Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2155

Appeal PA-020086-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester. The first was for all records referring to certain specified properties licensed under the *Aggregate Resources Act* and located on Pelee Island. The second was for records referring to the construction of a dock or docks on certain specified land, also located on Pelee Island.

The Ministry combined the requests and dealt with all responsive records except those referring to third parties in a decision letter dated February 20, 2002. In a second decision letter dated May 8, 2002, the Ministry set out its position with respect to records involving the interests of third parties.

The Ministry located a number of records responsive to the requests and prepared an index of records for each request. The Ministry granted access to some records, in whole or in part, and denied access to others, claiming the application of the following exemptions contained in the *Act*:

- invasion of privacy – section 21(1);
- information relating to species at risk – section 21.1;
- advice or recommendations – section 13(1);
- third party information – section 17(1);
- economic or other interests – section 18(1); and
- solicitor-client privilege – section 19.

The requester, now the appellant, appealed the Ministry's decisions.

During the mediation of the appeal, the Ministry agreed to disclose a large number of records to the appellant. The appellant also agreed to withdraw his appeal with respect to some of the records, or parts of the records. As a result, the scope of the remaining records at issue was substantially narrowed. Further mediation was not possible and the appeal was moved into the adjudication stage of the process.

I decided to seek the representations of the Ministry initially, as it bears the onus of establishing the application of the exemptions claimed to the information contained in the records. The Ministry made representations, the non-confidential portions of which were shared with the appellant, along with the Notice of Inquiry. The appellant also made detailed submissions, which were in turn shared with the Ministry. I then requested and received further reply representations from the Ministry.

RECORDS:

The records at issue consist of a large number of e-mails, correspondence, memoranda, reports and other documents relating to the requests. The appellant and this office have been provided with a copy of an index prepared by the Ministry setting out the records, and parts of records, remaining in dispute.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

General Principles

The Ministry has applied the discretionary exemption in section 13(1) to a significant number of the records, or parts of records. Section 13(1) states:

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

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible

> under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*. [Orders 94, P-233, M-847, P-1709]

The Ministry's representations

The Ministry has not provided submissions on the application of section 13(1) to the individual records and parts of records remaining at issue. Rather, it has simply restated the principles set forth above and included the following general statement concerning the application of section 13(1). It argues that:

> In this case, the exemption has been applied to portion[s] of a variety of records, such as emails, briefing notes, hand written notes and minutes/notes of meeting[s] handwritten and electronically created. An examination of each record shows that it contains advice/recommendation from an employee of the Ministry, its legal counsel or an outside consultant. This advice or recommendation relates to the development of a Ministry position and course of action relating to the blue racer snake and the proposed quarry development. The later records provide the type of advice or recommendations within the context of a hearing before the Ontario Municipal Board. In this regard, the records speak for themselves and clearly set out advice or recommendations. Accordingly, it is the position of the Ministry that records for which the Ministry has claimed the exemption fall within the ambit of subsection 13(1) when the principles outlined above are applied.

The appellant's representations

The appellant takes issue with the submissions of the Ministry in a number of ways. It first points out that the Ministry has failed to consider the specific questions set out in the Notice of Inquiry as they relate to the specific records, and parts of records, to which it has applied section 13(1). The appellant is also of the view that the Ministry has not set out in "sufficient specificity" its position with respect to the disclosure of the records and that it has been inconsistent in its application of the exemption.

The appellant argues that she has been disadvantaged in not being provided with more information on the Ministry's position with respect to the application of section 13(1) to a number of records; it is not possible for her to determine why the Ministry has claimed the exemption applies to specific records.

The appellant points out that, the section 13(1) exemption "was not intended to exempt all communications between public servants (or, by extension, communications between public

servants and consultants retained by the Ministry), even though they may be viewed broadly as advice or recommendations.

The appellant also relies on the mandatory exceptions to the section 13(1) exemption which are set out in sections 13(2)(d) and (h), which read:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (d) an environmental impact statement or similar record;
>
> (h) a report containing the results of field research undertaken before the formulation of a policy proposal;

Findings

First request

The Ministry's representations are very general in nature, and provide me with little assistance in applying the exemption to specific records. However, I have carefully reviewed all of the records at issue under this exemption and I make the following findings, by category.

Briefing Note

Record 3 is a briefing note prepared by Ministry staff on March 15, 2001. This note outlines the Ministry's position with respect to the manner in which it intends to present evidence at the upcoming hearing before the Ontario Municipal Board (the OMB). In my view, this record qualifies for exemption under section 13(1) as it contains specific advice to a decision maker within the Ministry regarding the presentation of its evidence at the hearing.

Emails

I find that Record 128 (which is identical to Record 226) is exempt under section 13(1) as it contains details of a communications plan to be undertaken by the Ministry and suggests a course of action to be followed. Similarly, Records 275-276, 290 and 291-292 contain specific advice as to how the Ministry will approach a specific problem. As a result, I find that these records qualify for exemption under section 13(1).

I do not, however, agree with the Ministry's contention that the remainder of the email messages to which it has applied the section 13(1) exemption qualify under that section. Records 11, 79, 81, 231-234, 288, 299 and 304 express the "concerns" of the authors about the contents of other records or make suggestions for the amendment of drafted documents but do not contain specific "advice or recommendations" within the meaning of section 13(1). In addition, I find that Records 26, 94, 95, 96 and 293 do not contain any information which meets the criteria expressed above for exemption under section 13(1). As no other exemptions have been claimed

and no mandatory exemptions apply to these records, I will order that they be disclosed to the appellant.

Notes

Records 86 (handwritten notes) and 87-88 contain specific advice and recommendations concerning the Ministry's conduct and presentation of its evidence at the hearing before the OMB which is discussed in Record 3. For the same reasons expressed in my discussion of Record 3, I also find that these records qualify for exemption under section 13(1).

Record 286 however, does not contain or reveal any specific advice or recommendations and is not exempt under section 13(1).

Report

Record 108-113 is a critique prepared by a biologist retained by the Ministry of a scientific study undertaken by a biologist retained by the operator of the quarries on Pelee Island. The paper makes a number of comments and criticisms of the research undertaken by the operator's biologist but does not contain any specific advice or recommendations regarding a course of action to be followed by the Ministry. Rather, it simply comments on the information gathered and analyzed by the biologist in order to inform the Ministry as to how the conclusions reached in the paper may be rebutted. I find, accordingly, that the section 13(1) exemption has no application to Record 108-113.

Agenda/Minutes of Meetings

The undisclosed portions of Record 133 describe in detail the results of a "strategy session" involving Ministry staff regarding its approach to the presentation of its evidence and arguments before the OMB. I find that the undisclosed portions of Record 133 describe in detail the recommended course of action to be followed by the Ministry and that this information qualifies for exemption under section 13(1).

Records 178-180 are minutes of a meeting held on January 20, 1992 by Ministry staff for the purpose of canvassing a number of options and determining a course of action to be undertaken. I find that this record sets forth a suggested course of action and that this information qualifies as "advice or recommendations" within the meaning of section 13(1).

Records 239 to 242 represent handwritten notes taken at the same meeting of Ministry staff on January 20, 1992. Similarly, as the information contained in this document is substantially the same as that in Records 178-180 and 184-186, I find that they also qualify for exemption under section 13(1).

Record 175 is a letter to the Minister dated January 21, 1992 reporting on the results of the meeting on January 20, 1992. I find that this record also is subject to the section 13(1) exemption as it contains a specific course of action that was recommended by the staff persons attending the meeting.

By way of summary, I find that the undisclosed portions of Records 3, 11, 86-88, 128, 133, 175, 178-180, 184-186, 226 and 239-242 are exempt from disclosure under section 13(1). I find that none of the information contained in these records falls within the categories of information listed in the exceptions to section 13(1) which are included in sections 13(2) or (3).

Records 26, 79, 81, 94-96, 108-113 and 231-234 do not qualify for exemption under this section. As no other exemptions have been claimed for Records 26, 79, 81, 94-96 and 231-234 and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

Second request

The undisclosed portion of Record 75, a handwritten memorandum dated December 23, 1992, contains a suggested course of action to be undertaken by the Ministry with respect to an environmental issue. Accordingly, I find that this portion of Record 75, consisting only of the final sentence, is exempt from disclosure under section 13(1).

The undisclosed portion of Record 77 does not, however, contain advice or recommendations on a specific course of action. Rather, it simply describes a set of facts relating to the proposed dock facility. This record does not qualify for exemption under section 13(1).

The sentence at the bottom of Record 107 which begins "District actively. . ." contains a suggested course of action to be undertaken by the Ministry and thereby qualifies for exemption under section 13(1).

Page 149 contains a lengthy outline of a suggested course of action to be followed by the Ministry. The memorandum includes very detailed recommendations on the manner in which the Ministry ought to proceed in its dealings with the operator of the quarry. I find that this information qualifies for exemption under section 13(1).

The Ministry has claimed the application of section 13(1) to the second last paragraph of Record 150, which is the same as Record 184. I find that it does not contain "advice or recommendations" within the meaning of section 13(1) and will order that these records be disclosed.

Record 152 is a memorandum setting out the results of a telephone conference call between those Ministry staff involved in the Pelee Island quarry discussions. The Ministry has claimed the application of section 13(1) to that portion of the record that outlines the specific course of action to be followed by the Ministry in the months following the conference call. I find that this information qualifies as "advice or recommendations" and is exempt from disclosure under section 13(1).

Record 180-182 is a summary of the comments and suggestions regarding the "Blue Racer Briefing Note" which were made by Ministry staff in late 1997 and early 1998. I find that this record sets forth the suggested course of action to be undertaken by the Ministry according to

each of the individuals who provided comments. This document qualifies for exemption under section 13(1).

The undisclosed portion of Record 186 contains very explicit instructions from one Ministry staff person to another regarding a specific course of action to be followed. I find that this record qualifies for exemption under section 13(1).

The undisclosed information contained in Record 189-190 also outlines a recommended course of action to be followed by the Ministry. I find that this information also qualifies for exemption under section 13(1).

Records 207-208 contain the same information as Records 215-216. Again, the undisclosed portions of these documents set out a specific set of recommendations for a course of action to be undertaken by the Ministry. I find that this information qualifies for exemption under section 13(1).

Similarly, Records 221-222 and 223-224 contain detailed recommendations of a suggested course of action to be undertaken by the Ministry. I find that these records also qualify for exemption under section 13(1).

In summary, I find that the final sentence of Record 75 and the undisclosed portions of Records 107, 149, 152, 180-182, 186, 189-190, 207-208, 215-216, 221-222 and 223-224 qualify for exemption under section 13(1). Records 77, 150 and 184 are not exempt under this section, however.

ECONOMIC AND OTHER INTERESTS

General principles

The Ministry has claimed the application of the discretionary exemption in section 18(1)(e) to a number of the records, and portions of records still at issue. This section reads:

> A head may refuse to disclose a record that contains,
>
> > 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;

In order to qualify for exemption under subsection 18(1)(e), the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

The Ministry's initial representations

The Ministry submits that:

> Subsection 18(1)(e) applies to records that relate to ongoing or future events. The provision is not wide enough to encompass negotiations that have not commenced or that are not contemplated. A 'vague possibility' of future negotiations is not sufficient.
>
> . . . . .
>
> In this instance there are more than a vague possibility of negotiations. This matter is to go to the Ontario Municipal Board. As in any hearing, negotiations will continue to settle the matter or narrow the issue before the board. The negotiations will be based on the strength of the evidence relating to the presence of the snake. The records at issue are comments on the strength of the Ministry's position, positions of the Ministry in term[s] of steps necessary to protect the snake and the proposed quarry development or the Ministry's position on evidence brought forward by the requester. They are or will form the position that the Ministry will take in the negotiation to settle the matter or narrow the issues. The Ministry represents the Government of Ontario. Accordingly, it is the position of the Ministry that the records clearly fall within section 18(1)(e) of the *Act*.

The appellant's representations

The appellant submits that:

> . . . the onus is on the Ministry to demonstrate (among other things) that the records contain 'positions, plans, procedures, criteria or instructions'. 'Plan' as used in section 18(1)(e), has been defined previous IPC orders as 'a formulated and especially detailed method by which a thing is to be done; a designer scheme' and the other items in section 18(1)(e) have been considered 'similarly referable to pre-determined courses of action or ways of proceeding.' (Orders MO-1199-F, MO-1264, PO-1977) It is submitted that the records which contain information, comments or recommendations, without also including a detailed plan or method of proceeding, do not qualify under the section 18(1)(e) exemption. (Order P-603) According to the Ministry's submissions, the records in question contain

> comment, evaluations or information about the Ministry's positions but are not said to contain any detailed plan or course of action, so as to qualify under section 18(1)(e).
>
> The criteria given on page 19 of the Notice of Inquiry for this section indicates that the negotiations must be carried on currently or will be carried on in the future.
>
> There are several documents that are affected by this section according to the index. The majority are dated in 1997 and 1998, in the period leading up to a decision to seek to amend the site plan to take away the rights of the licensee. Some of the records date back to 1993 and 1994. These records in our view do not satisfy the requirement of currency or future action.

The appellant also suggests that the exception in section 18(2) relating to "records that contain the results of product or environmental testing carried out by or on behalf of an institution" may apply to some of the records or parts of records remaining at issue.

The Ministry's reply representations

In its reply submissions, the Ministry argues that the records to which it has applied section 18(1)(e) contain more than "raw data" and their disclosure would reveal its position on a number of issues which will be the subject of negotiation. It also indicates that the positions expressed in documents created in 1993, 1994, 1997 and 1998 continue to be relevant to the negotiations that will take place prior to the OMB hearing. It states that:

> The hearing will deal with issues which are the subject of the comments recommendations etc [to] which the Ministry has applied the exemption. In determining its position, the Ministry will be reviewing its files and adopting the positions contained therein an which have been exempted under section 18(1)(e). The time factor is a product of delays in the planning process and the need to complete necessary studies. However, the elapsed time does not effect the relevancy of the records to and their use in negotiations, which are to take place at the time of the hearing.

With respect to the application of the exceptions in section 18(2), the Ministry submits that "while the records do relate to the environment, they do not contain the results of environmental tests."

Findings

I have reviewed the contents of the records to which the Ministry has applied the exemption in section 18(1)(e), along with the representations of the parties and make the following findings.

Records 6, 7, 35, 36, 40, 46, 48 and 130 are email communications in which the Ministry's negotiating positions with respect to the issues currently before the OMB are described in detail.

In my view, these records contain information relating directly to the positions to be applied by the Ministry in the negotiations that will take place prior to the OMB hearing. I find that these negotiations have yet to take place but that the positions expressed in the records remain relevant to those discussions. Accordingly, I find that the Ministry has satisfied the requirements of section 18(1)(e) with respect to Records 6, 7, 35, 36, 40, 46, 48 and 130 and that these records are, accordingly, exempt from disclosure under this exemption.

I further find that the undisclosed portions of Records 64, 65, 68 and 77 do not contain information relating to the positions to be taken by the Ministry in the negotiations which are contemplated prior to the OMB hearing. Rather, this information relates to the costs incurred by the Ministry in the preparation of studies undertaken by outside contractors. This information does not qualify for exemption under section 18(1)(e).

In addition, I find that the review by a biologist of a scientific study prepared by a consultant retained by the quarry operator that is contained in Record 108-113 does not contain information relating to the Ministry's positions with respect to the issues that will be the subject of negotiation prior to the OMB hearing. As a result, this record is not exempt from disclosure under section 18(1)(e).

SOLICITOR-CLIENT PRIVILEGE

Introduction

During mediation, the appellant withdrew her appeal with respect to the majority of the records, or parts of records, which the Ministry originally claimed were exempt under section 19. There remain, however, three records subject to a claim for exemption under section 19, Records 335-336, 337-338 and 339-340 from the first request.

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that are available in the context of Crown counsel giving legal advice or conducting litigation.

Here, the Ministry relies on solicitor-client communication privilege under both branches. The Ministry does not rely on litigation privilege under either branch. I will first consider the application of common law solicitor-client communication privilege under Branch 1.

Solicitor-client communication privilege under Branch 1

General principles

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The parties' representations

The Ministry submits that:

> . . . the District consulted with the Ministry's legal services branch throughout the process. The advice of counsel appears in a number of ways in those records to which section 19 applies. The records are either email directly to or from counsel such as [three named Ministry counsel], or which report on the advice or questions which counsel required answer[ed] in order to provide advice. Other records are notes of meetings in which one or more of the counsel have participated.
>
> . . . . .
>
> These records contain accurate descriptions of the advice of counsel. The advice relates to the operation of the *Endangered Species Act*, the legal requirements relating to consideration of the quarry proposal and the Ontario Municipal Board hearing on the matter. Accordingly, it is the position of the Ministry that these records are exempt from disclosure pursuant to section 19 as common law solicitor client privilege attaches to the records.

The appellant submits that:

> the non disclosure should only be authorized in clear cases of litigation privilege or the solicitor-client privilege. The absence of detail in the hands of the company makes further submissions impossible.

Findings

In my view, each of these records consists of a confidential communication from a client to a lawyer, aimed at keeping the lawyer up-to-date on factual developments in the matter of the *Endangered Species Act* and the OMB hearing, matters on which the lawyer was giving legal advice. As such, these records fall within the *Balabel* "continuum of communications." Therefore, I find that Records 335-336, 337-338 and 339-340 are exempt from disclosure under section 19.

THIRD PARTY INFORMATION

Introduction

The Ministry has claimed the application of the section 17(1) mandatory third party information exemption for a number of records responsive to the second request. The information contained in these records relates to the activities of the holders of commercial fishing licences in the waters surrounding Pelee Island during the years 1973 to 1992.

General Principles

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry 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 (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1 - types of information

The Ministry submits that the records to which it has applied section 17(1) contain information that meets the definition of the term "commercial information" adopted in previous orders of the Commissioner's office. It states that:

> The records relate to the amount of fish which has been caught pursuant to the licence. In addition to the amount or weight of fish, a number of the records identify the price of the fish caught. These licensees are commercial fishers. Accordingly, any information relating to the amount of fish caught or the price obtained is, on its face, [the information is] clearly commercial information. In

> past orders, your office has indicated that 'commercial information' relates to the buying, selling or exchanges of merchandise or services. Furthermore, it is possible to determine the income of the fishers or licence holders from this information and would appear to be financial information.

The Ministry also suggests that the records may contain information that qualifies as "technical information" for the purposes of section 17(1).

The appellant argues that information in the records which does not include prices paid for the fishers' catches ought to be disclosed. The appellant suggests that information from many years ago relating to fish catches landed is no longer "commercial information" for the purposes of section 17(1).

In my view, the undisclosed information in Records 9, 10 to 15, 38-45, 46, 47, 49-50, 52-53, 55-56 and 58-60 qualifies as "commercial information" for the purposes of section 17(1) as it relates directly to the selling prices and quantities of fish landed by specific licence holders in the waters off Pelee Island.

Records 48, 51 (internal Ministry correspondence) and 57 (a map indicating the location of the licensed fishing grounds) do not contain commercial information within the meaning of section 17(1). The undisclosed portions of Records 48 and 51 do not specifically relate to any licence holder but merely comment on the general state of the industry. The map similarly does not contain commercial information relating to the transactions involved in the industry. As no other exemptions have been claimed for this information, and no other mandatory exemptions apply to it, I will order that they be disclosed to the appellant.

Part 2 – Supplied in confidence

The Ministry submits that the information contained in the records was supplied to it by the licence holders in accordance with the requirements of their licence agreements. It notes that the majority of the records contain handwritten entries submitted by the fishers themselves regarding the amount of their catches and their value.

If further submits that, while there is no express statement of confidentiality on the records, it is reasonable to assume that the fishers provided this data to the Ministry with an expectation that it would be treated in a confidential manner. The Ministry points out that the information on the forms completed by the fishers "is akin to information that would be provided in an income tax return." The Ministry also points out that the individual licence holders are small businesses operating in a very small, isolated community. The information contained in the records could be used to determine their incomes and they would reasonably expect the Ministry to maintain information of this sort in a confidential manner.

The appellant argues that she is not seeking access to the prices paid for the fish caught but rather, is only seeking access to information relating to the number of fish landed. As a result, she submits that the expectation of confidentiality in the information is lessened.

In my view, the information was provided to the Ministry by the holders of fishing licences with a reasonably-held expectation that it would be treated confidentially. I find that it is reasonable to assume that individuals who supply information relating to their sole source of income would expect that data to be treated confidentially. Accordingly, I find that the second part of the test under section 17(1) has been satisfied with respect to Records 9, 10 to 15, 38-45, 46, 47, 49-50, 52-53, 55-56 and 58-60.

Part 3 – Harms

Under part 3, the Ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry submits that:

> [the licence holders] operate on Lake Erie in which there are a number of number of fishers with whom the affected parties compete. They compete in terms of fishing and operating their business. If information revealing the income of the affected party was released, it could be used by these competitors in terms of buy[ing]/selling fish, the purchase of supplies or other business dealings. Accordingly, it is the position of the Ministry that disclosure of the information would result in prejudice in the competitive position of the affected party.

In its submissions, the appellant argues that the disclosure of information which is at least ten years old would not result in undue loss or gain to the licence holders or cause harm to their competitive position.

In its reply representations, the Ministry submits that:

> the information provided reveals details of the size and nature of the operation of the fishermen. An analysis of the information could assist competitors by revealing the strength or weakness of individual business[es]. Information covering a long period of time such as at issue here would allow for a more in depth analysis.

In my view, the disclosure of the information contained in Records 9, 10 to 15, 38-45, 46, 47, 49-50, 52-53, 55-56 and 58-60 could reasonably be expected to harm the competitive position of the licence holders as contemplated by section 17(1)(a). The business activities outlined by the records indicate the commercial viability of the enterprises. As the records set out these activities over a long term, it is possible to draw certain conclusions or inferences as to the long-term health of the businesses. The information would be useful to competitors or to potential purchasers of the licences in order to better determine the true value of the licence and a possible purchase price for them. I find that the disclosure of this information would work to the detriment of the licence holders.

Accordingly, I find that the information that was not disclosed in Records 9, 10 to 15, 38-45, 46, 47, 49-50, 52-53, 55-56 and 58-60 is exempt under section 17(1).

PERSONAL INFORMATION

The Ministry has claimed the application of the mandatory invasion of privacy exemption in section 21(1) to many of the records responsive to both requests on the basis that they contain the personal information of individuals other than the requester.

Personal information is defined in section 2(1) of the *Act* to mean, in part, "recorded information about an identifiable individual", including the address or telephone number of the individual [paragraph d)], the personal opinions or views of the individual [paragraph (e)], correspondence sent to the Ministry by the individual that is implicitly or explicitly of a private or confidential nature [paragraph (f)] and the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

I have reviewed the submissions of the Ministry and the appellant and make the following findings with respect to the records responsive to the first request:

- Record 64 does not contain any information that qualifies as "personal information" under the definition of that term in section 2(1). The information is not related to an identifiable individual and does not, accordingly, qualify as personal information.

- Record 68-71 is a Memorandum of Understanding between the Ministry and a biologist for the provision of professional services. I find that this information does not qualify as the personal information of this individual as it relates solely to this individual in his capacity as a professional providing certain services to the Ministry.

- The second severance in Record 77 is the personal information of the individual named therein as it indicates his personal opinion.

- The information contained in Record 108-113 is not the personal information of its author as it represents his professional evaluation of a report prepared on behalf of the appellant's client. The views expressed therein are not the personal opinions or views of the author and the record does not, accordingly, qualify as his personal information.

- Records 334, 360, 369-370, 371, 374, 376, 377, 378, 409, 410, 412, 415, 420, 421, 436, 437-438, 439, 440 and 441 contain the personal information of certain Pelee Island landowners as it refers to their personal views and opinions, their addresses, telephone numbers and other personal information relating to them.

I make the following findings with respect to the information contained in records responsive to the second request:

- Record 8 does not contain information that relates to an identifiable individual. Rather, the information contained in this record relates to two corporations only.

- Records 21 and 22 contain the personal views or opinions of one of the Ministry's biologist consultants about another individual. This information qualifies as the personal information of the other individual, though not the biologist.

- The undisclosed portion of Record 23 consists of the name of an individual whose opinions are contained in the memorandum. I find that this information qualifies as the personal information of this individual.

- Record 24 contains the personal information of an identifiable individual as it sets out information relating to financial transactions in which the individual has been involved.

- The undisclosed portions of Records 26-28, 34, 37, 80, 86-87, 88-90, 96, 111, 115, 117, 140-141, 142 and 143 contain the personal views of a number of Pelee Island residents, thereby qualifying as the personal information of these individuals.

- The undisclosed information in Record 75 is not personal information as it represents the professional opinion of a Ministry employee and was not made in his personal capacity.

- Record 91-92 is a list of resident status, approximate age and occupations of a large number of individuals who signed a petition (Record 101-104) in 1974. Neither of these records has been disclosed to the appellant. I find that the information contained in Record 91-92 qualifies as the personal information of the individuals referred to. Although their names are not included in this record, I find that the personal information is easily tied to the persons whose names are listed on the petition that forms Record 101-104.

- Record 101-104 is a petition signed by a number of individuals in 1974. The petition was in support of a proposal by the company that operated the quarry at that time to build a dock facility on the island. I find that Record 101-104 contains personal information as it sets out the views or opinions of the individuals who are listed in it. I will address whether this information is exempt from disclosure in my discussion of section 21(1) below.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs

(a) through (f) of section 21(1) applies. The only exception that might apply in the present circumstances is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption.[Order PO-1764]

If none of the presumptions in section 21(3) applies, the Ministry must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The Ministry submits that the considerations listed in sections 21(2)(f) (the information is highly sensitive) and (h) (the information was provided in confidence), both of which weigh in favour of privacy protection, are relevant in determining whether disclosure would constitute an unjustified invasion of the personal privacy of the individuals named in the records.

The appellant's submissions do not include any reference to the application of the considerations listed in section 21(2) which favour the disclosure of the information that contains personal information.

Based on my review of the contents of the records, I find that they are exempt under section 21(1) and that their disclosure would constitute an unjustified invasion of privacy. I find that the information contained in the records was provided to the Ministry with an expectation that it would be treated confidentially, as contemplated by section 21(2)(h). I do not agree that the information may accurately be characterized as "highly sensitive" within the meaning of section 21(2)(f), however. The appellant has not provided submissions on the application of any of the considerations favouring disclosure and I find that none apply. The sole relevant factor under section 21(2) is, accordingly, section 21(2)(h).

I specifically find that the disclosure of the information in Records 77, 334, 360, 369-370, 371, 374, 376, 377, 378, 409, 410, 412, 415, 420, 421, 436, 437-438, 439, 440 and 441 from the first request and Records 21, 22, 23, 24, 26-28, 34, 37, 80, 86-87, 88-90, 91-92, 111, 115, 117, 135, 140-141, 142 and 143 from the second request would constitute an unjustified invasion of personal privacy. These records qualify for exemption under section 21(1).

As Records 64, 68, 71 and 108-113 from the first request and Records 8 and 75 from the second request do not contain personal information within the meaning of section 2(1), they do not qualify for exemption under the invasion of privacy provisions of section 21(1).

Record 101-104 is a petition signed by a number of Pelee Island residents in 1974. Past orders of this office have found that petitions, by their very nature, are intended to be public documents (Orders P-154, P-171 and P-516). In my view, the disclosure of Record 101-104 would not result in an unjustified invasion of privacy under section 21(1) and I will order that it be disclosed to the appellant.

HARM TO SPECIES AT RISK

Introduction

The Ministry has claimed the application of section 21.1 of the *Act* to Record 202-204 from the first request. It had also applied this exemption to Record 27 but this document was removed from the scope of the appeal during the mediation stage. Record 202-204 consists of raw data gathered by Ministry biologists describing in very specific terms the locations on Pelee Island where Blue Racer snakes have been found.

Section 21.1 provides:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to the killing, capturing, injuring or harassment of fish or wildlife that belong to a species at risk or to interference with the habitat of fish or wildlife that belong to a species at risk.
>
> (2) In this section.
>
> > "fish" and "wildlife" have the same meanings as in the Fish and Wildlife Conservation *Act*, 1997

This is the first appeal in which this office has considered the interpretation and application of this exemption.

The Ministry's initial representations

The Ministry submits that if the information contained in Record 202-204 were to be disclosed, it could reasonably be expected to facilitate the killing, capturing, injuring or harassment of Blue

Racer snakes, which are an endangered species, or lead to interference with its habitat. It goes on to add that:

> It has been the experience of the Ministry that there are those who collect such rare species or who wish to kill or harm endangered species in order to remove barriers to development of property. While it is unlikely that a reputable firm, such as the requester would take such actions, there is no control over its dissemination once this information is released. The Ministry must operate on the assumption that the information will be released to the world, including the unscrupulous.

The appellant's representations

The appellant takes the position that there does not exist a reasonable expectation of harm to the endangered species or its habitat. It notes that, if this were so, her client would have already taken steps to remove the snakes from the site that is the subject of the OMB hearing. The records demonstrate that the operator has not, however, done so. The appellant also indicates that similar information could be gleaned from the maps that are registered on lands whose owners benefit from a tax incentive program designed to encourage the preservation of endangered species' habitats. The appellant also states that the population of Blue Racer snakes on Pelee Island appears to be increasing, as demonstrated by the studies conducted by Ministry biologists and those retained by the quarry operator.

The Ministry's reply submissions

The Ministry states that the information contained in records already disclosed and the maps which are registered on the title of lands which are subject to the tax incentive program (the Conservation Land Tax program) referred to in the appellant's representations do not contain the kind of detailed information which is set forth in Record 202-204. It argues that "[R]eleasing the specific information would significantly increase the risk of harm to the snake."

The Ministry also points out that once information is disclosed to a requester under the *Act*, it has no control over its dissemination. Disclosure to the appellant could lead to the release of the information to those who are "less scrupulous" than the appellant.

Findings

What is the appropriate interpretation of the word "could reasonably be expected to" in section 21.1?

Before considering the evidence and arguments of the Ministry and the appellant, I must determine the meaning of the words "could reasonably be expected to" in section 21.1.

Section 21.1, like many other "harm-based" exemptions in the *Act*, uses the words "could reasonably be expected to" to described the evidentiary threshold that must be met. This office

has found that in the case of most exemptions, the words "could reasonably be expected to" require the following:

> The institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-1747; *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

However, in the case of the exemptions at sections 14(1)(e) and 20, both of which concern threats or endangerment to an individual's safety or health, this office has ruled that a different, lower standard is required, as follows:

> The institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [Order PO-1747; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The Ministry argues that the latter, less stringent test is applicable under section 21.1. It indicates that similar issues exist in the law enforcement milieu under section 14 and the endangered species protection regime that is intended to be protected by section 21.1. It states that "the harm to society in terms of loss of species forever which section 21.1 is designed to prevent is akin to public safety and health of individuals; thus the same test should apply."

The appellant disagrees, and submits that the appropriate test ought to be the more stringent test applicable to most exemptions. The appellant takes the position that:

> The latter test has been applied where there is a threat to the safety or health of an individual and the issue is the 'bodily integrity' of a person (*Ontario (Ministry of Labour) v. Big Canoe* [1999] O.J. No. 4560 (C.A.)). In the absence of a threat to the safety or bodily integrity of an individual, it is submitted that the usual test applies, under article the Ministry is required to provide "detailed and convincing" proof of a "reasonable expectation of probable harm". It is submitted that the Ministry has failed to discharge that burden in the present case.

I agree with the appellant that since section 21.1 does not deal with potential harm to an individual, in contrast to sections 14(1)(e) and 20, the standard interpretation of the words "could reasonably be expected to" is appropriate. Therefore, the Ministry must provide detailed and convincing evidence to establish a reasonable expectation of harm. Evidence amounting to speculation of possible harm is not sufficient.

Is there a reasonable expectation of harm under section 21.1?

Section 21.1 requires the Ministry to demonstrate that:

1. The animal in question qualifies as "fish" or "wildlife" as defined in the *Fish and Wildlife Conservation Act, 1997*;

2. The animal belongs to a species at risk;

3. Disclosure could reasonably be expected to lead to:

   (a) the killing, capturing, injuring or harassment of the animal; or

   (b) interference with the habitat of the animal.

The *Fish and Wildlife Conservation Act, 1997*, at section 1(1), defines "wildlife" as "an animal that belongs to a species that is wild by nature, and includes game wildlife and specially protected wildlife." There is no dispute that the Pelee Island Blue Racer snake is "wildlife", and I find it so qualifies, and the first part of the test is met.

In addition, there is no dispute that this snake belongs to a "species at risk". Since 1973, the Blue Racer snake has been listed as an endangered species under the provisions of the *Endangered Species Act*. Therefore, the second part of the test is met.

The only contentious issue under section 21.1 is whether disclosure could reasonably be expected to lead to one of the two listed harms.

Record 202-204 contains very specific information as to the locations where Ministry biologists have found the snakes. In the circumstances, I am persuaded that disclosure of this record could reasonably be expected to lead to interference with the habitat of the snake on Pelee Island. In my view, the Ministry's representations, combined with the record itself, constitute more than mere speculation as to possible harm. While the quarry operator has demonstrated a conscientious approach to the preservation of the snake's habitat, disclosure of the information in Record 202-204 to it is tantamount to disclosure to the world (Order M-96). In the heated atmosphere surrounding the issue amongst Pelee Island residents, I find that interference with the snake's habitat could reasonably be expected to result from the disclosure of the information in Record 202-204. As a result, I find that this document is exempt from disclosure under section 21.1.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 3, 6, 7, 11, 35, 36, 40, 46, 48, the second severance in Record 77, Records 86-88, 128, 130, 133, 175, 178-180, 184-186, 202-204, 226, 239-242, 275-276, 290, 291-292, 334, 335-336, 337-338, 339-340, 360, 369-370, 371, 374, 376, 377, 378, 409, 410, 412, 414, 420, 421, 436, 437-438, 439, 440 and 441 from Request A-2001-00057 and Records 9, 10-15, 21, 22-23, 24, 26-28,

34, 37, 38-45, 46, 47, 49-50, 52-53, 55, 56, 58-60, 70, the final sentence of Record 75, Records 80, 86-87, 88-90, 96, 107, 111, 115, 117, 135, 140-141, 142, 143, 149, 152, 180-182, 186, 189-190, 207-208, 215-216, 221-222 and 223-224 from Request A-2001-00058.

2. I order the Ministry to disclose Records 26, 64, 65, 68-71, 77 (with the exception of the second severance, Records 79, 81, 94, 95, 96, 108-113, 231-234, 286, 288, 293, 299 and 304 from Request A-2001-00057 and Records 8, 48, 51, 57, 75 (with the exception of the final sentence), Records 77, 101-104, 150 and 184 from Request A-2001-00058 to the appellant by providing her with copies by **July 22, 2003** but not before **July 17, 2003.**

3. In order to verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant.

Original signed by: June 17, 2003
Donald Hale
Adjudicator