Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3201

Appeal PA11-574-2

Ministry of Natural Resources

May 15, 2013

Summary: The property owners' association for a lake near Sudbury submitted a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Natural Resources for records related to an aggregate permit application proposing the location of a quarry adjacent to the lake. The ministry denied access to the responsive records under sections 17(1) (third party information), 19 (solicitor-client privilege) and 21(1) (personal privacy).The appellant pursued access to records withheld under section 19 only, but also challenged the adequacy of the ministry's searches for responsive records. In this order, the adjudicator finds that the ministry's search was reasonable and partly upholds the section 19 exemption claim. The adjudicator orders the ministry to disclose the non-exempt records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 24.

Cases Considered: *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

OVERVIEW:

[1] This order addresses the issues raised by an eight-part request to the Ministry of Natural Resources (the ministry or MNR) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a contentious "Category 12

Aggregate Permit"[1] application. The contentiousness of the application flows from the proposed location of the quarry adjacent to a lake near Sudbury. The requester, who represents the property owners' association for the lake, sought the "most current, accurate and complete information" about the application to enable the association to review it and provide comments to the ministry in opposition. The stated intent behind the request was to try to ensure that local inhabitants' rights had been protected by the process.

[2] The ministry identified approximately 150 pages of records responsive to the request and notified third parties whose interests may be affected by disclosure.[2] After providing the affected parties with an opportunity to provide submissions on disclosure, the ministry issued a decision, granting full access to some records and partial access to others. The ministry withheld information under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 19 (solicitor-client privilege).

[3] The appellant appealed the ministry's access decision to this office, and a mediator was appointed to explore resolution. During mediation, the appellant withdrew the appeal respecting access to the information withheld under the mandatory exemptions in sections 17(1) and 21(1). As a result, these exemptions and the information withheld under them were removed from the scope of the appeal. The appellant maintained his appeal of the ministry's decision to withhold information under section 19. The appellant also questioned whether the ministry had conducted a reasonable search for records responsive to two specific parts of the request.

[4] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to the appeal commenced her inquiry by sending a Notice of Inquiry outlining the issues to the ministry, initially, to seek representations. Upon receipt of the ministry's representations, the adjudicator provided a copy of them to the appellant along with a Notice of Inquiry. In turn, the adjudicator sent the representations she received from the appellant to the ministry, seeking reply representations. The ministry submitted brief representations in reply. The appeal was then moved to the orders stage of the process and transferred to me to because the adjudicator formerly assigned to it was not available to complete the order. In reviewing the file materials to prepare the order, I decided to contact the ministry to request submissions on the search issue because the ministry had not addressed it in its

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[1] According to the ministry's website, a Category 12 Aggregate Permit is required for a "quarry operation which intends to extract aggregate material from below the established groundwater table." Reference: *Aggregate Resources Act,* R.S.O. 1990, c. A.8, as amended by Bill 52, the *Aggregate and Petroleum Resources Statute Law Amendment Act, 1996.*

[2] Sections 28(1)(a) and (b) of the *Act* provide third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 17(1) or section 21(1), respectively.

reply representations, despite having been asked to do so. The ministry provided brief representations and also issued a revised decision with respect to two additional records located as a result of a new search initiated following receipt of my inquiry about the search issue. Next, I provided the ministry's brief representations to the appellant and received submissions in response. Although sur-reply representations from the appellant were sought only on the search issue, the appellant provided additional comments on the ministry's exemption claim under section 19.

[5] In this order, I uphold the ministry's search for responsive records. I find that section 19 of the *Act* applies to some of the withheld records, but I order the ministry to disclose all other remaining records to the appellant.

RECORDS:

[6] Duplicated records have been removed from the scope of the appeal as a preliminary matter, below. Accordingly, remaining at issue are approximately 44 pages of records, consisting of email or written correspondence, in their entirety.

ISSUES:

A. Preliminary Matters: duplication of records and limits of inquiry
B. Did the ministry conduct a reasonable search for records?
C. Do the records contain solicitor-client privileged information that is exempt under section 19?
D. Did the ministry exercise its discretion under section 19?

DISCUSSION:

Issue A. Preliminary Matters

Duplication of records

[7] On review of the records at issue in this appeal, I noted that a set of consecutively dated letters, covered by two or three pages of email correspondence between ministry staff, is duplicated multiple times. It is not unusual for there to be duplicated chains of discussion when the records consist of email correspondence. In this case, it appears that because of minor variations in the content, author or recipient of the covering emails, the ministry identified each of these sets of emails and attached correspondence as separate records.

[8] There is no variation in the exemption claim for each of the duplicated records, in that they are all withheld, in their entirety, under the discretionary solicitor-client privilege exemption in section 19 of the *Act*. In the circumstances, I am satisfied that it

is not necessary for me to review the possible application of section 19 to each of these duplicated copies of the attachments to the email exchanges. Therefore, although I will review each of the two or three page email exchanges separately under section 19, I will only review the first attached set of correspondence identified as pages 7-27. To be clear, the ministry should consider my decision on section 19 in relation to the first occurrence of the duplicated set of correspondence at pages 7-27 as applicable to all subsequent versions.[3]

[9] In addition, the ministry's revised April 2, 2013 decision letter disclosed two "newly identified" records to the appellant, in their entirety. My review of those records, which are emails between ministry staff, revealed that they contain identical content to the previously identified emails at pages 196 and 198. More particularly, I note that the withheld portion on each of pages 196 and 198 has now been disclosed to the appellant in this recent revised decision.[4] In this context, I conclude that no useful purpose would be served by reviewing the possible application of section 19 to this information. I therefore remove pages 196 and 198 from the scope of this appeal.

Limits of this inquiry

[10] It is apparent from the appellant's representations that the process followed, and certain actions taken, by the ministry with respect to the identified aggregate permit application greatly concern him and the property owners' association he represents. The appellant provides the following description of his association's perspective and motivation with respect to this matter:

> We consider this area to be very special and a natural resource that must be protected from environmental degradation. A number of Species at Risk have been identified in this area. This area also provides the essential habitat for numerous Species at Risk.
>
> Our Association does not have a staff of solicitors, hydro-geologists, environmental planners, biologists, engineers, etc. to research all of the possible negative impacts of having a quarry adjacent to a recreational lake. However, it is our understanding that the Provincial Government has the mandate to protect the environment and the people of Ontario. There are numerous Acts, Policies and Procedures, Guidelines, Statements of Environmental Values, etc. that enshrine these rights. Citizens must insist that their legal entitlement to clean air shall be achieved and accept nothing less when a quarry is proposed. …

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[3] Pages 7-27 are duplicated at 31-51, 54-74, and 78-93. The final five-page letter attachment contained in the first three sets is not contained in the fourth set.

[4] The information disclosed to the appellant in the ministry's April 2, 2013 revised decision consists of portions of emails dated May 9, 2011 2:34 p.m. and May 4, 2011 1:37 p.m. between ministry staff.

[11] Given the nature and conviction of the appellant's concerns, I will briefly address the limits of this inquiry as a preliminary matter to establish expectations about the remedy this order can provide. First, I have no authority over the various statutes or associated laws that are identified in the appellant's representations and in the records themselves, including: the *Aggregate Resources Act*, the *Aggregate Resources of Ontario* Provincial Standards, the *Ontario Water Resources Act*, the *Environmental Protection Act,* the *Environmental Bill of Rights,* the *Environmental Assessment Act*, or the Class Environmental Assessment process.[5]

[12] How, or indeed, *if* the ministry met its obligations under these laws are not matters within my jurisdiction under the *Freedom of Information and Protection of Privacy Act*. Under the *Act*, I do not have the power to review any decisions made, or actions taken (or not taken), by the ministry in relation to the quarry permit application process that concerns the appellant. Rather, my jurisdiction is limited to reviewing the adequacy of the ministry's search for records responsive to his request and the access decision issued to him under the *Act*.

[13] The appellant should be assured that I have carefully reviewed the representations provided, in their entirety, and that I appreciate the larger context of this appeal. However, I will not comment further in this order on the aspects of the appellant's representations that raise matters falling outside my authority.[6]

Issue B. Did the ministry conduct a reasonable search for records?

[14] According to the appellant, the only way his association's members can determine if their rights have been protected with respect to the approval of this quarry application is for the ministry to "provide full disclosure of the directions provided, the decisions made and the rationale for these decisions."[7] In my view, this position directly raises the issue of the ministry's search for responsive records.

[15] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

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[5] The various statutes listed fall under the purview of two different ministries: Ministry of the Environment and Ministry of Natural Resources. The ministry in this appeal is responsible for administering the *Aggregate Resources Act*, *Aggregate Resources of Ontario* Provincial Standards (including Category 12 Aggregate Permits), and Class Environmental Assessments for MNR Resources Stewardship and Facility Development Projects ("Class EA").

[6] See also Orders MO-2554 and PO-2883.

[7] As outlined at pages 2-3 of the appellant's initial representations.

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[8]

[17] Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[9] If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the ministry to carry out further searches.

[18] For clarity in this section of the order, I will set out the request, in its entirety. The appellant's October 7, 2011 request stated:

> On behalf of the [identified] Property Owners Association, I am requesting copies of the following documents under the *Freedom of Information and Protection of Privacy Act*.
>
> 1. The Ministry of Natural Resources letter to [the proponent] acknowledging the receipt of an application for a Category 12 quarry permit in [identified] Township, adjacent to [specific] Lake.
>
> 2. Any of the Ministry of Natural Resources written correspondence to [the proponent] that outlines the Agencies that must be contacted during the initial public consultation period for the above noted application (May-June 2010).

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[8] Orders P-134 and P-880.

[9] Orders P-85, P-221, and PO-1954-I.

3. In the document MNR Resources Stewardship & Facility Development Projects in Section 3.1.2, Section 3.2, Section 3.3, section 3.4(1)(2)(3) and Section 3.5 (table 2) there is a procedure and process dealing with categorizing quarry applications. We are requesting the completed form outlined in Table 3.1: Screening Criteria that was completed for [the proponent's] quarry application in [identified] Township. Also, we request any MNR correspondence pertaining to the decision by the MNR to identify this application as a Category "B" Project.

4. Any correspondence (emails, letters, notes, etc.) between [a named individual] Area Supervisor, Sudbury District and Legal Services Branch MNR regarding the decision and rationale not to respond to the [identified] Property Owners Association by September 30, 2010 as promised in the MNR letter of August 27, 2010.

5. Any written documentation from [the proponent] requesting an extension of the quarry application resolution period (January 17, 2011). Additionally, we request the Ministry of Natural Resources written approval of the request and the rationale provided for this approval.

6. Copies of any of the comments, concerns, nil reports, etc. provided to the MNR from any of the peer reviews conducted on this application (MNR, MOE, MNDM and F, DFO, SEPB, First Nations, etc).

7. Any and all correspondence between [a named individual], MNR District Manager, Sudbury District, the Minister of Natural Resources (Communications Branch), Legal Services Branch, and Sudbury District MNR staff regarding the decision by [the above-named individual] not to provide the information that he promised in his email letter of June 21, 2011.

8. The dates and minutes of any meetings held with [the proponent] dealing with amendments or changes to the initial site plan for the above mentioned quarry application in [identified] Township.[10]

[10] The request also contained the following statement: "Additionally, in accordance with section 24(3) of the [*Act*] this request will continue to have effect for a period of up to two years." Reference to this component of the request is contained in the appellant's April 2013 sur-reply representations, where it is

[19] According to the mediator's report, which was reviewed by the parties prior to the appeal's transfer to adjudication, the appellant challenges the adequacy of the ministry's search for records responsive to parts 5 and 8 of his request, only. The appellant was concerned that the ministry's searches had not yet located the "written documentation" from the proponent requesting an extension of the quarry application resolution period, the ministry's "written approval" of the request and the "rationale" for granting it; and the "dates and minutes of any meetings held with the proponent" regarding "amendments or changes to the initial site plan" for the quarry.

[20] Based on my review of the appellant's inquiry submissions, however, I noted that the concerns expressed about the adequacy of the searches conducted by the ministry also identified additional categories of records and other ministry staff who may have been involved in the quarry application. As my preliminary view was that the types of records and/or individuals identified by the appellant did not fall within the parameters of parts 5 and 8 of the request, I decided to ask the parties to comment on both the scope of the request and the search issue prior to writing this order.

Representations

[21] Regarding the scope of the request, the ministry takes the position that it was evident from the wording of the request that the requester had detailed knowledge of the process. The ministry also asserts that the request contained sufficient detail, in terms of subject matter, scope and time frame, to allow ministry employees to identify responsive records. According to the ministry, the types of records sought were not in question and in this context, the ministry reasonably concluded that clarification was not required.

[22] On the issue of scope,[11] the appellant submits that before filing the request under the *Act,* the ministry's local contact person for access requests was approached, and members of the association reviewed the relevant website, including a sample copy of the access form and a Mini Guide to the *Act.* Although the association was advised they could consider narrowing the request's scope to reduce costs, the appellant states that they concluded it would be "very difficult to decide what areas to reduce when to date the MNR has not shared any information with us." The appellant disputes the ministry's suggestion that it was reasonable to "respond literally to the request," due to

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submitted that the ministry refused to grant the request for continuing access. However, as I can find no record of this decision by the ministry, or of such a decision being appealed by the appellant, it is not before me for determination in this appeal.

[11] Only the portions of the appellant's sur-reply representations addressing scope, as that term is interpreted under section 24 of the *Act*, are reproduced here. The appellant takes issue with statements made by ministry counsel (in the August 2012 submissions) that the "substance" of the appellant's concerns (i.e., dissatisfaction with the permit process) are outside the scope of this appeal. In that context, counsel's reference to scope relates to matters of jurisdiction, rather than scope of the request. The limits of this inquiry have been addressed as a preliminary matter, above.

its level of specificity because, the appellant submits, the association's "knowledge and exposure" to the *Act* was very limited at the time. The appellant also submits that:

> As mentioned in previous representations, we are not solicitors that deal with these circumstances on a daily basis. In retrospect, maybe our request should have contained the statement "any and all" related documents.

[23] In conclusion, the appellant argues that the ministry's position has had the effect of limiting the association's access to pertinent documents.

[24] With specific reference to the reasonable search issue, the ministry submits that it has met its obligation to expend a reasonable effort to identify and locate responsive records. The ministry relies on the following excerpt from Order PO-1920:

> While the appellant has presented arguments as to why records should exist, my responsibility is not to determine whether records exist. Rather my responsibility is to determine whether the searches carried out by the Ministry in attempting to locate records responsive to the appellant's request were **reasonable** [emphasis in original].

[25] The ministry states that the three individuals with the most knowledge of the permit application conducted the searches. The now-retired supervisor conducted a search of her written and electronic records (including email). Additionally, the ministry notes that:

> Two of the individuals had carriage of the file associated with the permit application. They conducted searches of the electronic and hard copy files associated with the application and their email accounts. They have noted in their affidavit meetings with the [permit] applicant and its representatives.

[26] The affidavits from the three ministry staff members identify the positions they held with the ministry and indicate that the positions were held at the relevant times. The affidavits were prepared by the following individuals: the coordinator of the search and the two specialists responsible, consecutively, for the permit application.[12] The search coordinator contacted the two relevant technical specialists and the individual who was the area supervisor for the ministry at the relevant time.

[27] The ministry maintains that the records sought by parts 5 and 8 of the request were clear. Of relevance to the appellant's concerns with the searches conducted for

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[12] The individual who coordinated the search carries the job title Planning and Information Management Supervisor. The two Aggregate Technical Specialists had responsibility for the relevant permit application file from May 2010 to June 2011 and from June 2011 on.

records responsive to parts 5 and 8 of the request, the affidavits contain the following information:

- The only written communication from the permit applicant or its consultant requesting an extension of the quarry application resolution period was an email from the consultant dated December 16, 2010.[13]
- The written approval for the extension appears in an email from the first Aggregate Technical Specialist [ATS] to the consultant, dated January 20, 2011.[14]
- The only meeting between the first ATS and the applicant or its representatives took place on February 1, 2011. No formal minutes were prepared but the notes taken by the ATS at that meeting were disclosed to the appellant.[15]
- The first ATS submits that by virtue of her responsibilities on this file, she would have known if other meetings had taken place between ministry staff and the applicant/proponent or its consultant dealing with amendments to the initial site plan. The ATS submits that no other meetings took place.
- The second ATS met with the applicant on September 27, 2011 and the notes from this meeting were disclosed to the appellant.[16]

[28] The appellant submits, based on his own many years of experience as a former senior employee of the ministry, that:

> The decision to deprive the public of their legislated rights would not be taken lightly and would require the involvement of staff at senior levels. Surely, there would have been discussions with the District Manager, Regional Issues Officer, Regional EA Coordinator, etc. It is our opinion that additional documents related to this request do exist.

[29] Regarding item eight of the request, the appellant relies on a reference in one of the disclosed emails by the first ATS to a suggested meeting with the proponent in January 2011. The appellant expresses the belief that records related to this suggested meeting ought to exist.

[30] The appellant questions the completeness of the records identified as responsive by the area supervisor for the ministry. Noting that she was a "very key individual" who was instrumental in the decision-making regarding the application, including the public notification and consultation processes, he expresses disbelief that she "would have

[13] Disclosed as pages 110-111.
[14] Disclosed as pages 108-109.
[15] Disclosed as page 208.
[16] Page 209-211 (portion of page 211 withheld as not responsive to request).

made these very contentious decisions without some dialogue, meetings, discussions, etc. with other MNR staff, supervisors, etc. …".

[31] According to the appellant, one of the disclosed records refers to a draft letter being prepared for release to the objectors, regarding which the first ATS sought the input of another identified ministry employee. The appellant questions why this record and documentation of the input has not been identified and/or disclosed. The appellant then stated that upon reviewing the disclosed records, "we identified several additional people that appear to have been involved in the application process" and listed five individuals and one additional MNR position title.

[32] In response to my request for reply representations on the issue of search, the ministry advises that it conducted a new search, which identified two additional email records. These records were disclosed to the appellant. The ministry then addresses each of the five individuals listed in the appellant's representations, as requested, providing an explanation as to their creation of responsive records. According to the ministry, one of the individuals left before the permit application was submitted; one left after signing the initial application acknowledgement letter; and records involving the other three individuals have already been identified. With specific reference to the draft letter mentioned by the appellant, the ministry notes that this record was identified as responsive, but is being withheld pursuant to section 19.[17] In conclusion, the ministry maintains that it has discharged its obligations under section 24 of the *Act.*

[33] In sur-reply, the appellant contends that further records responsive to the request are "still outstanding." Specifically, the appellant submits that:

> It is our understanding that it is a standard MNR procedure to prepare a Briefing Note when an issue has the potential to become contentious. These briefing notes are managed at the local District Office level and also at the Regional Office level. These notes are prepared for senior managers at the local, regional and provincial level. … In this case, [the named area supervisor] was identified as the Contentious Issue Officer. … It is our contention that an issue of this nature certainly would have generated some Briefing Notes... [which] should have been included in the records released to the Association.

[34] The appellant then lists additional roles, positions and personnel with the ministry that he suggests would have handled "parts of this file" and points out that the ministry's representations do not refer to these (types of) employees or address whether their records were searched.

[17] This draft letter is identified as "record 7" (pages 200-201).

Analysis and findings

[35] I will address the scope of the appellant's request as a preliminary step in order to provide context for reviewing the adequacy of the searches conducted by the ministry. As outlined previously, section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. As suggested in the ministry's representations, section 24(1)(b) requires that the request "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Under section 24(2), an institution must contact the requester to offer assistance if there is not a sufficient description of the record sought.

[36] As stated previously, institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Providing a "liberal interpretation" of a request implies an obligation on the part of the institution receiving the access request to resolve any ambiguity in the request in the requester's favour.

[37] Based on my review of the request, the parties' representations and the other information before me, I find no ambiguity in the request. I find that the subject matter, scope and time frame of the request were clearly articulated and provided ample information to permit ministry staff to identify the records.

[38] I am also satisfied that the request contained a sufficient description of the records of interest to the appellant such that the ministry's conditional obligation to provide assistance under section 24(2) of the *Act* was not triggered. However, I also note that upon appeal to this office, the appellant was provided with opportunities to convey his interest in specific records to the ministry through the mediation process. In my view, the documentation in the file provides evidence that the boundaries of this request and potentially responsive records were explored by the parties. Accordingly, I am satisfied that the ministry reasonably interpreted the scope of the appellant's request in the circumstances of this appeal.

[39] As stated, in appeals involving a claim that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for responsive records as required by section 24 of the *Act*. If I am satisfied that the searches carried out were reasonable in the circumstances, I will dismiss the appeal. If I am not satisfied, I may order further searches.

[40] It is important to note, in my view, that the *Act* does not require an institution to prove with absolute certainty that specific records or additional records do not exist (Order PO-1954). Previous orders have established that a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request

expends a reasonable effort to locate records which are reasonably related to the request.[18]

[41] Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.[19]

[42] As I suggested above in addressing the request's scope, the issue of search and the responsiveness of the records to the different parts of the appellant's request were explored during the mediation of the appeal. During the inquiry, the parties were each offered several opportunities to provide representations on the search issue. I have had the benefit of reviewing these iterative representations on the subject, carefully and in their entirety.

[43] I am persuaded by the available evidence and the overall circumstances of this appeal that the ministry made a reasonable effort to identify and locate any existing records that are responsive to the appellant's request. Moreover, I accept that relevant ministry staff conducted adequate searches of their record-holdings for both electronic and hard copy records. I am satisfied that the staff involved were equipped with knowledge of the nature of the records said to exist, at least partly because the appellant's interests were well conveyed through his request. I am also satisfied that the ministry has offered reasonable explanations with respect to records related to parts 5 and 8 of the request, which were the search items allegedly outstanding at the end of mediation.[20]

[44] Furthermore, I note that the ministry conducted a further search upon receipt of my correspondence during the later point in this inquiry, in which I sought comments on the scope and search issues. This search resulted in the identification of several additional email records, which were disclosed to the appellant. While the appellant may yet wish to see further substantiation of the ministry's decision-making in this particular context, my review of the reasonableness of the search under section 24(1) of the *Act* does not extend to a review of record-keeping practices.[21] Furthermore, in my view, it is appropriate to impose some finality with respect to the review of searches conducted or required with respect to this particular request.

[45] As I am satisfied that the ministry carried out adequate searches for records responsive to the appellant's request, I find the searches to be reasonable and I uphold them.

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[18] Orders M-909, PO-2469, PO-2592 and PO-2831-F.
[19] Orders P-624, PO-2388 and MO-2076.
[20] See page 10, above, footnotes 13-16 and page 11, footnote 17.
[21] See Orders MO-2448 and MO-2630.

Issue C. Do the records contain solicitor-client privileged information that is exempt under section 19?

[46] The discretionary exemption in section 19 contains two branches. In this appeal, the ministry is relying on the first branch, which arises from the common law, to deny access to the withheld records. More specifically, the ministry cites "solicitor-client privilege" as the basis for the denial of access. This type of privilege falls under section 19(a), which provides that "A head may refuse to disclose a record that is subject to solicitor-client privilege." The ministry bears the burden of proof of establishing that the exemption applies.[22]

Branch 1: common law solicitor-client communication privilege

[47] 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.[23] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[24]

[48] 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.[25]

[49] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[26] 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.[27]

Representations

[50] As described by the ministry,

> … the records consist of emails to and from the program area and various counsel at Legal Services Branch, requesting and receiving legal advice

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[22] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[23] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[24] Orders PO-2441, MO-2166 and MO-1925.
[25] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[26] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[27] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> relating to issues relating to the aggregate application. Appended to the emails were pdf's or copies of documents which were to be considered by counsel in providing advice to the District.

[51] According to the ministry, section 19 was applied to all communications between ministry staff and counsel and amongst counsel. The ministry submits that all of these withheld (email) communications fall within the ambit of the common law definition of solicitor-client privilege. Relying on the Supreme Court of Canada case, *Canada (Privacy Commissioner) v. Blood Tribe,*[28] the ministry states that the Court held that "legislation interfering with confidentiality arising from the privilege should be interpreted restrictively" to "give effect to this fundamental policy of the law."

[52] From another Supreme Court of Canada case, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, the ministry provides the following excerpt:

> The purpose of this [section 19] exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.[29]

[53] The ministry argues that it is in the public interest that the free flow of legal advice between solicitor and client be encouraged so as to ensure "access to justice and the quality of justice in this country." From *Descôteaux*, cited above, the ministry submits that "a lawyer's client is entitled to have all communication made with a view to obtaining legal advice kept confidential." From *Balabel*, also cited above, the ministry sets out another lengthy quote, part of which states that "advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client…" According to the ministry, while any one email communication may not appear to be subject to solicitor-client privilege, the concept of a "continuum" of legal advice in *Balabel* applies to protect the information, particularly in the case of "in-house" legal advisors such as government Crown counsel where this type of email communication is common.

[54] The ministry submits that "facts may also be subject to solicitor-client privilege, if they are part of a communication that satisfies the criteria for the privilege."[30] The ministry asserts that this principle explains why section 19 has been claimed to deny access to the documents appended to the emails between ministry staff, including legal counsel. According to the ministry, background information provided to legal counsel for the purpose of supplying the necessary context within which to consider and provide legal advice falls within the scope of solicitor-client privilege because it constitutes the

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[28] [2008] S.C.J. No. 45 at 55.
[29] 2010 SCC 23; [2010] 1 S.C.R. 815, at 53.
[30] *Susan Hosiery, supra,* and *BC (Ministry of the Environment) v. BC (IPC)* (1995), 16 B.C.L.R. (3d) 64 (S.C.).

"working papers" of counsel, which directly relates to the advice or assistance.[31] The ministry also asserts that the fact that the withheld records "may be available elsewhere is irrelevant to the question of whether the documents are subject to solicitor client privilege in this instance" since those same records provide the context and "will influence the provision of [the] advice."

[55] In the initial representations provided, the appellant notes that their solicitor has requested full disclosure of the documents, which is understood (by the appellant) to be a "standard request in these types of situations." The appellant submits that:

> In order to ensure that our rights provided under the Act, Policies and Procedures, Guidelines, documents, etc.[32] have been protected and respected we are requesting that all the documents be released. … The MNR at the highest levels has committed to a full response. For the MNR and the Legal Service Branch to now renege on that commitment seems grossly unfair and unlawful. It is our opinion that the purpose of the Act was to ensure that pertinent information should be available to the impacted public.

[56] The appellant remarks that the summary of withheld documents prepared by the ministry provided so little information that it was impossible to discern whether they had "any actual bearing" on the matter. In their sur-reply representations, the appellant added that:

> We have asked for the names, position, subject titles, etc. of the people associated with the withheld documents. Without this information, there is no way to know if these individuals are in fact entitled to Solicitor/Client Privilege. … Unless all of the withheld emails, letters were sent directly to and from MNR solicitors and providing advice does the Solicitor/Client Privilege apply?

[57] Further, the appellant submits that the ministry's claim of section 19 to deny access to the records appears overbroad, given the principle that the exemptions should be limited and specific. According to the appellant,

> The MNR's continued refusal to provide the documents only heightens our concerns with respect to the flawed process, the evaluation process and the denial of our rights. … The decision by the MNR to withhold these documents has left the local residents with the impression that the proponent and the MNR have been conspiring against the objectors.

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[31] Here, the ministry relies on *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] *supra,* and *BC (Ministry of the Environment) v. BC (IPC)*, *supra*.

[32] A listing of these documents appears on page 5, above, in the section titled *Limits of this Inquiry*.

[58] The ministry's reply representations address the appellant's assertions about disclosure of records claimed to be subject to solicitor-client privilege in the name of transparency by stating that it is "not the standard practice of this ministry or any other to release such records as part of a consultation process."

Analysis and findings

[59] To begin, I acknowledge the appellant's submission that the ministry's commitment to transparency and accountability should come in the form of a "full response" regarding the Category 12 Aggregate Permit in this case. The *Act* seeks to deliver accountability by requiring institutions to provide access to information in their custody or control "in accordance with the principles that information should be available to the public;" and that "necessary exemptions from the right of access should be limited and specific." Importantly, however, the *Act* expressly recognizes that certain types of information should be exempted from disclosure, including solicitor-client privileged information which is protected under section 19. As the ministry sought to convey in its representations, the public's entitlement to access must be balanced with certain other objectives, including maintaining the integrity of solicitor-client privilege.

[60] In reviewing the ministry's section 19 exemption claim, I have considered the circumstances surrounding the creation of the records, and I find that the lawyers for the ministry were in a solicitor-client relationship with program staff from the ministry's Sudbury district office. The analysis under branch 1 of section 19 next requires a determination of whether the records reflect a written record of communication between a solicitor and his or her client, and then whether each record is subject to privilege because of the giving or seeking of confidential legal advice. Based on the ministry's representations and my review of the records, I uphold the ministry's section 19 exemption claim in part.

[61] As discussed previously, there are a number of two or three-page email strings that serve as the cover pages for the same attached set of documents. There are also two email strings which do not have the set of documents appended. These six email strings vary only slightly with respect to author, recipient or content, and I will address them first, but separately from the duplicated attachments.

[62] Pages 1-3, 4-6, 28-30, 52-53, 75-77 and 248-250 are all emails exchanged either between counsel, or between counsel and other ministry staff. I am satisfied that they all form part of a continuum of communications between various counsel and their clients on the legal issues related to the aggregate permit application. I find that these records are confidential solicitor-client communications directly related to the seeking or giving of legal advice. Moreover, I also accept that the advice, at times, was not confined to a strict analysis of the application of the law, but included what measures "should prudently and sensibly be done," as contemplated by *Balabel,* cited above, in the legal context of the Category 12 Aggregate Permit application being processed and

administered by the ministry. Accordingly, I find that they are subject to common law solicitor-client communication privilege and are exempt under branch 1 of section 19 of the *Act.*

[63] I have not reached the same conclusion regarding page 247 which consists of an email between ministry staff, including legal counsel. Based on the content of this email, I am not satisfied that it contains (or would reveal) confidential legal advice or that it otherwise forms part of the continuum of communications on the *legal* issues related to the Category 12 Aggregate Permit. Indeed, the ministry offered no representations in support of withholding this particular record. On my review of page 247, therefore, I find that it is not exempt under branch 1, and I will order it disclosed to the appellant.

[64] I will now address the attachments to the email chains that I found exempt under section 19, above. As I indicated previously, I will only address the exemption claim under section 19 in relation to the first occurrence of the duplicated attachments, i.e. pages 7-27. The ministry claims that these documents constitute "background information" that provided the necessary context within which the ministry's legal counsel were being asked to formulate and provide legal advice. As such, the ministry's argument goes, the attachments formed the "working papers" of ministry legal counsel as discussed in *Susan Hosiery*, cited above. Apparently acknowledging the nature of the withheld attachments, the ministry also argues that their availability through other means "is irrelevant to the question of whether the documents are subject to solicitor client privilege in this instance." I reject the ministry's position on these records.

[65] These attachments consist of letters between the appellant or its representative and the ministry. Pages 7-10 consist of a letter dated August 12, 2010 from the legal representative of the property owners' association to the ministry's area supervisor. This letter was also provided by the appellant to this office; it was included with his representations in this inquiry. Indeed, he was copied on this correspondence originally. The three attachments to this August 12, 2010 correspondence consist of a July 26, 2010 letter from the ministry's area supervisor to the appellant (pages 11-12); a July 14, 2010 letter from the appellant's representative to the proponent's consultant and the ministry's responsible Aggregate Technical Specialist (pages 13-22), which was also copied to the appellant; and a July 5, 2010 letter from the appellant to the proponent's consultant (page 23-27).

[66] I accept that background information provided to legal counsel to assist in the preparation of legal advice may be exempt under section 19 when the information becomes sufficiently integrated with a solicitor's "working papers." However, this appeal does not present appropriate circumstances for a finding of privilege attaching to the four letters outlined above. I find that pages 7-27 (and their duplicates) do not contain, nor would their disclosure reveal, confidential legal advice of the ministry's legal counsel related to the Category 12 Aggregate Permit. Any legal advice provided by ministry

counsel that may be contained in the area supervisor's letters to the appellant is not confidential by virtue of it having been disclosed to the appellant in that context. Given the prior distribution of the withheld correspondence, it would be absurd, in my view, to exempt the appellant's own correspondence and replies to it under section 19 of the *Act*. In this context, the appellant's comment that the "denial of access to certain records in this appeal gives the wrong impression" is prescient. I find that pages 7-27 are not exempt under branch 1 of section 19, as claimed by the ministry.

[67] The remaining record withheld by the ministry under section 19 appears at pages 200-201. This record consists of a draft letter, which although unaddressed, appears to be intended for individuals who had expressed opposition to the identified aggregate permit application. I note that the appellant's sur-reply representations contain a copy of what appears to be the final version of this letter.[33] Other information in the responsive records confirms that this draft was prepared by ministry program staff at the district office. However, the ministry's representations do not address the exemption of page 200-201 under section 19, including whether legal advice was sought and provided in connection with revisions to the letter. Based on my review of the record, and in the absence of evidence that legal counsel participated in the drafting of it, or contributions to it, I am not satisfied that it contains confidential legal advice that would be evident, or readily deduced, by disclosure. Therefore, I find that it is not exempt under branch 1 of section 19 and I will order it disclosed to the appellant.

[68] Having upheld the ministry's claim under the discretionary exemption in section 19 with respect to pages 1-3, 4-6, 28-30, 52-53, 75-77 and 248-250, I must review its exercise of discretion.

Issue D. Did the ministry properly exercise its discretion under section 19?

[69] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 19 exemption is discretionary, which means that the ministry could choose to disclose information, despite the fact that it could withhold it. The ministry was required to exercise its discretion under these exemptions.

[70] On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether the ministry failed to do so. In addition, the Commissioner or her delegate may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on

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[33] This June 14, 2011 letter is addressed to the appellant.

proper considerations.[34] I may not, however, substitute my own discretion for that of the ministry.

Representations

[71] The ministry's brief representations on its exercise of discretion under section 19 indicate that the purposes of the *Act* and section 19, in particular, were considered, along with the circumstances of the request. The ministry also mentions that it considered the importance of solicitor-client privilege in the Canadian legal system, as highlighted by the court in *Criminal Lawyers' Association*, *supra.*

[72] The appellant's representations on the ministry's exercise of discretion were quite detailed and certain components of them have previously been set out, above. The appellant claims that the ministry's decision to exercise its discretion to withhold the records under section 19 seems like an attempt to cover up its "mishandling of this application under several Ontario statutes." As previously noted in the discussion of the solicitor-client privilege exemption, the appellant submits that the ministry's access decision has "left the local residents with the impression that the proponent and the MNR have been conspiring against the objectors. The level of public confidence in the MNR in this area is very low and decisions like this do very little to improve the situation."

[73] Regarding the exercise of discretion, the appellant submits that the ministry ought to have relied on or considered the following factors:

- information should be available to the public;
- exemptions from the right of access should be limited and specific;
- the requester's sympathetic or compelling need to receive the information;
- the likelihood that disclosure would increase public confidence in the operation of the institution; and
- ensuring that the ministry did not exercise its discretion in bad faith or for an improper purpose.

[74] The appellant maintains that all of these factors, had they been properly considered, would have resulted in increased disclosure to assist the property owners in participating more meaningfully in the consultations and processes related to the aggregate permit application.

Analysis and findings

[75] I have considered the parties' representations on the exercise of discretion in this appeal, including the ministry's brief submissions on the factors it took into

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[34] Order MO-1573.

consideration in exercising its discretion to not disclose the information for which it had claimed section 19.

[76] I have also considered the circumstances of this appeal, including the ministry's revised decision which led to the disclosure of several additional records to the appellant during the adjudication stage. Although these records were "new" records, certain disclosed information had previously been subject to the section 19 exemption claim. Therefore, the ministry effectively re-exercised its discretion in relation to this information. I also note that as a result of this order, the appellant will obtain access to some additional records because I have not upheld the ministry's discretionary exemption claim under section 19 in relation to them.

[77] With regard for the overall circumstances of this appeal, therefore, I find that the evidence before me does not support a finding that the ministry exercised its discretion under section 19 of the *Act* in bad faith or for an improper purpose. Therefore, I will not interfere with the ministry's exercise of discretion on appeal.

ORDER:

1. I uphold the ministry's decision to withhold pages 1-3, 4-6, 28-30, 52-53, 75-77 and 248-250 under section 19 of the *Act.*

2. I order the ministry to disclose to the appellant copies of all other withheld records, or portions of records, by **June 20, 2013**.

3. To verify compliance with provision 2, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant.

Original signed by: May 15, 2013
Daphne Loukidelis
Adjudicator