 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 18(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released, in contrast to sections 18(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure.

[90] As stated above, the first part of the section 18(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use. The authors of the Williams Commission Report commented on the reasoning behind the exemption at section 18(1)(e) at page 321:

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.

...

Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

[91] With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents

containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

An agency may refuse to disclose:

A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.

We favour the adoption of a similar provision in our proposed legislation.

[92] Additionally, background information that may form the basis for positions taken during negotiations is not exempt from disclosure under section 18(1)(e).³⁵

[93] I am satisfied that the first six records³⁶ referred to by the ministry contain its position on a possible negotiated settlement and meet the criteria of the four part test necessary for claiming the exemption in section 18(1)(e). I make this finding as well for record A0108592,³⁷ which is referred to in the ministry's index of records as having been partially withheld on the basis of section 18. However, in its representations, the ministry has disclosed two of the negotiating possibilities, namely, a land exchange and exploring current licensed aggregates sites suitable for expansion. These two negotiating positions, consequently, are no longer at issue given that the ministry has disclosed them in its representations, which were shared with the appellant on consent by the ministry. Therefore, I will order the ministry to disclose the portions of the six records that capture the two negotiating positions set out, above. The remaining portion of the seven records is exempt under section 18(1)(e).

³⁵ Order M-862.

³⁶ Records A0107450, A0107451, A0109816, A0109984, A0109999, and A0110001, which are portions of the slide deck.

³⁷ The ministry did not make representations in regard to this record, but it is a duplicate of five of the records for which representations were made.

[94] The next 16 records³⁸ for which the ministry has claimed the exemption in section 18(1)(e) consist of emails and maps. These records do not contain a "plan", "position", "procedure", "criteria" or "instructions." Rather, this information is comprised of background and evaluative information. The background information identifies certain geographical areas, in written and map form, and sets out certain evaluative information about the areas. Though background information may form the basis for positions taken during negotiations, it is not exempt from disclosure under section 18(1)(e).³⁹ In my view, disclosure of these records would not reveal the ministry's negotiating strategy or instructions given to those carrying out the possible future negotiations between the ministry and the appellant. Accordingly, I find that the background and evaluative information does not amount to a "plan," "position," "procedure," "criteria" or "instructions" which establishes a pre-determined course of action or way of proceeding. As no other exemptions have been claimed for these records, I will order the ministry to disclose them to the appellant, subject to my finding in regard to the ministry's exercise of discretion. In addition, I note that portions of record A0109941 were withheld by the ministry on the basis that they were not responsive to the request. I have reviewed this record and I agree with the ministry that these portions are not responsive to the request and I will not order the ministry to disclose these portions to the appellant.

[95] Records A0109923, A0109813 and A0109987 are identical. Record A0109923 was disclosed in part, with only one sentence withheld from the appellant. The content of the sentence was disclosed by the ministry in its representations, which were shared with the appellant with the ministry's consent. The sentence makes specific reference to the option of a negotiated settlement with the proponent and that it could be a possible trade of aggregate resources on Crown Land. Consequently, as the information has been disclosed to the appellant, the exemption cannot apply. In addition, I note that records A0109813 and A0109987 were withheld from the appellant, in their entirety, and the ministry has claimed the exemptions in sections 18 and 13, although the ministry did not provide specific representations on section 13. Given that the vast majority of record A0109923 has already been disclosed to the appellant, with the exception of the single sentence, and the remaining two records are duplicates, I will not be determining whether section 13 applies to those records, and I order the ministry to disclose complete copies of all three records to the appellant, subject to my finding in regard to the ministry's exercise of discretion.

[96] Records A0109814 and A0109982 are duplicates of an email chain. Record A0109980 is a partial duplicate of A0109814 with two additional emails. I find that these records do not qualify for exemption under section 18(1)(e), as they capture an internal decision making process and do not set out the ministry's negotiating position

³⁸ Records A0108596, A0108598, A0108601, A0108652, A0108653, A0108654, A0108655, A0108656, A0108657, A0108658, A0109710, A0109991, A0108595, A0109896, A0109933, and A0109941.

³⁹ Order M-862.

or strategy. The ministry is also claiming the application of the exemption in section 13, which I will consider below.

E. Does the discretionary exemption at section 13(1) apply to the records?

[97] Section 13(1) states:

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

[98] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.⁴⁰

[99] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.⁴¹

[100] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.⁴²

[101] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.⁴³

⁴⁰ Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

⁴¹ Order PO-2681.

⁴² Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁴³ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

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

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views;
- draft documents; and
- a supervisor's direction to staff on how to conduct an investigation.⁴⁴

[103] The ministry submits that in order to qualify for exemption, the record must have been prepared by a public servant or person employed in the services of an institution, or a consultant retained by the institution. The nature of the relationship between the author and the institution, the ministry submits, is a crucial factor in determining whether the exemption applies.

[104] Turning to the records for which the ministry is claiming the application of the exemption in section 13, the ministry states:

A0108683 and A0108697 are both emails attaching draft issues management plans. The portions severed under s. 13 are the communications objectives as well as the key messages and key secondary messages. A0108683 was forwarded to the Deputy Minister's Executive Assistant and constitutes the Communication Branch's recommendations for the Deputy Minister for issue management. A0108697 was forwarded to the Minister's staff and constitutes the Communication Branch's recommendations to the Minister for issue management. In each instance, the recipient of the recommended communications objective and messages had the ability to accept or reject the advice of the Communications Branch.

A0109943 is an email from the branch policy advisor to the Assistant Deputy Minister's Executive Assistant and represents the policy advisor's recommendation and advice to the Assistant Deputy Minister on whether the Minister could or should revoke the Delegation of Authority in respect of this particular application.

⁴⁴ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

A0108599 is an email exchange and in one email from the Regional Strategic Coordinator to both the Regional Director and the Assistant Deputy Minister's Executive Assistant. The middle paragraph of the email was severed under section 13 as it represented the advice and recommendation of the author to his superiors about the content of the draft slide deck and in particular the statements concerning the impact of the options presented.

A0109814 is a series of emails. Section 13 was claimed for the email exchange setting out options and recommendations based on the post script of a staff email.

A0109980 is a partial duplicate of the email exchange contained in A0109814 and the same arguments apply.

[105] The appellant submits that since the records are unavailable to it for review, it is not possible to respond to the ministry's representations.

Findings

[106] Based on the ministry's representations, and my review of records A0108683 and A0108697, I am satisfied that they contain or would reveal the advice of the ministry's communication branch staff to the Deputy Minister regarding the issues management plan. In addition, I find that this advice was provided within the deliberative process of government decision-making and that the advice and recommendations could be accepted or rejected by the Deputy Minister. Accordingly, I find that section 13(1) applies to these two records.

[107] Turning to record A0109943, the portion of the email that has been withheld contains a policy advisor's advice and recommendations to the Assistant Deputy Minister on the subject of the delegation of authority, which advice could be accepted or rejected by the Assistant Deputy Minister. Consequently, I find that it is exempt under section 13(1).

[108] On my review of record A0108599, I find that the portions that have been withheld contain the opinions and cautions of the writer and/or factual assessment of the issues. I find that the record does not contain any recommendations. I find further that it is not advisory in nature, nor would its disclosure reveal any advice or recommendations, with the exception of portions of two sentences, that refer to advice. Accordingly, I find that part of the portion of this record that was withheld under section 13(1) does not qualify for exemption under section 13(1) of the *Act*, subject to my finding in regard to the ministry's exercise of discretion.

[109] The remaining three records are email chains. Records A0109814 and A0109982 are duplicate copies of the same email chain. Record A0109980 is a partial duplicate of the other two records, with further email communication. I find that portions of these records are exempt under section 13(1), as the disclosure of these portions would permit one to accurately infer the advice or recommendations that will be given. However, the remaining portions of these records is not exempt under section 13(1), as it consists of communications regarding the timing of a particular project, and who will be participating in the project. These portions do not contain advice or recommendations and I order the ministry to disclose them to the appellant, subject to my review of the ministry's exercise of discretion.

F. Did the institution exercise its discretion under sections 13(1), 18(1)(e) and 19? If so, should this office uphold the exercise of discretion?

[110] The section 13(1), 18(1)(e) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[111] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[112] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁵ This office may not, however, substitute its own discretion for that of the institution.⁴⁶

[113] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁷

- the purposes of *FIPPA*, including the principles that;
 - information should be available to the public
 - individuals should have a right of access to their own personal information

⁴⁵ Order MO-1573.

⁴⁶ Section 54(2).

⁴⁷ Orders P-344 and MO-1573.

- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[114] The ministry submits that in considering whether to exercise its discretion, it attempted to balance the purpose of the exemptions at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular request. The decision, the ministry argues, involved two steps. First, the head determined whether the exemption applied. Second, the head considered regard to all relevant interests, including the public interest in disclosure. Lastly, the ministry submits that it severed records in order to allow for the public interest in disclosure to be maximized.

[115] The appellant did not make representations on the ministry's exercise of discretion.

[116] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I am satisfied that the ministry weighed the appellant's interest in access to information against the purpose of the exemptions which it claimed. In addition, I am satisfied that the

ministry took relevant considerations into account and did not take irrelevant considerations into account. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion to refuse to disclose the records and portions of records to the appellant that I have found to be exempt.

[117] In conclusion, I uphold the ministry's decision in part, I uphold the ministry's exercise of discretion, and I order the ministry to disclose records either in whole or in part, as set out in the order provisions below.

ORDER:

1. I order the ministry to disclose the following records, in full, to the appellant by **February 4, 2013** but not before **January 28, 2013**: A0108677, A0108687, A0109923, A0109813, A0109987, A0108596, A0108598, A0108601, A0108652, A0108653, A0108654, A0108655, A0108656, A0108657, A0108658, A0109710, A0109991, A0108595, A0109896, A0109933 and A0109941 (the responsive portion).
2. I order the ministry to disclose the following records, in part, to the appellant by **February 4, 2013** but not before **January 28, 2013**: A0109951, A0109819, A0109929, A0107450, A0107451, A0109816, A0109984, A0109999, A0108592, A0110001, A0108599, A0109980, A0109982 and A0109814. I have included copies of these records to the ministry with this order. I have highlighted the portions that are not to be disclosed to the appellant. Where there are exact duplicate records, I have only included one version, but the highlighted areas apply equally to the duplicates.
3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the city provide me with a copy of the record sent to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ December 27, 2012