Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3274

Appeal PA12-142

Ministry of Natural Resources

November 4, 2013

Summary: The appellant made a request to the Ministry of Natural Resources, seeking access to copies of all reports created by the Parks Registration & Reservation Steering Committee, copies of all meeting minutes of the committee and copies of all communication between the committee and OPS employees created in a specified time period. The ministry granted access to some responsive records and denied access to others, either in whole or in part, claiming the application of the mandatory exemptions in sections 12 (Cabinet records), 17(1) (third party information) and 21 (personal privacy) and the discretionary exemptions in section 13 (advice or recommendations), 14(1)(l) (facilitate commission of an unlawful act), 15 (relations with other governments), 18 (valuable government information) and 19 (solicitor-client privilege) of the *Act*. During the inquiry, the records withheld under section 14 were removed from the scope of the appeal and are no longer at issue. In this order, the adjudicator upholds the ministry's decision, in part, and determines that the exemptions in sections 12, 13, 18 and 21 apply. The adjudicator also finds that the three part test in section 17(1) is met with respect to some records, but not others and that the exemption in section 19 applies to most of the records for which it was claimed. The adjudicator also upholds the ministry's exercise of discretion. The adjudicator does not uphold the exemption in section 15 and those records are ordered disclosed. The remaining records, or portions thereof, for which the test under section 17(1) are not met and for which section 19 does not apply are also ordered disclosed.

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), 12, 13, 15, 17, 18, 19 and 21.

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 number 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 a number of 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 a contract 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 contract with the requester and entered into another contract with the second ranked vendor. The ministry, the requester and the second ranked vendor are currently engaged in a civil litigation in relation to the termination of the contract.

[3] This order disposes of the issues raised as a result of 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 copies of all reports created by the Parks Registration & Reservation Steering Committee, copies of all meeting minutes of the Committee and copies of all communication between the Committee and OPS employees created between a specified time period.

[4] The ministry identified responsive records and notified several affected third parties under section 28(1) of the *Act* to obtain their views regarding disclosure of the records.

[5] Some of the affected third parties provided the ministry with submissions on which portions of the records they believed should not be disclosed.

[6] After considering the representations from the third parties, the ministry issued a decision, granting access to some records, in whole, and to others, in part. The remaining records were withheld, in full. The ministry claimed the application of the

mandatory exemptions in sections 12 (cabinet records), 17 (third party information) and 21 (personal privacy), and the discretionary exemptions in sections 13 (advice or recommendations), 14 (law enforcement), 15 (relations with other governments), 18 (economic and other interests) 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 mediator contacted the appellant, the ministry and two affected third parties. The ministry confirmed its position that no additional portions of the records may be disclosed.

[9] The appellant advised that he was not seeking access to information that was clearly an affected party's personal information, such as personal email addresses or phone numbers. The appellant advised, however, that he was seeking access to information that may state when a ministry employee was on vacation, as this information that he believed may be of interest to him.

[10] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry, the appellant and two affected parties. Representations were shared in accordance with this office's *Practice Direction 7*.

[11] 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. At that time, further records were disclosed to the appellant.

[12] In his representations, the appellant stated that he had no further representations other than to state that I should place the ministry under the strict burden of proof with respect to the exemptions it claimed. Staff from this office contacted the appellant and clarified with him that he was no longer seeking any information relating to teleconference numbers and related passwords. This information, which was withheld under sections 14(1)(l) and 18 is no longer at issue.

[13] One affected party provided representations on the application of the exemptions in sections 15 and 21. The second affected party provided representations on the application of the exemption in section 17(1).

[14] For the reasons that follow, I uphold the ministry's decision in part, and order it to disclose certain records to the appellant.

RECORDS:

[15] The ministry provided the appellant with an index of records, which describes each of the records, stating whether access to each record or portion of a record was

granted or denied, and identifies the exemption that was claimed for that record or portion of the record. The records consist of various types of correspondence, reports, slide decks, communications, briefing notes, meeting minutes, updates and forms.

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 12 apply to the records?

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

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

F: Does the discretionary exemption at section 15(a) apply to the records?

G: Does the discretionary exemption at section 18(1) apply to the records?

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

I: Did the institution exercise its discretion under sections 13, 18 and 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?

[16] 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,
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> (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,
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> (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,
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> (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;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[18] 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]

[19] 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]

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[1] Order 11.
[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.

[20] The ministry submits that portions of some of the records contain personal information such as individuals' names in conjunction with their home addresses, home telephone numbers, email addresses, names of relatives and details of vacations. Some of the personal information, the ministry argues, consists of customers' names.

[21] In his representations, the appellant states that he is not seeking any personal information, unless it refers to information about the timing of when ministry employees were on vacation. Based on the appellant's stated position, personal information such as home addresses, email addresses, names of customers and cell phone numbers is no longer at issue in this appeal. Consequently, I have removed this information from the scope of the request.

[22] One of the affected parties argues that record A0150843 should be withheld from disclosure as it relates to personal information that was obtained for the purpose of collecting a tax.[4] The tax information relates to the ministry itself as a collector and remitter of GST/HST. I find that any tax information about the ministry does not qualify as personal information. As stated above, to qualify as personal information, the information must be about an individual in a personal capacity. The ministry is not an identifiable individual nor does it act in a personal capacity. Therefore, this information does not qualify as being personal information.

[23] Consequently, the remaining information that was withheld from the appellant and which remains at issue is information concerning vacation time taken by a number of individuals. I have reviewed the records and find that information about the individuals' vacation 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 about an individual's vacation time would reveal something of a personal nature about them and that it qualifies as personal information under paragraph (h) of the definition in section 2(1).

[24] I will now determine whether the portions of records that contain personal information, specifically an individual's vacation 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?

[25] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The ministry submits that disclosure of the personal information at issue would constitute an unjustified invasion of the individuals' privacy, as contemplated by section 21(1)(f).

[4] I note that from the ministry's index that it is prepared to disclose the record.

[26] The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

[27] 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).

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

[29] 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 or educational 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.

[30] 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.[6]

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

[32] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[7] I note that the appellant did not provide representations on this issue beyond expressing his wish to be provided with this information.

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[5] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[6] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.
[7] Order P-239.

[33] 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 time to the appellant. However, because the section 21(1) exemption is mandatory, and there are no factors favouring disclosure, I uphold the ministry's application of the exemption to this personal information. 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 12 apply to the records?

[34] The ministry is claiming the application of the mandatory exemption in section 12 with respect to records A0151632, A0151633, A0151662, A0151686, A0151687, A0151690, A0151693, A0151717 and A0151972. I also note that although the ministry did not make representations on record A0151709, a portion of it has been marked as being withheld under Section 12. Section 12 reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
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> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
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> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
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> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
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> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
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> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to

> be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
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> (f) draft legislation or regulations.

[35] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).[8]

[36] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[9]

[37] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[10]

[38] The ministry claims that the records for which it has claimed this exemption relate to the Fiscal Oversight Committee (FOC) of Cabinet and its deliberations. The ministry advises that the FOC is part of the review process that determines what content is to go before Treasury Board, which is a Cabinet Committee.

[39] The ministry states that the records consist of emails between: the ministry and the Ministry of Finance; ministry employees; and ministry employees and Cabinet Office staff. One email includes a briefing note and another includes a slide deck discussion.

[40] The topics of discussion in the emails, according to the ministry, are:

- the implementation of a financial matter by Parks through the PRRS;
- potential options discussed by the FOC; and
- the parks reservation system as approved by the FOC.

[8] Orders P-22, P-1570, PO-2320.
[9] Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725.
[10] Order PO-2320.

[41] The ministry argues that the subject matter of the records was park fees, and some of the challenges of the PRRS became "entangled" in the issue of fees. As a result, the ministry advises, the Minister was required to seek approval from Treasury Board and ultimately, Cabinet approved the recommendation. The ministry states:

> The review and direction was part of the deliberative review process for a Cabinet committee, [Treasury Board] and release of the severed portions or entire records would reveal the substance of the deliberations of that committee.

[42] In order to qualify for exemption under the introductory wording of section 12(1), the actual substance of the deliberations of Cabinet or one of its committees must be reflected in or inferred from the contents of a record. I have carefully reviewed the information contained in the records, and I find that its disclosure would reveal the substance of the deliberations that took place by the Treasury Board during the course of its review of issues with the PRRS. The records contain specific options, as well as various implications and requirements necessary to implement these recommendations. In addition, one record[11] contains a slide deck that was actually approved by Cabinet. In my view, it is reasonable to conclude that this information formed the basis of the deliberations of the Treasury Board and Cabinet itself, as submitted to them by the FOC. Accordingly, I find that the records for which the ministry claimed section 12 qualify for exemption under the introductory wording of section 12(1).

[43] In making my finding with respect to the portion of record A0151709 for which this exemption was claimed, I reiterate that the ministry did not provide representations on this record. However, as section 12 is a mandatory exemption, I am able to uphold the ministry's decision based on my review of the record and its contents.

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

[44] The ministry submits that disclosure of records or portions of records A0148621, A0148623, A0148628, A0148694, A0148697, A0148699, A0148705, A 0148862, A0150760, A0150847, A0151895, A0148799, A0150756 and A0150879[12] would give rise to a reasonable expectation of harm as identified in sections 17(1)(a) and/or 17(1)(c) of the *Act*, which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

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[11] A0151972.

[12] Although not referred to in the ministry's representations, portions of records A0148783, A0150930, A0150933, A0150998, A0151702 and A0148615 were also withheld under section 17(1) of the *Act*.

> supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
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> > (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;

[45] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[13] 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.[14]

[46] 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

[47] The ministry submits that the information at issue is the technical and/or commercial information of affected parties. 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,

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[13] *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.).
[14] Orders PO-1805, PO-2018, PO-2184, MO-1706.

> 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.[15]
>
> *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.[16] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[17]

[48] With respect to commercial information, the ministry states that records relate to the buying and selling of two affected party's services relating to a parks reservation system and describe in detail payments made to one affected party. In addition, the ministry advises, there is a reference to one of the affected party's other customers.

[49] 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 parties. In particular, the ministry states, the records describe:

- discussions of the affected party's software and its capabilities;
- issues with the technical service which were resolved; and
- former and current technical operations of the affected party.

[50] During the request stage, an affected party advised the ministry that it objected to the disclosure of record A0148628. The affected party reiterates this position in its representations with respect to record A0148628, as well as to records A0148621, A0148623, A0148694, A0148697, A0148699, A0148705, A0148862, A0150760, A0150847 and A0151895.

[51] The affected party[18] submits that these records contain commercial and technical information in connection with the implementation of the Parks Registration and Reservation Service.

[52] I have reviewed the records and I am satisfied that some of the records contain information that would constitute "commercial" information for the purposes of section 17(1) as it relates to the buying, selling or exchange of merchandise or services. In this

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[15] Order PO-2010.
[16] See note 9.
[17] P-1621.
[18] This affected party is the company that processes customers' payments and refunds when they reserve campsites through the on-line reservation system.

case, there is information in the records about the affected party's provision of services to the ministry.

[53] In addition, portions of the some of the records refer to a named company that had submitted a proposal to the ministry, but was not awarded the contract. I am satisfied that this information constitutes commercial information for the purposes of section 17(1).

[54] Consequently, I find that some of the records contain "commercial" information for the purposes of section 17(1).

[55] Similarly, I find that some of the records contain "technical" information, as described above. In particular, some of the records describe technical problems and how they were proposed to be resolved, as well as implementation plans, validation protocols and functionality. This type of information qualifies as technical information for purposes of section 17(1), as it describes the operation or maintenance of a process, specifically the processing of customers' payments using the on-line reservation system.

[56] As all of the records for which this exemption was claimed contain either "commercial" or "technical" information, part one of the three-part test has been met and I will go on to determine whether the information was supplied in confidence to the ministry by a third party.

Part 2: Supplied in confidence

[57] 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.[19]

[58] 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.[20]

[59] 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.[21]

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[19] Order MO-1706.
[20] Orders PO-2020, PO-2043.
[21] Order PO-2020.

[60] 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.[22]

[61] The ministry submits that the information at issue was supplied in confidence to it 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 communicated in confidence. Consequently, within the context of the exchange of records, there is an objective basis as required by past orders[23] for an expectation of confidentiality with respect to the affected party's information.

[62] The affected party who provided representations on the application of section 17 also submits that the commercial and technical information contained in records A0148621, A0148623, A0148628, A0148694, A0148697, A0148699, A0148705, A0148862, A0150760, A0150847 and A0151895 with duplicated information in records A0148703, A0150861 and A0151968 was supplied in confidence by it to the ministry.[24] In regard to these records, the affected party further submits that the information was supplied in the affected party's mind in confidence that, in keeping with the norm for customers of this type of service, accepted the information in confidence.

[63] The affected party goes on to state that a confidentiality provision in the contract between the ministry and it requires the ministry to keep any information disclosed to it by the affected party confidential. The information at issue, the affected party argues,

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[22] Orders PO-2043, PO-2371, PO-2497.
[23] Orders P-582, P-607, P-610, M-258, P-765 and P-788.
[24] Duplicate information is contained in records A0148703, A0150861 and A0151968.

was generated as a result of the contract, that is, post-contract and was supplied by it to the ministry with the expectation of confidentiality.

[64] Further, the affected party advises that it has not disclosed the information at issue to any party which has not been subject to confidentiality obligations and has consistently treated this information in a manner that indicates a concern for its protection from disclosure. Lastly, the affected party submits that the information at issue has not been otherwise disclosed and is not available from publicly accessible sources.

[65] Having reviewed the records and the representations from the ministry and the affected party, I am satisfied that they have provided sufficient evidence that the commercial and technical information contained in records A0148621, A0148623, A0148628, A0148694, A0148697, A0148699, A0148705, A0148862, A0150760, A0150847 and A0151895 along with duplicate information contained in records A0148703, A0150861 and A0151968, 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 contract and the history of this type of information being treated as confidential, the affected party had a reasonable expectation that this information would be kept confidential.

[66] Conversely, I am not satisfied, based on the ministry's representations and on the face of the records themselves, that the information in the following records was supplied in confidence to the ministry by a third party either directly or by inference:

- A0148783. This record sets out an internal discussion among ministry staff about the progress of the project and what steps they will take to proceed;

- A0148799. This record reflects a brief statement made from one ministry staff to another about how they solved a problem in the past;

- A0150756. This record is an internal discussion between ministry staff setting out the total money the ministry paid to a third party for services rendered;

- A0150879, A0150930, A0150933 and A0150998. The withheld portions of these records [three of which are identical] consist of the name of a company that had submitted an unsuccessful proposal to the ministry. In record A0150879 an individual acting on behalf of this company is seeking an update from the ministry. There is no evidence to suggest from these records that the identity of this company was to be held in confidence;

- A0151702. This record captures an internal discussion among ministry staff about tax remittance; and

- A0148615. The withheld portion of this record is a discussion of what information technology system various campground providers use.

[67] The records listed in the first two bullets reflect internal discussions amongst ministry staff about how they should proceed or how they solved a problem in the past. There is no evidence either from the representations or in the records that the information that formed the basis of these discussions was supplied by a third party. In fact, it appears that the information discussed reflects information generated by the ministry itself.

[68] The record in the third bullet sets out the total amount of money the ministry paid for services rendered by a third party. I find that the lump sum payment was not supplied by the third party to the ministry; nor could one infer from the record any information that may have been supplied by the third party to the ministry.

[69] With respect to the records listed in the fourth, fifth and sixth bullets, while one might conclude that the information may have been originally supplied to the ministry by third parties, there is no evidence before me or on the face of the record to suggest that it was supplied with a reasonable expectation of confidentiality.

[70] Consequently, these records do not meet the second part of the three part test in section 17(1) and are, therefore, not exempt from disclosure. As no other exemptions have been claimed for records A0148799, A0150930, A0150933, A0150998 and A0151702, I order the ministry to disclose them to the appellant, in full.

[71] With respect to record A0150879, a portion of that record is no longer at issue, as it contains personal information the appellant does not seek. I order the remainder of the record to be disclosed to the appellant.

[72] With respect to record A0148615, the ministry is claiming the application of section 15 to a separate portion of the record, which I will consider below. I order the remainder of the record to be disclosed to the appellant.

[73] The ministry has claimed the application of other exemptions to the same portions of records A0148783 (section 19) and A0150756 (section 18), which I will consider below.

[74] In sum, records A0148621, A0148623, A0148628, A0148694, A0148697, A0148699, A0148705, A0148862, A0150760, A0150847 and A0151895 and duplicate information in records A0148703, A0150861 and A0151968 have met the requirements

of the second part of the three part test in section 17(1). I will now determine whether the third part of the test has been satisfied with respect to these records.

Part 3: Reasonable expectation of harm

[75] For ease of reference, the relevant subsections of section 17(1) 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

[76] 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.[25]

[77] 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.[26]

[78] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[27] 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*.[28]

[79] The ministry states that the affected party is in the best position to present argumentative evidence on whether disclosure of the information would prejudice an

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

affected party's competitive position resulting in undue loss or gain. However, the ministry notes that the type of business the affected party is in is very competitive. The ministry argues that disclosure of the records could cause considerable harm to the affected party, as competitors could use the technical information contained in the records to their advantage. In particular, the ministry submits the minor technical issues described in the records could be misinterpreted as security issues. This misinterpretation, the ministry argues, could be used by competitors to cast doubt on the security of the affected party's service, resulting in loss of business to it.

[80] The affected party submits that the detailed technical and commercial information in the records is in connection with the implementation of the PRRS, and that this information reflects a proprietary process and system functionality which it has developed over significant time and through the expenditure of significant effort. The affected party goes on to state that the information at issue represents certain choices it has made with respect to the payment process, and is based on the culmination of its extensive experience in the online payment processing sector. Should this information be disclosed, the affected party argues, it would represent invaluable information for its competitors, as they would have the opportunity to position their own products, implementations and communications as being better than those of the affected party. In addition, the affected party argues that public disclosure of the technical information could jeopardize its own security measures.

[81] The affected party goes on to argue that disclosure of the information in the records would reduce its competitive strengths and its flexibility and leverage with other customers, going forward. The affected party states:

> In this case, it is consistent with the purpose of the exemption to deny access to this information. The credit and debit card acceptance services sector is extremely competitive, and is populated by a number of highly qualified, sophisticated vendors. In order to be competitive, [the affected party] must devote significant resources to the development of payment products and services which distinguish [the affected party] in the market.
>
> In the context of such a highly competitive market, any non-public information about competing payment companies is very valuable. If that information can also assist in reducing any competitive advantage of any one competitor in responding to both public and private sector procurements, it becomes critically valuable
>
> In this context, it is of critical importance that no confidential information of [the affected party] be released as a result of the access request, in order to ensure that [the affected party] is not materially prejudices in responding to the next procurement.

[82] As well, the affected party provided further representations on this issue, which met the confidentiality criteria of this office's *Practice Direction* 7, including a sworn affidavit of its Manager of Specialized Electronic Payments. Although not reproduced in this order, I did take the further representations and the affidavit into consideration in making my finding. I am satisfied that the affected party has provided "detailed and convincing" evidence establishing a reasonable expectation of harm.

[83] In particular, I am sufficiently persuaded by the affected party's arguments that disclosure of the information that I have found was supplied in confidence could reasonably be expected to prejudice significantly its competitive position or interfere significantly with the its contractual or other negotiations, resulting in undue loss to it and gain to other competitors.

[84] Consequently, records A0148621, A0148623, A0148628, A0148694, A0148697, A0148699, A0148705, A0148862, A0150760, A0150847 and A0151895, with duplicate information in records A0148703, A0150861 and A0151968 or portions thereof, for which the ministry has claimed this exemption have met the requirements of all three parts of the three part test in section 17(1)(a) and are exempt from disclosure.

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

[85] The ministry is claiming the application of the discretionary exemption in section 13(1) to records A0148553, A0148647, A0150882, A0151135, A0150899, A0151605, A0151617, A0151638, A0151660, A0151684, A0151695, A0151726, A0151722, A0151938, A0151946, A0151949, A0151950-A0151954, A0152308, A0148557, A0148621, A0148697, A0148699, A0151671, A0151709 and A0148633. I also note that the ministry did not make representations in regard to record A0148587, but it is marked as being withheld under section 13(1).

[86] Section 13(1) states:

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

[87] The purpose of section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[29]

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

[88] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[30]

[89] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[31]

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

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[32]

[91] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited below) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[33]

[92] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[34]

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

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views; and

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[30] See Order PO-2681.
[31] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[32] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).
[33] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).
[34] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

- a supervisor's direction to staff on how to conduct an investigation.[35]

[94] In its representations, the ministry relies on the Court of Appeal's decision[36] and a number of past orders from this office and submits that:

- Recommendations set out a course of action;
- Advice is also protected and may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action;
- The advice or recommendations must provide more than mere information and must suggest courses of action;
- There is no need to produce evidence that the information went to the ultimate decision maker and an institution can rely on circumstantial evidence to show that the records were part of the deliberative process;
- Where information is so interwoven with advice and recommendations that it cannot be reasonably severed, the exemption may apply to the entire record; and
- The record must be prepared by a public servant or person employed by an institution or a consultant retained by an institution. The nature of the relationship between the author and the institution is a crucial factor in determining whether the exemption applies.

[95] The records for which the ministry claimed this exemption consist of emails, a handwritten note, and a draft communications plan. The ministry advises that the emails are between various government staff containing options, recommendations, advice and suggested comments and courses of action.

[96] I have reviewed each record to determine whether or not the information for which the ministry has claimed section 13(1) either consists of advice or recommendations or whether, if it is disclosed, permit one to accurately infer the advice or recommendations given.

[97] As noted above, for information to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Alternatively, the information in the record must *reveal* or *allow one to infer* that suggested course of action. These are the

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

[36] See note 31.

principles upon which my decision of whether section 13(1) applies to exempt the records or portions of records from disclosure will be founded.

[98] As previously stated, I have reviewed all of the portions of the records for which the ministry has claimed section 13(1) to determine whether, in my view, the exemption applies. Having considered the records and the ministry's representations, I accept that all of the severed information on the basis that it is subject to section 13(1) contains advice or recommendations, or would allow one to accurately infer advice or recommendations. In my view, the ministry has not been overly broad in its application of the exemption and, therefore, I uphold the ministry's decision to withhold this information under section 13(1), subject to my finding regarding the ministry's exercise of discretion.

[99] Further, although the ministry did not provide representations on record A0148587, I have reviewed it and note that it consists of a Minister's Briefing Note. I am satisfied that the record contains recommendations made by ministry staff, which the Minister could either accept or reject. Consequently, this record qualifies for exemption under section 13(1), subject to my finding regarding the ministry's exercise of discretion.

[100] I also find that none of the exceptions in section 13(2) apply to the information at issue.

Issue F: Does the discretionary exemption at section 15 apply to the records?

[101] In the index of records, the ministry has claimed the exemption in section 15 for records A0148615 and A0105888. Section 15 states:

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

> and shall not disclose any such record without the prior approval of the Executive Council.

[102] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments.

[103] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[37]

[104] The ministry did not provide representations on this exemption. Consequently, as the ministry has failed to provide "detailed and convincing" evidence, let alone any evidence to establish a reasonable expectation of harm, the exemption does not apply and I order the ministry to disclose records A0148615 and A0150888 to the appellant.

[105] Further, an affected party provided representations with respect to record A0150843. The reference to this record on the index of records notes "consult – release." However, the record is marked as being withheld under section 15. The affected party submits that disclosure of this record would disclose the identity of a tax payer in relation to the tax matters referred to the record and this "itself would prejudice the conduct of intergovernmental relations."

[106] Section 28(1) of the *Act* requires the head to notify affected parties in order to provide them with the opportunity to make comments with respect to the application of sections 17(1) and 21(1)(f). The *Act* does not require the head to notify an affected party with respect to any other exemption; nor does it provide for an affected party to raise any other exemption for consideration in an inquiry. As a general rule, with respect to all discretionary exemptions, it is up to the head to determine if they apply to a requested record, as it is the head who exercises its discretion. An affected party does not have the right to rely on a discretionary exemption, and I have no obligation to consider it. Consequently, it is not necessary for me to consider the affected party's arguments with respect to section 15.

[107] A portion of record A0150843 contains personal information that is no longer at issue. Therefore, if it has not already done so, I order the ministry to disclose the remainder of this record to the appellant.

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[37] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439.

Issue G: Does the discretionary exemption at section 18(1) apply to the records?

[108] The ministry is claiming the application of sections 18(1)(c) and (d) in regard to records A0148786 and A0148700. In addition, a portion of record A0150756 is marked as being withheld under section 18(1), although no representations were made with respect to the application of this exemption to this record. Sections 18(1)(c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[109] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[38] explains the rationale for including a "valuable government information" exemption in the *Act*:

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

[110] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[39]

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[38] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

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

[111] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[40]

[112] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act.*[41]

[113] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[42]

[114] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[43]

[115] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[44]

[116] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[45]

[117] The ministry submits that record A0148786 is an email with an attached chart which details damages from the PRRS. The ministry states that it is currently in litigation with the appellant. The ministry argues that if the information in this record is disclosed prematurely and without the proper context and final assessment of damages suffered by the ministry, it could be used to limit or distort that recovery of damages by

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[40] Orders MO-1947 and MO-2363.
[41] Order MO-2363.
[42] See Orders MO-2363 and PO-2758.
[43] Orders P-1190 and MO-2233.
[44] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[45] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

the ministry. Limiting the recovery of damages, the ministry submits, would be harmful to its financial or economic interests.

[118] The ministry submits that record A0148700 sets out technical information and risks associated with third party software and systems used to process credit card payments. The ministry submits that if disclosed, third parties could use the information to attack or manipulate the software and interfere with its operation. This, in turn, would inhibit/interfere with the ministry's ability to collect monies for reserving campsites, causing harm to its economic or financial interests.

[119] I am satisfied that the ministry has provided credible, detailed and convincing evidence to support a finding that the disclosure of the technical information could reasonably be expected to cause harm to the economic interests of the ministry and the financial interests of the government of Ontario. I agree with the ministry that this information could be used to interfere with or thwart the collection of reservation fees.

[120] In addition, I am satisfied that the ministry has provided evidence that disclosure of the damages chart could interfere with possible future negotiations between the litigants regarding damages and/or limit the amount of damages, which would be harmful to its economic interests.

[121] However, with respect to record A0150756, the ministry has not provided any evidence of harm to the financial and economic interests of the ministry and/or the government should the information at issue be disclosed, as it did not provide any representations about this record. Therefore, I find that this record is not exempt from disclosure under section 18(1).

[122] Accordingly, I find that the information at issue in the above records is exempt under sections 18(1)(c) and (d), subject to the discussion of the exercise of discretion, below and with the exception of record A0150756, which I order the ministry to disclose to the appellant.

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

[123] The ministry is claiming the application of section 19 to a number of records on the basis that they are subject to solicitor-client privilege. The records for which this exemption is being claimed are voluminous and will not be listed in this order.

Section 19 of the *Act* states, in part:

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

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

[125] 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.[46]

[126] 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.[47]
The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[48]

[127] 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.[49]

[128] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[50]

[129] 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.[51]

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

[131] The ministry further submits that the privilege was not impaired in situations where the solicitor and client communicate with each other through intermediaries. For

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[46] 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).
[47] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[48] Orders PO-2441, MO-2166 and MO-1925.
[49] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[50] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[51] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

example, the ministry argues that records are subject to solicitor-client privilege where they form a "conduit" in which legal advice, either from the ministry or the Ministry of the Attorney General, work product and updates from counsel or instructions to counsel are transmitted to or from the various layers of the client ministry. The ministry states that in a large complex organization, it is not possible for direct contact to occur between the client ministry and legal counsel. Therefore, the ministry states that solicitor-client privilege attaches to records not authored by legal counsel, but that describe instructions to or advice or updates on legal work being done for the ministry.

[132] 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.

[133] 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* it becomes apparent that such communications fall within the scope of the privilege. This type of continuum or protracted nature of legal advice is particularly prevalent in the case of "in-house" legal advisors such as government Crown counsel.

[134] The ministry then goes on to describe each record for which the exemption is claimed.

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

[136] With respect to the vast majority of the records,[52] I am satisfied that they are exempt under section 19, as they are subject to the common law solicitor-client communication privilege. These voluminous records contain communications between ministry staff and legal counsel, in which legal advice is sought by staff and given by legal counsel. In addition, the records contain legal counsel's working papers and comments made by counsel in reviewing written materials drafted in conjunction with ministry staff. In many cases, several drafts of these materials are reviewed and commented on by legal counsel. In addition, some of the records consist of

[52] Many of the records contain duplicate information.

communications between ministry staff, but disclose the content of legal advice given by their legal counsel.

[137] The records describing the legal advice provided by ministry counsel contains information that forms 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.

[138] However, I also find that there are five records where only portions qualify for exemption under section 19. Records A0148783, A0148789, A0151140, A0151141 and A0151961 consist of email correspondence between ministry staff and I find that portions of these records do not contain information that qualifies for solicitor-client communication privilege at common law. The portions that do not qualify for solicitor-client privilege consist of discussions among ministry staff about the next steps ministry staff will take in carrying out a project, and what expectations the ministry had of particular companies. Legal counsel does not appear to be involved in these discussions, nor is legal advice sought or given in these portions of the emails.

[139] However, other portions contained in these records reveal that legal advice was sought on particular issues and set out what advice was given by legal counsel. Consequently those portions of the emails are exempt from disclosure under section 19, as they are subject to solicitor-client privilege at common law.

[140] In sum, I find that portions of the five records are not exempt under section 19 and I order the ministry to disclose those records, in part, to the appellant. I will enclose copies of these records with this order and highlight the portions that are not to be disclosed to the appellant

Issue I: Did the institution exercise its discretion under sections 13, 18 and 19? If so, should this office uphold the exercise of discretion?

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

[142] 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.

[143] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[53] Under section 54(2) of the *Act*, this office may not, however, substitute its own discretion for that of the institution.

[144] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[54]

- 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.

[145] 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

[53] Order MO-1573.
[54] Orders P-344, MO-1573.

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.

[146] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I note that with respect to several records, the ministry severed them and only withheld portions of the records, disclosing the remaining information.

[147] 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. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemptions in sections 13, 18 and 19 to the records I did not order disclosed to the appellant.

[148] In conclusion, I uphold the ministry's decision, in part. I uphold the application of the mandatory exemption in section 17 and the discretionary exemption in section 19 with respect to some of the records but not others. In addition, I uphold the mandatory exemptions in sections 12 and 21. I also uphold the ministry's application of the discretionary exemptions in sections 13 and 18 and its exercise of discretion. Finally, I do not uphold the ministry's application of the discretionary exemption in section 15.

ORDER:

1. I order the ministry to disclose records A0148615, A0148799, A0150756, A0150888, A0150930, A0150933, A0150998 and A0151702 in full, to the appellant by **December 10, 2013** but not before **December 4, 2013**.

2. I order the ministry to disclose records A0148783, A0148789, A0150843, A0150879, A0151140, A0151141 and A0151961 in part, to the appellant by **December 10, 2013** but not before **December 4, 2013**. I have enclosed copies of these records and have highlighted the portions that are not to be disclosed to the appellant.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the ministry provide me with a copy of the records sent to the appellant.

Original Signed By: November 4, 2013
Cathy Hamilton
Adjudicator