Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3841

Appeal PA16-128

Ministry of Natural Resources and Forestry

May 16, 2018

Summary: The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a proposed Hydro-electric Generating Station. The ministry decided to disclose all of the responsive records in full.

The third party appealed this decision and relied on the mandatory third party information exemption in section 17(1) and the mandatory personal privacy exemption in section 21(1). It also sought to raise the application of the discretionary exemptions in sections 16 (prejudice defence of Canada), 18(1) (economic and other interests), 19 (solicitor-client privilege), and 20 (danger to safety or health). In response, the requester raised the application of the public interest override in section 23 of the *Act*.

In this order, the adjudicator orders disclosure of all of the records at issue. In particular, she does not find that section 21(1) applies, as the records do not contain personal information. She also does not allow the appellant to raise the application of the discretionary exemptions. She finds that the mandatory exemption in section 17(1) applies to five records and applies the public interest override in section 23 to order these records disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 17(1)(a), 16, 18(1), 19, 20, and 23.

Orders Considered: Orders MO-2635, PO-3512, P-257, P-777, PO-3032, PO-3158, and PO-3601.

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the MNRF or the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for:

> All records relating to the proposed Hydro-electric Generating Station at the [name] Falls.

[2] The ministry identified responsive records relating to the request. Before releasing the records to the requester, the ministry notified a third party to obtain its view regarding disclosure of the records.

[3] The third party provided the ministry with submissions stating that its position is that the information should not be disclosed.

[4] After considering the representations from the third party, the ministry issued a decision granting full access to the records subject to the third party notification.

[5] The third party, now the appellant, appealed the decision of the ministry.

[6] During mediation, the ministry notified the appellant of additional records responsive to the request and solicited its views on the release of the records. After reviewing the appellant's submissions, the ministry issued a decision to disclose those records in full. The appellant appealed the ministry's decision, and those records were added to the records at issue in the appeal.

[7] During the course of mediation, the appellant consented to the release of 53 pages of records at issue. As such, those records were removed from the records at issue in the appeal.

[8] The appellant claimed that the mandatory exemptions at sections 17(1) (third party information), and 21(1) (personal privacy) and the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* apply to the remaining records at issue.

[9] The requester advised that he is not interested in the records identified by the ministry as duplicate records, therefore, any duplicate records were removed from the scope of this appeal.[1]

[10] The requester also raised the possible application of the public interest override in section 23 to the records at issue.

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[1] The appellant provided a list of duplicate records in its submissions. As well, As Record 24 is a duplicate of Record 23, and Record 25 is contained in Record 47, I have also removed these duplicate records, Records 24 and 25, from this appeal.

[11] No further issues were resolved at mediation, and this appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[12] I sought the representations of the parties in accordance with the IPC's *Practice Direction 7* and section 7 of the *Code of Procedure*.

[13] In its representations, the appellant agreed to the disclosure of additional records or portions of records. As a result, the ministry then issued a supplementary decision letter to the requester enclosing a copy of this additional information that the appellant had agreed to the disclosure of.

[14] Furthermore, the appellant in its representations raised the application of additional discretionary exemptions in sections 16, 18, and 20. I sought representations on these additional exemptions, along with the discretionary exemption in section 19. I also asked the parties to provide representations on whether this case qualifies as a rare exception to the general presumption that affected parties are not entitled to raise the possible application of discretionary exemptions to the records.

[15] Representations were received from all parties and were exchanged between them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.[2]

[16] In this order, I find that section 21(1) does not apply as the records do not contain personal information. I do not allow the appellant to raise the application of the discretionary exemptions. I find that the mandatory exemption in section 17(1) applies to five records and apply the public interest override in section 23 to order these records disclosed. Accordingly, all of the records at issue are ordered disclosed.

RECORDS:

[17] The records relate to the proposed development by the appellant of a hydro-electric generating station (the project) on Crown land that is adjacent to a ministry-owned dam and consist of emails, drawings, letters and maps.

[18] Remaining at issue is information contained in the following:

RECORD	**TIFF#**[3]	**PAGES**	**Exemptions**	**Part/entire**
1	A0262985	10693	21(1)	part
		10694-10695	17(1), 18(1), 19, 21(1)	entire

[2] The parties provided representations that contain both confidential and non-confidential portions.
[3] Tagged Image File Format number.

2	A0262985	10700	16, 17(1), 18(1), 20	entire
3	A0262985	10701-10706	16, 17(1), 18(1), 20, 21(1)	entire
4	A0262988	10709-10710	21(1)	part
	A0263076	10737-10740	17(1), 18(1), 19, 21(1)	entire
5	A0263074	10741-10744	17(1), 18(1), 19, 21(1)	entire
6	A0261047	8834	16, 17(1), 20, 21(1)	entire
		8845, 8847-8848	16, 18(1), 20	part
		8868	21(1)	part
7	A0261902	9826	16, 17(1), 20, 21(1)	entire
8	A0261905	9827	16, 17(1), 20, 21(1)	entire
9	A0261938	9893	16, 17(1), 20, 21(1)	entire
10	A0263676	1897	16, 17(1), 20, 21(1)	entire
11	A0261269	0461	16, 17(1), 20, 21(1)	entire
12	A0263576	5917	21(1)	part
		5918	16, 17(1), 20, 21(1)	entire
14	A0263850	6965	21(1)	part
		6966	16, 17(1), 20	entire
15	A0263852	6967	21(1)	part
		6968	16, 17(1), 20	entire
16	A0264118	7406	21(1)	part
		7407	16, 17(1), 20	entire

19	A0261196	8952-8955	16, 17(1), 18(1), 19, 20, 21(1)	part
20	A0261240	0436-0437	17(1), 21(1)	entire
21	A0262193	10474-10475	16, 18(1), 20	part
		10476-10489	16, 17(1), 18(1), 19, 20, 21(1)	part
		104790	21(1)	part
		10491-10497	16, 17(1), 18(1), 19, 20	entire
22	A0263574	5909-5911	17(1), 18(1), 21(1)	part
23	A0263582	11815-11816	17(1), 21(1)	part
28	A0264429	11844-11846	17(1), 21(1)	part
29	A0263643	6145	21(1)	part
		6146-6147	17(1)	part
30	A0263767	11987	17(1), 19, 21(1)	part
32	A0263858	6970	17(1), 18(1), 19, 21(1)	entire
33	A0263860	6971	17(1), 18(1), 19, 21(1)	entire
36	A0263907	12126	17(1), 19, 21(1)	part
37	A0263908	12129-12130	17(1), 19, 21(1)	entire
40	A0263980	7161	17(1), 19, 21(1)	entire
41	A0264282	12313	17(1), 21(1)	part
		12314	21(1)	part
43	A0264344	12351-12352	17(1), 21(1)	part

45	A0264373	8061-8062	17(1), 21(1)	part
47	A0263670	6636	17(1), 21(1)	part
		6637	21(1)	part
50	A0264429	8125-8126	17(1), 21(1)	entire
52	A0264436	8144-8146	17(1), 18(1), 21(1)	part
53	A0264436	8147-8148	17(1), 21(1)	part

ISSUES:

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

B. Does the mandatory third party information exemption at section 17(1) apply to the records?

C. Should the appellant be allowed to raise the application of the discretionary exemptions in sections 16, 18(1), and 20?

D. Should the appellant be allowed to raise the application of the discretionary exemption in section 19? If so, does section 19 apply to the records at issue?

E. Is there a compelling public interest in disclosure of Records 1, 3 to 5, and 19 that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

BACKGROUND

[19] By way of background, the appellant states that it made an application for and was accepted into Ontario's Feed-In-Tariff (FIT) Program, which is a program that facilitates the increased development of renewable energy generating facilities using a standardized, open and fair process.

[20] The appellant states that the project embodies in part the realization of Ontario's objectives in fostering the growth of renewable energy projects, removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.

[21] The ministry states that the records relate to the proposed construction of a hydro-electric generating station on Crown land that is adjacent to a ministry owned dam.

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

[22] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

[23] 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]

[24] Sections (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.

[25] 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]

[26] 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]

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

[28] The appellant states that the records contain personal information as they contain certain identifiable individuals' names, opinions or correspondence in accordance with paragraphs (e) to (h) of the definition of personal information in section 2(1).

[29] The appellant submits that although the information relates to these individuals in a professional or business capacity under section 2(3) of the *Act*, it qualifies as personal information because it reveals something of a personal nature about them and further, because it is reasonable to expect that they may be identified if the information is disclosed.

Analysis/Findings

[30] The appellant has provided me highlighted copies of all of the records,

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

identifying in green where it submits personal information of identifiable individuals is located. Records 2 and 7 to 11 and the information at issue in Record 6 (except for page 8868), which are technical drawings and a chart, do not contain any green highlights, nor can I ascertain wherein any personal information is located.

[31] Similarly, Record 53 is an email chain, and the appellant has not highlighted any personal information on this record, nor can I ascertain the same from my review of this record.

[32] From my review of the appellant's representations and the remaining records or portions of records at issue, it is very clear to me that the individuals mentioned in these records are mentioned therein in their business capacity. In fact, the appellant even lists their business titles in its confidential representations, and the business titles are also referred to in the records. I also find that the records do not reveal anything of a personal nature about these individuals.

[33] Therefore, I find that the records do not contain personal information. Accordingly, the personal privacy exemption in section 21(1) cannot apply to the information that the appellant has claimed is subject to section 21(1).

[34] As only the exemption in section 21(1) has been claimed for pages 10693, 10709-1071, 8868, 5917, 6965, 6967, 7406, 104790, 6145, 12314, 6637, these pages are no longer at issue and will be ordered disclosed.

[35] As the appellant has claimed other exemptions for the remaining pages of the records that it has submitted also contain personal information, I will consider these exemptions below.

B Does the mandatory third party information exemption at section 17(1) apply to the records?

[36] The appellant relies on sections 17(1)(a) and (c), which read:

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

[37] The appellant claims that these sections applies to parts or all of the records at

issue.

[38] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[8] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[9]

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

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

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

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

Part 1: type of information

[40] The appellant states that all of the records contain at least one of the following:

- scientific or technical drawings;

- detailed scientific or technical information related to the construction of the project;

- detailed scientific or technical specifications related to the operation of the project;

- detailed scientific or technical information related to species protection near the project construction site; and/or

- detailed financial or commercial information related to the operation of the appellant and/or the project.

[41] The ministry did not address the first part of the test.

[42] The requester disputes that the records contain scientific information as the

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

appellant is designing the project and this would be applying engineering knowledge and principles, not testing and hypothesis. He states that the appellant does not have any scientists on staff, and the companies they have contracts with are engineering companies, not scientific companies.

Analysis/Findings re: part 1

[43] The types of information referred to by the appellant as listed in section 17(1) have been discussed in prior orders:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[10]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[11]
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> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[12] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[13]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[14]

[44] I disagree with the appellant's submission that the information at issue in Records 33 and 47 is scientific and/or technical information. I find that part 1 of the test under section 17(1) has not been met for these two records.

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[10] Order PO-2010.
[11] Order PO-2010.
[12] Order PO-2010.
[13] Order P-1621.
[14] Order PO-2010.

[45] Record 33 is a short email from the appellant to the MNRF asking for a copy of a document and does not reveal information that fits within part 1 of the test under section 17(1). I will consider below whether the discretionary exemptions in sections 18(1) and 19 can be claimed by the appellant for Record 33.

[46] Record 47 is a cover email to a letter that has been disclosed and does not reveal information that fits within part 1 of the test under section 17(1). As only sections 21(1) and 17(1) have been claimed for Record 47, and neither exemption applies, I will order Record 47 disclosed.

[47] Based on my review of the remaining records for which section 17(1) has been claimed, I agree with the appellant that they contain scientific, technical and commercial information regarding the project. I acknowledge that the requester disputes that the records contain scientific information, however, I find that certain records contain scientific information as described above.

[48] I will now consider whether part 2 of the test has been met for the records that I have found that part 1 applies to.

Part 2: supplied in confidence

Supplied

[49] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[15]

[50] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[16]

[51] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[17]

[52] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate

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[15] Order MO-1706.
[16] Orders PO-2020 and PO-2043.
[17] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[18] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[19]

[53] Record 28 is a letter with an attachment dated January 2011, sent by the appellant to Ontario Power Generation Inc. (the OPG), and copied to the Ministry of Energy.[20]

[54] Based on my review of Record 28, I find that this letter and attachment at Record 28 was not supplied to the MNRF. I find that this record comprises an agreement entered into by the appellant with the OPG and reflects an agreement related to the MNRF's involvement in the project. I find that the immutability and inferred disclosure exceptions do not apply to this record.

[55] I also find that Record 29 was not supplied as disclosure would not reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant. This is an email from the MNRF to the appellant clarifying what documents the MNRF needs or has. It primarily refers to a number of documents that the MNRF has in its possession.

[56] Therefore, I find that part 2 of the test under section 17(1) has not been met for Records 28 and 29. As only sections 17(1) and 21(1) were claimed for them, and neither exemption applies, I will order these two records disclosed.

[57] None of the other records are contracts or agreements and I find that all of them were directly supplied to the ministry by the appellant or that disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by it to the ministry.

In confidence

[58] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[21]

[59] In determining whether an expectation of confidentiality is based on reasonable

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[18] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[19] *Miller Transit*, above at para. 34.
[20] The OPG is an electricity generation company wholly owned by the Province of Ontario, whose principal business is the generation and sale of electricity in Ontario. See https://www.opg.com/reports/Pages/Intro.aspx
[21] Order PO-2020.

and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[22]

[60] The appellant submits that there is a reasonable implication that when it or its contractors supply information to the MNRF, either directly or indirectly through another federal or provincial governmental department, such supply would not be intended to be shared with the public, and would remain confidential as between it, its contractors, the MNRF, and other related departments of government.

[61] The appellant submits that all of the records listed were supplied in confidence to the MNRF because:

> (1) the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential, and likely would not have been communicated in the same way if there had been no expectation of confidentiality; and
>
> (2) it was information that was not otherwise disclosed or available from sources to which the public has access.

[62] The ministry states:

> Regarding the second part of the test, the appellant's reasonable expectation of confidentiality, the appellant has not provided evidence of an expectation of confidentiality sufficient to meet the second prong of the test. Nothing in the record[s] indicates that the ministry gave the appellant any explicit assurance of confidentiality. Moreover …the appellant's assertion of confidentiality seems to rest solely on the fact that it was supplying information to the ministry. Merely supplying information to the ministry cannot be the sole basis for a reasonable expectation of confidentiality, especially in light of the ministry's obligations under the *Act*, which were or should have been known to the appellant. Additionally,

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[22] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

> over the years there have been several access requests and disclosures relating to this proposed project. Those requests and the subsequent disclosures were very similar to the current request.
>
> Further, it is clear that the records in question were created or provided as part of an application process subject to the ministry's regulatory authority (see for example Records 52 and 53), which is generally a process where an applicant wouldn't typically expect confidentiality.

[63] The requester states that the appellant did not take any action to indicate the information being provided was confidential. He states:

> (a) If the situation was that all of the information supplied by the appellant was confidential, perhaps it could be justified that there was an implicit understanding of confidentiality and the appellant would be seen as consistently treating their supplied information as confidential.
>
> (b) But over the years the appellant has supplied both confidential and non-confidential records to the MNRF, the vast majority being non-confidential. Yet the appellant has not treated records they now claim are confidential any differently.

[64] In reply, the appellant states that it would be unlikely that the information supplied by it to the MNRF would have been supplied the same way both in content and manner if it knew that it would be disclosed to the public and potential competitors.

[65] The appellant further states[23] that the fact that the information was not otherwise available or disclosed from sources to which the public has access is a strong factor lending in favour of confidentiality. It states that it has a publicly-accessible website with significant information available, including technical drawings and the fact that none of the information at issue is displayed on its public website also strengthens the argument that the information was intended to be confidential and not disclosed to the public.

[66] The appellant submits that at no point in time did the MNRF communicate verbally or in writing to it that the process being engaged in was a public process where an applicant would not typically expect confidentiality, and that such a disclaimer was never provided in any of the MNRF's communications to it. On the contrary, the appellant states that the process being engaged in was that resembling a business relationship, which involved the exchange of information and fees in return for regulatory approvals. It states:

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[23] Relying on Order PO-2043.

> Simply because this was an approvals process does not negate an expectation of confidentiality. It would be absurd to claim that such a process should involve a default presumption of non-confidentiality - in a business-like transaction, any default presumption should be that the information being exchanged is confidential.
>
> Examples of cases in which the IPC has held that information supplied as part of a similar process qualified as information "supplied in confidence" include the following: PO-2294, which involved information supplied to the Ontario Securities Commission as part of a regulatory approval process; P-479, which involved information supplied to the Ministry of the Environment as part of an approvals process from a third party developer for the construction of a sedimentation pond; and PO-2965, which involved information supplied to the Ministry of Natural Resources as part of a forest licensing process.

Analysis/Findings re: in confidence

[67] In addition to the representations referred to above, the appellant provided representations on each individual record.

[68] I have reviewed the records and the parties' representations and find that only some of the records meet the in confidence component of part 2 of the test.

[69] In particular, I find that certain records do not meet the in confidence component of part 2 of the test as they were not communicated to the institution on the basis that they were to be kept confidential and prepared for a purpose that would not entail disclosure.

[70] Record 20 is an email from the appellant to the ministry containing information from the appellant's engineer. The disclosed portion of this email indicates that:

> The graphical representation of this information [in the email] is below, and available at [website].

[71] The email was circulated to four other MNRF staff. Since the information in Record 20 was available publicly and was circulated widely at the ministry, I find that it was not supplied in confidence, as the information at issue in particular was available from sources to which the public has access.

[72] I also find that the appellant's letter to the Ministry of Environment and Climate Change (the MOECC) dated May 14, 2015, which was copied to the MNRF, found at pages 10476 to 10497 of Record 21, was prepared for a purpose that entails disclosure and does not meet part 2 of the test.

[73] In support, I note that in the disclosed portion of page 15 of the letter (page

10490 of Record 21), the appellant informs the MOECC that:

> Please note that it is our intention to post this letter and the attachments on the project website [name] and will announce its existence through our social media accounts (twitter and Facebook). It is expected that this will be completed within the next few days.

[74] This information about public disclosure of the appellant's letter, is reiterated in the disclosed portion of the email chain found at pages 10474 to 10475 of Record 21, circulating the letter at pages 10476 to 10497 to various Ontario government staff within the MOECC, the MNRF, and the Office of the Premier. As well, this letter at Record 21 was copied to the Mayor and the Chief Administrative Officer of a local township.

[75] Record 40 is an email dated May 2015 related to the letter in Record 21 and also refers to the posting of information contained in this email on the appellant's website.

[76] Record 41 is a very short email, dated March 2015, describing some specifications about a public structure. This email was also sent by the appellant to a local township.

[77] I find that the emails from the appellant to the ministry in Records 40 and 41, were not supplied in confidence, as the information at issue in them was not prepared for a purpose that does not entail disclosure.

[78] Record 53 is an email chain dated April 2014. This record was widely circulated among a number of individuals in the MNRF, the MOE, and the MOECC, and does not include the appellant as a sender or a recipient. This record is an email chain about various aspects of the application process and includes references to other entities besides the appellant.

[79] I do not agree with the appellant that there was an implicit understanding that the discussions around the specific issues and questions related to obtaining the required permits and approvals in Record 53 would be confidential and not accessible to the public. This record outlines certain steps in the application process and I find that the information therein was not supplied in confidence.

[80] As only sections 17(1) and 21(1) were claimed for Records 20, 41 and 53, and neither exemption applies, I will order these records disclosed.

[81] I also find that the following information would have been prepared for a purpose that would entail disclosure to others in order to complete construction of the project:

- Records 2, 6 (page 8834), 7 to 11, 12 (page 5918), 14 (page 6966), 15 (page 6968), and 16 (page 7407).

[82] These pages of the records solely consist of technical drawings prepared by engineers related to the work to be completed as part of the project.

[83] I find that these technical drawings, which are specific to the project, would have been needed to be disclosed and reviewed by others in order to allow for the construction of the project. This is evidenced by the letter at pages 8844 to 8851 of Record 6, which refers to the appellant's 2009 environmental review/screening report that included similar or the same drawings to those at issue in this appeal.

[84] Therefore, I find that the technical drawings were not supplied in confidence and part 2 of the test has not been met for these records.

[85] In making this finding, I have considered the orders referred to by the appellant above. None of these orders refer to application of part 2 of the test under section 17(1) to technical drawings prepared by engineers for a construction project, or a letter such as the one found at Record 21, where the ministry has claimed that part 2 does not apply.

[86] I will consider below whether the appellant may claim the application of discretionary exemptions to the technical drawings, the letter and email found at Records 2, 6 (page 8834), 7 to 11, 12 (page 5918), 14 (page 6966), 15 (page 6968), 16 (page 7407), 21, and 40.

[87] I agree with the appellant that the information at issue in the remaining records was supplied by it to the ministry in confidence and I will consider whether part 3 of the test applies to these records. This information contains detailed information about the project exchanged between the MNRF and the appellant or the appellant's counsel.

Part 3: harms

[88] The appellant submits that disclosure of the records to third party competitors and/or interested community groups could reasonably be expected to significantly prejudice its competitive position by:

- revealing sensitive and detailed technical and/or scientific drawings and information, or commercial and/or financial information to market competitors,
- jeopardize or delay the building of the project, which would prevent it from fulfilling many of its contractual obligations, resulting in a waste of resources which have already been used to advance the project to date, and
- expose it to risk of undue financial loss for both a breach of contract and a diminution of profits.

[89] The appellant provides specific representations on each individual record.

[90] The ministry states that the appellant does not satisfy part 3 of the test. It states that the appellant has provided no evidence, only a bare assertion, that disclosure could negatively impact its competitive position or create undue losses.

[91] The ministry further states that the appellant does not provide any evidence or explanation of what the undue losses would be or how this release would render it unable to fulfill any contractual obligation or hamper its construction deadlines.

[92] The requester states that as the appellant was established solely to develop the project, it has no operations, income, or employees, it has never developed a hydro-electric generating station, and according to all available information such as its website, it is not looking for any other work or projects to develop.

[93] The requester further states that the appellant has no market competitors, since in 2005 the MNRF awarded the appellant the exclusive opportunity to pursue developing the project, which the appellant has been working on for over 11 years. He, therefore, submits that competition and marketplace forces have no impact on the appellant's opportunity or ability to develop and operate the project, which is their only business and purpose.

[94] The requester also disputes that disclosure could delay the building of the project. He submits that if properly planning and safely executing the project requires additional time, then that is certainly in the public interest rather than facilitating a development which would create unaddressed risks to the public and to public infrastructure.

[95] In reply, the appellant states that it is a subsidiary of a larger company that pursues renewable energy projects across Central and Eastern Canada and the northern United States, as well as commercial development projects and, therefore, its business and operations are carried out within a larger corporate structure.

[96] The appellant states that it does not have a monopoly in hydro-electric energy generation, and that the ministry has not guaranteed profits to it. It relies on Order MO-3182 where Toronto Hydro argued that disclosure of certain records could harm its competitive position in the marketplace and Order PO-3607 where Hydro One made a similar argument that was ultimately successful in exempting records from disclosure.

[97] The appellant states that the fact that the requester and his group plainly discuss their opposition to the project and the potential economic damage they or any other member of the public could cause if they so wished is demonstrative of the potential economic harms that the appellant would likely suffer. It submits that disclosure of the records would amplify the risk of damage and vandalism.

Analysis/Findings re: part 3

[98] The party resisting disclosure must provide detailed and convincing evidence

about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove 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.[24]

[99] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[25]

[100] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[26]

[101] I have found that the following information meets parts 1 and 2 of the test under section 17(1):

Record	**Pages**	**Description of Record**	**Date**
1	10694-10695	Letter to MNRF counsel from from appellant's counsel	March 2015
3	10701-10706	Letter to appellant from engineers regarding construction activities	May 2014
4	10737-10740	Letter to MNRF counsel from appellant's counsel	January 2015
5	10741-10744	Letter to appellant from appellant's counsel	November 2014
19	8952-8955	Email chain between and appellant and MNRF	Feb. 2011 - June 2012
22	5909-5911	Appellant's email and letter to MNRF attaching insurance certificate	May 2015
23	11815-11816	Email chain between appellant and MNRF	June 2015

[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[25] Order PO-2435.
[26] Order PO-2435.

30	11987	Email chain between appellant and MNRF related to License of Occupation	May 2015
32	6970	Email from appellant to MNRF	May 2015
36	12126	Email chain between appellant and MNRF related to License of Occupation	May 2015
37	12129-12130	Email chain between appellant and MNRF related to License of Occupation	May 2015
43	12351-12352	Email chain between appellant and MNRF	June 2015
45	8061-8062	Email chain between appellant and MNRF	May 2015
50	8125-8126	Email chain between appellant and MNRF	June 2015
52	8144-8146	Email chain between appellant and Ministry of Energy (MOE)	April – May 2014

[102] The appellant provided confidential representations on the subject matter of the records. It also provided non-confidential representations on part 3 of the test for each record.

[103] For each of the records at issue, except for Record 22, the appellant submits that disclosure would result in significant prejudice to its competitive position as well as result in undue economic losses from an inability to fulfill its contractual obligations to its contractors and failure to adhere to construction timelines.

[104] For Record 22, the appellant submits that disclosure would harm the economic interests and competitive position of the appellant.

[105] I have carefully reviewed each record, which are dated between February 2011 and June 2015, to ascertain how the specific information in each record could reasonably be expected to result in the harms set out in sections 17(1)(a) and (c).

[106] I will now review the appellant's particular representations specific to part 3 of the test for each record and my finding on each record at issue.

[107] For Records 1, 4 and 5, the appellant submits that disclosure of each of these letters from its lawyers would:

> …result in … a premature disclosure of negotiations respecting the [project] between the MNRF and [the appellant], and/or reveal plans,

> policies or projects where the disclosure could reasonably be expected to result in undue financial loss.

[108] These three letters are a series of detailed opinion letters from appellant's lawyer interpreting legislation and the progress of the project. The first letter is Record 5, followed by Record 4, then Record 1. I agree with the appellant that disclosure of these three letters could reasonably be expected to interfere significantly with the contractual or other negotiations of the appellant under section 17(1)(a). Therefore, part 3 of the test has been met for Records 1, 4 and 5.

[109] For Record 3, the engineers' letter, the appellant submits that disclosure of this record:

> …is likely to reveal premature construction plans and details that may or may not still be accurate as of 2016/2017 that could delay or jeopardize the building of the [project].

[110] I agree with the appellant that disclosure of this record, which contains proposed construction work, could reasonably be expected to interfere significantly with the contractual or other negotiations of the appellant under section 17(1)(a). Therefore, part 3 of the test has been met for Record 3.

[111] For the emails found at Records 19, 23, 32, 43, 45, 50, and 52, the appellant submits that disclosure of each of these records could:

> …delay or jeopardize the building of the [project] and interfere with the negotiating position of [the appellant] with the MNRF and/or other government ministries.

[112] Record 19 is a detailed email chain containing information related to the issues set out in Records 1, 4, and 5. I agree with the appellant that this record contains:

> …negotiations and questions and answers with the intention of resolving the issues [in the record]…
>
> The issues identified in this correspondence prompted legal opinion letters with respect to the same issue, records which are also subject to this appeal…

[113] I agree with the appellant that disclosure of this record could reasonably be expected to interfere significantly with the contractual or other negotiations of the appellant under section 17(1)(a). Therefore, part 3 of the test has been met for Record 19.

[114] I do not agree that Records 23 and 50 contain information that comes within part 3 of the test. The severed information is primarily a discussion of topics to be

discussed at a meeting and does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c). Therefore, as these records are not exempt under sections 17(1) and 21(1), the only exemptions claimed for them, I will order them disclosed.

[115] I do not agree that Record 32 contains information that comes within part 3 of the test. The severed information is merely a short email from the appellant with some questions and a request about setting up a conference call. I find that this record does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c). I will consider below whether the appellant may claim the application of the discretionary exemptions in sections 18(1) and 19.

[116] Record 43 is two pages. The information at issue on the second page of Record 43 is the same information as that at issue in Record 23. The first page of Record 43 (Page 12351) contains two emails. The earlier email is a question from the appellant. The responding email from the ministry contains some advice to the appellant and discusses scheduling a meeting. For the same reasons as in Record 23, I find that this record is not exempt under sections 17(1). As only sections 17(1) and 21(1) have been claimed for it, I will order Record 43 disclosed.

[117] At issue in Record 45 are three emails. The earliest email at issue contains a question from the appellant. The remaining two emails contain a short response from both the appellant and the ministry and does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c). Therefore, as this record is not exempt under sections 17(1) and 21(1), the only exemptions claimed for it, I will order it disclosed.

[118] Record 52 is an email chain between the MNRF, MOECC, MOE and the appellant about a draft application and is dated April and May 2014. Part of the record discusses setting up a meeting and a large part of the record discusses information about entities other than the appellant. I find that this record does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c). I will consider below whether the appellant may claim the application of the discretionary exemption in section 18(1).

[119] For the emails found at Records 30, 36, and 37, the appellant submits that disclosure of each of these records:

> …is likely to reveal premature plans that could delay or jeopardize [the appellant's] License of Occupation over the [project's] lands, and interfere with the negotiating position of [the appellant] with the MNRF and/or other government ministries.

[120] Record 30 is an email chain about a surveyor's sketch provided by the ministry to the appellant. The emails at issue contain a question from the appellant about the contents of this sketch and the ministry's response. I find that this record does not

contain sufficient information to result in the harms specified in sections 17(1)(a) or (c).

[121] Record 36 contains duplicate portions of the two emails in Record 30. The top portion of this record, which represents the most recent e-mail in the e-mail thread is not a duplicate. This email is an internal MNRF email and contains a suggestion related to the survey sketch. I find that this record does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c).

[122] Record 37 contains the same two emails found in Records 30 and 36. In addition, it contains two earlier emails from the ministry to the appellant as to information the ministry needs from the appellant, and a later email about a phone call to be arranged. As I have found for Records 30 and 36, I find that this record does not contain sufficient information to result in the harms specified in sections 17(1)(a) or (c).

[123] For the email and letter at Record 22, the appellant submits that disclosure of this record would:

> … be harmful and prejudicial to the economic interests of [the appellant] because it provides detail about the operation of the business that would be valuable to competitors. It would also allow a competitor to infer information about the current business of [the appellant] and disadvantage the competitive position of [the appellant] for prospective customers.

[124] Pages 1 and 2 of this record are an email chain and a letter between the appellant and the ministry. The only information severed from this page is an amount the appellant paid to the ministry in May 2015. The appellant has not explained how disclosure of this particular amount could be harmful and prejudicial to its economic interests.

[125] Severed from page 3 of Record 22 is certain information from the Certificate of Insurance dated May 2015. The Certificate of Insurance is for a limited time period in 2014/2015.

[126] In Order PO-3158, the adjudicator found that the affected party's Certificate of Insurance did not provide the kind of insight into the affected party's current and proposed business strategies that could reasonably lead to harm to its competitive position or undue loss or gain.

[127] Similar to the findings in Order PO-3158, I cannot ascertain from this record what information in Record 22 would allow a competitor to infer information about the appellant's current business as submitted by the appellant. Therefore, I find that page 3 of this record is also not exempt under section 17(1).

Conclusion re: section 17(1)

[128] Of all the records for which section 17(1) has been claimed, I have found only that Records 1, 3, 4, 5, and 19 are exempt under section 17(1). I will consider whether the public interest override in section 23 applies to override this exemption.

[129] After consideration of the sections 17(1) and 21(1) exemptions, the following pages of records and exemptions remain at issue:

Record	**Pages**	**Description of Record**	**Exemptions**	**Part/ entire**
2	10700	Technical drawing	16, 18(1), 20	entire
6	8834	Technical drawing	16, 20	entire
	8845, 8847-8848	Letter from a third party to the Premier of Ontario and the Prime Minister of Canada	16, 18(1), 20	part
7	9826	Technical drawing	16, 20	entire
8	9827	Technical drawing	16, 20	entire
9	9893	Technical drawing	16, 20	entire
10	1897	Technical drawing	16, 20	entire
11	0461	Technical drawing	16, 20	entire
12	5918	Technical drawing	16, 20	entire
14	6966	Technical drawing	16, 20	entire
15	6968	Technical drawing	16, 20	entire
16	7407	Technical drawing	16, 20	entire
21	10474-10475	Email chain	16, 18(1), 20	part
	10476-10489	Letter from appellant to MOECC	16, 18(1), 19, 20	part
	10491-10497	Technical drawings, sketches and chart	16, 18(1), 19, 20	entire

22	5909-5911	Appellant's email and letter to MNRF attaching insurance certificate	18(1)	part
30	11987	Email chain between appellant and MNRF related to License of Occupation	19	part
32	6970	Email from appellant to MNRF	18(1), 19,	entire
33	6971	Email from appellant to MNRF	18(1), 19	entire
36	12126	Email chain between appellant and MNRF related to License of Occupation	19,	part
37	12129- 12130	Email chain between appellant and MNRF related to License of Occupation	19	entire
40	7161	Email from appellant to MNRF	19	entire
52	8144-8146	Email chain between appellant and MOE	18(1)	part

C. Should the appellant be allowed to raise the application of the discretionary exemptions in sections 16, 18(1), and 20?

Introduction

[130] The appellant has raised the application of the discretionary exemptions in sections 16, 18, 19, and 20. I sought representations on these exemptions and also asked the parties to respond to the following:

> The appellant is seeking to raise the application of discretionary exemptions in sections 16, 18, 19, and 20. This office has considered the raising of discretionary exemptions by parties that are not institutions under *FIPPA* in previous orders and has determined that it only applies in

> rare circumstances. A recent order on this topic is found at Order PO-3512 [link to order provided].
>
> If the appellant wishes to pursue these four discretionary exemptions, the adjudicator asks you [to] provide representations on:
>
> > Given the mandatory exemptions already claimed in this appeal, why this case qualifies as a "rare exception to the general presumption that affected parties are not entitled to raise the possible application of …discretionary exemptions".

[131] This office has previously addressed whether a third party may raise discretionary exemptions. In Order P-777, Assistant Commissioner Irwin Glasberg stated:

> As a general rule, the responsibility rests with a Ministry to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by a Ministry during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

[132] In Order PO-3512, the requester sought internal records from the Ministry of Health and Long-Term Care (the MOHLTC) relating to a specific drug generated by personnel in the Ontario Public Drugs Program Division or in association with the listing of that drug on the Ontario Drug Benefit Formulary.

[133] The pharmaceutical manufacturer of the identified drug in Order PO-3512 appealed the ministry's decision to disclose some of the information and raised the discretionary exemptions at section 18(c) and (d), relating to an institution's economic interest, to some of the information that the ministry was prepared to disclose.

[134] In Order PO-3512, Adjudicator Catherine Corban relied on the findings in Order P-257, where former Assistant Commissioner Tom Mitchinson, in considering the question of when an affected party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*, stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. . . .

> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it. [Emphasis added by me].

[135] Adjudicator Corban also adopted these findings in Order PO-3032, where a number of pharmaceutical manufacturers claimed that the section 18(1) exemption applied more broadly than was claimed by the ministry. In Order PO-3032, Senior Adjudicator John Higgins stated:

> … [T]he purpose of the section 18 exemptions, broadly stated, is to protect the economic interests of institutions. In this case, it is evident that the ministry took a different view than the drug manufacturers who provided representations on this issue, of the extent to which disclosure of information in the records could reasonably be expected to damage its economic interests.
>
> In my view, this is a decision the ministry is entitled to make. As outlined below, the ministry clearly took the views of drug manufacturers into account in its decision to claim sections 18(1)(c) and (d) for the payment amounts.
>
> Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader economic interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are directed at protecting their own interests, and not those of the government or the public.
>
> In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own

> interests. Any perceived overlap with the interests of the government or the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[136] In Order PO-3512, Adjudicator Corban found that the appellant in that appeal was primarily concerned with protecting its own interests and that it had not provided any evidence to suggest that the disclosure of the information at issue could reasonably be expected to be prejudicial to the economic or financial interests of the government of the public.

[137] Adjudicator Corban found that the MOHLTC was the party that was in the best position to judge whether the harms described in sections 18(1)(c) and (d) could reasonably be expected to result from the disclosure of the information.

[138] Adjudicator Corban noted that prior to making the decision to disclose portions of the records the MOHLTC sought and received representations from the appellant on the disclosure of the responsive information. She found that the ministry clearly had the opportunity to consider the appellant's views on the disclosure of the information, before concluding that disclosure of this information would not give rise to the harm to Ontario's economic or financial interests as contemplated by those sections. She stated:

> Also, during the inquiry stage, in its representations in response to those submitted by the appellant, the ministry continues to take the position that the section 18(1) exemption does not apply more broadly than the way in which it was initially applied. Clearly, the possible application of the discretionary exemptions to the portions of the records at issue has been considered by the ministry and it has exercised its discretion not to rely on them.

[139] Adjudicator Corban concluded in Order PO-3512 that the appeal did not present circumstances that would amount to a rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions at section 18(1).

[140] I agree with the reasoning in the above orders. The issue, therefore, is whether this is one of those "rare occasions" where a third party should be permitted to raise a discretionary exemption not claimed by an institution.

[141] The appellant in this appeal submits that there is no evidence that the MNRF considered the application of any of the discretionary exemptions to the records at issue, and in the absence of such, it is entitled to raise the possible applicability of discretionary exemptions in its place, including those that are intended for the benefit of institution.

[142] The appellant states that, because of the FIT Program, it is working in partnership with the province in part to help further its mandate and objectives. It therefore submits that it would be inequitable to prohibit it from raising the possible applicability of discretionary exemptions to the records at issue.

[143] The appellant provided extensive representations on whether it should be allowed to raise each discretionary exemption it claims applies to the records at issue.

[144] These representations to a large extent also address the issue of whether the exemptions, in fact, apply. However, I do not need to decide whether the exemptions apply, if I find that the appellant cannot raise them. I only need to determine whether this is one of those "rare occasions" where the appellant should be permitted to raise a discretionary exemption not claimed by the ministry.

Discussion

[145] The appellant has sought to claim sections 16, 18(1), and 20 to the information at issue in the following records:

Record	**Pages**	**Description of Record**	**Exemptions**	**Part/entire**
2	10700	Technical drawing	16, 18(1), 20	entire
6	8834	Technical drawing	16, 20	entire
	8845, 8847-8848	Letter from a third party to the Premier of Ontario and the Prime Minister of Canada	16, 18(1), 20	part
7	9826	Technical drawing	16, 20	entire
8	9827	Technical drawing	16, 20	entire
9	9893	Technical drawing	16, 20	entire
10	1897	Technical drawing	16, 20	entire
11	0461	Technical drawing	16, 20	entire
12	5918	Technical drawing	16, 20	entire
14	6966	Technical drawing	16, 20	entire
15	6968	Technical drawing	16, 20	entire
16	7407	Technical drawing	16, 20	entire

21	10474-10475	Email chain	16, 18(1), 20	part
	10476-10489	Letter from appellant to MOECC	16, 18(1), 20	part
	10491-10497	Technical drawings, sketches and chart	16, 18(1), 20	entire
22	5909-5911	Appellant's email and letter to MNRF attaching insurance certificate	18(1)	part
32	6970	Email from appellant to MNRF	18(1),	entire
33	6971	Email from appellant to MNRF	18(1),	entire
52	8144-8146	Email chain between appellant and MOE	18(1)	part

Sections 16 and 20

[146] Of the records remaining at issue, the appellant has raised the application of the discretionary exemptions in sections 16 and 20 to the information remaining at issue in Records 2, 6 to 12, 14 to 16, and 21.

[147] These sections read:

> 16. A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.
>
> 20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[148] The appellant submits that with respect to section 16, it satisfies the "unusual circumstances" threshold because of the unique nature and context of the project. It states that:

> It is clear that section 16 is intended to protect vital public security interests, and as stated in Order PO-3506, section 16 "must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries".
>
> It is submitted that in a heightened era of security and national defence, there is a more pressing and immediate need to protect structures such as the ones proposed for the [project]. Many of the section 16 and 20 Records are technical drawings that are extremely detailed and reveal the design and construction of the [project], or otherwise reveal information that relate to technical elements of the structures. Disclosure of this information, in the wrong hands, could reasonably be expected to jeopardize and/or endanger the security of the [project] and any other surrounding structure, which could also reasonably be expected to prejudice the broader defence of Canada. It is not difficult to see how release of this information would aid in potential targeted acts of terrorism or sabotage.

[149] The appellant submits that the section 20 exemption applies as there is a tangible risk to the safety and health of the individuals who are responsible for securing the structures, the individuals who are involved in the construction of the project, and any and all individuals who will remain at and operate the project once it is completed and operational.

[150] The appellant further submits that it is even more entitled to raise the possible application of sections 16 and 20, because the structures will belong to it, and all security personnel and other employees will be staff of the appellant, and not the institution.

[151] The ministry provided representations that addressed its position on the application of all of the discretionary exemptions. It also referred to the orders cited in Order PO-3512 and stated:

> The approach adopted in Order P-1137 was upheld in Order PO-3512, which also cited Order P-257, is that there are only two situations that would meet the extraordinary and rare situation where the IPC would consider a claim of discretionary exemption by an affected third party: (1) where it is evident that the disclosure of the records would affect the rights of a third party and (2) where the institution's actions are clearly inconsistent with the application of a mandatory exemption. Order MO-2635 elaborated on the appellant's burden to show the extraordinary circumstances apply:
>
> > ... [i]n other words, as discussed earlier, 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.
>
> Therefore, for a party other than the institution to claim a discretionary exemption that party must provide sufficient evidence to justify the extraordinary approach of allowing an affected party to claim a discretionary exemption. In the instant case, the appellant has not provided adequate evidence that either one of these extraordinary and rare situations apply to the disclosure of the records.

[152] Concerning sections 16 and 20, the ministry submits that it properly exercised this discretion and determined that the information in the records did not prejudice the defence of Canada and could not reasonably be expected to seriously threaten the safety of health of an individual. It states that the appellant did not provide any detailed or convincing evidence of the potential for harm, which is the standard for the application of these exemptions.

[153] The requester disputes the specific concerns of the appellant and states that as the MNRF's north dam would be directly adjacent to, and even attached to, the project, the MNRF has clearly found no basis for a national defence concern.

[154] In reply, the appellant submits that there is a significant body of evidence demonstrating that hydro-electric generating stations have been the subject of sabotage/terrorism in the past, in both the U.S. and around the world, and that government departments have contemplated the kinds of protections and security measures that need to be implemented to insulate power generation facilities from such attacks. It further submits that there is therefore a strong argument that the project could properly be considered a potential target for an act of sabotage or terrorism.

Analysis/Findings re sections 16 and 20

[155] The records for which the appellant has claimed the application of sections 16 and 20 are technical drawings, which all appear to be from 2015 or earlier. As well, it has claimed these exemptions to portions of an email and a letter in Record 21, dated May 2015.

[156] The appellant has claimed sections 16 and 20 for two of its engineer's technical drawings and a chart from the engineer contained in a letter dated December 12, 2014 at pages 8844 to 8851 of Record 6. This letter was sent by an outside organization to the Premier of Ontario and the Prime Minister of Canada and was copied to 15 other individuals, each of whom is part of a different organization. The disclosed portions of

this letter contain detailed explanations of the information contained in the drawings at issue on pages 8847 and 8848.

[157] As well the appellant has claimed sections 16 and 20 to the technical drawing at page 8834 of Record 6, which was attached to a letter dated May 2012 from the appellant to the same outside organization as that at pages 8844 to 8851. This letter contains information that suggests that the drawing at page 8834 was publicly available.

[158] The two drawings at issue in Record 6 are similar to each other and are similar or identical to other drawings at issue. For example, the drawing on page 8847 is identical to the drawing at issue in Record 8. The drawings in Records 2, 9, 10, and on page 10491 in Record 21 are all very similar to the widely circulated drawings at pages 8847 and 8848 of Record 6. The remaining drawings are mainly survey type drawings.

[159] As well, the letter and its attachments at Record 21, dated May 14, 2015, as noted above, was to be posted by the appellant on its website within days of that date.

[160] Based on my review of the information disclosed from the records and the parties' representations, it is apparent to me that the location of the project is well known. As well, despite the information at issue in Records 6 and 21 being widely circulated or publicly available by 2014 or 2015, I have not been provided with evidence of any harm that has arisen because of the circulation of these two records.

[161] I have carefully reviewed the appellant's representations and the records at issue, and have considered the interests that sections 16 and 20 are designed to protect, as well as the public disclosure of similar information in Records 6 and 21. I am not satisfied that this is one of those rare cases where the appellant should be allowed to raise the application of the discretionary exemptions in sections 16 and 20. This is not a case where release of the records at issue would seriously jeopardize the rights of a third party.[27]

[162] Therefore, I find that this is not a case where the appellant has provided adequate evidence that the rare exception to the general presumption that affected parties are not entitled to raise the possible application of discretionary exemptions applies.

[163] Accordingly, I am not allowing the appellant to raise the application of the discretionary exemptions in sections 16 and 20 to the information at issue in Records 2, 6 to 12, 14 to 16, and 21.

[164] I will order the information at issue in Records 6 (page 8834), 7 to 12, and 14 to 16 disclosed, as no other discretionary exemptions have been claimed for this

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[27] See order P-777.

information and no mandatory exemptions apply to these records.

Section 18(1)

[165] Of the records remaining at issue, the appellant has raised the application of the discretionary exemptions in:

- section 18(1)(c) to Records 2, 22, and 52;
- section 18(1)(e) to Records 2, 21, 22, 33, and 52; and,
- section 18(1)(g) to Records 21, and 52.

[166] These sections read:

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
> >
> > (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[167] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[28]

[168] The appellant submits that it is entitled to raise the possible application of sections 18(1)(c), (e), and (g) to the records as this appeal satisfies the "unusual circumstances" threshold because the MNRF, by failing to apply the section 18 exemption to the records at issue, puts in jeopardy the very goals that Ontario seeks to achieve through the FIT Program.

[169] The appellant states that it was accepted into the FIT Program and that this program's fundamental objective is to facilitate the increased development of renewable generating facilities of varying technologies using a standardized, open and fair process.

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[28] Toronto: Queen's Printer, 1980.

[170] The appellant submits that disclosing:

- the records it has applied section 18(1)(c) to may jeopardize or unduly delay the construction of the project and severely inhibit the fulfillment of the MNRF's mandate.

- the records it has applied section 18(1)(e) to would severely hinder the MNRF's ability to continue negotiations on the project and/or other similar renewable energy projects in the future.

- the records it has applied section 18(1)(g) to would reveal the MNRF's pending policy decisions with respect to a number of the issues, as well as delay or jeopardize the building of the project, which could result in undue financial losses to the appellant from an inability to fulfill its contractual obligations to its contractors and failure to adhere to construction timelines.

[171] The ministry specifies that, as stated in Order PO-3512, the purpose of section 18 is to protect certain economic interests of institutions and to enable the institution to "earn money in the marketplace".

[172] The ministry points out that Order PO-3512 also states that the extent to which disclosure of the records could damage the province's economic interest is a determination that the institution is entitled to make. The ministry states that it did make such a determination in this case and it properly exercised its discretion in applying all of the discretionary exemptions applicable in this matter, including the section 18(1) exemption.

[173] With respect to section 18(1)(c), the requester states that the appellant confuses its own self-interest and profits for those of the economy of Ontario.

[174] With respect to section 18(1)(e), the requester disputes the appellant's submission and points out that negotiations are between parties. He states that if there are: "negotiations respecting the project and the leasing of certain crown lands to [the appellant]" then being party to the negotiation, the MNRF would also have claimed this exemption. He states that, as the MNRF has not contested the release of these records, it would appear the appellant's claim is unjustified.

[175] With respect to section 18(1)(g), the requester submits that if the MNRF had disclosed internal information to the appellant, who is a private developer and could benefit from this advance information, this could be inappropriate and all the more reason why the contested records should be disclosed.

[176] In reply, the appellant submits that Order PO-3601 provides that there are rare occasions when third parties can raise the application of a discretionary exemption, one of which is where the release of a record would seriously jeopardize the rights of a third party. It submits that in this appeal, its economic interests are very much tied to the

economic interests of the Province because of the FIT Program and Ontario's Long-Term Energy Plan, and is therefore entitled to argue for the protection of the Province's economic interests.

Analysis/Findings re: section 18(1)

[177] The appellant is seeking to apply the section 18(1) exemption[29] to the following records, which are more particularly described above:

- Record 2, which is a technical drawing,
- Record 6 (pages 8845, 8847 to 8848), which is a letter.
- Record 21, which is an email and a letter,
- Record 22, which is information from a Certificate of Insurance and an amount paid by the appellant to the ministry,
- Record 32, which is a short email from the appellant to the ministry,
- Record 33, which is a short email from the appellant to the ministry, and
- Record 52, which is an email chain between the MNRF, MOECC, MOE and the appellant about a draft application.

[178] The appellant relies on Order PO-3601, where Adjudicator John Higgins stated that:

> The appellant's argument on this point refers several times to alleged damage to its own position, with several very general allegations that Ontario's financial interests could be harmed by disclosure. A cursory review of sections 17 and 18 makes it clear that section 17(1) is the exemption intended to protect the appellant's interests, while section 18 is intended to protect Ontario's interests.
>
> It is apparent that the appellant's desire to rely on section 18 is, essentially, an attempt to protect its own interests, not those of Ontario. [Emphasis added by me].

[179] I find that the position taken by the appellant with respect to section 18(1) is one that is fundamentally concerned with protecting its own interests. I also find that any perceived overlap with the interests of the province arises from arguments that the appellant's interests would be damaged by disclosure, and that this would have a spill-

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[29] In particular, section 18(1)(c) to Records 2, 22, and 52; section 18(1)(e) to Records 2, 21 (pages 10476 to 10489), 22, 33, and 52; and section 18(1)(g) to Records 21 (pages 10476 to 10489), and 52.

over effect that could reasonably be expected to be prejudicial to the interests of the province.

[180] Relying on the findings in Orders PO-3032 and PO-3601, I find that this appeal is not a rare exception to the general presumption and that the appellant is not entitled to raise the application of the discretionary exemption in section 18(1).

[181] Therefore, as no other discretionary exemptions have been claimed by the appellant for the information at issue in Records 2, 6, 21 (pages 10474 to 10475), 22, and 52, and no mandatory exemptions apply, I will order this information disclosed.

[182] I will consider, below, whether the appellant may raise the application of the discretionary exemption in section 19 to Records 21 (pages 10476 to 10497), 32, and 33, as well as to the other records it has claimed that section 19 applies to.

D. Should the appellant be allowed to raise the application of the discretionary exemption in section 19? If so, does section 19 apply to the records at issue?[30]

[183] Section 19 states as follows:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
> >
> > (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[184] Of the records remaining at issue, the appellant has raised the application of the discretionary solicitor-client privilege exemption in section 19 to the following information:

Record	Pages	Description of Record
21	10476-10489	Letter from appellant to MOECC
	10491-10497	Technical drawings, sketches and chart
30	11987	Email chain between appellant and MNRF related to

[30] The issue of whether a third party can raise a discretionary exemption is reviewed under Issue C above.

		License of Occupation
32	6970	Email from appellant to MNRF
33	6971	Email from appellant to MNRF
36	12126	Email chain between appellant and MNRF related to License of Occupation
37	12129-12130	Email chain between appellant and MNRF related to License of Occupation
40	7161	Email from appellant to MNRF

[185] The appellant submits that the statutory litigation and settlement privilege in Branch 2 of section 19 of the *Act* is not a discretionary exemption, but rather is a mandatory exemption as section 19 does not contain express language that would abrogate settlement privilege that continues to apply until it has been expressly or implicitly waived. It submits that the exemption of settlement discussions from public disclosure is necessary to maintain the confidentiality of negotiated settlements.

[186] In the alternative, the appellant states that if I find that section 19 is not a mandatory exemption but is a discretionary exemption, I am still entitled, on appeal, to determine whether the institution erred in exercising its discretion.

[187] In the further alternative, the appellant submits that this case qualifies as this case is the "most unusual of circumstances" as it addresses matters of importance to the public at large, as the release of the records at issue would:

1. be contrary to the broader public interest in maintaining the integrity of settlement privilege, and

2. seriously jeopardize the negotiating position of the appellant vis-à-vis the MNRF or any other government ministry in future negotiations.

[188] The appellant submits that this would result in significant prejudice to the appellant's competitive position, and reveal plans, policies or projects where the disclosure could reasonably be expected to result in undue financial loss. It submits:

> Pursuant to the common law rules of settlement privilege, the section 19 records would be protected from disclosure and inadmissible as evidence in a court of law. If the IPC were to nonetheless decide to release these records, [the appellant] would have no choice but to commence proceedings to enforce its rights in the court system, including but not limited to bringing an injunction to prevent the release of these records.

> This would inevitably involve a significant expenditure in terms of legal fees and court resources.

[189] The ministry disagrees that section 19 should be treated as a mandatory exemption. It points out that the *Act* is clear that a head of an institution "may" exempt documents from disclosure under section 19. It states that, as highlighted above, the IPC has long held that, this exemption is "designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government."

[190] The ministry further submits that there are no "rare and extraordinary circumstances" in the instant case that warrant an exception to the general rule that the application of discretionary exemptions should be left to the ministry's discretion. As well, it states that there was no solicitor-client privilege between the ministry and the appellant, who was represented at all times by its own counsel.

[191] The ministry further states that there was:

- no common interest or enterprise between that parties that could give rise to solicitor-client privilege,
- the appellant did not provide the records as part of any settlement process, and
- the records were not created in preparation for litigation.

[192] It is the ministry's position that the appellant's dominant purpose in providing the records to it was as part of the regulatory process for obtaining approval to construct a hydro-electric generating station. It states that the appellant sought ministry approval for its plans and specifications for this proposed facility as required under applicable legislation such as at the *Lakes and Rivers Improvement Act* and the *Public Lands Act.*

[193] The ministry states that there was no adversarial case or controversy to settle between the ministry and the appellant at the time that these records were created or provided. It submits that the case of *Liquor Board of Ontario V. Magnotta Winery Corporation* (*Magnotta*)[31] is clearly distinguishable from these circumstances because the parties in that case were involved in a formal mediation process aimed at averting litigation. It states that since the ministry and the appellant were not engaged in settlement negotiations at the time the records were created, settlement privilege cannot attach to them.

[194] The ministry further submits as there was not a reasonable prospect of litigation, the records were not prepared in anticipation of litigation and litigation privilege cannot attach to them. It states to date, no party has commenced any litigation proceedings

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[31] 2010 ONCA 681.

relevant to the records.

[195] The requester states that, as the MNRF would be the other party in any claims of solicitor-client privilege, and the MNRF has not opposed the release of the records, this shows there is no such valid concern. The requester relies on the findings in Order PO-2112, and states that the appellant has not adequately demonstrated the harms that would be caused by the release of the contested records, or if releasing the material would cause harm then the material would be protected by other sections of the *Act*.

[196] In reply, the appellant disputes the applicability of Order PO-2112, a 2003 IPC decision, as either incorrect, and/or outdated and states that a significant body of case law from both the IPC and the courts has developed since then which have strengthened the protections afforded by solicitor-client, litigation and settlement privilege.

[197] The appellant submits that *Magnotta* stood for the principle that fundamental common law privileges such as settlement privilege "ought not to be taken as having been abrogated absent clear and explicit statutory language ... Section 19 does not contain express language that would abrogate settlement privilege,". It submits that this case is particularly applicable because it dealt directly with privileged records in the context of an IPC appeal pursuant to the same provision of the *Act*.

[198] The appellant submits, therefore, that statutory litigation privilege is applicable to all the records for which it claims the application of section 19, and as such, these records should be exempt from disclosure on the basis of this privilege alone.

[199] Of the records remaining at issue, the appellant wants to claim section 19 to Records 21 (pages 10476 to 10489), 30, 32, 33, 36, 37, and 40.

[200] 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.

[201] Branch 1, the common law solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[202] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[203] The appellant relies on branch 2 statutory litigation privilege. This privilege

applies to records prepared by or for Crown counsel[32] "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[33]

[204] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[34]

[205] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[35]

[206] Only the head of an institution may waive the statutory privilege in section 19. Disclosure by Crown counsel to defence counsel during a criminal proceeding, for example, does not result in waiver of the statutory privilege.[36]

[207] The appellant states that the records at issue were created or provided in the course of settlement negotiations, because they were made in confidence with the intent of trying to resolve a litigious dispute. It states that although litigation was not ultimately commenced, it was contemplated, and legal advice respecting the same was obtained in order to resolve or settle any legal disputes, which were being contemplated.

[208] As noted above, it is only in "rare circumstances" that a third party can raise the application of discretionary exemptions. Even if I were to accept that the appellant is able to claim the application of the section 19 exemption instead of the ministry in this case, I would not find that it applies. I find that the records at issue were either not prepared in contemplation of litigation or for settlement discussions or that if any privilege attached to the record, such privilege was waived by the appellant.

[209] In particular, I find that I do not have sufficient information to determine that the records at issue are subject to section 19 as claimed by the appellant. I cannot ascertain what litigation existed or was reasonably contemplated from the emails at issue in Records 30, 32, 33, 36, 37, and 40, nor can I find that they contain confidential privileged solicitor-client communications. As well, if there had been any privilege in Record 21 (pages 10476 to 10489), any such privilege has been waived.

[210] In making this finding, I have taken into account the Court of Appeal decision in the *Magnotta*, which postdates the 2003 order referred to by the appellant. The Court

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[32] Or counsel employed or retained by an educational institution or hospital.
[33] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[34] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[35] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[36] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

of Appeal in *Magnotta* stated:

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. [Emphasis added by me].

[211] I will review each record separately.

[212] Record 21 (pages 10476 to 10489) is a letter with attachments. I find that this record was not made in confidence as claimed by the appellant. As well, I find that any privilege attached to this record was waived by the appellant. The appellant sent this letter to the MOE, and copied it to the township. Within days it was sent by the MOE to the MNRF. As well, the letter indicates that the appellant was going to post the letter and attachments on its website and announce its existence on its social media accounts.

[213] Record 30 is an email chain concerning a question from the appellant about a survey sketch. The subject line of the email has been disclosed and reads:

> Re: [project] - Submission requirements - sketch, fees and other documents

[214] The appellant submits that Record 30 qualifies for the section 19 exemption because the issues identified in this correspondence prompted legal opinion letters and dealt with the same sensitive and confidential matters subject to solicitor-client privilege, and/or litigation privilege, and/or settlement privilege outlined in Records 1, 4, and 5.

[215] However, Record 30 postdates Records 1, 4, and 5, therefore, it could not have prompted the letters in Records 1, 4 and 5. As well, it contains very little substantive information and was not copied to the appellant's solicitor.

[216] Record 36 is a duplicate of Record 30, except for the top portion of this record, which represents the most recent email in the email chain. The appellant states that this record also qualifies for the section 19 exemption because it is related to the same issues discussed in the rest of the record, and is subject to solicitor-client privilege, and/or litigation privilege.

[217] The top email in Record 36 is an internal MNRF email discussing a MNRF suggestion for the appellant's submission and is dated the same date as Record 30.

[218] Record 37 contains the same two emails as those at issue in Record 30, plus the appellant's response. The response of the appellant to the MNRF at the top of Record 37 is primarily about setting up a conference call. This email was copied to the appellant's solicitor.

[219] Record 32 is a short email from the appellant, primarily about setting up a conference call and was copied by the appellant to its counsel.

[220] Record 33 is also a short email from the appellant, asking for information to be sent to the appellant and was copied by the appellant to its counsel.

[221] The appellant provided identical representations on Records 32 and 33. The appellant submits that they qualify for the common law and statutory definitions of solicitor-client communication privilege because they contain communications from it to its legal counsel conveying information with the explicit intention of seeking advice at some future point in time.

[222] The appellant also submits that Records 32 and 33 qualify for the common law and statutory definitions of litigation privilege because the discussions in the records took place in contemplation of litigation (which encompasses actual or contemplated actions as well as mediation and settlement), and continues to be privileged under the statutory litigation privilege, which does not end where the litigation or contemplation of litigation ends.

[223] I disagree with the appellant that solicitor-client communication privilege applies. Record 32 does contain a sentence indicating some information it received from its counsel in the form of a question. Record 33 merely asks for a document on a specific issue. I find that these records were created outside the zone of privacy as they were sent by the appellant to the MNRF.

[224] Record 40 is an email dated May 2015 from the appellant to the MNRF. The appellant submits that this record qualifies for the section 19 exemption because the issues identified in this correspondence prompted legal opinion letters and dealt with the same sensitive and confidential matters subject to solicitor-client privilege, and/or litigation privilege, and/or settlement privilege outlined in Records 1, 4, and 5.

[225] I disagree with the appellant that Record 40 deals with the same information as that in Records 1, 4, and 5. Instead, it is related to the letter in Record 21 and also refers to the posting of information contained in this email on the appellant's website.

[226] Therefore, I disagree with the appellant that Record 40 qualifies for the section 19 exemption.

[227] In conclusion, even if I were to find that this case qualifies as one of the rare occasions where the appellant can raise the application of the section 19 exemption, I would find that the records at issue are not subject to this exemption.

[228] As no other exemptions remain for Records 21 (pages 10476 to 10489), 30, 32, 33, 36, 37, and 40, I will order these records disclosed.

E. Is there a compelling public interest in disclosure of Records 1, 3 to 5, and 19 that clearly outweighs the purpose of the section 17(1) exemption?

[229] I found above that section 17(1) applies to Records 1, 3 to 5, and 19. However, the requester has raised the application of section 23, which 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.

[230] Both the appellant and the requester provided extensive representations on the application of section 23.

[231] The appellant submits that there is a more compelling public interest in the non-disclosure of the records, as it relies on communication and collaboration with market participants and partners in order to administer legislation and perform its duties.

[232] The appellant submits that the project fulfills the MNRF's mandate of promoting economic opportunities in the resources sector, leading the management of Ontario's Crown lands and waters, and supporting and encouraging the development of renewable sources of energy. Therefore, it submits that any jeopardy to or delay in these interests would not be in the public interest.

[233] The appellant acknowledges that there is a general public interest in providing information relating to the project to members of the public and ensuring that the project is not shrouded in secrecy. It states that to the extent that any public interest exists that might compel disclosure, this is clearly outweighed by the harm that such disclosure would cause to its ability to advance the project and maintain a competitive position in the marketplace.

[234] The appellant states that the second way that this general public interest has been acknowledged by it is the large amount of information published on the project's website. It states that this includes a significant number of site plans and drawings, technical information, list of governmental approvals obtained, and notices related to public meeting dates as well as the public meetings and open houses themselves where information is provided to all participants.

[235] By way of background, the requester states that:

> … [T]he MNRF's authority and responsibility includes the safe design and operation of Ontario's hydro-electric generating stations, regardless of the entity that actually owns and operates them.
>
> As the Proposed Project would be on a public and navigable waterway, the broad public has a direct interest in whether the Proposed Project could and would be operated safely, especially for those using and recreating on, in, and under the water upstream and downstream of the Proposed Project.
>
> A purpose of the Act is to enable public scrutiny of government decision making. To do this, the public needs access to the records the appellant supplies to the MNRF as background to, and in application for, the MNRF's decision making…

[236] The requester states that he has spent six years requesting to view all the records from both the MNRF and the MOECC concerning the project and has learned that:

> … many of the records have been extremely beneficial to the public, as [the requester's group has] been able to learn of self-serving decisions the appellant has made, such as:
>
> > • Risking damage [to] public infrastructure, flooding Lake [name], and contaminating the environment to speed-up their proposed construction.
> >
> > • Not following the MNRF's and the Canadian Dam Association's public safety procedures and guidelines.
> >
> > • Not honouring commitments made to other ministries and other levels of government.

[237] The requester disputes the appellant's submissions in detail. He states that most technical work for government ministries is now done by private developers (such as the appellant) or outside contractors. He states that the MNRF has extremely limited resources to review and approve the appellant's detailed plans and specifications. As a result, he states that it appears that the MNRF:

> a) Did not realize that the appellant's change to an upstream cofferdam design that would fully obstruct the [Fall's] north channel was a design that:
>
> > • Created an unacceptably high probability of flooding Lake [name] during the proposed construction.

> • Could not be lowered and later raised as required by the MNRF's cofferdam lowering plan.
>
> b) Did not realize that the excavations required by the soldier pile cofferdam subsequently proposed by the appellant would risk damaging the MNRF's … north dam. [The requester's group does] not know if this issue has been addressed.

[238] The requester provided what he considers examples of the public benefit from information that he was only able to receive through previous FOI requests. The requester states that the appellant has made significant changes from what it presented in its Environmental Study Report. He states that for too many of these changes, the appellant is not informing the public, and in many cases, is also not informing other ministries and levels of government. He states:

> Without me learning about the issues, incorrect government decisions would likely have resulted, such as accepting a construction plan that could not be implemented, or risking flooding Lake [name].

[239] The requester states that it is not clear that renewable energy projects benefit Ontario's economy and that the project would have negative economic impact as it would require diverting 94% of the water from the falls where it is located, and that tourists would not come there to see the dry rocks where the falls used to be.

[240] The requester submits that there are too many unaddressed questions of public safety and risk to public infrastructure to allow the project to proceed without public scrutiny of government decisions. He states that this requires the public having access to the appellant's input to the government.

[241] The requester states that, some time ago, the appellant removed most of the information from their website and has not issued or posted any project updates, press releases, or other news in over a year. As well, the requester states that the appellant has not answered any of the emails he or others have sent to it over the past years.

[242] The requester acknowledges that power plants can be targets for vandalism, but disputes that the project is such a target due its small size and because any impact on Ontario's power grid would be insignificant.

[243] In its non-confidential reply representations, concerning the records that I have found subject to section 17(1), the appellant submits that release of this information would prematurely reveal construction plans and premature policies, decisions and negotiations. It submits that this could lead to public confusion and misinformation, thereby further delaying the building of the project and significantly jeopardizing the ability of the appellant to fulfill its existing contractual obligations to its contractors and to adhere to construction timelines.

[244] The appellant states that there has been an extremely vocal and demonstrated resistance from members of the public against the project and that disclosure would likely be exploited by activists who are closely monitoring the commencement of the project. It refers specifically to the requester's organization, which it claims has publicly indicated that their sole mission is to prevent the project from being commenced or completed.

[245] The appellant states that it is further worrisome that the requester goes into significant detail with respect to how vulnerable and exposed the project is without any of the records having been released yet, and lists simple ways in which any member of the public may have the means to interfere with, obstruct, or vandalize the project. It states that the requester notes that no detailed technical drawings nor threatening of personnel would be required to commit the kind of vandalism described by it as that which would "cause an immediate and automatic shutdown of the project's operation" and "would likely require months, and hundreds of thousands of dollars, to repair."

[246] The ministry did not provide representations on the application of section 23.

Analysis/Findings

[247] The only records that I have found exempt in this order are Records 1, 3, 4, 5, and 19, which I found exempt by reason of the mandatory third party information exemption in section 17(1).[37]

[248] I have already found the technical drawings at issue not exempt in this order. Records 1, 3 to 5, are letters dated between May 2014 and March 2015 and Record 19 is an email chain dated between February 2011 and June 2012.

[249] The appellant has sought to apply:[38]

- sections 17(1), 18, and 19 to Records 1, 4, and 5;
- sections 16, 17, 18, and 20 to Record 3; and,
- sections 16, 17, 18, and 20 to Record 19.

[250] Records 1, 4, and 5 are opinion letters from the appellant's counsel to the ministry interpreting legislation and relate to the appellant's building of the project.

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[37] The appellant had sought to apply:
- sections 17(1), 18, and 19 to Records 1, 4, and 5;
- sections 16, 17(1), 18, and 20 to Record 3; and,
- sections 16, 17(1), 18, and 20 to Record 19.

[38] Other than the information in the records that contains names and titles and contact information of individuals, which I have found is information about these individuals in their professional capacity.

[251] Record 3 is a letter from the appellant's engineers to the appellant, sent to the ministry, outlining proposed construction activities for the project.

[252] Record 19 is an email chain. The disclosed portions of this record indicate that the subject matter of these emails include land and water mains associated with the project.

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

[254] 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.[39]

Compelling public interest

[255] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[40] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[41]

[256] A public interest does not exist where the interests being advanced are essentially private in nature.[42] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[43]

[257] A public interest is not automatically established where the requester is a member of the media.[44]

[258] The word "compelling" has been defined in previous orders as "rousing strong

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[39] Order P-244.
[40] Orders P-984 and PO-2607.
[41] Orders P-984 and PO-2556.
[42] Orders P-12, P-347 and P-1439.
[43] Order MO-1564.
[44] Orders M-773 and M-1074.

interest or attention".[45]

[259] Any public interest in *non*-disclosure that may exist also must be considered.[46] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[47]

[260] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[48]
- the integrity of the criminal justice system has been called into question[49]
- public safety issues relating to the operation of nuclear facilities have been raised[50]
- disclosure would shed light on the safe operation of petrochemical facilities[51] or the province's ability to prepare for a nuclear emergency[52]
- the records contain information about contributions to municipal election campaigns[53]

[261] It is clear from the requester's representations that there is a public interest in disclosure of the records. The project is a high profile and controversial undertaking on a public and navigable waterway entered into between the appellant, a private developer, and the MNRF.

[262] The requester's group is active in bringing to light problems with the project and its impact on the local environment. Some of the concerns about the project raised by this group include the following:

- Risk of damage to public infrastructure (the Highway Bridge and the north dam), and possible contamination of the river (due to the treatment or leaks from the piping for groundwater pumped out of the proposed excavation).

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[45] Order P-984.
[46] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[47] Orders PO-2072-F, PO-2098-R and PO-3197.
[48] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[49] Order PO-1779.
[50] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[51] Order P-1175.
[52] Order P-901.
[53] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

- Proposed construction sequence risks flooding the lake and the thousands of private properties on it, due to an unacceptable cofferdam lowering plan.

- Proposed operation would risk injuring the public (as the fast and dangerous water would extend far outside and downstream of the proposed downstream safety boom, contrary to the Canadian Dam Association's guidelines).

- Proposed operation would often begin at about noon on summer days, but not provide warning to the recreating public about increased flow to the river, contrary to the MNRF's public safety measures requirements.

[263] I find that although disclosure may jeopardize or delay the completion of the project, it is in the public's interest that any public safety or public property damage concerns about the construction of the hydro-electric generating station be brought to light.

[264] I have also considered whether there is a public interest in non-disclosure of the records at issue. A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[54]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[55]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[56]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[57]

- the records do not respond to the applicable public interest raised by appellant[58]

[265] I do not agree with the appellant that there is a public interest in non-disclosure.

[266] Although hydro-electric generating stations or any utility structure could be at risk for vandalism or intentional damage, I disagree that disclosure of the contents of the specific records at issue would reveal any information that could reasonably be expected to jeopardize and/or endanger the security of the project or any surrounding

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[54] Orders P-123/124, P-391 and M-539.
[55] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[56] Orders M-249 and M-317.
[57] Order P-613.
[58] Orders MO-1994 and PO-2607.

building, individual or entity.

[267] The appellant is concerned that disclosure of the severed information in these records could jeopardize or delay the building of the project, and interfere with the appellant's contractual obligations or negotiating position with the MNRF and/or other government ministries. I find that these are private interest concerns of the appellant.

[268] I disagree with the appellant that there would not be a free flow of information between the MNRF and those who interact with it as the information provided by the appellant to the MNRF was required information related to the appellant's application to construct the project. As well, the MNRF has not indicated that this is a concern for it.

[269] I also find that there is not another public process or forum to address public interest considerations. Although there has been a significant amount of information already disclosed by the ministry, based on my review of the detailed information at issue in this appeal, I find that this is not adequate to address any public interest considerations.

[270] As well, there is not an alternative disclosure mechanism. The records would shed further light on the matter and the records respond to the applicable public interest raised by the requester.

[271] Therefore, I find that there is a compelling public interest in the disclosure of the records at issue.

Purpose of the exemption

[272] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[273] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[59]

[274] As noted above, section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[60] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the

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[59] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

[60] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

marketplace.[61]

[275] I found above that disclosure could reasonably be expected to interfere significantly with the contractual or other negotiations of the appellant under section 17(1)(a). I do not find that disclosure of the information at issue could be exploited by competitors. I find that the public interest in the project as, outlined above, clearly outweighs the purpose of the section 17(1) exemption in this case.

[276] Accordingly, I find that the existence of a compelling public interest clearly outweighs the purpose of the established section 17(1) exemption claim in the specific circumstances in this appeal. Therefore, I will order the remaining records at issue, Records 1, 3 to 5, and 19 disclosed.

ORDER:

I uphold the ministry's decision and order it to disclose all of the information at issue in this appeal to the requester by **June 20, 2018** but not before **June 15, 2018**.

Original Signed by: May 16, 2018

Diane Smith
Adjudicator

[61] Orders PO-1805, PO-2018, PO-2184 and MO-1706.