

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3437

Appeal PA13-272

Ministry of Natural Resources and Forestry

December 17, 2014

Summary: The appellant sought access to records relating to the release of a reservation respecting a cottage property covering a specified period of time. The appellant was granted access to a number of records while access to others was denied under sections 19, 21(1) and 49(b). In this decision, the ministry's decision to deny access to some of the responsive records under sections 19, 21(1) and 49(b) is upheld. The ministry's decision to deny access to other records under sections 19 and 49(b) is not upheld, however. In addition, the ministry was ordered to re-exercise its discretion to deny access to certain records under sections 19 and 49(b) and to provide the appellant with an access decision to those records, as well as certain maps found to be responsive to the request. Finally, the ministry's search was found to be reasonable and was upheld on that basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, definition of "personal information" in section 2(1), 19, 21(1), 49(b).

Orders and Investigation Reports Considered: PO-3317

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records regarding the requester and/or a specific property. The request was divided into two main sections: A) "Access to general & own personal records" and B) "Access

to Specific Records". Each of these sections contains multiple parts. The requester also defined that she is seeking access to the following specific information in relation to the items described in part A of her request:

...Access to "All records" means: all memos, notes – including handwritten notes, briefing notes and information notes, all letters, faxes, fax cover sheets, telephone messages, records of verbal transactions, records of meetings, minutes of meetings and e-mails produced and/or received by MNR.

[2] The ministry granted partial access to the responsive records, denying access to certain portions of them pursuant to sections 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*. The ministry provided the appellant with two indices of records that also identify some records as "not relevant".

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

[4] It is important to note that this appeal is the second of two involving the appellant and the ministry. The first request, covering documents maintained by the ministry during the period July 1, 2011 to July 25, 2012, resulted in appeals PA12-506 and PA12-506-2 which were resolved by Order PO-3317.¹ In that decision, I uphold the ministry's decisions to deny access to certain records or parts of records containing the personal information of individuals other than the appellant, as well as several documents that were subject to the solicitor-client privilege exemption in section 19. I also made a number of other findings with respect to issues raised by the appellant during the course of the appeal.

[5] This appeal involves a similar, broadly-worded request for records relating to the same subject matter involving the appellant's cottage property, covering the time period July 26, 2012 to the date of the request, May 3, 2013. The principals which I relied upon in making my decision in Order PO-3317, particularly those respecting the treatment of the personal information of individuals other than the appellant, continue to apply and will be relied upon again in my analysis of the issues before me in this appeal.

[6] During the course of mediation, the appellant provided the mediator with her interpretation of the issues in the appeal in a 13-page document. The mediator provided a copy of this document to the ministry.

[7] The appellant advised the mediator that she was pursuing access to the withheld records and was of the view that additional responsive records should exist. The appellant explained that there are many documents that the ministry did not produce,

¹ Issued on March 10, 2014.

including correspondence from the Minister, briefing notes to the Minister, correspondence from the Minister to the cottagers association, and summaries of the events surrounding the subject matter of the records prepared by intermediary staff within the ministry.

[8] The appellant also indicated that there are gaps in the TIFF numbers assigned to records and as such questioned the existence of additional records. For example, there are no records assigned to TIFF numbers A0196981 to A0196982 and A0196984 to A0196985. In response, the ministry explained that the TIFF numbers do not run consecutively or have gaps because all potentially responsive records are scanned into the system and are assigned TIFF numbers. The records are then reviewed for any duplicates or ones that are "not relevant" to the request and are set aside from further consideration. The appellant advised the mediator that she would like to pursue access to these records.

[9] The appellant identified pages of records that were not legible and asked that the ministry produce legible copies. The ministry advised the mediator it has already produced the most legible copies of records and that it does not have copies that are any more legible.

[10] The ministry also advised the mediator that it would not disclose any of the withheld records and that it had already conducted a comprehensive search for responsive records. The ministry confirmed that the records identified in the index of records as "not relevant" were withheld.

[11] The appellant advised the mediator that she seeks access to all of the withheld records, including those that are identified as "not relevant" except for A0196986 – page 65 which is a blank page. The appellant also confirmed that she is not pursuing access to A0196986 – page 63 which is an exact duplicate of A0196986 – page 62. Accordingly, A0196986 – pages 63 and 65 are no longer at issue in this appeal.

[12] The appellant also indicated that she wishes to examine the original copies of the records in person, rather than simply obtaining copies of them.

[13] As some of the records appeared to contain the personal information of the appellant, the mediator raised the possible application of section 49(b) of the *Act* with respect to those records. As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[14] I sought and received the representations of the ministry initially. These submissions included an affidavit sworn by a ministry employee with the ministry's Bracebridge office respecting the searches that were conducted by its staff in response to this request. A complete copy of the ministry's representations was shared with the

appellant, along with a Notice of Inquiry setting out the issues to be addressed in the appeal. Prior to the appellant providing her representations, the ministry disclosed several additional records responsive to her request. The appellant also provided me with representations in response to the Notice, setting out in great detail her responses to the representations of the ministry.

[15] As a result of this request and appeal, the appellant has been provided with a large number of records, in addition to those disclosed as a result of Appeal PA12-506-2. The information remaining at issue in this appeal consists of a very small number of records and excerpts from records which contain what the ministry argues is the personal information of individuals other than the appellant. It submits that this personal information is exempt from disclosure under either of the personal privacy exemptions in section 21(1) or 49(b). In this order, I uphold, in part, the ministry's decision in that respect. In addition, I uphold the reasonableness of the ministry's search for responsive records and dismiss that aspect of the appeal.

RECORDS:

[16] The records at issue in this appeal include the undisclosed portions of various correspondence, e-mails, forms, maps and land registry documents. The specific records remaining at issue are itemized below under each issue remaining in dispute.

ISSUES:

- A. Are the maps which comprise record A0196983 responsive to the appellant's request?
- B. Is the appellant entitled to view the original copies of the responsive records?
- C. Do the records contain "personal information" as that term is defined in section 2(1) of the *Act* and if so, to whom does it relate?
- D. Is the personal information exempt under either the mandatory personal privacy exemption in section 21(1) or the discretionary exemption in section 49(b)?
- E. Are records A0197258, A0197259 and A0197011 exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Act*?
- F. Was the ministry's search for responsive records reasonable?
- G. Did the ministry properly exercise its discretion to deny access to the undisclosed information under sections 19 and 49(b)?

DISCUSSION:

Issue A: Are the maps which comprise record A0196983 responsive to the appellant's request?

[17] In its representations, the ministry succinctly describes this record as follows:

Record A0196983 is a series of Geo Warehouse property data pages for the properties in the vicinity of requester/appellant's property. The one page identifying the appellant's property was released to her.

[18] The ministry submits that because these data pages relate to properties other than that which was owned by the appellant, they are not responsive to her request.

[19] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.² To be considered responsive to the request, records must "reasonably relate" to the request.³

[20] In my view, the records fall within the ambit of the appellant's request, which was broadly worded to include a multitude of possible records. While the appellant did not specifically identify the Geo Warehouse data pages relating to her neighbour's properties, I find that her request was sufficiently broad in scope to include such documents, which were located in the ministry's record-holdings relating to its discussions and communications with the appellant. Accordingly, I find that the maps which comprise record A0196983 are reasonably related to her request and are, therefore, responsive to her request.

[21] The ministry has not provided the appellant with an access decision claiming the application of any exemptions to these records because it took the position that they are "not relevant". I will, accordingly, order the ministry to provide the appellant with a decision letter respecting access to them.

Issue B: Is the appellant entitled to view the original copies of the responsive records?

[22] In Order PO-3317, I addressed a similar argument put forward by the appellant to view original copies of the records as follows:

The appellant also indicated to the mediator that she wished to have the opportunity to view the original versions of the responsive records in person, pursuant to section 30(2) of the *Act* which states:

Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

The ministry instead provided the appellant with copies of those records which it decided to disclose to her, in whole or in part. I find that, for those records which have been withheld, in whole or in part, because they contain exempt information, it is not reasonably practicable for the ministry to allow the appellant to view the original copies in person. To do so would result in the disclosure of information that is exempt under sections 19 or 21(1). Accordingly, I uphold the ministry's decision to deny the appellant the right to view the original, responsive records.

[23] In the present appeal, identical considerations apply as the same exemptions are being claimed for the undisclosed portions of the records. As was the case in Order PO-3317, I find that it is not reasonably practicable for the appellant to view the original copies of the records in person. As a result, I uphold the ministry's decision to deny the appellant access to the records in their original form.

Issue C: Do the records contain "personal information" as that term is defined in section 2(1) of the *Act* and if so, to whom does it relate?

[24] The ministry takes the position that the majority of the undisclosed information in the records is exempt from disclosure under section 49(b) as it contains "personal information" pertaining to identifiable individuals other than the appellant. In order to determine if the information is properly exempt under the personal privacy exemptions in the *Act*, it is necessary to decide whether it satisfies the definition of "personal information" which is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[25] 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.⁴

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

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

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

[27] 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.⁵ 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.⁶

⁴ Order 11.

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

[28] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

[29] The ministry argues that the following information from the records qualifies as "personal information" within the meaning of that term in section 2(1) of the *Act*:

records designated as TIFF AO196974, AO196975, AO196977, AO196978, AO196986, AO196987, AO196989, AO196990, AO196994, AO197000, AO197029, AO197030, AO197041 and AO197270.

[30] It takes no position with respect to Record AO197016, and I agree that it does not contain personal information for the purposes of the *Act*. I will, accordingly, order that it be disclosed to the appellant.

[31] It argues that these records, or portions of records, contain the personal information of various identifiable individuals, including their email and mailing addresses and telephone numbers (paragraph (d) of the definition) and their names, along with other personal information relating to them (paragraph (h) of the definition).

[32] The appellant does not appear to dispute that some of the records contain the personal information of some identifiable individuals. However, she takes issue with the ministry's position that two individuals whose names appears in the records in the context of acting as the volunteer president or legal counsel to a cottager's association qualifies as their "personal information". This information appears to be the sole information severed from Records AO196974, AO196975, AO196977 and AO196978, AO196986.

[33] I find that references to the home address, email address and telephone number of the president of the cottagers association refer to this individual in a personal, rather than a professional context. This individual is acting as an unpaid volunteer and is not providing professional services to the association, unlike legal counsel whose name appears in Record AO196986. This individual's name only appears in the records in the context of her retainer as counsel to the association. As this information does not qualify as counsel's personal information, I will order that it be disclosed to the appellant as it cannot be exempt under the personal privacy exemptions in the *Act*.

[34] The remaining records contain information that qualifies as the personal information of a number of individuals. This includes their home addresses, email addresses, telephone numbers (paragraph (d)) and their names along with other personal information about their experiences and relationships within their community (paragraph (h)). In addition, I find that Records AO196987, AO196989, AO196990 and AO196994 contain personal information about these individuals alone.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[35] Record AO197000 also contains a reference to about a social event attended by a ministry staff person and I find that this qualifies as the personal information of this individual.

[36] Most of the other records or parts of records which the ministry has claimed to contain "personal information" were compiled and collected in the context, first, of the appellant's release of reservation application and second, the fall-out within the cottage community once the release was finalized. As a result, I find that all of the records also contain the appellant's personal information, whether she was mentioned by name in the documents or not.

Issue D: Is the personal information exempt under either the mandatory personal privacy exemption in section 21(1) or the discretionary exemption in section 49(b)?

[37] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[38] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[39] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 21(1)(f)].

[40] If any of paragraphs (a) to (e) of section 21(1) apply, the personal privacy exemption is not available. I find that in the circumstances, only the exception in section 21(1)(f) may have any application to the records before me.

[41] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. I find that none of these are applicable in the current appeal.

Sections 21(2) and (3)

[42] 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.

[43] For records claimed to be exempt under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.⁸

[44] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.⁹

[45] For records claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁰ The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹¹

[46] Neither the appellant nor the ministry have raised the possible application of any of the presumptions in section 21(3) to the personal information contained in the records. They have also not explicitly made reference to any of the considerations listed in section 21(2) with respect to this information. The appellant's representations refer generally to the reasons why she continues to seek access to this information. I have interpreted the language she has used to refer to a desire to make government accountable and to ensure that her own rights are enforced to the greatest degree possible, thereby raising the application of sections 21(2)(a) and (d).

21(2)(a): public scrutiny

[47] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.¹²

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁹ Order P-239.

¹⁰ Order MO-2954.

¹¹ Order P-99.

¹² Order P-1134.

[48] In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.¹³

21(2)(d): fair determination of rights

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

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁴

Analysis and findings

[50] I am not satisfied that the disclosure of the remaining personal information in these records will subject the activities of the ministry to greater scrutiny, as contemplated by section 21(2)(a). The actions of government are not reflected in these documents and their disclosure will not serve to bring its actions under greater scrutiny. In addition, I find that the appellant has not established that the disclosure of the remaining personal information in the records has some bearing or significance to the determination of some right which the appellant is seeking to have enforced. Accordingly, I find that section 21(2)(d) also has no application to the personal information at issue.

[51] The appellant has provided me with submissions which indicate that she provided many of the records remaining at issue to the ministry herself. She notes that many of them contain notations in her own handwriting. Based on the submissions she has provided, I am satisfied that the appellant was the source of some of the records which the ministry claims to be exempt under section 21(1). The following represents my decision respecting access to these records, or parts of records:

¹³ Order PO-2905.

¹⁴ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

- The personal information severed from records AO196974, AO196975, AO196977 and AO196978 consists of an individual's home address, telephone numbers and email address. I find that this information qualifies for exemption under section 49(b).
- The individual's name severed from record AO196986 does not qualify as "personal information" under the definition of that term in the *Act*. As such, it cannot qualify for exemption under section 21(1) and I will order it disclosed.
- Records AO196987, AO196989, AO196990 and AO196994 are various articles and letters written by individuals relating their personal experiences at their cottages and their family ties to these properties. I find that the personal information contained in these records qualifies for exemption under section 21(1) as they do not relate to the appellant or her actions with respect to her property.
- Record AO197000 is exempt under section 21(1) as the disclosure of the personal information contained therein would give rise to an unjustified invasion of the personal privacy of the ministry employee to whom the information relates.
- I find that records AO197016, AO197029, AO197030, AO197041 and AO197270 were provided to the ministry by the appellant. I accept the appellant's evidence that she made the handwritten notes on each of them. As a result, the disclosure of the information contained in these records would not result in an unjustified invasion of personal privacy under section 49(b).

[52] By way of summary, I uphold the ministry's decision to deny access to records AO196974, AO196975, AO196977, AO196978, AO196987, AO196989, AO196990, AO196994 and AO197000 on the basis that they are exempt under section 21(1) or 49(b). I will, however, order the ministry to disclose records AO196986, AO197016, AO197029, AO197030, AO197041 and AO197270 to the appellant.

Issue E: Are records A0197258, A0197259 and A0197011 exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Act*?

[53] Section 19(a) of the *Act* states as follows:

A head may refuse to disclose a record,

that is subject to solicitor-client privilege;

[54] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[55] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[56] 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.¹⁵ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁶ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁷

[57] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁸

[58] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁹ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.²⁰

[59] The ministry submits that these three email records contain privileged communications passing between a solicitor and ministry staff regarding a legal issue. On this basis, the ministry argues that the records qualify for exemption under the solicitor client communication privilege aspect of Branch 1 of section 19.

[60] I note that in Order PO-3317, I addressed the application of section 19 to record AO197011, which was described as record 3-4 in that decision. I found that because ministry staff described in some detail the contents of the legal advice contained in this record, any privilege in it had been implicitly waived and that the exemption in section 19 did not apply. I find that the circumstances in the present appeal do not suggest any reason that my finding in Order PO-3317 respecting this same record should be different. In order to be consistent I will order that record AO197011 be disclosed, in its entirety, to the appellant.

¹⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁶ Orders PO-2441, MO-2166 and MO-1925.

¹⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

¹⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁰ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[61] Records AO197258 and AO197259 are email communications passing between a solicitor employed by the ministry and a staff person which relate directly to the giving of confidential advice about a legal subject. I find that these records are subject to solicitor-client communication privilege and are exempt from disclosure under Branch 1 of section 19. I have no evidence that the privilege in these documents has been waived or otherwise lost.

[62] In conclusion, I find that record AO197011 is not exempt under section 19 while records AO197258 and AO197259 qualify under this exemption.

Issue F: Was the ministry's search for responsive records reasonable?

[63] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.²¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[64] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²² To be responsive, a record must be "reasonably related" to the request.²³

[65] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁴ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁵

[66] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁶

[67] The main focus of the appellant's submissions appears to address her concerns that additional records beyond those identified by the ministry ought to exist. Her concerns are based primarily on certain assumptions she has made regarding the amount of time and attention the ministry has expended in responding to the issues

²¹ Orders P-85, P-221 and PO-1954-I.

²² Orders P-624 and PO-2559.

²³ Order PO-2554.

²⁴ Orders M-909, PO-2469 and PO-2592.

²⁵ Order MO-2185.

²⁶ Order MO-2246.

raised as a result of her efforts to obtain a release of the reservation on her cottage property from both the local cottagers association and herself. The fallout from the appellant's actions within the cottage community where she resided was overwhelmingly negative and resulted in requests and appeals under the *Act* by the cottagers association (PA12-499) and the appellant (PA12-506 and PA12-506-2) with the ministry and the Ministry of Government Services (PA13-275), in addition to the current appeal.

[68] The appellant provided me with extensive representations setting out what she considers to be gaps in the disclosure of records. She refers to specific email communications between and amongst ministry staff and representatives of the cottagers association which refer to attachments and other correspondence, all relating to complaints about the release of reservation process which were triggered by the appellant's legitimate application to obtain such a release. I appreciate that the appellant has taken enormous care and expended many hours to document in great detail what she feels to be the deficiencies in the manner in which the ministry conducted its searches for responsive records. Much of the appellant's submission is premised on her belief that additional records ought to exist demonstrating how the release of reservation issue relating to her property percolated through the many layers of decision making within the ministry, all the way to the Minister's office.

[69] In support of its position that the searches undertaken were reasonable in their scope, the ministry submits the following:

A search was conducted in the Minister's office, that of the Deputy Minister, the Communications Branch, the Mapping and Information Branch, the Assistant Deputy Minister, Operations Office, the Integration Branch, the Legal Services Branch, the Natural Heritage Lands & Protected Species Branch. No records were found in any of the offices. This is as expected as the records relate to a purely local issue. A search of the Area Office did uncover records.

[70] The ministry provided me with an affidavit sworn by the supervisor of the ministry employee who conducted the searches, who happened to be away on leave from her position. In the affidavit, she describes the searches undertaken by the employee and the additional efforts made after the submission of the representations to locate other records, which resulted in record AO233553 being made available to the appellant.

[71] The appellant provides evidence to substantiate her arguments that additional records responsive to her request ought to exist, particularly those relating to correspondence between the cottagers' association and various staff within the ministry, up to and including the Minister's office. The ministry has located and disclosed a number of such records which document the communications that took

place over the release of reservation question between the cottagers' association and the Minister's office. It also has provided me with representations in which it submits that searches of the Minister, Deputy Minister and Assistant Deputy Minister's offices were undertaken and that any records that were located were disclosed, in response to the request which gave rise to this appeal and that relating to Appeal PA12-506-2.

[72] Based upon the ministry's representations, I am satisfied that it conducted a thorough search of its record-holdings in a number of locations for records responsive to this request. While its searches may not have uncovered all of the documents which the appellant feels ought to have been found, I am satisfied that the searches were reasonable in their scope and addressed each aspect of the request in a comprehensive fashion. I must reiterate that the *Act* does not require the ministry to demonstrate with absolute certainty that additional records do not exist. Rather, it is required to provide evidence that the searches which it undertook for responsive records were reasonable, given all of the circumstances present. In this case, I find that the ministry has satisfied this onus.

Issue G: Did the ministry properly exercise its discretion to deny access to the undisclosed information under sections 19 and 49(b)?

General principles

[73] The section 19 and 49(b) 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.

[74] 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.

[75] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

²⁷ Order MO-1573.

Relevant considerations

[76] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁸

- 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.

²⁸ Orders P-344 and MO-1573.

The ministry's position

[77] In its representations, the ministry submits that it "attempted to balance the purpose of the exemptions at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular case." It goes on to state that:

[T]he decision involved two steps. First, the head determined whether the exemption applies. If it did, the head had regard to all relevant interests, including the public interest in disclosure, and concluded that disclosure should not be made. In this case, the interest in disclosure was of a private nature, i.e. related to the Appellant's property interests, rather than a broader public interest in holding the Ministry to greater scrutiny on public issues. To the extent possible, the Ministry severed records in order to allow for whatever public interest there was in disclosure.

Analysis and findings

[78] The ministry's representations with respect to the exercise of its discretion appear to be conflating the language used in the discussion of the application of the "public interest override" provision in section 23 with that relating to the exercise of discretion. I find that the imposition of a "public interest" component into the analysis is both unnecessary and improper. As a result, I find that the ministry has introduced and relied upon an irrelevant factor in making its decision to deny access to the records and parts of records which I have found to be exempt under sections 19 (records AO197258 and AO197259) and 49(b) (records AO196974, AO196975, AO196977 and AO196978). I will, accordingly, order it to properly exercise its discretion respecting access to these records, relying on only relevant considerations, which do not include this "public interest" aspect.

ORDER:

1. I uphold the ministry's decision to deny access to records AO196974, AO196975, AO196977, AO196978, AO196987, AO196989, AO196990, AO196994, AO197000, AO197258 and AO197259.
2. I order the ministry to provide the appellant with a decision letter pursuant to section 26 of the *Act* respecting access to the maps which comprise record AO196983, using the date of this order as the date of the request.
3. I order the ministry to re-exercise its discretion respecting access to records AO196974, AO196975, AO196977, AO196978, AO197258 and AO197259 and to provide the appellant with a decision on access under section 26 of the *Act* using the date of this order as the date of the request.

4. I order the ministry to disclose records AO196986, AO197011, AO197016, AO197029, AO197030, AO197041 and AO197270 to the appellant by providing her with copies by **January 26, 2015** but not before **January 21, 2015**.
5. I uphold the ministry's search for responsive records and find that it was reasonable in the circumstances of this appeal.

Original signed by: _____
Donald Hale
Adjudicator

_____ December 17, 2014