Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3285

Appeal PA12-337

Ministry of Natural Resources

December 16, 2013

Summary: The appellant sought access to records of communication between the Ministry of Natural Resources and a company relating to discussions of timelines and deliverables during the performance of a contract between the two. The ministry granted access to some records and denied access to others, either in whole or in part, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), and the discretionary exemptions in sections 13 (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator upholds the ministry's decision, in part, and determines that the exemption in section 21(1) applies. The adjudicator also determines that the exemption in section 19 applies, in part. However, the adjudicator finds that the exemption in section 17(1) does not apply. Lastly, the adjudicator upholds the ministry's exercise of discretion. The ministry is ordered to disclose some of the records at issue to the appellant.

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), 17, 19 and 21(1).

Orders and Investigation Reports Considered: Order PO-2435.

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) operates a number of provincial parks in Ontario through Ontario Parks. These parks are open to the public for a variety of activities, including camping. The Park Reservation and Registrations Service

(the PRRS) is jointly managed by the Land & Resource Cluster (LRC) and Ontario Parks. The PRRS provides services relating to provincial parks including the use of an integrated reservation/accounting tool used to streamline park reservations, including:

- a staffed call centre;
- an internet reservation website;
- software to process the reservation, issue permits and account for revenues;
- computers at the call centre and park level;
- an ongoing helpdesk; and
- a telecommunications network to move data between the call centre/internet and each provincial park.

[2] The current service commenced following an RFP process. The ministry entered into an agreement with the first ranked vendor, the requester, to develop and implement the service. According to the ministry, several problems began to emerge with the service and eventually the ministry terminated its agreement with the requester and entered into another agreement with the second ranked vendor. The ministry, the requester and the second ranked vendor are currently engaged in civil litigation in relation to the termination of the agreement.

[3] This order disposes of the issues arising from a decision made by the ministry in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to verbal or written exchanges and/or meetings regarding projected and revised timelines, and projected and actual completion dates for all deliverables between a named company and the ministry prior to a given date.

[4] The ministry identified responsive records and notified five affected third parties to obtain their views regarding disclosure of the records.

[5] Two affected parties provided their consent to disclose certain records and another one provided the ministry with submissions on which portions of the records it believed should not be disclosed.

[6] After considering the response from the affected parties, the ministry issued a decision, granting access to some records, in whole or in part. Other records were withheld, in full. The ministry claimed the application of the mandatory exemptions in section 21(1) (personal privacy) and 17(1) (third party information), and the

discretionary exemptions in sections 13 (advice or recommendations) and 19 (solicitor client privilege) of the *Act*.

[7] The requester, now the appellant, appealed the ministry's decision to this office.

[8] During the mediation of the appeal, the appellant advised that he was not seeking access to information that is clearly an affected party's personal information, such as personal email addresses or phone numbers. Consequently, the information that was withheld under section 21(1) in records A0163910, A0164064, A0163931, in part and A0164012 has been removed from the scope of the appeal and is no longer at issue.[1] The appellant advised, however, that he is seeking access to information that may state when a ministry employee was on vacation, as this information may be of interest to him.

[9] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry, the appellant and two affected parties. I received representations from the ministry, but not the appellant or the affected parties. Representations were shared in accordance with this office's *Practice Direction 7*.

[10] During the inquiry, the ministry issued a supplementary decision letter to the appellant in which it revised its claim with respect to the exemption in section 19, and disclosed further records to him.

[11] For the reasons that follow, I uphold the ministry's decision, in part, and order it to disclose certain records to the appellant either in whole, or in part. I also uphold the ministry's exercise of discretion.

RECORDS:

[12] The records consist of emails, faxes, correspondence, and draft agreements.

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 information at issue?

C: Does the mandatory exemption at section 17(1) apply to the records?

[1] The withheld portions of these records contain home telephone numbers, and a home email address.

D: Does the discretionary exemption at section 19 apply to the records?

E: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] 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;

[14] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) 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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] 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]

[16] 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]

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

[18] The ministry submits that records A0163912, A0163931, A0163967, A0164023 and A0164136 contain personal information in that they reveal identifiable individuals' vacation plans and/or time away from the office for personal reasons.

[19] Based on the ministry's representations and my review of the records, the remaining information that was withheld from the appellant and which remains at issue is information concerning vacation and/or personal time taken by a number of identifiable individuals. I have reviewed the records and find that information about the individuals' vacation and/or personal time is recorded information about them and qualifies as their personal information. I make this finding despite the fact that the named individuals were acting in their professional capacity. I find that information

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[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.).

about an individual's vacation and/or personal time would reveal something of a personal nature about them and therefore qualifies as their personal information within the meaning of that term in section 2(1).

[20] I will now determine whether the portions of records that contain personal information, specifically an individual's vacation and/or personal time, is exempt from disclosure under section 21(1) of the *Act*.

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

[21] 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.

[22] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

[23] 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).

[24] The ministry submits that the disclosure of information such as vacations is presumed to be an unjustifiable invasion of privacy, as it relates to one's employment history. The ministry further states that even if the presumption does not arise, balancing the factors in section 21(2) and the circumstances of the request favour non-disclosure of the information at issue.

[25] With respect to the presumption in section 21(3)(d) (employment history), past orders of this office have found that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.[5]

[26] I am not persuaded by the ministry's argument that reference to an individual's one-time vacation would on its own qualify as information that would reveal their

[5] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.

employment history. I find, therefore, that the presumption in section 21(3)(d) does not apply in this appeal.

[27] 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.[6]

[28] I have considered the factors in section 21(2) and find that there are no factors either favouring disclosure or non-disclosure of the individuals' vacation and/or personal time to the appellant. However, as the section 21(1) exemption is mandatory, and there are no factors favouring disclosure, I uphold the exemption and the ministry's decision with respect to the personal information contained in the records. Consequently, those portions of records that were withheld under section 21(1) will not be disclosed to the appellant.

Issue C: Does the mandatory exemption at section 17(1) apply to the records?

[29] The ministry submits that disclosure of records A0163770, A0163919, A0163925, A0164075, A0164080, A0164035, A0164038, A0164050, A0164051, and A0164069 would give rise to a reasonable expectation of the harm identified in sections 17(1)(a) and/or 17(1)(c) of the *Act*. I note that the index of records provided to me by the ministry lists records A0163938, A0164059 and A0164076 as being withheld under section 17(1), either in whole or in part, as well. As section 17(1) is a mandatory exemption, I will consider these records in my analysis. Sections 17(1)(a) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[30] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7]

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[6] Order P-239.

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[8]

[31] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[32] The ministry submits that the information at issue is the technical and/or commercial information of the affected party. These types of information listed in section 17(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[9]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[10] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[11]

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[7] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[8] Orders PO-1805, PO-2018, PO-2184, and MO-1706.
[9] Order PO-2010.
[10] See note 9.
[11] P-1621.

[33] The ministry describes the records as follows:

- A0163770 is a fax from an affected party's employee, setting out his comments in regard to the meeting minutes that were taken detailing his company's answers to the tender interview questions;

- A0163919, A0164075 and A0164080 were withheld, as the affected party to whom these records relate objected to their disclosure;

- A0163925 is an email from outside legal counsel forwarding on an agreement schedule;

- A0164035, A0164038, A0164050 and A0164051 were partially withheld, as they contain the technical support telephone number for the call centre. This number, the ministry states, was not to be released to the public and only to be used by the ministry; and

- A0164069 is an email which includes an affected party's letter of credit.

[34] With respect to commercial information, the ministry states that the records relate to the affected party's offer to provide services relating to the operation of a parks reservation system, including information on the affected party's performance in providing the service. The ministry concludes that the records describe the exchange of services for consideration, which qualifies as "commercial" information.

[35] The ministry also submits that the records contain technical information, in that they contain specific information relating to the technical implementation of the services provided by the affected party. In particular, the ministry states, the records describe discussions of the affected party's software, its capabilities and its implementation.

[36] As previously stated, the affected parties did not provide representations in this appeal.

[37] I have reviewed the records and I am satisfied that those for which section 17(1) was claimed contain information that would constitute "commercial" information for the purposes of section 17(1). These records contain information relating to the buying, selling or exchange of merchandise or services. In this case, there is information in the records about the affected party's proposed provision of services to the ministry and the substance of negotiations between the affected party and the ministry.

[38] As all of the records for which this exemption was claimed contain "commercial" information, part one of the three-part test under section 17(1) has been met.

Part 2: Supplied in confidence

[39] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[12]

[40] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[13]

[41] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[14]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[15]

[43] The ministry submits that the information at issue was supplied to it in confidence and states:

> The nature of the services provided to the PRRS would suggest that the information was supplied in confidence. There is a significant degree of confidentiality implicit in the process of developing and implementing the reservation system, particularly the technical aspects of it which is part of competitive industry. An examination of the records makes it clear by the candour of the discussion and the information provided that it was

[12] Order MO-1706.
[13] Orders PO-2020 and PO-2043.
[14] Order PO-2020.
[15] Orders PO-2043, PO-2371 and PO-2497.

> communicated in confidence. . . Consequently, within the context of the exchange of records, there is an objective basis as required by past orders[16] for an expectation of confidentiality with respect to the affected party's information.

[44] The ministry also advises that one of the affected parties provided representations in response to the ministry's notification of the request under section 28 of the *Act*. The affected party stated at that time that records A0164075 and A0164080 contain sensitive commercial and financial information, and that it supplied this information to the government in confidence during the course of a competitive commercial transaction. The ministry further advises that, in keeping with the norm for this type of service provider, it accepted the information in confidence. The ministry argues that given the nature of the business sector in which the affected party operates, its implicit understanding of confidentiality was reasonable.

[45] Having reviewed the records and the representations from the ministry, I am satisfied that they have provided sufficient evidence to demonstrate that the commercial information contained in the records at issue was supplied by the affected party to the ministry with a reasonable expectation of confidentiality. It is clear that the information in these records was generated by the affected party and supplied by it to the ministry. I am also satisfied that, given the confidentiality terms of the proposal and the history of this type of information being treated as confidential, the affected party had a reasonably-held expectation that this information would be kept confidential.

[46] Consequently, the records at issue have met the requirements of the second part of the three part test in section 17(1).

Part 3: harms

[47] I will now determine whether the third part of the three-part test applies to the records at issue. The relevant subsections of section 17(1) that the ministry is relying on state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[16] Orders P-582, P-607, P-610, M-258, P-765 and P-788.

. . .

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[48] To meet this part of the test, the party claiming the exemption must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[17]

[49] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[18]

[50] 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 17(1).[19] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[20]

[51] The ministry states that the affected party is in the best position to present argumentative evidence on whether disclosure of the information would prejudice its competitive position resulting in undue loss or gain. However, the ministry notes that the affected party is in a very competitive business. The ministry argues that disclosure of the records could cause considerable harm to the affected party, as competitors could use the technical and commercial information contained in the records to their advantage. In particular, the ministry submits that the disclosure of the records would provide insight into the affected party's provision of service, which could then be used by competitors to address issues with their system or to undermine the affected party in competing for other work.

[52] I gave two affected parties the opportunity to provide representations on this exemption, but they did not submit representations. However, when notified of the request by the ministry under section 28, one affected party responded that records A0164075 and A0164080 contain sensitive commercial and financial information. According to this affected party, the disclosure of this information would significantly prejudice its competitive position in future dealings with the government and in the

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[17] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[18] Order PO-2020.
[19] Order PO-2435.
[20] Order PO-2435.

market generally, as it would provide competitors with information about pricing and contracting practices.

[53] Based on my review of the ministry's representations, one affected party's general comments to the ministry at the request stage, and the absence of representations from the other two affected parties, I find that I have not been provided with sufficient evidence to link the disclosure of the information in the records to the harms alleged under section 17(1)(a) or (c).

[54] I find that the affected party who responded to the ministry has not provided the kind of "detailed and convincing" evidence required to satisfy part 3 of the section 17(1) test. The allegations of harm in its comments to the ministry have not demonstrated that a "reasonable expectation of harm" exists if the information in the records is disclosed, nor is such harm apparent on the face of the records themselves.

[55] Further, the affected party's argument that disclosure of the record could reduce competitiveness in future dealings with the government and in the market generally has been rejected in previous orders of this office. In Order PO-2435, Assistant Commissioner Brian Beamish commented as follows on the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" under section 17(1):

> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:
>
> > …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form

> of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money.

. . .

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 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [e-Physician Project], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA [Service Level Agreement] and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

While I can accept the Ministry's [Ministry of Health and Long-Term Care] and SSHA's [Smart Systems for Health Agency] general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a), (b) and (c), this is not such a case. Simply put, I find that the

> institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs . . . The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[56] In Order PO-3183, Adjudicator Donald Hale, relying on Order PO-2435, came to a similar conclusion with respect to a proposal submitted in response to an RFP for the provision of legal services to a hospital. In ordering the proposal disclosed, Adjudicator Hale found that "the fact that disclosure of the proposal may result in a more competitive bidding process in the future does not result in significant prejudice to the affected party's competitive position or result in an undue loss to it."

[57] In addition, I note that the records at issue are over fifteen years old and it is reasonable to assume that pricing information has changed over the course of these years, such that disclosure of this information would not be of assistance to an affected party's competitor at this time.

[58] Consequently, I agree with and adopt the reasoning of Assistant Commissioner Beamish and find that part 3 of the test under section 17(1) has not been met with respect to all of the information for which this exemption was claimed.

[59] I also note that the majority of the records for which this exemption was claimed relate to another affected party, who did not provide representations to this office, although it was given the opportunity to do so. This affected party has not provided

any evidence that a "reasonable expectation of harm" exists if the information in the records is disclosed, nor is such harm apparent on the face of those records either. Therefore, I find that part three of the three-part test has not been met and the records are not exempt under section 17(1) of the *Act*.

[60] The ministry has claimed the application of the discretionary exemption in section 19 to records A0163925, A0163938 and A0164076, which I will consider below.

[61] As no other exemptions were claimed with respect to records A0163770, A0163919, A0164075, A0164080, A0164035, A0164038, A0164050, A0164051, A0164059 and A0164069, I order the ministry to disclose them to the appellant.

Issue D: Does the discretionary exemption at section 19 apply to the records?

[62] The ministry is claiming the application of section 19 to several records, which I will describe below, on the basis that they are communications between ministry staff and both internal and external legal counsel. Therefore, the ministry submits, these records are subject to solicitor-client privilege at common law.

[63] Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;

[64] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a).

[65] 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]

[66] 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]

[67] 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]

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[21] 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).
[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[68] 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]

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

[70] 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]

[71] As stated above, the ministry submits that it applied the discretionary exemption in section 19 to all communications between ministry staff and counsel, as they fall within the ambit of the common law definition of solicitor client privilege. This privilege, the ministry argues, attaches to all verbal and written communications between solicitor and client related to the seeking, formulating or giving of legal advice or assistance.

[72] In addition, the ministry submits that factual information may be subject to solicitor client privilege to the extent that it is provided to legal counsel for the purpose of receiving a legal opinion or advice, including all working papers directly relating to the advice or assistance.

[73] The ministry states:

> 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,*[27] it becomes apparent that such communications falls 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. The privilege remains permanent until it has been waived by the client.

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[23] Orders PO-2441, MO-2166 and MO-1925.
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[25] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[26] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[27] [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[74] The ministry goes on to describe the records as follows:

- Records A0163902, A0163903, A0163904 and A0164032 are email exchanges between ministry staff and the ministry's legal services branch. The ministry also states that three of the email exchanges were copied to counsel at the Ministry of the Attorney General, who was assisting in the provision of legal services;

- Records A0164025, A0163931, A0163932, A0163934, A0163936, A0163938, A0163940, A0164070 and A0164071 are emails and attachments between ministry staff, internal legal counsel and external legal counsel retained to provide legal services with respect to a particular issue. These records consist of communications relating to the provision of legal services; and

- Records A0163946, A0163947, A0163948, A0163949, A0163950, A0163951, A0163953, A0163954, A0163955, A0164011, A0163956, A0164012, A0163957, A0163958, A0163959, A0163960, A0163962, A0163984, A0163985, A0163987, A0164008, A0164020, A0164021, A0164022, A0164023, A0164028, A0164057 and A0164076 are emails between the ministry's legal counsel and ministry staff relating to the provision of legal advice or services to the ministry by legal counsel.

[75] I note that in the ministry's index of records, the exemption in section 19 has also been claimed with respect to record A0163925.

[76] Having reviewed the records for which this exemption is claimed, I uphold the ministry's decision with respect to section 19 with the exception of one record, subject to my findings on the ministry's exercise of discretion.

[77] I find that record A0163925 is exempt from disclosure under section 19 of the *Act*, as it is clearly a legal opinion about a particular issue provided by external legal counsel to the ministry. Consequently, this record is subject to the common law solicitor-client communication privilege.

[78] With respect to the other records for which this exemption was claimed, with the exception of record A0164008, I am satisfied that they too are exempt under section 19, because they are subject to the common law solicitor-client communication privilege. These records consist of:

- Emails sent to legal counsel by ministry staff, seeking a legal opinion or legal advice on a particular issue; and

- Emails sent to ministry staff from legal counsel, providing legal advice and attaching written materials drafted and reviewed in conjunction with ministry staff.

[79] I find that these records form part of the "continuum of communications," as they reflect confidential communications between a solicitor and his client and they are, therefore exempt from disclosure under section 19 of the *Act*. The ministry also claimed the application of the discretionary exemption in section 13 to three of these records. However, as I have found them to be exempt under section 19, it is not necessary to conduct a section 13 analysis.

[80] Conversely, I find that record A0164008 is not exempt from disclosure under section 19. This record consists of an email and draft agreement sent by ministry staff to one of the affected parties for the affected party's review. The email is also copied to legal counsel. In my view, on the face of this record there is neither the seeking nor giving of legal advice or a legal opinion. The fact that the email and draft agreement were copied to legal counsel does not alter my finding, as counsel was simply copied on the email to be kept up to date, rather than to provide an opinion or advice. As no other exemptions were claimed with respect to this record, I order the ministry to disclose it to the appellant.

Issue E: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[81] The section 19 exemption is discretionary, and permits 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.

[82] 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.

[83] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[28] This office may not, however, substitute its own discretion for that of the institution.[29]

[84] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[30]

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[28] Order MO-1573.
[29] Section 54(2) of the *Act*.
[30] Orders P-344, MO-1573.

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and 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.

[85] The ministry submits that, in exercising its discretion, it attempted to balance the purpose of the exemptions with all other relevant interests and considerations, including the facts and circumstances of this request. The ministry states that its exercise of discretion involved two steps. The first step involved a determination by the head on whether the exemption applied. The second step involved the head evaluating all relevant interests, including the public interest in the disclosure of the information and concluding that disclosure should not be made. In this case, the ministry states, the interest in disclosure was of a private nature, that is, to advance the appellant's interests in litigation, rather than holding the ministry to greater scrutiny on a public issue. In addition, the ministry submits that it severed the records in order to disclose as much information as possible.

[86] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion.

[87] I am satisfied that that ministry weighed the appellant's interest in obtaining access to the requested information against the protection of sensitive government information that is subject to solicitor-client privilege. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemption in section 19 to the records for which I upheld the ministry's decision.

[88] In conclusion, I uphold the ministry's decision, in part. I uphold the application of the mandatory exemption in section 21(1). I do not uphold the application of the mandatory exemption in section 17(1). I uphold the application of the discretionary exemption in section 19, in part. Lastly, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose records A0163770, A0163919, A0164008, A0164035, A0164038, A0164050, A0164051, A0164059 and A0164069, A0164075 and A0164080 to the appellant by **January 21, 2014** but not before **January 16, 2014**.

2. I uphold the ministry's decision to deny access to the remaining records at issue.

3. In order to verify compliance with order provision 1, I reserve the right to require that the ministry provide me with a copy of the records sent to the appellant.

Original Signed By: December 16, 2013
Cathy Hamilton
Adjudicator