

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3339

Appeal PA13-43

Ministry of Natural Resources

May 8, 2014

Summary: The Ministry of Natural Resources received a request under the *Freedom of Information and Protection of Privacy Act* for information relating to the detection of the viral hemorrhagic septicemia virus in Lake Simcoe in 2010 and 2011. The ministry denied access to portions of the records under sections 13 (advice or recommendations), 15(a) (relations with other governments) and 19 (solicitor-client privilege). This order upholds the ministry's decision under section 19 and partially upholds the ministry's decision under sections 13 and 15(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 15(a) and 19.

OVERVIEW:

[1] The Ministry of Natural Resources (MNR or the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for information relating to the detection of the viral hemorrhagic septicemia (VHS) virus in Lake Simcoe in 2010 and 2011. The request was subsequently narrowed as follows:

1. All records on the chain of command for the 2011 VHS virus testing on Lake Simcoe including fish sampled in response to die-offs and pre-planned monitoring/surveillance (e.g. how the fish were captured, when, where, by who, how the fish were shipped to the lab and who received the fish).

2. All records from June 29, 2011 (the date MNR was informed by CFIA [Canadian Food Inspection Agency]¹ that VHS had been confirmed in fish from Lake Simcoe) to December 31, 2011 relating to the VHS virus on Lake Simcoe.

3. A copy of any approved policies dealing with the VHS virus in Ontario.

[2] Following third-party notification, the ministry issued a final decision advising that access has been granted in full to some of the records; however, access was denied to other records pursuant to the sections 13 (advice or recommendations), 14 (law enforcement), 15 (relations with other governments), 17 (third party information), 18 (economic and other interests), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During mediation, the appellant clarified the issues under appeal and indicated that he is specifically interested in the records relating to the ministry's decision-making process surrounding the announcement of the VHS found in Lake Simcoe. The appellant took the position that there exists a public interest in the disclosure of the requested information referring to section 23 of the *Act*, as he maintains that politicians should be held accountable for their decisions around the treatment of this issue.

[5] During mediation, the ministry advised that the mandatory personal privacy exemption in section 21(1) of the *Act* had been applied to some portions of the records containing other individuals' personal information such as email addresses, phone numbers and comments of personal nature. Upon discussions with the mediator, the appellant indicated that section 21 of the *Act* is not at issue in this appeal.

[6] With respect to the application of sections 14 and 18 of the *Act*, which the ministry claimed to protect some teleconference phone numbers and passwords from disclosure, the appellant indicated that they are also not at issue in this appeal. The appellant further indicated that he is not pursuing access to the law enforcement records to which section 14 has also been applied.

[7] With respect to the codes that have been severed throughout the records under section 15 of the *Act*, the appellant advised that they are not at issue in this appeal. The appellant however, advised that he wishes to pursue access to the ministry's communications with other governments which have been severed and withheld pursuant to section 15 of the *Act*.

¹ The CFIA is a federal food inspection agency mandated to contribute to consumer protection and facilitate a more uniform and consistent approach to safety and quality standards and risk-based inspection systems. See *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6.

[8] In addition, the appellant also took issue with the application of sections 13 and 19 of the *Act* to the records relevant to the ministry's decision-making process surrounding the announcement of the VHS in Lake Simcoe.

[9] However, the appellant is not pursuing access to the records containing third-parties' information to which the ministry had applied section 17 of the *Act*, nor to the information that had been deemed non-responsive to the request.

[10] After the issuance of the Mediator's Report, the ministry decided to reconsider its decision with respect to the application of section 13 of the *Act* and granted access to several additional records.

[11] In a subsequent discussion with the mediator, the appellant advised that he wished to pursue access to the records which continue to be severed or withheld pursuant to sections 13, 15 and 19 of the *Act*.

[12] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the ministry and the appellant in accordance with section 7 of IPC's *Code of Procedure and Practice Direction 7*.

[13] I also sought representations from the CFIA on the information withheld under section 15(a) from pages 1918, 4258, 4259, 4979, 4980, 5052, 5053, 5056 and 5057 of the records. I received representations from the CFIA.

[14] In this order, I uphold the ministry's decision under section 19 and partially uphold the ministry's decision under sections 13 and 15(a).

RECORDS:

[15] The records remaining at issue include e-mails, correspondence, maps and program guidelines.

ISSUES:

A.: Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?

B. Does the discretionary relations with other governments exemption at section 15(a) apply to the records?

C. Does the discretionary solicitor-client privilege exemption at section 19 apply to the records?

D. Did the institution exercise its discretion under sections 13, 15 and 19? If so, should this office uphold the exercise of discretion?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13 and 15 exemptions?

DISCUSSION:

A. Does the discretionary advice or recommendations exemption at section 13(1) apply to the records?

[16] 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.

[17] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.²

[18] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.³

[19] "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.⁴

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

- the information itself consists of advice or recommendations

² Orders 24 and 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.).

³ Order PO-2681.

⁴ Orders PO-2028 and 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.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations⁵

[21] It is implicit in the various meanings of “advice” or “recommendations” considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) 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.⁶

[22] 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.⁷

[23] 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
- a supervisor’s direction to staff on how to conduct an investigation.⁸

[24] The ministry states, by way of background, that VHS is an infectious virus that can cause disease and death in susceptible fish species. The virus does not pose a threat to human health.

[25] On June 3, 2011, the ministry received the results of testing from the University of Guelph indicating a suspected positive detection for VHS in fish from Lake Simcoe. On June 29, 2011, MNR was notified by the CFIA that VHS had been confirmed in the fish samples from Lake Simcoe. The ministry states that:

⁵ Orders PO-2028 and 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).

⁶ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

⁷ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁸ 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).

During the summer of 2011, MNR staff developed options to address the finding of VHS in Lake Simcoe. This work also involved the CFIA, which has national level responsibility for fish health. In response to the confirmation of VHS in fish from Lake Simcoe, a new Lake Simcoe Management Zone was established effective January 1, 2012. No movement of commercial baitfish (live or dead) was permitted into or out of the zone...

Lake Simcoe was a major source of live baitfish and implementation of the new zone was opposed by the baitfish industry. As a result, there are currently several *Fish and Wildlife Conservation Act* hearings ongoing related to bait harvest licence conditions stemming from the implementation of the Simcoe Management Zone.

[26] The ministry states that Records A0170349, A0171989 and A0175870 are email chains about the status of VHS. At issue is the severed information on pages 376, 881, 882 and 4974. The ministry states that it severed the recommendation of a member of ministry staff regarding a Question and Answer communication.

[27] The ministry states that Record A0172644 is an email chain concerning issues for a meeting, as well as information about a phone call from a stakeholder. At issue is the severed information on page 1616. In this record, the ministry states that it severed staff comments containing advice regarding contacting key stakeholders and filling them in on the status of VHS.

[28] The ministry states that Record A0173914 is an email chain regarding Lake Simcoe goby samples and sets out information relating to what happened in 2010. At issue is the severed information on page 3267, which the ministry describes as a recommendation concerning a house note on the subject.⁹

[29] The appellant did not address this issue in his representations.

Analysis/Findings

[30] I have considered the representations of the ministry and reviewed the information at issue in the emails at pages 376, 881, 882, 1616, 3267 and 4974 of the records. I agree with the ministry that most of this information consists of advice or recommendations given by a ministry staff person to another ministry staff person. Disclosure of this information in these records would reveal a course of action that will ultimately be accepted or rejected by its recipient. As a result, I find that they qualify for exemption under section 13(1).

⁹ In Order PO-2200, Assistant Commissioner Tom Mitchinson describes a house note as a document used to prepare the Minister for Question Period in the Legislative Assembly.

[31] However, I find that two sentences on page 3267 do not contain advice or recommendations. Although part of the paragraph these sentences are located in does contain advice or recommendations, the remainder of this seven paragraph email has been disclosed to the appellant. The sentences which I find do not contain advice or recommendations are not about the house note referred to by the ministry in its representations. As no other exemptions have been claimed for these two sentences, I will order them disclosed.

[32] As none of the exceptions to section 13(1) in section 13(2) apply, I find that subject to my review of the ministry's exercise of discretion and the applicability of the public interest override in section 23, the remaining information at issue on page 3267 and the information at issue in the emails at pages 376, 881, 882, 1616 and 4974 of the records is exempt by reason of section 13(1).

B. Does the discretionary relations with other governments exemption at section 15(a) apply to the records?

Section 15(a) 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;

....

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

[33] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.¹⁰

[34] 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.¹¹

¹⁰ Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

¹¹ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); see also Order PO-2439.

[35] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.¹²

[36] The ministry states that pages 1918, 4258, 4259, 4979, 4980, 5052, 5053, 5056 and 5057 discuss the development of a communication plan with the CFIA and discuss the CFIA's approach to communications and media releases. The ministry states that for relations between the ministry and CFIA to work, there must be open and free discussions between the two and amongst ministry staff on how each side approaches communications.

[37] The ministry further states that disclosure of this type of information would have a chilling effect on such discussions, therefore, resulting in prejudice to the conduct of relations between the two levels of government.

[38] After reviewing the emails for which the ministry had claimed section 15(a), in its representations the CFIA argued that two specific sentences in the middle of page 4259 ought to be exempted. The CFIA's rationale for this exemption was that its working relationship with the ministry on this file is strained with respect to the movement controls of live bait fish because of VHS. It states that release of this information could damage its current consultations with the ministry and the bait industry on its domestic movement control program in Ontario.

[39] The CFIA also had an issue with the disclosure of two portions of two emails found on pages 5052, 5053, 5056 and 5057, as it could potentially lead to damaging the relationship between the federal and provincial governments in terms of negotiations.

[40] The appellant did not address the applicability of section 15(a) to the records in its representations.

Analysis/Findings

[41] I will discuss each page individually, as follows:

[42] Page 1918 is an internal ministry email relaying information about what the CFIA said in a phone call to the ministry. The CFIA does not object to disclosure of this email. Based on my review of the ministry's and the CFIA's representations and this email, I find that its disclosure could not reasonably be expected to prejudice the conduct of intergovernmental relations and this email is not exempt by reason of section 15(a). As no other exemptions have been claimed for this email, I will order it disclosed.

¹² Order P-1552.

[43] Pages 4258, 4979 and 4980 contain very general information and consist of an email from the CFIA to the ministry and emails passing on this CFIA email to other ministry employees. The CFIA does not object to disclosure of the severed information. Based on my review of the ministry's and the CFIA's representations, I find that disclosure of pages 4258, 4979 and 4980 could not reasonably be expected to prejudice the conduct of intergovernmental relations and the information at issue is not exempt by reason of section 15(a). As no other exemptions have been claimed, I will order these records disclosed.

[44] Page 4259 is an email from the ministry to the CFIA about a communication plan. The CFIA only objects to disclosure of two sentences in this email. After my review of page 4259 and the ministry's and the CFIA's representations, I agree with the CFIA that section 15(a) applies to the two sentences referred to by the CFIA. I further find that disclosure of the remainder of the email on page 4259 could not reasonably be expected to prejudice the conduct of intergovernmental relations and that the remainder of this email is not exempt by reason of section 15(a). As no other exemptions have been claimed for the remainder of this email, I will order it disclosed.

[45] Page 5052 is an internal ministry email about the ministry's view of the CFIA's enforcement proceedings and its relationship with the CFIA. The CFIA has stated that a portion of this email can potentially lead to damaging the relationship between the federal government and the provincial government in terms of negotiations. Based on my review of this information, I find that disclosure of this portion of the email on page 5052 could reasonably be expected to prejudice the conduct of intergovernmental relations and that this email is subject to section 15(a).

[46] I find that the remainder of the information at issue on page 5052 is general information about who called the ministry and why and it is not exempt by reason of section 15(a). As no other exemptions have been claimed for this information, I will order it disclosed.

[47] Page 5053 contains two emails. Pages 5056 and 5057 each contain one email. The second email in page 5053 and the email at page 5057 are identical to the email at page 1918, which I found not exempt by reason of section 15(a). For the same reasons as set out above for page 1918, I find that the second email at page 5053 and the email at page 5057 are not exempt by reason of section 15(a). As no other exemptions have been claimed for this information, I will order it disclosed.

[48] The first email at page 5053 and the email at page 5056 are identical. These emails are internal ministry emails discussing a telephone call from the CFIA. The CFIA has stated that a portion of this email can potentially lead to damaging the relationship between the federal and provincial governments in terms of negotiations. Based on my review of this information, I find that disclosure of this portion of the first email on page 5053 and the sole email at page 5056 could reasonably be expected to prejudice the

conduct of intergovernmental relations and that this email is subject to section 15(a). I find that the remainder of the information at issue on pages 5053 and 5056 is general information about who called the ministry and why and is not exempt by reason of section 15(a). As no other exemptions have been claimed for this information, I will order it disclosed.

[49] In conclusion, after reviewing the representations of the ministry and the CFIA on the information for which section 15(a) has been claimed, I have found that only those portions of the emails identified by the CFIA could reasonably be expected to prejudice the conduct of intergovernmental relations and are, therefore, subject to the section 15(a) exemption. I will consider below whether the ministry exercised its discretion in a proper manner concerning this information.

C. Does the discretionary solicitor-client privilege exemption at section 19 apply to the records?

[50] Section 19 of the *Act* states in part as follows:

A head may refuse to disclose a record,

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

[51] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

[52] The ministry submits that the pages of the records for which it has claimed section 19 are subject to solicitor-client communication privilege.

[53] Solicitor-client communication privilege under branch 1 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.¹³

[54] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁴

[55] The privilege applies to “a continuum of communications” between a solicitor and client:

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-2166 and MO-1925.

. . . 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.¹⁵

[56] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁶

[57] 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.¹⁷

[58] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[59] Branch 2 applies to a record that was prepared by or for Crown counsel "for use in giving legal advice."

[60] The ministry states that section 19 was applied to all communications between ministry staff and legal counsel, both internal and external counsel. It is the position of the ministry that pages 153, 204, 392, 393, 1322, 1324, 1440, 1442, 2280, 2309, 4348, 4356, 4555, 4567, 4568, 4575, 4901-4904, 4938, 5063, 5131, 6344, 7213 -7215, 7221, 7223, 7289, 7916, 8193, 8195, 8627 and 9124 of the records fall within the ambit of the common law definition of solicitor-client communication privilege.

[61] Concerning this first set of records for which section 19 has been claimed, the ministry describes these pages of the records as email chains about various subjects related to VHS. It states that it has severed from these pages legal opinions, legal advice, as well as information about the status of the work performed by legal counsel or the direction of or the need to obtain legal advice.

[62] The ministry states that although this information is not communication directly with legal counsel, in these pages of the records, legal counsel and the ministry client communicate with one another through intermediaries in the form of ministry staff. The severed records relate to the provision of advice, instructions to legal counsel or counsel's advice.

[63] Section 19 was also claimed by the ministry for pages 4557-4561, 4975, 5133-5157, 7256-7259, 7285-7288, 7291-7292, 7293-7296, 7297-7301, 7302-7305, 7323-7327, 7328-7330, 7331-7334, 7335-7336, 7337-7422, 7423-7425, 7426-7429, 7430-7431, 7432-7436, 7982, 8035 and 9141-9146 of the records. Concerning this second

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

set of records for which section 19 has been claimed, the ministry states that these pages of the records are emails and email chains between legal counsel and ministry staff in which the client ministry staff request advice or provide information and/or instructions, such as requests for review and comments and communications in which legal counsel provide advice or legal services.

[64] The appellant did not provide representations on this issue.

Analysis/Findings

[65] Based on my review of the information at issue, I agree with the ministry that the records contain direct communications of a confidential nature between a ministry solicitor and ministry staff, made for the purpose of obtaining or giving professional legal advice. I also agree with the ministry that the records contain emails that form part of a continuum of communications between a ministry solicitor and ministry staff aimed at keeping both informed so that advice may be sought and given as required.

[66] Accordingly, the information for which the ministry has claimed section 19 is all subject to solicitor-client communication privilege and, subject to my review of the ministry's exercise of discretion, is exempt under branch 1 of section 19.

D. Did the institution exercise its discretion under sections 13, 15 and 19? If so, should this office uphold the exercise of discretion?

[67] The sections 13, 15 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.

[68] 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
- it fails to take into account relevant considerations.

[69] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

¹⁸ Order MO-1573.

¹⁹ Section 54(2).

[70] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁰

- 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
 - 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
- the historic practice of the institution with respect to similar information.

²⁰ Orders P-344 and MO-1573.

[71] The ministry states that in exercising its discretion to exempt records under section 13, it considered the purposes of the *Act*, the purposes of this section and the circumstances of the request. The ministry states that:

Mindful of these considerations, including the fact that there had been a hearing into the issues around the aggregate application which dealt with the adaptive management plan, and the Court of Appeal's decision in *Ministry of Finance v. IPCO*,²¹ in which the Court highlighted the important function performed by a civil service in providing advice to Ministers of the Crown in a properly functioning parliamentary democracy, the Ministry applied its discretion to apply the exemption.

[72] Concerning the application of section 15(a), the ministry states that disclosure of this type of information would have a chilling effect on discussions between the ministry and the CFIA; therefore, would prejudice the conduct of relations between the two levels of government.

[73] Concerning section 19, the ministry states that in exercising its discretion, it considered the purposes of the *Act* but was mindful of the Supreme Court's decision and concerns around the importance of solicitor-client privilege.²²

[74] The appellant did not provide representations on this issue.

Analysis/Findings

[75] Based on my review of the information that I have found subject to sections 13, 15 and 19, I find that the ministry exercised its discretion in a proper manner taking into account relevant factors and not taking into account irrelevant factors.

[76] Accordingly, I am upholding the ministry's exercise of discretion and find that the information that I have found subject to the sections 13, 15 and 19 exemptions is exempt, subject to my consideration of the public interest override in section 23 to the information that is subject to sections 13 and 15.

[77] The public interest override exemption in section 23 does not apply to the information that is subject to the solicitor-client privilege exemption in section 19.²³

²¹ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125.

²² The ministry cited several cases including *Canada (Privacy Commissioner v. Blood Tribe Department of Health)*, [2008] S.C.J. No. 45, at 55, 2008 SCC 44 at 54; *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] 1 S.C.R. 815; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 173; *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

²³ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

Accordingly, the information for which the ministry has claimed the section 19 exemption is exempt.

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 13 and 15 exemptions?

[78] Section 23 states:

An exemption from disclosure of a record under sections **13, 15, 17, 18, 20, 21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[79] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[80] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²⁴

[81] The appellant only provided representations on this issue. The entirety of the appellant's representations state that:

After reviewing many of the documents I have noticed that the MNR have been totally undecided on whether to release information to the public and Bait industry about the VHS virus in Lake Simcoe from the time they were notified in June 2011 to December 2011. What I find really interesting there is a lot of talk about what to do and who to notify during the months of July and August then nothing until November 2011. Also I find it odd that there is nothing directly from the Ministers office on the subject, only options to the Minister and which one was chosen but no comments or suggestions from either Minister during that time period. I think the documents not being release might supply me with the missing link. I know there is talk about the repercussions if the MNR keeps this information away from the industry during the time they harvest live bait for the winter freeze up (October and November). Which is also the same time there was a Provincial Election? It is also rather strange the MNR and the Province would allow a Virus in Lake Simcoe be spread around the

²⁴ Order P-244.

rest of the Province when they could have amended the Bait licenses in July with a letter to the affected Bait Harvesters to limit where the bait from Lake Simcoe could be distributed. Instead they elected to wait until December 14 of 2011 to tell the industry by a letter and then gave the industry another two weeks after the notification to move the contaminated bait. This is a Virus and viruses do spread and it only takes one minnow to contaminate a body of water, so somebody gave someone bad advice and that is why I believe the documents that have not been release should be.

[82] In reply, the ministry states that:

In this instance, no evidence has been presented of any significant public or media interest in the ministry's dealing with the outbreak of the VHS virus. There have been some concerns expressed by individual baitfish operators around licenses. These concerns have been or are being addressed through the hearing process under *Fish and Wildlife Conservation Act*.²⁵ To the extent that there is interest in the Ministry's activities with respect to the outbreak of the VHS virus, that can be addressed through the aforementioned hearing process.²⁶ It is the position of the ministry that considerations set out in MO-1180²⁷ apply in that there has been an opportunity for independent review of the Ministry's actions. Therefore the weight of any public interest is lessened.

Analysis/Findings

[83] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁸ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.²⁹

²⁵ In its initial representations, the ministry stated that there are currently several *Fish and Wildlife Conservation Act* hearings ongoing related to bait harvest licence conditions stemming from the implementation of the Simcoe Management Zone.

²⁶ The *Fish and Wildlife Conservation Act* hearings relate to bait harvest licence conditions stemming from the Simcoe Management Zone implemented in response to the confirmation of VHS in fish from Lake Simcoe.

²⁷ The ministry refers to Order MO-1180 as to the lessened weight of the argument for public interest disclosure by the fact of an independent court review of the institution's decision.

²⁸ Orders P-984 and PO-2607.

²⁹ Orders P-984 and PO-2556.

[84] A public interest does not exist where the interests being advanced are essentially private in nature.³⁰ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³¹

[85] Based on my review of the records that I have found exempt by reason of sections 13 and 15(a), I find that disclosure of the exempt information does not serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³²

[86] Therefore, I find that there is not a public interest in disclosure of the information at issue. Even if I was to find that there is a public interest in the information at issue, I would not find this interest to be compelling. The word "compelling" has been defined in previous orders as "rousing strong interest or attention".³³

[87] In making this finding, I have considered that another public process or forum³⁴ has been established to address public interest considerations³⁵ and, from my review of the records, a significant amount of information has already been disclosed. I find that this is adequate to address any public interest considerations.³⁶

[88] As well, I find that the information in the records that I have found subject to sections 13 and 15 does not respond to the applicable public interest raised by appellant, which is information received directly from the Ministers office or records addressing any delay in advising the public about the outbreak of the virus.³⁷

[89] As I have found that there is not a compelling public interest in disclosure of the information at issue, there is no need for me to also consider whether this public interest clearly outweighs the purpose of the established exemptions claimed by the ministry.

[90] Accordingly, I find that the public interest override in section 23 does not apply to the information I found exempt under sections 13 and 15(a).

³⁰ Orders P-12, P-347 and P-1439.

³¹ Order MO-1564.

³² Orders P-984 and PO-2556.

³³ Order P-984.

³⁴ As stated above, there are currently several *Fish and Wildlife Conservation Act* hearings ongoing related to bait harvest licence conditions stemming from the implementation of the Simcoe Management Zone implemented in response to the confirmation of VHS in fish from Lake Simcoe.

³⁵ Orders P-123/124, P-391 and M-539.

³⁶ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

³⁷ Orders MO-1994 and PO-2607.

ORDER:

1. I uphold the ministry's decision that the information at issue in the records is exempt, except for the information that I have found not subject to the sections 13 and 15(a) exemptions.
2. I order the ministry to disclose to the appellant by **June 12, 2014** but not before **June 6, 2014** the information I have found not exempt under sections 13 and 15(a). For ease of reference, I am providing the ministry with a copy of the pages of the records highlighting the information that I have ordered to be disclosed.
3. I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant pursuant to Order provision 2.

Original Signed By: _____
Diane Smith
Adjudicator

_____ May 8, 2014