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

ORDER PO-2380

Appeal PA-040138-2

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to:

> The planning and coordination, including meeting notes, e-mails, and documents both within the MNR and with other agencies that went into the September 12, 2002 seizure of animals at the Ottawa-Carleton Wildlife Centre [the OCWC]. Provide a breakdown of the costs, including travel, rentals, salaries (direct and contracted), special equipment that went into the September 12, 2002 seizure operations. Include any evaluations of this operation.

During the initial processing of the request, the requester clarified its scope as follows:

> Please include notes from officer notebooks for officers involved in the planning of the Sept. 12 seizure. Notes from officer notebooks pertaining to the actual activities on Sept. 12 are not requested.

The Ministry located a large number of responsive records and granted full access to some of them and partial access to others. Other records were withheld in their entirety on the basis that they were exempt under sections 13(1) (advice or recommendations), 14(1)(c), (e), (g), (h) and (l) (law enforcement), 19 (solicitor-client privilege) and 21(1) (invasion of privacy), taken in conjunction with the presumption in section 21(3)(b) (compiled as part of a law enforcement investigation) and the factors in sections 21(2)(f) (highly sensitive information) and (h) (information supplied in confidence) of the *Act*. The Ministry also provided the requester with an initial index of records (the Request Report) and identified some additional pages of records as "not relevant" to the request.

The requester (now the appellant) appealed the Ministry's decision to deny access to the undisclosed information and disputed the Ministry's identification of some records as being "not relevant" to the request.

During the initial processing of the appeal, the Ministry located additional records, comprised of e-mails, and granted partial access to them. The Ministry also applied the exemptions found in sections 14, 19 and 21(1) of the *Act* to deny access to portions of these records.

During the mediation stage of the appeal, the appellant removed some of the records identified as "not relevant" from the scope of the appeal. Also during mediation, the Ministry disclosed additional information and provided the appellant and this office with a copy of an updated index, which will form the basis for my description of the records in this Order.

As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I sought and received the representations of the Ministry initially and shared the non-confidential portions of them with the appellant, along with a copy of the Notice of Inquiry. I received representations from the appellant in which she referred to the possible application of the "public interest override" provision in section 23 of the *Act*. I shared the appellant's

representations with the Ministry, and received additional submissions from it by way of reply, addressing specifically the application of section 23 to the records.

The appellant maintains that Records 72, 73, 76, 94, 123, 151, 159, 160, 161, 162, 301 and 307, identified by the Ministry as being "non-responsive" to her request are, in fact, responsive and ought to be addressed as part of her appeal. These records are described by the Ministry in an Index provided to the appellant and this office as the "Index of Non-Relevant Records". I will address this issue below.

RECORDS:

The records at issue are described in the Index of Records provided to the appellant and to this office on August 27, 2004. In addition, the Ministry also prepared and provided to this office and the appellant a further "Index of Non-Relevant Records". The appellant takes the position that Records 72, 73, 76, 94, 123, 151, 159, 160, 161, 162, 301 and 307 from that Index are also at issue.

DISCUSSION:

RESPONSIVENESS OF THE RECORDS

The Ministry takes the position that certain of the records are not responsive to the request on the basis that they are "not relevant" to the request. These documents, in whole or in part, are described in detail in the "Index of Non-Relevant Records" prepared by the Ministry for this office and the appellant. The appellant argues that Records 72, 73, 76, 94, 123, 151, 159, 160, 161, 162, 301 and 307, which the Ministry describes as "non-relevant", are responsive to her request and ought to be included as part of this appeal.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

I have carefully reviewed all of the records identified by the Ministry as "non-relevant" and find that they clearly fall within the ambit of the request as originally framed, and subsequently modified during the mediation stage of the appeal by the appellant. The records relate directly to the sequence of events that resulted in the search warrant execution operation undertaken by the Ministry on September 12, 2002 as well as the planning and other logistical arrangements made by the Ministry in preparation for the events of that date. Accordingly, I find that the records identified as "not relevant" are, in fact, responsive to the request.

I will, therefore, order the Ministry to provide the appellant with a decision letter respecting access to Records 72, 73, 76, 94, 123, 151, 159, 160, 161, 162, 301 and 307 from its "Index of Non-Relevant Records" in accordance with the requirements of section 26 of the *Act* and without recourse to a time extension under section 27(1) of the *Act*.

ADVICE OR RECOMMENDATIONS

The Ministry claims the application of the discretionary exemption in section 13(1) to the undisclosed portion of Record 36, an email from its Kemptville District Manager to the Ministry's District Communication Officer and its District Enforcement Supervisor and Clerk. In the email, the District Manager conveys his views on certain corrections to be made to ensure the accuracy of a document entitled "Revised Enforcement Q's and A's".

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner),* [2004] O.J. No. 163 (Div. Ct.)]

In my view, the undisclosed portion of Record 36 qualifies for exemption under section 13(1) as it contains a specific course of action to be taken by the recipient of the communication. I further find that the disclosure of the record could reasonably be expected to impede the free flow of advice and recommendations within the Ministry's decision-making and policy development process. The undisclosed portion of Record 36 does not contain factual information, and does not thereby fall within the exclusion in section 13(2)(a), as argued by the appellant. As a result, the undisclosed portion of Record 36 is exempt under the discretionary exemption in section 13(1).

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that Records 191, 192-196, 197, 198-207, 208, 209-219, 246-280, 288-293, 294, 300, 301, 342, 471-472, 486, 527, 532-533 and 563 are exempt from disclosure under the discretionary exemption in section 19, which states:

> 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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

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 privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

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

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Representations of the parties

The Ministry submits that the records described above fall within the ambit of Branch 2 of the section 19 exemption. It argues that the records fall within two types, and that they are all:

> . . . communications to or from legal counsel, either at the Ministry's Legal Services Branch or at the Ministry of the Attorney General, containing either requests for advice or actual advice. Alternatively, they are records created for use in litigation either for the motion brought [by the organization represented by the appellant] or for use in the charges. Given the intransigence of [the appellant's organization] on the issue of the surrender of the rabies vectors species, there was a reasonable prospect of litigation in the form of charges under the *Fish and Wildlife Conservation Act*. Therefore it is the submission of the Ministry; the records in question fall within section 19 of the *Act* and are exempt from disclosure.

The Ministry goes on to argue that the privilege that exists in the records has not been waived through their sharing with anyone outside of Crown employees.

The appellant submits that:

> . . . confidentiality is an essential component of the solicitor-client privilege and the institution must demonstrate that the communication was made in confidence and that the document was brought into existence by the author for the dominant purpose of using its contents in order to obtain legal advice. It is the MNR's position that the dominant purpose in preparing the records was in the giving of legal advice even though the records were also prepared for operational purposes. It is the [appellant's] position that the MNR has not fully demonstrated that the original purpose or intent of the records was not for operational purposes and although a secondary purpose may have been for legal review, this concept should not be applied to all MNR documentation. The exclusion should be limited to those documents specifically prepared for Counsel and that contain a confidence clause. In addition, given the termination of litigation and no related litigation involving the same parties, such records should lose their exemption status of solicitor-client privilege.

Findings under section 19

Records 191 to 219, 221 to 230, 246 to 280, 288 to 293, 294, 471, 472 and 486

These documents represent a chain of email communications passing between legal counsel for the Ministry and a Conservation Officer. The communications took place in the context of the obtaining of a search warrant by the Ministry. Records 191 to 219, 246 to 280, 288 to 293, 294, 471, 472, and 486 contain information pertaining to the Conservation Officer seeking the legal advice of counsel in the preparation of certain documents in support of the Ministry's application for a search warrant, and the actual advice provided by counsel to the Officer.

In my view, these records qualify for exemption under the solicitor-client communication component of Branch 2 of section 19. I find that these documents represent confidential communications between a solicitor and her client that were created for the purpose of seeking and giving legal advice.

Records 300 and 301

These documents, which comprise hand-written notes taken by the Ministry's District Enforcement Supervisor, include references to certain legal advice provided by Ministry legal counsel to the author of the notes. I find that Records 300 and 301 are exempt under Branch 2 of section 19. The references in the notes to which the Ministry has applied section 19 reflect certain confidential communications between a solicitor, the Ministry's legal counsel and her client, the District Enforcement Supervisor. The notes contain legal advice provided by counsel to the Supervisor and represent confidential communications passing between them.

Accordingly, I find them to be exempt under the solicitor-client communication privilege component in Branch 2 of section 19.

Record 342

The undisclosed portion of Record 342 that is responsive to the request is a note made by a Ministry Conservation Officer describing certain actions taken on a specified date. I cannot agree that this information qualifies for exemption under either branch of section 19. On its face, it does not represent a confidential communication between a solicitor and client and I have not been provided with sufficient evidence to demonstrate that it qualifies under the litigation privilege aspect of either Branch 1 or 2 of section 19. As this is the only exemption claimed for the responsive, undisclosed portions of Record 342, I will order that it be disclosed.

Records 527, 532-533 and 563

Each of these email messages represent a confidential communication between a solicitor and her client about a legal issue relating directly to the giving or seeking of legal advice. The issue under discussion relates directly to the legal position of the Ministry with respect to the preparation of documentation relating to the issuance of the search warrant and certain potential litigation. In my view, these records qualify for exemption under the solicitor-client communication component of Branch 2 of section 19.

LAW ENFORCEMENT

The Ministry submits that the records, or portions of them, qualify for exemption under the discretionary exemptions in sections 14(1)(c), (e), (g) and (l), which state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

General principles

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", 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-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), 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 [*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.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations of the parties

The Ministry submits that records relating to or including the "Operations Plan, the Contingency Plan, the Communications Plans, Officers note, the chronology of events, documents used to obtain or prepare the search warrant, the emails to the Ottawa Police and Ministry of Natural Resources or Attorney General legal counsel" are exempt under the law enforcement exemptions in sections 14(1)(c), (e), (g) and (l). The Ministry argues that the disclosure of these records, as well as any other records to which it has applied the section 14(1) law enforcement exemptions, would interfere with the gathering of intelligence information and would reveal how the Ministry conducts large scale law enforcement operations.

The Ministry relies on the reasoning contained in Order P-745 in which Adjudicator Anita Fineberg made certain findings respecting the application of section 14(1)(e) to a "security plan" relating to a cull of deer planned for a provincial park. She found that:

> In its representations, the Ministry explains that the techniques contained in the Plan, the purpose of which is to diffuse violent situations, are used by the Ontario Provincial Police and other ministries to deal with demonstrations. The Ministry submits that the effectiveness of these techniques would be severely limited if they were disclosed. If those intent on violence were aware of the procedures used to diffuse or avoid violent situations, they could take steps to counter those techniques. The Ministry states that if this should occur, the risk of harm to either Ministry staff acting as law enforcement officers or to members of the public who are directly involved in, or who witness the incident, becomes significant.
>
> I have reviewed the representations of the Ministry and the contents of the record. I accept the submissions of the Ministry that the proactive approach set out in the

> Plan has successfully prevented violent confrontations in the past. The success of the Plan is attributable to the fact that it accurately predicts the actions of certain parties and sets out the procedures to deal with them. The Ministry indicates that, because of its success in 1993, the Plan will be used as a model for similar plans in the future.
>
> I agree with the position of the Ministry that the effectiveness of the Plan will be lost should it be disclosed. I also accept its submissions on the relationship between the disclosure of the Plan and the danger to the life or physical safety of the Ministry staff acting as law enforcement officials and/or other individuals, such as those involved in the herd reduction or protesters or witnesses to the event.
>
> Accordingly, I am satisfied that the Ministry has provided sufficient evidence to establish a clear and direct linkage between disclosure of the record and the alleged harms. Therefore, section 14(1)(e) of the *Act* applies to exempt the Plan from disclosure.

The Ministry goes on to add:

> Furthermore revelation of the techniques would facilitate the commission of an unlawful act or hamper the control of crime. Not only would the release of [these] records reveal law enforcement techniques and endanger the physical safety of officers, as described above, their disclosure would reveal the techniques by which the Ministry executes search warrants. Revelation and the study of this information could enable wrong doers to develop techniques or schemes to thwart the effectiveness of such searches. As a result, the Ministry would not be able to or be hampered in its ability to obtain convictions; thus facilitating the commission of [an] unlawful act and/or hampering the control of crime or unlawful act[s].

The Ministry also provided submissions on the application of section 14(1)(h) to the records. I will not consider its possible application because this is a discretionary exemption and was only raised for the first time late in the appeal resolution process. In the Confirmation of Appeal notice sent by this office to the Ministry on June 18, 2004, this office advised that "Since this is an appeal of a decision arising from a deemed refusal appeal, you are not permitted to claim any new discretionary exemptions." In my view, the Ministry was precluded from claiming the application of any additional discretionary exemptions, such as section 14(1)(h), by virtue of this communication. I will not, accordingly, consider the possible application of section 14(1)(h) to the records. As this exemption is the only one claimed to apply to Record 574-575, I will order that it be disclosed to the appellant.

The appellant has provided detailed representations with respect to each of the subsections in section 14(1) claimed by the Ministry. With respect to section 14(1)(c), the appellant argues that this exemption can apply to "investigation techniques" only, and not to information relating to the Ministry's enforcement procedures or techniques. She argues that the subject matter of the

records, involving the seizure of animals from the wildlife centre, was an "enforcement action" and was not related to "investigation" under the *Fish and Wildlife Conservation Act*.

In addition, the appellant relies on the findings in Order PO-2338 in which Adjudicator Sherry Liang dismissed arguments that information identifying specific research projects involving rabies and their participants could reasonably be expected to result in the harms contemplated by sections 14(1)(e) and (l). The appellant argues that in the present circumstances, there are insufficient grounds to withhold the records on the basis that they are exempt under sections 14(1)(e) and (l).

The appellant also submits that the information in the records was not gathered in a "covert" fashion and that it cannot, therefore, be considered "intelligence information" for the purposes of section 14(1)(g).

Findings under section 14(1)

Section 14(1)(e)

The Ministry's representations in favour of the application of the exemption in section 14(1)(e) do not refer specifically to the information contained in any record or records. I cannot agree that endangerment to the life or physical safety of Ministry employees or other individuals could reasonably be expected to result should the records at issue be disclosed. In the present case, the records address the Ministry's approach to conducting an in-depth investigation at one particular facility and did not involve circumstances that were comparable to those present in Order P-745. In that case, conservation officers and other Ministry staff were engaged in a cull of deer at a provincial park involving well-organized protesters intent on disrupting their activities. In the present appeal, no such resistance to the Ministry's actions was encountered. I find that the Ministry has not provided me with sufficient evidence to establish a reasonable basis for believing that endangerment will result from disclosure. As a result, I find that section 14(1)(e) has no application to the records at issue in this appeal.

With respect to section 14(1)(c), many of the undisclosed records, or parts of records, describe the procedures and techniques used by the Ministry in obtaining and executing a search warrant in a high profile and sensitive situation involving animal rights issues and activists. The records contain a great deal of detail about the manner in which the Ministry went about achieving the result they did in this situation and includes information about the involvement of the Ontario Provincial Police in the matter. In my view, many of the records relate directly to the investigation and behind the scenes activities of a law enforcement nature. As such, I am of the view that many of the records, or part of records, fall within the ambit of the exemption in section 14(1)(c).

I will now consider the possible application of sections 14(1)(c), (g) and (l) to each of the remaining records, or parts of records, at issue individually.

Record 1 to 6

This document is a copy of the search warrant which provided the legal basis for the Ministry's actions on September 12, 2002. I find that none of the exemptions in section 14(1) have any application to this publicly-available document.

Records 7 to 16 and 511 to 522

I find that these records, outlining in great detail how the search warrant was to be executed by the Police and Ministry staff, are properly exempt from disclosure under section 14(1)(c) as their disclosure could reasonably be expected to reveal certain investigative techniques and procedures currently in use in law enforcement.

Record 17 to 23

The disclosure of this document, prepared by the Evaluation and Special Services Unit of the Ministry's Enforcement Branch, could reasonably be expected to reveal investigative techniques that are currently in use in law enforcement. Accordingly, I find that it is exempt from disclosure under section 14(1)(c).

Record 43 (duplicated at Record 50)

I find that Record 43 is properly exempt under section 14(1)(g) as its disclosure could reasonably be expected to interfere with the gathering of law enforcement intelligence information respecting both identified organizations and persons.

Record 44 to 46 (duplicated at Records 51 to 53)

The disclosure of the contents of these documents could reasonably be expected to facilitate the commission of an unlawful act within the meaning of section 14(1)(l). The information relates directly to the manner in which the Ministry and the Police control a certain category of crime. I am satisfied on that basis that the information is exempt under section 14(1)(l).

Record 55 to 56

I have not been provided with sufficient evidence, nor does the record itself demonstrate, that its disclosure could reasonably be expected to give rise to the harms contemplated by sections 14(1)(c) or (l). As a result, I will order that this record be disclosed to the appellant.

Record 57 to 62

These documents were prepared by members of the Ontario Provincial Police (the OPP) following the execution of the search warrant against the OCWC. They relate to the searches undertaken of certain electronic records found at that location. I find that their disclosure could reasonably be expected to reveal investigative techniques and procedures currently in use by the OPP and these records are exempt under section 14(1)(c).

Record 67 to 70

The Ministry has claimed the application of sections 14(1)(c) and (l) for the four maps that comprise these particular records. I find that I have not been provided with sufficient evidence to allow me to make a finding that the disclosure of these maps could reasonably be expected to result in the harms contemplated by either of these exemptions.

Undisclosed portion of Record 71

Again, I find that the Ministry has not provided me with sufficient evidence to enable me to make a finding that the disclosure of this record, a list of the individuals comprising the Ministry's "Command Team", could reasonably be expected to result in the harms contemplated by sections 14(1)(c) or (l).

Record 72 to 74

The Ministry claimed the application of section 14(1)(h) for this record, along with section 14(1)(c). I earlier determined that the Ministry is not entitled to rely on the discretionary exemption in section 14(1)(h). I find that the Ministry has not established the application of section 14(1)(c), based on its representations to me.

Records 85 to 96, 101 to 109, 110 to 120, 121 to 125, 492 and 493 to 497

These records are copies of all or parts of the Operational Plan prepared by the Ministry's Evaluation and Special Services Unit for the execution of the search warrant against the premises operated by the OCWC on September 12, 2002. In my view, this document qualifies for exemption under section 14(1)(c) as its disclosure could reasonably be expected to reveal investigative techniques currently in use by the Ministry in enforcing its mandate. The record describes in detail the methods employed by the Ministry in obtaining evidence and information when executing a search warrant against a facility such as that operated by the OCWC.

Records 97, 98, 99 and 100

These are emails passing between Ministry staff prior to the execution of the search warrant that refer in a non-specific way to their preparations and plans for that operation. I find that the disclosure of this information cannot reasonably be expected to result in the harms contemplated by sections 14(1)(c) or (l). I will address the application of section 21(1) to portions of Records 98 and 100 below.

Records 126 to 157 and 158 to 180

These records are two versions of a document entitled "Enforcement Contingency Plan for OCWC Search Warrant". While similar to the Operational Plan described above, it includes other planning information and more specific details about the nuts and bolts of the operation. I find that these records fall within the ambit of section 14(1)(c) and are exempt under that section.

Record 231 to 232

These records represent a chain of emails passing between a Ministry official and an officer with the Ottawa Police Service in which the officer provided the Ministry with certain language to be included in its search warrant application. I find that this record qualifies for exemption under section 14(1)(c).

Record 233

I am not satisfied, based on my review of the contents of this record, a two-paragraph email, and the Ministry's representations that it qualifies for exemption under sections 14(1)(c), (g) or (l), as suggested by the Ministry. I will, however, evaluate whether portions of it qualify for exemption under section 21(1) below.

Record 234 to 243

This record comprises the appendices attached to the Ministry's Application for a Search Warrant and are publicly available, as are Records 1 to 6. I find that this information does not qualify for exemption under any of the section 14(1) exemptions claimed and I will order that they be disclosed.

Records 244 to 245

This document consists of an email chain between Ministry staff involved in the preparation of the Application for a Search Warrant described above. Portions of this record are identical to Record 233 and I find that it too is not exempt under the section 14(1) exemptions claimed.

Record 281 to 287

Based on my review of the contents of this document, an email with attachments received by the Ministry from an investigator with the Ontario Provincial Police (the OPP), I am satisfied that its disclosure could reasonably be expected to reveal investigative techniques and procedures within the meaning of section 14(1)(c).

Record 295 to 298

In my view, the disclosure of the information contained in this chain of emails could reasonably be expected to result in the harm contemplated by section 14(1)(c). The information relates directly to certain investigative techniques employed by the OPP and their disclosure could reasonably be expected to reveal them.

Records 299 to 386 and 435

These records consist of various handwritten notes taken by the Ministry's District Enforcement Supervisor and two Conservation Officers during the course of their investigation and prior to the date of the execution of the search warrant. The Ministry has not provided me with any

specific representations referencing the application of the exemptions claimed under section 14(1) to these records. I have carefully reviewed the contents of these records and find that I have not been provided with sufficient evidence to substantiate a finding that any of sections 14(1)(c), (g) or (l) apply to the information contained therein.

I have addressed the application of section 19 to portions of these records above and will address whether other portions may qualify for exemption under section 21(1) below.

Record 475

This document is a typewritten note made by a Ministry employee describing his or her involvement with the OCWC in 2001 and 2002. The Ministry has not provided me with any evidence pertaining to this record or the context in which it was created. On its face, I am unable to determine that the harms contemplated by sections 14(1)(c), (e), (g) or (l) could reasonably be expected to follow the disclosure of the information in this document. I will, accordingly, order that it be disclosed to the appellant.

Record 490

This document is a one-page email between Ministry staff regarding the Ministry's reaction to a public demonstration of support for the OCWC following the execution of the search warrant on the shelter property. In my view, the disclosure of Record 490 could reasonably be expected to reveal certain investigative techniques and procedures within the meaning of section 14(1)(c). I find that Record 490 is, therefore, exempt under that section.

Records 498 to 510

This record represents a generic Ministry Contingency Planning Guideline relating to a specified type of situation involving certain types of "emergency situations". I find that the disclosure of this record could reasonably be expected to interfere with the gathering of intelligence information respecting an organization or person within the meaning of section 14(1)(g). Because of the nature of the contents of this record, I am unable to describe it in greater detail.

Records 523 and 530

The undisclosed portions of these emails contain information whose disclosure could reasonably be expected to reveal certain investigative techniques and procedures in place and in use by the Ministry in its law enforcement activities. As such, I find that the undisclosed portions of Records 523 and 530 qualify for exemption under section 14(1)(c).

Record 546

Record 546 is a "check list" of things to be done by the Ministry in furtherance of its investigation. I find that the disclosure of this information could reasonably be expected to result in the harm contemplated by section 14(1)(c) and the record is, accordingly, exempt under that section.

Records 558 to 560

I find that the disclosure of Records 558 to 559, which consist of lists of the Directors of the Ottawa Carlton Wildlife Centre and Record 560, a list of other individuals who have other associations with the Centre, could not reasonably be expected to give rise to the harms contemplated by sections 14(1)(c), (g) or (l).

Records 561, 562, 565, 566, 570, 571 and 580

These records describe in detail certain logistical aspects of the Ministry's execution of the search warrant at the OCWC. In my view, they qualify for exemption under section 14(1)(c) as their disclosure would reveal certain investigative techniques and procedures in use by the Ministry.

PERSONAL INFORMATION/INVASION OF PRIVACY

Do the records contain "personal information"?

The Ministry submits that portions of a large number of the remaining records at issue are exempt under the mandatory exemption in section 21(1) of the *Act*. It argues that these portions of the records contain "personal information" relating to identifiable individuals within the meaning of section 2(1) of the *Act*, which states:

> "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 where they relate to another individual,

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

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 [Order 11].

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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. 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 [Orders P-1409, R-980015, PO-2225].

The Ministry submits that the records include "the names of suspects, dates of birth of subjects, addresses etc.", as well as personal information relating to various Ministry employees, such as information relating to "their work schedules, holiday time, over time, home phone numbers, addresses etc." and a commendation for one particular conservation officer.

The appellant takes the view that she is already aware of much of the information in the records relating to "suspects" as they are likely employees at the facility which she operates. The appellant also suggests that the information relating to Ministry employees is not their personal information within the meaning of section 2(1) as it relates to them in their professional, rather than their personal, capacities.

I have carefully reviewed each of the records which the Ministry claims contains personal information. I agree with the position taken by the Ministry regarding portions of Records 38, 39, 98, 100, 233, 301, 315, 324, 325 to 330, 332 to 341, 343, 466 (which is the same as Records 469, 470 and 473), 468, 524 and 581. These records contain the home telephone numbers and addresses of Ministry employees, as well as information relating to their vacations, days off and overtime claims. I concur that this information qualifies as the personal information of these employees within the definition of that term in section 2(1)(h). I find that, regardless of the fact that they are Ministry staff, the disclosure of information of this sort would reveal something personal about them. Also included in these records is information relating to suspects and other individuals who were involved in various aspects of the investigation, including their names,

vehicle license and identification numbers, addresses and telephone numbers. In my view, this information also qualifies as the personal information of these individuals within the meaning of section 2(1).

In addition, Records 63 to 64 and 558 to 560 contain the home addresses and telephone numbers of individuals identified in the records as supporters, employees or Directors of the wildlife centre. This information qualifies as the personal information of these individuals under section 2(1)(d).

Further, I find that Records 317, 318, 320, 321, 436 and 442 to 445 do not contain information that qualifies as "personal information" within the meaning of section 2(1). The telephone numbers listed in Records 317, 318 and 321 represent the business numbers of the individuals whose names are attached to them. They do not qualify as "personal information" under section 2(1) as they are not "about" these persons in their personal capacity. The personal privacy exemption in section 21(1) can only apply to information that qualifies as personal information under section 2(1). As no other discretionary or mandatory exemptions apply to the information contained in these records, I will order that they be disclosed to the appellant.

Is the personal information exempt from disclosure under section 21(1)?

General principles

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 which may have any application in the present appeal is section 21(1)(f), which states:

> 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. I will address the possible application of section 23 to the information below.

If none of the presumptions in section 21(3) applies, the institution 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.

Representations of the parties

The Ministry relies on the "presumed unjustified invasion of personal privacy" in section 21(3)(b) (information compiled as part of a law enforcement investigation) and the factor listed under section 21(2)(f) (highly sensitive information) of the *Act*. It argues that the records contain personal information that was "gathered as part of the numerous law enforcement investigation[s]" set forth in the background section of its representations. Accordingly, it submits that the presumption in section 21(3)(b) applies. In support of its argument in favour of the application of the factor listed in section 21(2)(f), the Ministry submits that the personal information contained in the records that relates to Ministry employees in their personal capacities:

> . . . would be considered highly sensitive as contemplated by section 21(2)(f). The information relates primarily to those involved in laws enforcement. By the nature of their employment, they deal with those who flout the law and who may develop grievances against the officers for being charged with illegal activities. Release of the information would enable those [individuals] to know the home addresses, phone numbers, etc. of officers and could make the officers or their families targets of illegal activity. Even if this were not the case, this is information which by its nature is sensitive. It is information which the Ministry normally refuses to release without the consent of the individual to whom the information relates.

The appellant counters the Ministry's arguments under section 21(2)(f) with the following:

> The Commission [this office] has stated that it must be found that disclosure could reasonably be expected to cause personal distress to the subject individual .

The appellant goes on to suggest that when individuals are retained as private researchers by the Ministry, they lose the protection over their personal information that they otherwise have. She suggests that they ought to be treated as any other employee or agent of the Ministry for the purposes of determining whether an unjustified invasion would result from the disclosure of their personal information.

Findings

I agree with the position taken by the appellant that in order for the consideration listed in section 21(2)(f) to apply, I must find that a disclosure of personal information contained in a record could reasonably be expected to cause that individual "excessive personal distress". In my view,

I have not been provided with sufficient evidence from the Ministry to enable me to make a finding that the disclosure of the types of personal information described above relating to the Ministry's own employees could reasonably be expected to result in excessive personal distress to them.

However, I find that the consideration referred to by the appellant has no application to this information either. The personal information contained in Records 38, 39, 98, 100, 233, 301, 315, 324, 325 to 330, 332 to 341, 343, 466 (which is the same as Records 469, 470 and 473), 468, 524 and 581 relate only to Ministry employees and do not contain information relating to the retention of "private researchers" as stated by the appellant.

In my view, no factors, listed or otherwise, favouring the disclosure of the personal information of the Ministry's employees found in Records 38, 39, 98, 100, 233, 301, 315, 324, 325 to 330, 332 to 341, 343, 466 (which is the same as Records 469, 470 and 473), 468, 524 and 581apply. Accordingly, I find that the disclosure of the personal information relating to various Ministry employees in their personal capacity, such as that pertaining to their vacation absences, overtime worked, training courses booked, commendations and days off, as well as their home addresses and telephone numbers would constitute an unjustified invasion of their personal privacy under section 21(1). Therefore, I uphold the Ministry's decision to deny access to Records 38, 39, 98, 100, 233, 301, 315, 324, 325 to 330, 332 to 341, 343, 466 (which is the same as Records 469, 470 and 473), 468, 524 and 581.

With respect to the undisclosed portions of Records 63, 64, 558, 559 and 560, which contain lists of supporters and Directors of the OCWC, I find that this information was compiled as part of the law enforcement investigation undertaken by the Ministry into a possible violation of law, the *Fish and Wildlife Conservation Act*. Accordingly, I find that it falls within the ambit of the presumption in section 21(3)(b) and its disclosure is presumed to constitute an unjustified invasion of personal privacy under section 21(1).

The appellant argues that to deny access to the names and addresses of the Directors and other individuals associated with the OCWC listed in Records 558 and 559 would lead to an absurd result as this information is clearly already known to her. I agree that denying access to the names and addresses of the Directors of the OCWC would not result in an unjustified invasion of the personal privacy of these individuals as this information is well-known to the appellant and is a matter of public record. I found above that section 14(1) does not apply to Records 558 and 559. Accordingly, I will order that they be disclosed to the appellant.

However, I find that the personal information in Records 63, 64 and 560 that relates to other individuals who are described in the records as "caregivers" or "supporter" must be treated differently. Records 63 and 64 contain more than just the names and addresses of individuals; they go on to describe in narrative form additional information about the persons interviewed. Record 560 also contains additional information about the persons listed beyond just their names and addresses. In my view, it is not at all clear how much of this additional information is already known to the appellant. I cannot agree that denying access to the information in Records 63, 64 and 560 would give rise to an absurd result, given the circumstances surrounding its

collection and its use as part of the Ministry's investigation. Accordingly, I find that Records 63, 64 and 560 are properly exempt under section 21(1).

By way of conclusion, I find that Records 38, 39, 63, 64, 98, 100, 233, 301, 315, 325 to 330, 332 to 341, 343, 466 (which is the same as Records 469, 470 and 473), 468, 524, 560 and 581 are exempt from disclosure under section 21(1). This exemption does not, however, apply to the information contained in Records 317, 318, 320, 321, 436, 442 to 445, 558 and 559.

PUBLIC INTEREST IN DISCLOSURE

The appellant maintains that there exists a public interest in the disclosure of the information contained in the records. She argues that section 23 applies to "override" the application of the exemptions found to apply to the records. Section 23 states:

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

Section 23 does not apply to records exempt under sections 14 or 19, which I have found apply to many of the records at issue in this appeal, including those relating to the Ministry's planning of the search warrant operation against the OCWC on September 12, 2002. Accordingly, I am only able to consider the possible application of section 23 to those records found to be exempt under sections 13(1) and 21(1).

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.

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 [Order P-984]. 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 the citizenry about the activities of their government, 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

The parties' representations on the application of section 23

In support of her contention that section 23 ought to apply, the appellant submits, in part, that:

> In October 2002, the OCWC and over 9,000 individuals petitioned the government to disclose what were the motives for the raid against the OCWC and requesting the reinstatement of responsible and humane rehabilitation of wildlife in the province. This continues even today in response to proposed changes to the Fish and Wildlife Act regulations that will further hinder progressive wildlife rehabilitation in Ontario.
>
> The actions of the MNR were highly controversial and very public. They drew criticism from many sectors including government and opposition MPP's, Ottawa City councilors, the media and members of the public. There have been over 370 editorials, articles, letters to the editor and radio/TV interviews on the issue which made reference to a breach of public trust with respect to the misrepresentations from the MNR, its abuse of power and it misuse of public funds, calling for full accountability on the part of government with respect to this matter.
>
> Even the MNR, as outlined in its Contentious Issue Note received through FOI (A-2002-00096), in response to the application filed in October 2002 identified that "*withholding the enforcement planning information requested in this FIPPA request may be portrayed as an attempt to prevent access to information about a well-publicized and contentious matter*. We contend that if withholding 55 pages from public scrutiny was considered by the MNR as contentious, surely it would understand that withholding 479 pages, or more than 80% of the file, would certainly be viewed as a major cover-up.

In response to these submissions, the Ministry argues that:

> . . . there has been some public interest in Ottawa Carleton Wildlife Centre and events which resulted in the seizure of the animals. However, as evidenced by enclosed press clippings, that public interest has tended to centre on the fate of the seized raccoons, the MNR Rabies policy, including the designation of the Ottawa area as a high risk rabies area and release of high risk species which have been captured and funding for Ottawa Carleton Wildlife Centre. However, the release of the records in question, and the information contained therein, will not further that debate around these issues.
>
> One of the exemptions that have been applied is section 21(1)(f) [sic], i.e. the disclosure would constitute an unjustified invasion of privacy. Given that protection of privacy is one of the primary purposes of the *Act*, the Ministry believes that disclosure of the records would have to significantly or critically further the debate of the public interest to justify the invasion of privacy. In this case, the records in question would not further the debate on the Rabies policy or the funding for the Centre and have nothing to do with the other matter of public

> interest, the fate of the seized animals. However, it could pose a significant risk to the individuals identified in the records for reasons set out in the original representations [and referred to in my reasons above].
>
> . . .
>
> With respect to the records to which section 13 have been applied, again their release would do little to further the debate concerning the Rabies policy or funding the Centre. It would have a chilling effect on the flow and means of how advice and recommendations are given in situations involving the activities and coordination of enforcement officers and related staff.

Findings with respect to section 23

As noted above, in order to apply section 23, there must be a compelling public interest in disclosure of the records. In the present case, I find that any public interest that exists in the records that are subject to the exemption in section 21(1) is not sufficiently compelling. These documents describe for the most part the personal information of various Ministry staff, including their work schedules and home addresses and telephone numbers. I find that any interest that may exist in the disclosure of this information is neither public nor compelling in nature. I find that section 23 has no application to those records that I have found to be exempt under section 21(1).

Insofar as Record 36 is concerned, I found above that the undisclosed portion of this document is exempt under section 13(1). I have reviewed the contents of the severed portion of Record 36 and find that while there may exist a public interest in matters relating to the execution of the search warrant at the OCWC on September 12, 2002, any interest in the information contained in this record could not be described as sufficiently compelling to meet the requirements of section 23. Accordingly, I find that Record 36 is not subject to the override provisions in that section.

ORDER:

1. I order the Ministry to provide the appellant with a decision letter respecting access to Records 72, 73, 76, 94, 123, 151, 159, 160, 161, 162, 301 and 307 from its "Index of Non-Relevant Records" in accordance with the requirements of section 26 of the *Act* and without recourse to a time extension under section 27(1) of the *Act*.

2. I order the Ministry to disclose to the appellant copies of Records 1 to 6, 55-56, 67 to 70, 71, 72 to 74, 97, 98 (with the exception of the personal information), 99, 100 (with the exception of the personal information), 233 (with the exception of the personal information), 234 to 243, 244-245, 299, 300 and 301 (except those portions exempt under section 19), 302 to 304, 305 to 312, 315 (except the personal information), 317-318, 319, 320, 322, 324 to 341 (except the personal information), the responsive undisclosed portion of Record 342, 343, 383 to 386, 435, 436, 442 to 445, 466, 468 to 470, 473 (except the personal information), 475, 558, 559 and 574-575 by providing him with copies no later than **May 12, 2005** but not before **May 6, 2005.**

3. I uphold the Ministry's decision to deny access to the remaining records, and parts of records.

4. In order to verify compliance with Order Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: April 7, 2005
Donald Hale
Adjudicator