Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3817-I

Appeal PA13-436

Ministry of Natural Resources and Forestry

February 27, 2018

Summary: This Interim Order follows Interim Order PO-3649-I, where the adjudicator partly upheld the ministry's decision to withhold records related to the harvesting of deer in a provincial park under sections 18(1)(e) and 19. The issues to be decided are whether the affected party in this appeal, a first nation, may raise the application of the discretionary exemption in section 15 (relations with other governments) and, if so, whether section 15 applies to the records. In this order, the adjudicator allows the affected party to raise section 15 and she finds that all of the records for which it is raised qualify for exemption under section 15(a). The adjudicator finds that the public interest override does not apply to the information that is exempt under section 15(a). The adjudicator returns the matter to the ministry for an exercise of discretion under section 15(a). The adjudicator remains seized of the appeal to address the ministry's exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 15(a) and 23; Bill 127, the Stronger, Healthier Ontario Act (Budget Measures), 2017, Schedules 13 and 20.

Orders and Investigation Reports Considered: Orders PO-3649-I, PO-2897, PO-2369-F, PO-1705, P-1137 P-908; NS Report FI-5-20; BC IPC Order 01-13.

Cases Considered: *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124.

OVERVIEW:

[1] This interim order addresses the issues remaining in this appeal under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) following

Interim Order PO-3649-I.

[2] An individual submitted a request under the *Act* to the Ministry of Natural Resources and Forestry (the ministry or MNRF)[1] for access to records relating to a specific meeting between Ontario Parks and the Haudenosaunee (the First Nation),[2] including correspondence arranging the meeting, minutes and notes of the meeting, and follow-up comments.

[3] The ministry located responsive records and notified several parties whose interests could be affected by the disclosure of the records to seek their views on disclosure. After receiving a response from the First Nation, through its agency, the Haudenosaunee Wildlife and Habitat Authority (HWHA), the ministry issued a decision letter to the requester, granting access to some of the records in their entirety, and partial access to others. Portions of the records were withheld under sections 14 (law enforcement), 18 (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy). Subsequently, the ministry issued a supplementary decision letter to the requester, advising that it was withholding additional information under sections 18(1)(d) and (e) and on the basis that it was not responsive to the request.

[4] The requester appealed the ministry's decision to this office. During the mediation of the appeal, the appellant decided not to pursue access to certain information that had been withheld under sections 14, 18(1)(d) and 21(1). This removed both the information specified and those exemptions from the appeal's scope. However, the appellant continued to seek access to the information the ministry withheld under sections 18(1)(e) and 19 and maintained that there is a public interest in the disclosure of this information, thereby raising the possible application of the public interest override in section 23 of the *Act.* As the appeal could not be resolved by further mediation, it was transferred to the adjudication stage for an inquiry. During this stage of the appeal, the First Nation sought to raise the possible application of the discretionary exemption in section 15 (relations with other governments).

[5] On September 20, 2016, Adjudicator Cathy Hamilton issued Interim Order PO-3649-I, upholding the ministry's decision, in part. Adjudicator Hamilton found that section 19 applied to the records for which the exemption was claimed and she also partly upheld the application of section 18(1)(e) and the exercise of discretion under both exemptions. The adjudicator found that the public interest override did not apply. Finally, the adjudicator stated that the issues arising out of the First Nation's claim that the discretionary exemption in section 15 applies to the records would be addressed by

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[1] When this request was received, the ministry was identified as the Ministry of Natural Resources.

[2] In this order, I refer to the institution and the affected party each by several different, but interchangeable, short forms, as befits the context. The *FIPPA* institution is the MNRF, but its representatives in these negotiations were mainly from Ontario Parks. Additionally, given the specific nature of the issues before me, the term "Government of Ontario" is sometimes apt. For similar reasons, in referring to the affected party, I also use First Nation and HWHA interchangeably.

continuing the inquiry.

[6] Next, the adjudicator invited the ministry and the First Nation to provide representations on the First Nation's entitlement to raise the discretionary section 15 exemption in the circumstances of this appeal, as well as on the possible application of the exemption. The adjudicator also notified a second affected party (Aboriginal Affairs and Northern Development Canada) and invited this party to provide representations. Aboriginal Affairs and Northern Development Canada did not submit representations, but submissions were received from the First Nation and the MNRF. The First Nation's representations were subsequently shared with the ministry and both of theirs were sent to the appellant, but neither the ministry nor the appellant provided additional comments in response. At that point, the adjudicator sent the First Nation's representations to the ministry, which provided representations, after indicating that it had consulted with several other ministries whose interests might be engaged by the issues in the appeal.[3] Finally, the First Nation was offered an opportunity to provide supplementary representations if it wished, but declined.

[7] The file was then transferred to me. In this order, I find that this appeal presents one of those rare occasions where an affected party may raise a discretionary exemption, and I permit the First Nation to do so. Further, I find that section 15(a) applies to the information remaining at issue following Interim Order PO-3649-I. I conclude that the public interest override does not apply to the records in the circumstances of this appeal. Finally, I order the ministry to exercise its discretion under section 15(a), and I remain seized of the appeal to address the ministry's response.

RECORDS:

[8] In Interim Order PO-3649-I, the adjudicator found that section 18(1)(e) did not apply to the following records: pages 14-18 (duplicated at 87-91), 20-24, 30-31 (duplicated in 32-33), 34-36, 41 (in part), 44-45 (partially duplicated in 58 and 61), 60, 63-65, and 72-73. This order reviews the application of section 15 to those records.

ISSUES:

A. Should the affected party be permitted to raise the discretionary exemption in section 15?

B. Does the discretionary exemption protecting relations with other governments in section 15 apply to the records?

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[3] Including the Ministry of Indigenous Relations and Reconciliation, the Ministry of Government and Consumer Services and Ministry of the Attorney General.

C. Is there a compelling public interest in disclosure of the records that outweighs the purpose of section 15?

D. The ministry's exercise of discretion under section 15(a)

DISCUSSION:

A. Should the affected party be permitted to raise the discretionary exemption in section 15?

[9] The First Nation takes the position that the discretionary exemption in section 15, which is designed to protect the conduct of intergovernmental relations, applies to the records at issue.

[10] Some exemptions in the *Act* are mandatory; if a record qualifies for exemption under a mandatory exemption, the head of an institution "shall" refuse to disclose it. However, a discretionary exemption like section 15 uses the word "may" and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim (or not) such an exemption to support its decision to deny access to a record. The MNRF did not claim this discretionary exemption.

[11] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[4] Generally, where a third party raises the possible application of a discretionary exemption, the adjudicator must consider the situation before her in the context of the purposes of the *Act* in order to decide whether the appeal might constitute the "most unusual of circumstances." As this represents the threshold to be met for me to permit the First Nation to claim the discretionary exemption in section 15, I have considered the parties' submissions, as summarized below.

Representations

[12] The ministry refers to past IPC orders that have addressed claims of discretionary exemptions by affected parties, noting that such decisions emphasize that discretionary exemptions are there to protect institutional interests. Further, the MNRF states that from these decisions, it is clear that section 15 of the *Act* does not extend to records related to negotiations between the ministry and a first nation that did not involve the federal government.[5] The MNRF summarizes the approach of this office to affected party claims of discretionary exemptions and its view of this appeal, as follows:

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[4] Most often cited are Orders P-1137 and PO-1705. See also Orders MO-2635, MO-2792 and PO-3489.
[5] Referencing Orders P-908 and PO-2897.

> … the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions. … The affected party has not provided sufficient evidence in this case to support a finding **that compelling circumstances exist that would justify the extraordinary approach** of permitting an affected party to claim a discretionary exemption when the head has elected not to do so. [emphasis in original]

[13] The ministry indicates that as a practice, it will consider the views of an affected party that responds to notification of an access request when it makes its decision about claiming discretionary exemptions. In this situation, the First Nation made two submissions – one before and one after the initial access decision – and it considered those submissions in making its access decision. The MNRF states that while it could not apply section 15 to exempt the records, based on past decisions on the subject by this office, it instead claimed section 18(1)(e) and 19 in an effort to avoid harm to the continuing negotiations with the affected party.

[14] Over the course of the appeal, the First Nation consistently objected to disclosure of these records on the basis that it would interfere with the intergovernmental negotiation of this aspect of its treaty rights. The HWHA explains that "the deer hunt is conducted through the implementation of the treaty relationship between the Haudenosaunee and the Crown." As for why this appeal presents "the most unusual of circumstances," the HWHA argues that it is entitled to invoke the section 15 exemption because the negotiations that led to creation of the records were conducted between authorized representatives of two governments: the provincial government and the First Nation.

[15] The First Nation states that the Prime Minister of Canada "has repeatedly expressed the restoration of respectful nation to nation relationships between the Crown and Indigenous nations as one of [its] goals." The First Nation adds that there is, therefore, a degree of insult in this situation because a Crown agency appears to be taking the position that it (the First Nation) does not constitute a "government" for the purpose of Ontario's freedom of information legislation.

[16] As stated, the appellant did not submit representations on this issue.

Analysis and findings

[17] As I noted previously, the purpose of discretionary exemptions is to protect various *institutional* interests: the interests of third parties are generally considered to be accounted for by the mandatory third party and personal privacy exemptions.

[18] In appeals where a party other than the institution raises the possible application of a discretionary exemption, the adjudicator must consider the purposes of the *Act* and the circumstances in the particular appeal. For guidance, I turn to Order PO-1705,

where former Assistant Commissioner Tom Mitchinson addressed an affected party's claim that discretionary exemptions the institution had neglected to consider in making its access decision should be considered in the inquiry. The former assistant commissioner wrote:

> This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:
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> > The *Act* includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
> >
> > The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
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> > Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[19] I adopt the rationale in Orders P-1137 and PO-1705, and I have applied it to the analysis of the issue before me.

[20] In my view, this is one of those "most unusual" appeals where an affected party, the First Nation, should be permitted to raise the issue of the application of section 15 even though the MNRF has exercised its discretion to not claim it.[6]

[21] In assessing the circumstances, I am mindful of the MNRF's express acknowledgement that it did not claim section 15 in this appeal based on its view that past orders, such as Orders P-908 and PO-2897, closed the door on this exemption claim, unless the federal government was involved in the activity leading to creation of the records. As I discuss in my analysis of the application of section 15(a), however, a modification of this approach is due.

[22] I have also factored into my decision the ministry's indication that in its deliberations about claiming section 15, it examined the possible harms that disclosure may have on its own interests in negotiating the deer harvest. In other words, it appears that the ministry would have claimed section 15 for these records on its own accord, if it had concluded this exemption was available in the circumstances. Moreover, it is clear that the ministry responded to the First Nation's second set of submissions at the notification stage by changing its access decision and issuing a supplementary access decision to the appellant, withholding additional information under the discretionary exemption in section 18.

[23] The institutional interest protected by section 15 is the conduct of intergovernmental relations by the Ontario government. The exemption reflects the importance of permitting a provincial institution to protect information related to its relations with other governments from disclosure – it enables Ontario to receive useful information that it might otherwise not be able to obtain without the ability to honour expectations of confidentiality.[7] In my view, not permitting the First Nation to invoke

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[6] It may be noted that section 15 is a hybrid exemption in the sense that its secondary clause states: "… and shall not disclose any such record without the prior approval of the Executive Council." If the exemption applies, therefore, the record must not be disclosed unless Cabinet approves the disclosure. In this way, a head is not entirely free to disclose a record to which section 15 applies, despite the application of the exemption.

[7] This paraphrases a summary of the purpose of the exemption from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), pages 306 to 307 (the Williams Commission Report) contained in Final Order PO-2369-F at page 8. In that decision, after reviewing the submissions of the parties in the context of that summary of section 15's purpose, the adjudicator concluded: "All of the above suggests strongly that the scheme of the Act does not allow for a third party claim that a record is exempt under section 15. This is consistent with the approach of this office with respect to discretionary exemptions in general." However, the adjudicator observed that the records the third party sought to exempt under section 15(b) were the same as those whose disclosure they also claimed would prejudice the conduct of intergovernmental relations under section 15(a). "In

the section 15 discretionary exemption claim in the circumstances of this appeal would not serve the interests of the ministry. Therefore, I find that the circumstances of this appeal generally, and the nature of the information at issue more specifically, provide an appropriate basis upon which to allow the First Nation to raise the issue of the application of section 15 of the *Act.*

[24] I will now consider whether section 15 applies to the information remaining at issue.

B. Does the discretionary exemption protecting relations with other governments in section 15 apply to the records?

[25] Based on the arguments of the First Nation and the ministry, sections 15(a) and 15(b) of the *Act* are raised in this appeal. These exemptions in *FIPPA* provide that:

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

[26] Section 15 recognizes that the Ontario government and its institutions will create and receive records in the course of their relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.[8] Similarly, the purpose of section 15(b) is to allow the Ontario government or an institution to refuse to disclose information received in confidence from another government or its agency, thereby building the trust required to conduct affairs of mutual concern.[9]

[27] For the exemption to apply, there must be detailed and convincing evidence about the potential for harm. The risk of harm must be well beyond the merely possible or speculative although it need not be proven that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue

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essence, the interests they seek to protect through section 15(b) are not distinguishable from their interests under section 15(a)."

[8] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

[9] Order 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.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

and seriousness of the consequences.[10]

Representations

[28] On the issue of the application of section 15 of the *Act* to these records, the ministry states:

> There are provisions similar to section 15 in the freedom of information legislation in all provincial, territorial and federal jurisdictions in Canada. Canada, as well as nine provinces and territories specifically reference aboriginal governments or organizations in the provisions. … The remaining freedom of information legislation, like section 15 of *FIPPA*, does not make any specific reference to aboriginal or First Nation governments.

[29] As noted under the discussion of the first issue, above, the MNRF's representations suggest that they did not claim the exemption based on their review of past IPC decisions. The ministry submits that section 15 has been upheld in decisions only where Canada is also a party to negotiations between Ontario and a first nation,[11] "including over periods prior to Canada's active involvement in the negotiations."[12] The MNRF notes that in Order P-908, then-Commissioner Tom Wright upheld sections 15(a) and 15(b) to exempt records held by the Ontario Native Affairs Secretariat because he accepted the "need for ongoing negotiations to implement the [land claim] agreement" between Ontario and the first nation. The MNRF notes, however, that the Commissioner based his finding on a reasonable expectation of prejudice to intergovernmental relations between Ontario and Canada. The ministry also refers to the then-Commissioner's suggestion in Order P-908 that the Legislature clarify whether relations between first nations and the Ontario government are to be considered intergovernmental for the purpose of the exemption.

[30] In its representations on section 23, the ministry argues that there is a compelling public interest in non-disclosure of the records because of the greater public interest in resolving issues with first nations through negotiation and agreement. This submission speaks to the MNRF's concern about disclosure of the records, which the ministry asserts would be taken as a sign of "bad faith" by the HWHA and other first nations.

[31] The ministry points to (now) Commissioner Beamish's comment on the inclusion of "aboriginal governments" in Canada and British Columbia's access statutes in Order PO-2897, suggesting that express language in the provisions indicating the intent to

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[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] MNRF cites Orders PO-2439, P-210, P-630, P-908, P-949 and P-961.
[12] MNRF refers to Reconsideration Order R-970003.

include such governments was required. For all these reasons, the ministry says, "section 15 of the Act does not extend to, and apply to these records relating to negotiations between the ministry and the affected party that did not involve the federal government."

[32] As mentioned in the discussion above, the ministry modified its initial access decision in response to submissions received from the First Nation and it did so by issuing a supplementary decision withholding additional information under sections 18 and 19.

[33] The First Nation states that the deer harvest that forms the subject matter of the request in this appeal takes place in the context of fulfilling the Crown's commitments in the 1701 Albany Treaty. The First Nation submits that the negotiations leading to the protocol for the harvest are themselves protected by the terms of the Treaty. The First Nation explains that "treaty rights in Canada, are in turn recognized and affirmed by section 35(1) of the Constitution Act, 1982, as part of the supreme law of the country," adding that the honour of the Crown is engaged in the implementation of treaty relations.

[34] The First Nation elaborates on its laws, governance and relations with the Crown to provide context for its position that it is a government for the purposes of *FIPPA.*[13] The First Nation states that it has long conducted its affairs and maintained relationships – both Indigenous and international – on a nation-to-nation basis. The First Nation explains that:

> [T]he Haudenosaunee Confederacy Council is the traditional government of the Haudenosaunee or Iroquois Confederacy. The Council was created through the *Kaianerenkó:wa*, the Great Law of Peace, the Constitution of the Haudenosaunee. That complex law is at least six centuries old. Its provisions are said to have inspired aspects of both the French Revolution and the United States Constitution. The legislative branch of the government created by that law is the Grand Council. The people of the fifteen Haudenosaunee communities recognize their government and obey its laws.
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> The Haudenosaunee have treaties with the Crown dating back as far as 1664, and a political relationship known as the Covenant Chain, created in 1677 and renewed many times since in formal councils, that meets the definition in Canadian law of a "treaty." The Confederacy Council makes laws which the Haudenosaunee people obey. It maintains relations with other nations, both Indigenous and international. It participates in United

[13] In addition to the representations submitted by the HWHA during the inquiry into these supplementary issues following Interim Order PO-3649-I, I have also considered the representations submitted by the HWHA during the initial stage of the inquiry into the appeal.

> Nations processes, and was instrumental in the negotiation of the United Nations Declaration of the Rights of Indigenous Peoples.
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> The Haudenosaunee Wildlife and Habitat Authority was created by the Haudenosaunee Confederacy Council to assist in dealing with matters of harvesting and ecological protection.

[35] Regarding the Haudenosaunee Wildlife and Habitat Authority, the First Nation indicates that the HWHA was given specific direction from the Confederacy Council to implement Treaty hunting provisions through agreements with other governments. As a branch of an Indigenous government, the HWHA is the counterpart of Ontario Parks (and the MNRF) because the negotiations are conducted between officials of two distinct governments. Additionally, the First Nation submits that negotiations between the HWHA and the MNRF have focused on how the harvest can be carried out safely, securely and consistent with conservation objectives. According to the First Nation, it explains these matters in detail "because it has consistently been our view that the negotiations between the [HWHA] and the Government of Ontario are 'intergovernmental negotiations'."

[36] In accordance with its view that the deer harvest negotiations between the HWHA and the MNRF are "intergovernmental negotiations," the First Nation argues that where such negotiations are conducted in confidence, the records of those negotiations are exempt. The First Nation submits that this is particularly important where their disclosure could harm the negotiations, as has happened previously. Elaborating on this concern, the First Nation submits that past disclosure of information about these confidential negotiations to individuals "whose activities and goals are clearly inimical to the agreements that have been made, and their orderly implementation" have injured the relationship and made future negotiations more difficult. Specifically concerning to the HWHA about the perceived lack of confidentiality for the negotiations is that a disinclination to document meetings, share draft versions of the protocol or communicate in writing between meetings has resulted. The First Nation identifies these results as symptoms of distrust, which hamper and delay progress and increase tension between the parties.

[37] Additionally, the First Nation alleges that the lack of confidentiality and previous disclosures have not only bolstered campaigns against the harvest, but have led to interference with the safe conduct of the deer harvest.[14] The First Nation submits that the negotiations have been complex and that the harm alleged here is to "ongoing, real negotiations" because of the need to coordinate and modify arrangements for the harvest every year.[15]

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[14] The HWHA provides examples of disruptions it connects to the release of specific records in the past.
[15] The HWHA's August 2014 representations identify the various actors involved and elaborate upon the issues and considerations making the negotiations "complex."

[38] The appellant did not submit representations on section 15 at this stage of the inquiry into the appeal.

Analysis and findings

[39] To qualify for exemption under section 15(a), the evidence must establish that each record relates to intergovernmental relations and that its disclosure could reasonably be expected to prejudice the conduct of intergovernmental relationships.[16] For the reasons that follow, I find that section 15(a) applies.

Part 1 – relate to intergovernmental relations

[40] In order to meet part one of the test, the records must relate to intergovernmental relations.

[41] The term "intergovernmental relations" has been described as "relations between an institution and another government or its agencies." To begin, I accept that the Haudenosaunee Wildlife and Habitat Authority is an agency of the First Nation. I am also satisfied that HWHA is capable of conducting negotiations on behalf of the First Nation as contemplated by this exemption. Without more, however, this finding alone does not qualify the First Nation as "another government" for the purpose of section 15. This is particularly the case when viewed through the lens of past decisions of this office, which tended to feature a "work-around" to the lack of express recognition of first nations in the existing provision in the form of finding that the requirements of the exemption were met when the federal government was involved. For the reasons discussed below, I conclude that the question of whether the First Nation qualifies as "another government" for the purpose of section 15 must now be answered in the affirmative.

[42] To begin, I must acknowledge that legislative change is on the way. As the ministry observed in its representations, the access to information legislation of nearly every other jurisdiction in Canada includes first nations as "other governments" in the provisions protecting intergovernmental relations.[17] After the representations on this issue were submitted, the Ontario government passed Bill 127, part of which provided for the inclusion and recognition of first nations as governments for the purposes of *FIPPA*.[18] Chapter V of the 2017 Ontario Budget (*Working with Our Partners*) states, in part:

> Protecting Sensitive and Confidential Information: Indigenous communities often share sensitive information with the Province and municipalities for a variety of reasons, such as facilitating resource

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[16] Reconsideration Order R-970003.
[17] The exceptions are Quebec, Saskatchewan and PEI.
[18] 2017 Ontario Budget: A Stronger, Healthier Ontario.

> management discussions, designing consultation processes, and negotiating land claim settlements and other agreements. To protect this information, the Province is proposing legislative amendments to the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.
>
> Amendments to these Acts would enable Provincial and municipal institutions to protect from disclosure information received in confidence from Indigenous communities, or information reasonably expected to prejudice the conduct of relations between institutions and Indigenous communities. These changes are an important step toward facilitating open discussions that will strengthen relationships while enhancing Provincial and municipal efforts to engage with Indigenous communities as full partners.[19]

[43] The amendments to *FIPPA* that create the new discretionary section 15.1 exemption reveal language that mirrors the current section 15. Under the new exemption, records created in the course of working relations between parties like the First Nation and the MNRF in this appeal will be offered protection from disclosure if certain conditions are met. Specifically, the new section 15.1(1) will state that:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or
> >
> > (b) reveal information received in confidence from an Aboriginal community by an institution.[20]

[44] As of the date of this order, the new section 15.1 has not been proclaimed and is not yet in force. However, these amendments clearly stand as the legislative recognition that relations between first nations and the provincial government are to be considered "intergovernmental" for the purposes of *FIPPA* and *MFIPPA.* On the passing of Bill 127, Commissioner Brian Beamish stated: "The amendments recognize the important status of our Aboriginal communities and provide them with the same rights as other governments under these acts."

[45] Notwithstanding the imminent statutory confirmation that first nation

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[19] https://www.fin.gov.on.ca/en/budget/ontariobudgets/2017/ch5.html#ch53. See Chapter V, Item 3, "Partnerships with Indigenous Communities."

[20] Bill 127 received Royal Assent on May 17, 2017. Schedule 13 of the bill amends *FIPPA* (with similar amendments to section 9 of *MFIPPA* in Schedule 20) by creating section 15.1. Subsection (2), not set out above, defines "Aboriginal community."

communities are to be considered "governments" under *FIPPA* and *MFIPPA*, however, this request and appeal proceeded under the *Act* as it existed prior to the introduction of Bill 127. Therefore, I am required to make a finding on whether the First Nation is a "government" under the current section 15.

[46] In Order PO-2897, as noted previously, then-Assistant Commissioner Brian Beamish concluded it was unnecessary to decide "whether or not a First Nations group is a 'government' for the purposes of section 15(a)" because his finding in that decision rested on another basis. In declining to find the first nation to be a "government" for the purpose of section 15, the Assistant Commissioner relied on *Chippewas of Nawash First Nation*,[21] where Justice Rothstein indicated that such a finding would "require an analysis of significant and relevant evidence," which he concluded had not been presented in that case. In this appeal, I find there to be sufficient relevant evidence available to make such a finding.

[47] It is clear from the First Nation's representations that it has long identified as a government and has conducted its affairs as such. It is true that the First Nation does not qualify as a "government" under the *Act* merely because it self-identifies as one. In my view, however, that perspective and the extensive, well-articulated submissions accompanying it that describe the First Nation's local, provincial, federal and international relationships and activities are factors that support a finding that the First Nation is a government for the purpose of section 15 of *FIPPA*.

[48] In suggesting an interpretation of section 15 that would effectively "read in" first nations to section 15, the First Nation alludes to the historic, long-standing existence of Indigenous governments, which "existed long before Ontario was anything but a Mohawk word for a beautiful lake," and their inherent (not merely delegated or legislated) rights to make and administer laws. The Haudenosaunee communities that make up the Confederacy have governing powers, elected councils, land use authority, and certain other bylaw powers.[22] However, it is also clear that the First Nation considers itself, and is, a self-governing community. Further, online federal government sources refer to the "federally recognized elected Chief and Council of Six Nations of the Grand River" as the appropriate contact for consultations with the Haudenosaunee.[23] In confirming the proper contact for consultation elsewhere in this same federal database,[24] one sees the following statement:

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[21] [1999] F.C.J. No. 1822.
[22] Under the *Indian Act*, R.S.C., 1985, c. I-5. The imposition of the *Indian Act* on their communities is a matter of contention.
[23] http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/AboriginalCommunityView.aspx
[24] "ATRIS (version 2.8.5 accessed) is a Web-based information system intended to map out the location of Aboriginal communities and display information pertaining to their potential or established Aboriginal or treaty rights."

> The Haudenosaunee Grand Council of Chiefs is considered to be the traditional central government of the Iroquois Confederacy. They are active on issues surrounding land development, the management of wildlife resources and the environment, as well as the retrieval of sacred objects within their asserted traditional lands in southern Ontario.[25]

[49] In my view, this reference to "traditional central government" further supports the strongly-held and substantiated view of the First Nation that it should be acknowledged as a "government" under the *Act*, as it is in so many other contexts.

[50] In this appeal, I accept that the ongoing negotiations about the deer harvest occur in the context of the Ontario government's recognition of the treaty hunting rights of the First Nation affirmed by the terms of the Albany Treaty of 1701. I also accept that the negotiators for each party – the Ontario Parks staff and HWHA – are authorized by each of their respective governments to reach agreement on the terms of the deer harvest, even if final approval rests with senior officials at the MNRF for the Government of Ontario and with the Council of the First Nation.

[51] The MNRF is clearly an institution for the purpose of section 15(a). The evidence also satisfies me that the First Nation is a government under section 15 of *FIPPA*. As a consequence, I am satisfied that the relationship between the MNRF and the First Nation for negotiating the deer harvest are relations between an institution and another government or its agencies. Finally, I am also satisfied that the particular records about the negotiations at issue here "relate to intergovernmental relations." Therefore, I find that part 1 of the test under section 15(a) is met.

Part 2 – could disclosure of the records reasonably be expected to prejudice the conduct of intergovernmental relations

[52] As identified above, in order for the section 15(a) exemption to apply, there must be detailed and convincing evidence about the potential for harm. The risk of harm must be well beyond the merely possible or speculative although it need not be proven that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [26]

[53] I found it helpful to review the characterization of the records at issue before me that is contained in Adjudicator Hamilton's reasons for finding that section 18(1)(e) did not apply to them. At paragraph 23 of Interim Order PO-3649-I, the adjudicator stated:

> In this appeal, based on my review of the records, I find that section 18(1)(e) does not apply to most of the information for which this

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[25] http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/ConsultationView.aspx

[26] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

> exemption was claimed. The majority of the information consists of email communications, correspondence and notes of meetings between the ministry and the affected party, **setting out opinions regarding past negotiations, as well as each of the parties' positions, responsibilities and actions to be taken as negotiated between them.** Other records document the results of the negotiations, in the form of various agreements, whether they be in final or in draft form. In my view, this information does not contain *positions, plans, procedures, criteria or instructions* for the purpose of section 18(1)(e). The withheld information does not contain a *pre-determined course of action* the ministry had decided to take. Instead, **the information relates to the development of an actual course of action that was negotiated between the ministry and the affected party, in which the affected party was privy to these communications.** The records essentially document the give and take of the negotiation process, rather than set out positions, plans, procedures, criteria or instructions to be applied to those negotiations [bold emphasis added]

[54] The only modification to this description is the observation that the ministry refers to *draft* agreements in its representations, not final. Based on my review of the records, I agree. The protocol for the deer harvest at pages 14-18 (duplicated at page 87-91) is not a final version negotiated between the HWHA and the ministry: rather, it represents the HWHA's own "final version" of the protocol for January 2013 harvest, as communicated to the ministry. The distinction is important in this context because past orders have held that section 15(a) cannot apply to publicly available records.[27] While there is no evidence before me that a final version of the agreement between the HWHA and the MNRF is public, I note that certain agreements between the HWHA and the Hamilton Conservation Authority are publicly available. I acknowledge this fact to address any possible uncertainty about the draft nature of the protocol at issue in this specific appeal. The records before me are otherwise as described in Interim Order PO-3649-I.

[55] In considering whether disclosure of the records of the negotiations could reasonably be expected to prejudice the conduct of intergovernmental relations, as part 2 of the test requires, decisions from other Canadian tribunals and courts regarding their own provisions that include "aboriginal communities" have been helpful. In *Chesal v. Attorney General of Nova Scotia,*[28] where records related to aboriginal policing initiatives in the province were at issue, Madame Justice Nancy Bateman of the Nova Scotia Court of Appeal observed (at paragraphs 62 and 63) that:

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[27] See Orders PO-1891-I, PO-2666 and PO-2897.
[28] 2003 NSCA 124 at paragraphs 62 and 63.

> … the FOIPOP Act does not contain a class exemption from disclosure for information passing between the aboriginal and provincial government. The information must be brought within the s. 12 exemption. …
>
> … [W]hile I accept that the importance of the promotion of aboriginal self government is a significant aspect of the context within which the statute must be interpreted and in which the expectation of harm must be assessed, the evidence, interpreted in that context, must nonetheless establish the factual basis for the exemption.

[56] The Nova Scotia Court of Appeal upheld the lower court's decision ordering disclosure because the exemption did not apply.[29] In that case, however, there was no evidence that negotiations about the aboriginal policing initiative were continuing, nor that disclosure of the particular records at issue could reasonably be expected to result in harm to the relations between the affected first nations communities and the provincial government. It was not sufficient that the one first nation that had responded to notification about the request baldly stated that it objected to disclosure. As former BC Commissioner David Loukidelis noted in BC Order 01-13 (Ministry of Environment, Lands and Parks),[30] the exemption "is not triggered simply because confidentiality is agreed upon in relation to a matter and the disclosing government or organization *might be upset by disclosure* (emphasis added)."

[57] Equally, however, "the Courts, and other ruling bodies, attach considerable importance to the need for sensitivity in dealing with First Nation negotiations."[31] I acknowledge this important context. The harm that I am considering, therefore, is the possible harm to the relations between the MNRF and the First Nation and the consequent harmful impact on negotiations. Significantly, I find that the evidence in this appeal establishes there is a need for specific and ongoing negotiations in respect of the deer harvest, a traditional activity that is recognized as an Aboriginal or treaty right.

[58] The MNRF is engaged with the HWHA in negotiations regarding the terms of an agreement and the protocol for the deer harvest, terms that are mutually beneficial for each party, as well as the park ecosystem. I accept that the HWHA is particularly concerned about the perceived lack of confidentiality to the negotiations and the uncertainty about disclosure, which diminishes the willingness to communicate in writing about matters related to the deer harvest negotiations. I accept that this disinclination to document and share drafts in the development of the agreements between the MNRF and the First Nation on this issue is a symptom of distrust and, further, that it has led to heightened tensions between the parties.

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[29] The Nova Scotia Supreme Court was hearing an appeal by the requester of the Department of Justice's decision not to implement the recommendation of the FOIPOP Review Officer to reverse its decision to refuse disclosure. The Justice Department's FOIPOP Coordinator had declined.
[30] Ministry of Environment, Lands and Parks, Re, 2001 CanLII 21567 (BC IPC).
[31] NS Report FI-5-20, Nova Scotia (Office of Aboriginal Affairs), Re, 2005 CanLII 23674 (NS FOIPOP).

[59] In my view, all of the concerns that I accept, above, can reasonably be expected to create a climate that discourages, rather than fosters, open discussion; this could be expected to inhibit, rather than facilitate, productive negotiations. In turn, this could reasonably be expected to weaken intergovernmental relations between the MNRF and the First Nation, generally – relations that must be strong enough for the government to meet its many obligations, including when collaboration is necessary for resource management, as it is here.[32]

[60] I accept the evidence of the ministry and the First Nation that disclosure of the records related to the negotiation of this deer harvesting agreement by the ministry would not only be taken as a sign of "bad faith" by the First Nation, but also by other first nations with whom the provincial government continues to negotiate. Therefore, I am satisfied by the evidence in this appeal, first, that disclosure of the records at issue could reasonably be expected to prejudice ongoing negotiations between the MNRF and the First Nation for the deer harvest, in particular; and, second, that disclosure may undermine the conduct of intergovernmental relations in general, because of a diminished willingness to share information in other contexts.[33]

[61] I find the evidence of this harm to be detailed, convincing and well beyond the merely possible or speculative. Since the appellant did not submit representations on this issue, there is no evidence to rebut the positions taken by the MNRF and the First Nation that disclosing these records could reasonably be expected to prejudice the conduct of intergovernmental relations by the Ontario government for the purpose of section 15(a). I accept, in particular, that the consequences of the disclosure could be significant and serious. In this way, I find that part 2 of the test under section 15(a) is met.

[62] Since both parts of the test under section 15(a) have been met in respect of the records remaining at issue, I find that the records are exempt on this basis. Consequently, it is not necessary for me to review whether section 15(b) may also apply to the records.

C. Is there a compelling public interest in disclosure of the records that outweighs the purpose of section 15?

[63] No representations were sought at the supplementary inquiry stage on the issue of whether the public interest override in section 23 might override the section 15 exemption, if it were found to apply. I will briefly review the matter to explain why I would conclude that it does not.

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[32] Indeed, when Bill 127 was introduced, the government stated that the express inclusion of a discretionary exemption for relations with first nation communities in the *Act* was an "… important step toward facilitating open discussions that will strengthen relationships while enhancing Provincial and municipal efforts to engage with Indigenous communities as full partners."
[33] Order PO-2369-F.

[64] Section 23 of *FIPPA* 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.

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

[66] 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.[34]

[67] To establish the first requirement of section 23, the evidence must show that there is a "compelling public interest in disclosure." The word "compelling" means "rousing strong interest or attention."[35] The appellant was invited, along with the other parties, to provide representations at this stage about whether the First Nation was entitled to raise section 15 and, if so, whether the exemption applied.

[68] Adjudicator Hamilton considered the appellant's initial submissions on the public interest in disclosure in Interim Order PO-3649-I.[36] The appellant had argued that there were public safety concerns with the deer harvest and that because of this, the records could pertain to public safety matters that she ought to be able to share with the public. The appellant's concerns about the harvest focussed on its (lack of) necessity and public safety issues she identified with security, signage, boundaries and control of participants.

[69] The MNRF's position has been that there is a compelling public interest in *non*-disclosure of the records due to the stronger public interest in the resolution of issues around first nation hunting through the negotiation of agreements. The MNRF's concern was that releasing records related to these negotiations would be taken as a sign of "bad faith" not only by the HWHA, but also by other first nations with whom the ministry is engaged in negotiations. The ministry's view in this regard is confirmed by the First Nation's position that while the public has an interest in knowing what rules govern the deer harvest in the provincial park, the interest does not extend to the records that document the negotiations between governments that led to establishing

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[34] Order P-244.
[35] Order P-984.
[36] See paragraph 48.

the harvest protocol.

[70] With consideration of the records that qualify for exemption under section 15(a), I conclude that any public interest in their disclosure to scrutinize the ministry's involvement in negotiating the deer harvest is not sufficiently compelling to outweigh the importance of protecting the ministry's interest in conducting intergovernmental relations with the First Nation. It is also my view that disclosure of these records about the negotiations between the ministry and the First Nation would not add materially to the debate about the public safety issues identified by the appellant.

[71] As there is no compelling public interest in disclosure of the records that I found to be exempt under section 15(a), I find that section 23 does not apply.

D. The ministry's exercise of discretion under section 15(a)

[72] There remains an outstanding matter with the exercise of discretion under section 15(a) in light of my conclusion that the records at issue qualify for exemption from disclosure on that basis. In the usual course, after making a finding that a discretionary exemption applies, the adjudicator must then determine whether the institution exercised its discretion under the particular exemption and, if so, whether that exercise of discretion should be upheld.

[73] In this appeal, it is clear that the MNRF did not exercise its discretion under section 15(a) because it had concluded that it could not claim the exemption. There may be parallels between the reasons given by the MNRF for its exercise of discretion under section 1837 and reasons for an exercise of discretion under section 15(a) that could be inferred from the available evidence. However, the reality is that there is no direct evidence of the exercise of discretion under section 15(a) by the ministry before me. Section 54(2) of the Act precludes me from substituting my own discretion for that of the institution. Similarly, in my view, I am also precluded from inferring evidence of an exercise of discretion that the ministry simply did not make under section 15(a).

[74] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[38] Since I have permitted section 15 to be raised by the First Nation, and I have found that section 15(a) applies and that the public interest override in section 23 does not, I will send this matter back to the MNRF to exercise its discretion under section 15(a) for the purpose of making a decision whether or not to withhold the undisclosed records.

[75] Upon exercising its discretion, the ministry is asked to provide me with representations explaining how it has exercised its discretion under section 15(a). The representations should identify what considerations the ministry decided were relevant

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[37] As reviewed, and upheld, in Interim Order PO-3649-I.
[38] Interim Order MO-1287-I.

under section 15(a) in the circumstances of this appeal. Relevant considerations may be those listed below, but may also include additional unlisted considerations:[39]

- 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 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.

[76] Once I receive the ministry's representations explaining its exercise of discretion under section 15(a), I will be in a position to conclude this appeal.

ORDER:

1. I order the MNRF to exercise its discretion under section 15(a) of the *Act* with respect to pages 14-18 (duplicated at 87-91), 20-24, 30-31 (duplicated in 32-33), 34-36, 41 (in part), 44-45 (partially duplicated in 58 and 61), 60, 63-65, and 72-73, which I have found to qualify for exemption under section 15(a) in this Interim Order.

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[39] Orders P-344 and MO-1573.

2. I order the ministry to provide me with representations on its exercise of discretion under section 15(a) by **March 27, 2018**.

3. I may share the MNRF's representations with the other parties to this appeal unless they meet the confidentiality criteria identified in IPC *Practice Direction 7*. If the ministry believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.

4. I remain seized of this appeal to address any issues related to the ministry's exercise of discretion under section 15(a).

Original Signed by: February 27, 2018

Daphne Loukidelis
Adjudicator