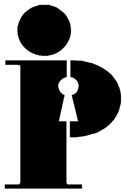
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2791

Appeal PA07-411

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Records for all costs of [Ministry] staff time, [Ministry] and Crown Law Office Lawyers' time in preparation for prosecution of charges and court appearances, OMB [Ontario Municipal Board] hearing of [specified date], travel time and expenses related to the enforcement of 23 specific pre-operational conditions on [identified quarry] from [specified date] to this date, [specified date].

The Ministry advised the requester that the Ministry of the Attorney General might also have responsive records and, accordingly, transferred part of the request pursuant to section 25 of the *Act*. The Ministry noted that, notwithstanding this transfer, it would also respond to the request.

The Ministry of the Attorney General issued a decision to the requester advising that no responsive records were located. The requester appealed the decision to this office. Appeal number PA07-350 was opened but was resolved at the intake stage of the appeal process.

The Ministry issued an interim decision and fee estimate in response to the request, stating the following:

> The Ministry does not have any records relating to the costs associated with the enforcement of "23 specific pre-operational conditions" on [identified quarry].
>
> However, if you are looking for records relating to the costs associated with the Ministry's efforts to ensure that the operation of [identified quarry] was in compliance with [identified licence] and the requirements of the *Aggregate Resources Act*, then the Ministry does have records and I am issuing a fee estimate and interim decision because it would be unduly expensive to review the large volume of records in order to make a decision regarding disclosure.

The Ministry's preliminary estimate was that there were approximately 1,036 pages of records, including electronic travel claims, purchasing card monthly statements, monthly vehicle diaries and receipts. Ministry noted that sections 19 and 21(1) might apply to some of this information. The Ministry advised that the estimated fee for preparing the records was $1,553.20, calculated as follows:

Search time (43 hours x $30.00 per hour)	$1,290.00
Record preparation (3.20 hours x$30.00 per hour)	$ 96.00
Photocopies (836 pages x $0.20 per page)	$ 167.20
TOTAL	**$1,553.20**

The Ministry also noted that it was prepared to grant access to the records on a CD-ROM at a cost of $10.00, thereby eliminating the photocopy cost, which would reduce the fee associated with processing the request to $1,396.00. In accordance with section 7(1) of Regulation 460 under the *Act*, the Ministry requested a deposit of 50 per cent of the fee in order to continue with the processing of the request.

The requester did not appeal the Ministry's fee estimate. The requester paid the deposit of $776.60 in order to proceed with the processing of the request for copies of the estimated 1,036 pages. The requester also noted that he did not seek access to records from his own files that were seized under a search warrant. However, he noted that he did seek access to records detailing the cost of the preparation of the search warrant by Ministry lawyers and staff, as well as for the 29 government personnel involved in its execution.

The Ministry noted that the request necessitated a search through a large number of records and took the position that meeting the time limit would unreasonably interfere with its operations. The Ministry therefore issued a time extension pursuant to section 27 of the *Act* and the time to process the request was extended 60 days. The requester did not appeal the Ministry's time extension.

The Ministry issued a final decision granting full access to some of the records and partial access to other records, as indicated in the disclosure column of an index of records that it attached to the decision letter. Access to certain information contained in the records was denied pursuant to sections 14(1)(l) (facilitate commission of an unlawful act), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*. The Ministry also noted that some of the records were excluded from the scope of the *Act* pursuant to sections 65(5.2) (records related to a prosecution) and 65(6)3 (labour and employment related matters).

Additionally, the Ministry advised that it does not have any records relating to the costs associated with the enforcement of "23 specified pre-operational conditions" on the identified quarry.

Finally, in its decision, the Ministry described the final fee for access to the records as follows:

Search time (43 hours x $30.00 per hour)	$1,290.00
Record preparation (1 hour x$30.00 per hour)	$ 30.00
Photocopies (45 pages x $0.20 per page)	$ 9.00
Subtotal	**$1,329.00**
Less Deposit	$ 776.60
TOTAL	**$ 552.40**

Due to the minimal number of responsive records that were located, the Ministry advised that the remaining fee associated with the processing of the request had been waived.

The requester, now the appellant, appealed the Ministry's final decision. In his appeal letter, the appellant noted that records relating to seven specific types of requested information were not provided to him.

During the mediation stage of the appeal process, the Ministry advised that there are no additional records pertaining to the request as it does not keep records containing the types of information identified by the appellant in his appeal letter. For example, it advised that it does not

keep track of staff travel time relating to specific sites. The Ministry also noted that the appellant's appeal letter appeared to raise issues that are outside the scope of the request, such as the cost for aircraft used to take aerial photos of the quarry.

The appellant advised that he believes that additional records responsive to his request should exist; specifically, the seven types of information that he identified in his appeal letter. He stated that he believes there should be records such as daily log books which would contain information about travel time, as well as the total time spent by Ministry officers in relation to his investigation. With respect to the cost for aircraft used to take aerial photographs, the appellant advised that he believes this type of information falls within the scope of his request because, in his view, the request is broad enough to capture all records relating to expenses.

The Ministry subsequently confirmed that there are no further records responsive to this request. Accordingly, the issue of reasonable search was added as an issue in this appeal. Responsiveness has also been added as an issue on appeal, specifically with respect to records relating to the cost for aircraft used for aerial photographs.

With respect to records that were identified as responsive, some of the issues were resolved in mediation, resulting in the following records being removed from the scope of the appeal: pages 31-50, 52-70, 72-76, and 78. During mediation, the following issues were clarified:

- The Ministry advised that it is relying upon section 14 to withhold all credit card numbers contained in the records. The appellant advised that he does not wish to pursue access to any credit card numbers. Accordingly, section 14 is no longer at issue in this appeal.

- The Ministry advised that it is relying upon section 21(1) to withhold employee identifications numbers (WIN numbers) and signatures. The appellant advised that he does not wish to pursue access to employee WIN numbers or signatures. Accordingly, section 21(1) is no longer an issue in this appeal.

- The appellant advised that he does not wish to pursue access to any portions of the records which have been identified by the Ministry as "non-responsive" (with the exception of pages that were incorrectly labelled as not relevant, described below).

- The appellant advised that he wishes to pursue all access to all records which have been excluded by the Ministry pursuant to sections 65(5.2) and 65(6)3. Accordingly, the application of the *Act* to these records remains an issue in this appeal. These records were not listed on the Index of Records, but have been provided to this office as a separate batch of records.

- It should be noted that some of the pages which had been identified on the Index of Records as not relevant, actually appeared to the Mediator to be responsive to the request. The Mediator took the position that they should have been identified as

excluded records, rather than not relevant. The appellant advised the Mediator that he wishes to pursue access to these records. Accordingly, pages 51, 71, 77 and 79-87 are being withheld as excluded pursuant to section 65(6)3, and these have been added to the records for consideration in this appeal.

- The appellant advised that he wishes to pursue access to the records which have been withheld pursuant to section 19. Accordingly, the solicitor-client privilege at section 19 is at issue in this appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry. The Ministry provided representations in response.

I then sent a Notice of Inquiry, together with copy of the Ministry's complete representations, to the appellant, seeking representations. The appellant advised that he did not wish to submit representations, but he continues to wish to pursue access to the records at issue.

RECORDS:

The records that remain at issue consist of expense records, expense claims, receipts, attendance forms, emails, correspondence, memos and reports of employee payment hours. Specifically, the following exemption claims have been made for the following indexed records:

- Section 19 has been claimed for pages 1 to 30; and
- Section 65(6)3 has been claimed for pages 51, 71, 77, and 79 to 87.

Additionally, the exclusions at sections 65(5.2) and 65(6)3 have been claimed for the following records that do not appear on the index:

- Section 65(.5.2) has been claimed for Records: 60707 (6 pages); 60709 (5 pages); 60710 (5 pages); 60711 (4 pages); 60712 (5 pages); 60713 (4 pages); 60715 (6 pages); 60716 (5 pages); 60717 (5 pages); and

- Section 65(6)3 has been claimed for Record: 65491 (2 pages).

DISCUSSION:

RESPONSIVENESS

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].

In his appeal letter, the appellant stated that he had not been provided with records that describe the cost for aircraft used to take aerial photographs of the quarry. During mediation, the Ministry took the position that costs for aircraft for aerial photographs fell outside of the scope of the request. The appellant disagreed and took the position that his request is broad enough to capture all records relating to expenses incurred by the Ministry, including costs for aircraft used to take aerial photographs.

The Ministry made no specific submissions on this issue in its representations.

As noted above, previous orders have established that to be responsive, a record must "reasonably relate" to the request.

In the appellant's original request, which I have reproduced above, he sought access to records describing all costs incurred as a result of Ministry staff time spent preparing for the prosecution of charges, as well as for court appearances, and hearings related to the enforcement of conditions placed on his company's quarry. Although the Ministry advised that it did not have records relating to the costs associated with the enforcement of the conditions on the quarry, it advised the appellant that it had located "records relating to the costs associated with the Ministry's efforts to ensure that the operation of [the appellant's company's quarry] were in compliance with [an identified licence number] and the requirements of the *Aggregate Resources Act*." The Ministry subsequently treated these records as responsive to the appellant's request.

Despite not being provided with any submissions on this issue, I accept that if the Ministry incurred costs in relation to aircraft used to take aerial photographs for the purpose of the

investigation into the operation of the appellant's company's quarry, any such records can be properly characterized as "reasonably related" not only to the appellant's original request, but to the clarified definition of responsive records in the Ministry's decision letter. Therefore, I find that any records detailing costs for aircraft used to take aerial photographs of the quarry to be responsive to the appellant's request.

Throughout mediation, the Ministry maintained its position that records relating to costs for aircraft fall outside of the scope of the appellant's request. Nevertheless, the Ministry also advised that no records describing such costs exist. As I have found this type of record to be responsive to the request and the appellant continues to believe that records describing such costs should exist, I will include them in my analysis of whether the Ministry's search for responsive records was reasonable, outlined below.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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

Representations

Although the appellant did not submit representations, in his appeal letter he identified a number of different types of information responsive to his request that he believes should be documented in records held by the Ministry. Specifically, the appellant identified the following types of information that he believes should exist but was not provided to him:

1. No disclosure for cost of enforcement officers travel time from Aylmer to Hagersville for inspections and investigations 1 hour each way on numerous occasions for a period of over 4 years.

2. No costs associated with numerous inquiries with various individuals related to investigations over a period of 4 years.

3. No costs for aircraft for aerial photos of the quarry.

4. No costs for lawyers and preparation travel time etc. to court appearances to charges stayed, appealed and then dropped by the Ministry.

5. No costs for lawyers time to defend against the Judicial Inquiry of [specified date] which declared that pre-operational conditions do not form part of the licence, which decision the Ministry did not appeal. It should be noted therefore that this decision is not before the court nor are the original charges which the Ministry dropped after appeal. All of this information should be made available. Section 65(5.2) does not apply.

6. No costs for the preparation and execution of a search warrant [specified date] by 27 government officials over a period of 9 ½ hours. This is a stand alone event and should be subject to release of information.

7. No costs for inspectors and enforcement officers' time for court appearances.

During mediation, despite the Ministry's explanation that it did not maintain records of the specific types of information he outlined in his appeal letter, the appellant continued to take the position that responsive records containing those types of information should exist. In particular, he explained that he believes that there should be records such as daily log books which contain information about travel time, as well as the total time spent by the officers in relation to the investigation into his company.

The Ministry submits that the search for responsive records was conducted and overseen by the Intelligence/Enforcement Officer based out of its Alymer District. In his affidavit, the Intelligence/Enforcement Officer states that to locate the records responsive to the appellant's request he recruited the help of fourteen identified employees of the Aylmer District. He states that the search involved going through the following types of records that were related to the investigation into the appellant's company:

- reports in the Ministry's Compliance Activity Violation Report System,
- timesheets,
- travel claims, and
- expense claims.

The Intelligence/Enforcement Officer also states that the following types of files were searched for those which contained the appellant's company name as the file name:

- hard copies of personal files,
- computer expense files,

- general computer files, and
- computer records containing a specific identifying Enforcement Branch Operational Code .

The Intelligence/Enforcement Officer advised that together with the assistance of a number of District employees he searched its Archive Records Room for any relevant records and that he also contacted any former employees who might have knowledge of responsive records but who had left the District Office or had retired. He also advised that he requested that the District Enforcement Supervisor provide him with a "summary printout" of the Enforcement Branch Operation Code which was assigned to the investigation. He submits that a summary printout tracks the overall time and effort spent on an investigation.

In his affidavit, the Intelligence/Enforcement Officer also responded directly to the appellant's concerns about the specific types of information that had not been provided to him. The Ministry reproduced these responses in its representations as follows:

1. *No disclosure for cost of enforcement officers travel time from Aylmer to Hagersville for inspections and investigations 1 hour each way on numerous occasion for a period of over 4 years.*

   Officers' field records (diaries, note books, hand notes, normal shift time) do not isolate the cost to the [appellant's company's] Investigation files as a normal practice. Some records indicate that an officer or inspector investigated or spent effort on an aggregate investigation but it is not normal practice to isolate the specific subject beyond the "Aggregate" identifier to specific "[appellant's company]."

2. *No costs associated with numerous inquiries with various individuals related to investigations over a period of 4 years.*

   It is not common practice for [Ministry] officers to maintain cost records related to complaints received. The complaint is recorded and the action taken but isolating the costs of the effort is not maintained.

3. *No costs for aircraft for aerial photos of the quarry.*

   The aerial photos of the quarry were digital files provided by Federal Insect Technician [named individual] and Species at Risk Biologist [named individual]. In both incidents the suppliers were provided Federal funds or private donation to conduct an unrelated activity and while in the area of the [identified quarry] photographed the activity and provided the file photos to [the Ministry] at no cost. The cost of printing the photos for court disclosure was not maintained.

4. *No cost for preparation and execution of a search warrant [specified date] by 27 government officials over a period of 91/2 hours. This is a stand alone event and should be subject to release of information.*

   The cost of preparing search warrants is not tracked over and above purchases of specific office supplies. The Officers [named officers] worked in conjunction with legal services to complete the preparation. No special purchases were made and no overtime was paid. [The Ministry] does not isolate the preparation costs for warrants unless a cost is unique and that case an advance budget would have been created and expenses charged to this special project. This warrant was not deemed to be a special project and therefore the base preparation costs was not tracked. The support cost to complete the search warrant was in the form of travel claims, expense claims and time sheets containing premium time. [Ontario Provincial Police] officers and experts attending were paid for by their specific agencies and [the Ministry] was not charged or [did not maintain] any records as to their incurred costs. All [Ministry] costs relating to the search warrant have been disclosed.

5. *No costs for inspectors and enforcement officers' time for court appearances.*

   [The Ministry] does not normally track the preparation cost for court and day to day events…[Although the Ministry] has logged a significant number of hours over and above the normal investigation it is not significant enough to qualify for special funding. The only situation where the preparation cost would be isolated and tracked is [when] the activity was deemed to be a special project. In the case of the [appellant's company] Investigation file it has not been considered for special funding and therefore preparation cost is not tracked.

Analysis and finding

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 24 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

I have considered the position of the appellant as outlined in his decision letter and during mediation, the representations of the Ministry, and the overall circumstances of this appeal, to decide whether or not I am satisfied that the Ministry made a reasonable effort to identify and locate any records that might be responsive to the appellant's request.

On my review of the representations provided by the Ministry, including the affidavit evidence of the Ministry's Intelligence/Investigation Officer, I am satisfied that Ministry staff possessing adequate knowledge of the nature of the records that were of interest to the appellant performed the necessary searches for responsive records. The Ministry provided, through both its representations and the affidavit sworn by its Intelligence/Investigation Officer, a comprehensive description of the steps taken to locate the responsive records. I have also considered the fact that the Ministry utilized a significant number of experienced employees at its Aylmer District/Southern Region/Enforcement Branch to undertake to locate the information sought by the appellant.

As previously noted, although in his appeal letter and during mediation the appellant specifically identified types of additional information responsive to his request that he believes should exist, he did not provide representations in response to the Ministry's detailed description of the searches performed. In the circumstances, therefore, I find I have not been provided with a reasonable basis upon which I might conclude that additional responsive records not yet identified by the Ministry may exist.

Based on the evidence before me, I am satisfied that the Ministry made a reasonable effort to identify and locate responsive records. Accordingly, I find that the Ministry conducted a reasonable search for the purposes of section 24 of the *Act*, and I dismiss this part of the appeal.

RECORDS RELATING TO A PROSECUTION

The Ministry claims section 65(5.2) applies to exclude record numbers 60707 (6 pages); 60709 (5 pages); 60710 (5 pages); 60711 (4 pages); 60712 (5 pages); 60713 (4 pages); 60715 (6 pages); 60716 (5 pages); and 60717 (5 pages), from the application of the *Act*.

Section 65(5.2) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

Representations

The Ministry submits:

> Subsection 65(5.2) provides that the *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. The records which were excluded under subsection 65(5.2) consist of 45 pages of expense reports, receipts and covering memos for [named Ministry counsel] for travel and attending court with respect to charges against [appellant's company] and its directors. As noted above, the litigation relating to the charges has not concluded.

Analysis and finding

In Order PO-2703, Senior Adjudicator John Higgins interpreted and applied section 65(5.2) for the first time. In that order, Senior Adjudicator Higgins enunciated what he considered to be the purpose of section 65(5.2) as follows:

> In my view, section 65(5.2) is aimed at protecting prosecutors from having to address access-to-information request for records that are part of their prosecution file where the matter is ongoing. The apparent rationale for doing this would be avoidance of the distractions that would be caused to Crown prosecutors, who are well known to have heavy caseloads, if they were required to address access-to-information requests, including which exemptions to claim, while proceedings are ongoing. Similar considerations apply to provincial offences officers, who prosecute provincial offences such as the outstanding charges under the WSIA [*Workplace Safety and Insurance Act*] in this case. The fact that materials of this kind can be voluminous, to say the least, provides further reinforcement for this rationale.

In Order PO-2703 Senior Adjudicator Higgins addressed four questions that he felt were relevant to the interpretation and application of section 65(5.2). These questions are:

(1) What constitutes a "prosecution"?

(2) What is required to find that a record is "relating to" a prosecution?

(3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?

(4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

Senior Adjudicator Higgins went on to expand upon the four questions in turn. I have summarized his comments on each below:

(1) What constitutes a "prosecution"?

As the *Act* does not define "prosecution" and as Order PO-2703 was the first time section 65(5.2) was interpreted, Senior Adjudicator Higgins considered the meaning of this term. In doing so he reviewed the approach applied in orders issued by the British Columbia Information and Privacy Commissioner as that province's *Freedom of Information and Protection of Privacy Act* has a similar provision that has been interpreted.

Following his review of the approach taken by the British Columbia Commissioner and, after having considered the specific circumstances of the inclusion of section 65(5.2) in the *Act*, Senior Adjudicator Higgins adopted the definition of "prosecution" used by the British Columbia Commissioner for the purposes of interpreting the provision. He stated:

> In my view … the term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.

(2) What is required to find that a record is "relating to" a prosecution?

In Order PO-2703, Senior Adjudicator Higgins noted that the words "relating to" and similar phrases such as "in relation to," "respecting" and "associated with" have been the subject of previous interpretation by this office. He also noted that in Order PO-2694, in considering the meaning of "respecting or associated with research" in section 65(8.1)(a) of the *Act*, he summarized those decisions and made the following finding:

> I have concluded that the words "respecting or associated with" *require that there be a substantial connection between the records and actual or proposed research. In my view, the purpose of the section must be considered in assessing whether the connection between the records and the actual or proposed research is sufficient to establish the necessary substantial connection in a particular case.* [Emphasis in Order PO-2703]

After reviewing the authorities that he considered in Order PO-2694, Senior Adjudicator Higgins decided that the following principles should be followed in the interpretation of the words "relating to" in section 65(5.2):

- "relating to" should be interpreted in the same manner as "in relation to", that is it means "for the purpose of, as the result of, or substantially connected to";

- there must be a substantial connection between the records and the prosecution, and the connection must not be merely superficial; and

- the purpose of the provision must be taken into account in deciding whether the connection is sufficient to justify the application of this exclusion.

(3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?

In Order PO-2703, Senior Adjudicator Higgins found that records maintained in "court brief" binders were either prepared for use in prosecution or are copies of other records that have been expressly made and included in the court brief for the same purpose are clearly "relating to" a

prosecution. However, he stated that it is not so clear whether records found outside of prosecution materials "relate to" a prosecution within the meaning of section 65(5.2). He stated that, in these circumstances, it is necessary to consider:

(a) the original purpose for preparing the record,

(b) when the intent to prosecute became crystallized, and

(c) the date the record was originally prepared or created.

Senior Adjudicator Higgins went on to state:

> If the purpose of preparing records found outside the court brief and other prosecution materials was to assist or to be used in a prosecution, and the intent to prosecute had already crystallized when the records were created, such original records clearly "relate to" the prosecution for the purposes of section 65(5.2)

(4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

In Order PO-2703, Senior Adjudicator Higgins found that only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. Accordingly, this question is to be decided based on the facts of each case.

I agree with Senior Adjudicator Higgins' reasoning in Order PO-2703 and find that the four questions he identified as relevant in that appeal are equally relevant in the circumstances of the current appeal.

However, having reviewed the records for which the Ministry has claimed the application of section 65(5.2) I find that the section 65(5.2) exclusion does not apply to record numbers 60707, 60709, 60710, 60711, 60712, 60713, 60715, 60716 and 60717. These records represent expense claims prepared and submitted by various Ministry employees describing their expenses and corresponding receipts for travel in relation to their attendance at court for the prosecution of the appellant's company. In my view, these records were clearly not prepared with the original purpose of assisting or being used in the prosecution. Although they incidentally relate to a prosecution, these records are expense receipts submitted by Ministry staff to claim reimbursement for expenses incurred. The connection between these records and the prosecution is not sufficiently substantial to merit a finding that they are records "relating to" a prosecution as outlined above. Accordingly, I do not accept that these are the types of records to which the legislature intended the exclusion at section 65(5.2) to apply. In my view, expense claims of public servants are precisely the type of information to which the *Act*, as a whole, was designed to apply.

Therefore, I find that the records do not "relate to" the prosecution at issue within the meaning of section 65(5.2), and, as a result that section 65(5.2) does not apply to exclude record numbers 60707, 60709, 60710, 60711, 60712, 60713, 60715, 60716 and 60717 from the scope of the *Act*. I will accordingly order the Ministry to issue an access decision with respect to these records.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry submits that section 65(6)3 applies to exclude pages 51, 71, 77, and 79 to 87 as well as record number 65491 from the scope of the *Act*.

Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships. [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.]

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

In its representations, the Ministry identifies that there are three types of records amounting to fourteen pages for which section 65(6)3 was claimed. The Ministry describes the three types of records as follows:

- Reports of Regular and Premium Payment Hours (pages 51, 71, 77, 79 to 83 and [record number 65491 which consists of two pages]) contain information about regular hours worked including the date, number of hours worked, scheduled hours worked, shift premium and details of premium hours worked including date, start time, end time, hours worked and reason.

- Compliance Activity Violation System Reports (pages 84 and 85) contain information about hours worked by two enforcement

individuals including the date, individuals' title, hours worked and if there was travel involved.

- Vehicle Mileage Monthly Report 2006-2007 (pages 86 and 87) lists the mileage attributed to [the investigation into the appellant's company] for September, October, November 2006 and January and November 2007.

The Ministry submits that the information contained in these records was collected, prepared, maintained or used by the Ministry for employment related matters in which the Ministry has an interest. It submits that "[i]n particular, the information collected on the forms is collected for the principle purposes of fulfilling the Ministry's statutory and contractual obligation with respect to processing payroll."

The Ministry points to Order PO-2248 in support of its position that these types of records are employment records which are excluded under section 65(6)3. The Ministry submits that in Order PO-2248, Adjudicator Sherry Liang stated:

> The recording of information about overtime worked for scheduling and payment purposes are so clearly a part of standard personnel management practices that it hardly requires any more specific an explanation of why such information is collected, prepared, maintained or used.

Analysis and findings

In Order PO-2248, which the Ministry referred to in its representations, Adjudicator Liang found that a summary of overtime hours and amounts paid to Ontario Provincial Police officers who accompanied the Premier on trips to the United States was properly excluded from the *Act* as a result of the operation of section 65(6)3. The information in the record at issue in that appeal included the number of hours worked, the rate of pay and the amount of overtime paid per officer. I agree with the reasoning applied in that appeal and adopt it in the circumstances of the current appeal.

Part 1: collected, prepared, maintained or used

Based on the representations of the Ministry and on my review of the records themselves, which consist of personnel records of identified employees including general timesheets, details of hours worked on the specific investigation at issue, and travel statistics, I am satisfied that the records which the Ministry claims fit within the exclusionary language of section 65(6)3 were collected, prepared, maintained or used by the Ministry. Accordingly, I find that the requirements of part 1 of the test have been satisfied.

Part 2: meetings, consultations, discussions or communications

Based on the information before me, I am satisfied that the records were collected, prepared, maintained or used "in relation to meetings, consultations, discussions or communications." The records are forms relating to Ministry employees prepared by either the employees themselves and provided to management or generated by management. On their face, they communicate or summarize information relating to work assignments as well as attendance and hours of various Ministry staff. I am satisfied that, due to the nature of these forms and based on the representations of the Ministry, these records were collected prepared, maintained or used "in relation to … meetings, consultations, discussions or communications" with or by Ministry management about the employment of these individuals. Accordingly, I find that the Ministry has satisfied the requirements of part 2 of the three-part test for these records.

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The records collected, prepared maintained or used by the Ministry are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related

matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

In the circumstances of this appeal, I am satisfied that the records identified by the Ministry satisfy the third part of the test under section 65(6)3. I accept that these records relate to a number of employment-related matters, including days and hours worked, compensation issues, and performance issues of Ministry personnel. Accordingly, I find that pages 51, 71, 77, and 79 to 87 as well as record number 65491 are about "employment-related matters" in which the Ministry "has an interest" within the meaning of that term in section 65(6)3.

Although I have found that the requirements of all three parts of the section 65(6)3 test have been met, whether or not section 65(6)3 applies to exclude pages 51, 71, 77, and 79 to 87, as well as record number 65491 from the scope of the *Act* is subject to my determination of whether any of the exceptions in section 65(7) apply.

Section 65(7): exceptions to section 65(6)

If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Having carefully reviewed the records for which section 65(6)3 was claimed, I find that none of them fall within any of these exceptions listed in section 65(7). Additionally, in my view it is worth particular mention that I am satisfied that none of the information amounts to expense accounts submitted by an employee for the purpose of seeking reimbursement for expenses incurred in the course of his or her employment (65(7)4). Therefore, I conclude that the section 65(6)3 applies to exclude pages 51, 71, 77, and 79 to 87 as well as record number 65491 from the scope of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that pages 1 to 30 are exempt from disclosure pursuant to the discretionary exemption at section 19 of the *Act*. The relevant portions of section 19 state as follows:

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

Section 19 contains two branches: common law privilege and statutory privilege. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: Common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

In the circumstances of this appeal, the Ministry submits that the common law solicitor-client communication privilege under branch 1 applies. Although the Ministry does not specifically claim the application of the common law litigation privilege component of branch 1, in my view, a discussion of this type of solicitor-client privilege is also relevant in the circumstances of this appeal.

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. v. Chrusz.*

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] 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.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, former Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the former Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for [exemption] under the *Nickmar* test and should be tested under "dominant purpose".

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

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

The Ministry submits that this office has "long held" that a legal account from a lawyer to his or her client reflects a confidential communication related to legal advice and is therefore exempt under common-law solicitor-client communication privilege (branch 1 of section 19). The Ministry also submits that prior orders of this office have considered whether lawyers' bills or accounts are subject to solicitor-client privilege:

> Citing *Stevens v. Canada* (P.C.) (1998), 161 D.L.R. (4th) 85 (F.C.A.), in PO-1714 and MO-1339 determined that unless an exemption such as a waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the privilege where an access statute incorporates it in an exemption. Those portions of legal accounts which describe the matters attended to or services rendered would reveal the subject matter on which legal advice was sought or given. The Commission has found that this information on a legal account was exempt as being confidential communication between the client and the legal advisor regarding legal advice [Orders M-560, P-1115].

With respect to the particular information at issue in this appeal, The Ministry submits that pages 1 to 30 relate to expense claims submitted by three legal counsel of the Ministry's Legal Service Branch with respect to the prosecution of the appellant's company. It submits that these pages consist of covering memos with statements of travel expenses and receipts attached which were submitted to the Enforcement Supervisor for the District office to sign and submit for payment. The Ministry submits that these are records produced by Ministry counsel and are, therefore, subject to solicitor-client privilege and exempt from disclosure under section 19 of the *Act*.

Analysis and findings

Solicitor-client communication privilege

In Orders PO-2483 and PO-2484, upheld on Judicial Review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769 (Div. Ct.), Senior Adjudicator Higgins analyzed in detail the state of the law in relation to the common law solicitor-client communication privilege under branch 1 concerning legal billing information. In particular, these orders address the presumption of privilege as applied to legal billing information in *Maranda v. Richer*, [2003] 3 S.C.R. 193, in which the Supreme Court of Canada found that legal billing information is subject to a rebuttable presumption of solicitor-client communication privilege. In formulating this approach the Supreme Court rejected the "facts" and "communications" distinction as the sole or primary basis for the rule in relation to privilege as applicable to lawyers' billing information. This distinction had previously been discussed in the context of legal billing information in *Stevens v. Canada*, which the Ministry relied upon in its representations.

In Order PO-2483 and PO-2484, Senior Adjudicator Higgins summarized the criteria to be applied to the issue of whether legal billing information is subject to the presumption of privilege set out in the *Maranda* decision, in the context of the application of common law solicitor-client privilege under branch 1:

> Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly

> reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

Applying these standards to legal statements of account, in Order PO-2483 Senior Adjudicator Higgins agreed that narrative descriptions of services rendered, identifying particular activities and how much time was spent on each, would reveal privileged information.

Having considered the information at issue carefully, and having considered the reasoning applied by Senior Adjudicator Higgins in Order PO-2483, I do not accept that pages 1 to 30 contain information which qualifies as legal billing information that is subject to the common law solicitor-client communication privilege. These pages amount to claims relating to expenses incurred by counsel attending at court to deal with the prosecution of the appellant's company. The information includes reimbursement claims for expenses such as gas and mileage, as well as incidental expenses such as meals, but does not include billing information in relation to the provision of legal advice by the lawyers to which the claims relate. In my view, the information contained on pages 1 to 30 are not communications of a confidential nature made for the purpose of giving or receiving legal advice and are not exempt pursuant to the common law solicitor-client communication privilege at section 19 of the *Act*.

Even if I were to find that these expense reports amount to legal billing information presumed to be subject to the solicitor-client communication privilege, by applying the questions established by Senior Adjudicator Higgins in Order PO-2483 to the specific information at issue, in my view, that presumption would be rebutted. I do not accept that there is any reasonable likelihood that disclosure of the expense claims would either directly or indirectly reveal any communication that would be protected by the privilege. Additionally, I do not accept that an assiduous inquirer, specifically, the appellant who, as party to the matter, is aware of background information relating to this prosecution, could use the information contained on these pages to deduce or otherwise acquire privileged communications. The information reveals only that the Ministry sent counsel to attend at court on specific days, a fact that would be known to the appellant, whose company is a named party to the proceedings. Additionally, the information in pages 1 to 30 does not contain a narrative portion describing the nature of any legal services provided, nor does it describe any fees charged for such services, or outline the number of hours spent by counsel on this matter. In my view, the records do not contain any information that could be said to reveal, either directly or indirectly, communications of a confidential nature made for the purpose of giving or receiving legal advice.

Therefore, I find that pages 1 to 30 of the records are not exempt pursuant to the application of the common law solicitor-client communication privilege component of branch 1 of section 19 of the *Act*.

Litigation privilege

I now turn to the possible application of the common law litigation component of branch 1.

In Order PO-2037, former Senior Adjudicator David Goodis found that litigation privilege did not apply to exempt records relating to costs incurred as the result of bringing witnesses from a foreign country to Canada to testify at a trial. Those records included receipts and invoices detailing expenses such as airfare, accommodations, meals and other miscellaneous expenses.

Senior Adjudicator Goodis stated:

> It may be the case that any litigation privilege arising from the original trial would continue in respect of the current, related proceedings. However, I am not persuaded that litigation privilege is applicable to the records at issue in any event. In my view, it cannot be said that the records were prepared for the dominant purpose of litigation. As explained in *Waugh*, to meet the dominant purpose test, the Ministry must establish that the purpose of creating the records was to use them or their contents to obtain legal advice or to conduct or aid in the conduct of litigation. The records at issue are administrative records relating to payments made to witnesses to cover certain living expenses. On the fact of the records, it is difficult to see how these records would actually be *used* by Crown counsel in prosecuting the criminal charges, or specifically to obtain legal advice or to conduct or aid in the conduct of litigation. The Ministry's representations, which consist of generalized assertions, offer no assistance in this regard. By itself, it is not sufficient that the records bear some relation to the litigation. Accordingly, I find that the records were not created for the dominant purpose of the litigation.
>
> Applying the *Nickmar* test, I also find that the Ministry has failed to establish that the records have "found their way into the lawyer's brief," or that any "selective copying" or exercise of skill and knowledge" were undertaken by counsel regarding these records. There is simply no evidence or argument in support of this aspect of litigation privilege.

I agree with the reasoning applied by Senior Adjudicator Goodis and find it applicable to the circumstances in the current appeal.

Having reviewed the records, I do not accept that the dominant purpose of creating the expense claims submitted by Ministry counsel was to use them or their contents to obtain legal advice or to conduct or aid in the conduct of litigation. In my view, the records were clearly prepared for the purpose of obtaining reimbursement for expenses incurred in the course of performing their professional responsibilities for the Ministry. As found by Senior Adjudicator Goodis in Order PO-2037, it is not sufficient that the records bear some relation to the litigation.

Additionally, as also found in Order PO-2037, I find that, in the circumstances of this appeal, the Ministry has adduced no evidence or argument to support a finding that pages 1 to 30 have "found their way into the lawyer's brief", and, from my review, it is not apparent that they have.

Accordingly, I find that the records are not exempt pursuant to the application of the common law litigation privilege component of branch 1 of section 19 of the *Act*.

Summary conclusion

To conclude, I find that pages 1 to 30 do not fall within either the solicitor-client communication privilege component or the litigation privilege component of branch 1 of the section 19 exemption. Accordingly, I find that the exemption at section 19(a) does not apply.

Additionally, for the same reasons that I have found that the two heads of privilege in branch 1 do not apply, I find that the statutory privileges in branch 2 also do not apply. In my view, pages 1 to 30 were not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. Accordingly, I find that the exemption at section 19(b) does not apply.

In addition to claiming that section 19 applied to exempt pages 1 to 30 in their entirety, the Ministry claimed section 14 to withhold all credit card numbers and section 21(1) to withhold employee identification numbers and signatures from disclosure. As noted above, during mediation, the appellant advised that he did not wish to pursue access to credit card numbers or employee identification numbers or signatures and the possible application of those exemptions to the relevant portions of the records was removed from the scope of the appeal. Accordingly, those portions of pages 1 to 30 for which either section 14 or 21(1) has been claimed are no longer at issue and should not be disclosed to the appellant.

As no other exemptions have been claimed for the remaining portions of pages 1 to 30 and no mandatory exemptions apply, I will order that they be disclosed to the appellant, subject to the severances delineated above.

ORDER:

1. I uphold the Ministry's search for responsive records and dismiss this part of the appeal.

2. I do not uphold the Ministry's decision that record numbers 60707, 60709, 60710, 60711, 60712, 60713, 60715, 60716 and 60717 are excluded from the scope of the *Act* on the basis of section 65(5.2). I order the Ministry to provide the appellant with an access decision with respect to these records in accordance with the provisions of sections 26, 28 and 29 of the *Act,* treating the date of this order as the date of the request.

3. I uphold the Ministry's decision that pages 51, 71, 77, and 79 to 87 and record number 65491 are excluded from the scope of the *Act* on the basis of section 65(6) 3 and dismiss this part of the appeal.

4. I order the Ministry to disclose to the appellant pages 1 to 30 of the records, with the exception of credit card numbers, employee identification numbers and employee signatures, by **July 23, 2009** but not before **July 17, 2009**.

5. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 4.

Original signed by: June 18, 2009
Catherine Corban
Adjudicator