



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2786

Appeal PA07-123-2

Ministry of Energy and Infrastructure



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BACKGROUND OF APPEAL:

On November 26, 2004, Ontario Premier Dalton McGuinty announced that by January 1, 2007, gasoline sold in Ontario will contain an average of five per cent ethanol, as part of the government's commitment towards reduced emissions and cleaner air across the province.

On August 31, 2006, the Premier's office issued the following press release:

SARNIA — Ontario Premier Dalton McGuinty today helped officially open Suncor's new ethanol plant, which will help attract investment, create jobs and lead to a cleaner environment for Ontario families.

"The start of production at this world-class facility marks a major step forward for Ontario's emerging ethanol industry," said Premier McGuinty. "It will attract investment, create jobs and open up new markets for our farmers."

The St. Clair Ethanol Plant is the largest ethanol production facility in Canada with an expected production volume of 200 million litres per year. The plant has 38 full-time employees and is expected to use 20 million bushels of corn per year, creating ongoing opportunities for corn growers.

The plant has been supported by the signing of the Ethanol Manufacturer's Agreement between Ontario and Suncor. Designed to provide a stable environment for investment in ethanol, the agreement will provide the Suncor plant with a projected \$36 million over the next three years.

The government is encouraging the construction of more ethanol plants in Ontario by investing up to \$520 million in the 12-year Ontario Ethanol Growth Fund. The fund supports ethanol producers and independent retailers selling ethanol blends and promotes research and innovation.

The records in this appeal are documents relating to the Ethanol Manufacturers Agreement (EMA) and Ontario Ethanol Growth Fund (OEGF) referred to in the press release.

NATURE OF THE APPEAL:

The Ministry of Energy and Infrastructure (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for the following records:

- Copies of all correspondence between the Ministry of Energy and [a named company] from January 1999 to today
- Copies of all final reports, submissions and studies done by [the named company] and provided to the Ministry of Energy
- Copies of all correspondence including emails dating back to January 2000 between [the named company] and [individual employed at the Ministry]

- Copies of all correspondence, studies, analysis and reports regarding [the named company's] Ethanol Manufacturers Agreement
- Copies of all correspondence between [the former Minister of Energy] and [the named company] between January 2002 and June 2004

After receiving the request, the Ministry contacted the requester to clarify certain aspects of the request. Following the clarification, the Ministry notified the named company [the third party] pursuant to the notification provisions of the *Act*. The Ministry identified ten records and sought the third party's views on disclosure of these records. In response, the third party provided its consent to the release of these records.

Following a time extension and a deemed refusal appeal, the Ministry issued a decision letter to the requester. The decision letter identified 64 records responsive to the request. The Ministry granted the requester full access to 15 records, partial access to 24 records and withheld access to 25 records.

The Ministry indicated that access to the 49 records or portions of records which were not provided was denied pursuant to sections 12(1) (cabinet records), 13(1) (advice or recommendations), 17(1) (third party information), 18(1)(economic and other interests), and 19 (solicitor-client privilege) of the *Act*. The Ministry also indicated that, in some cases, the records contained non-responsive information.

The requester, now the appellant, appealed the Ministry's decision to this office.

During mediation, the appellant confirmed that he was not seeking access to the non-responsive portions of the records. Accordingly, the portions of the withheld records the Ministry identified as non-responsive are not at issue.

Mediation did not resolve the remaining issues, and this file was transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. This office commenced its inquiry by seeking the representations of the Ministry and the third party, initially, both of whom provided submissions.

The non-confidential portions of the Ministry's and third party's representations were provided to the appellant, who was given an opportunity to provide representations.

In response, the appellant wrote to advise that it will not be submitting representations, but continued to seek access to some of the records at issue. The appellant's letter identified 21 records it no longer seeks. One of these records is the Ethanol Manufacturing Agreement between the Ministry and the third party (Record 24). Some of the records identified by the appellant are records the Ministry already indicated it would release to the appellant. Namely, Records 12-14 and 34-36. Accordingly, the number of records the appellant continues to seek is 37.

RECORDS:

The Ministry identified the records at issue and the applicable exemptions in their representations and in the Index of Records they provided to this office. The following chart describes the 37 records remaining at issue:

Record #	General Description	Date	Ministry's Decision	Exemption Applied
5	Memorandum between Ministry staff	January 20, 2003	Partial disclosure	17(1) 18(1)
6	Issue paper prepared by the Ministry's Energy Policy Branch	January 31, 2003	Withheld	13(1) 17(1) 18(1) 19
18	E-mail from Ministry staff member to other staff member	February 1, 2005	Withheld	13(1) 17(1) 18 19
19	Draft slide deck entitled "EMA Proposal" slide deck	February 7, 2005	Withheld	12(1) 13(1) 18(1)
20	Slide deck entitled "Ethanol Related Initiatives"	February 16, 2005	Responsive portions Withheld	12(1) 13(1) 18(1)
21	Memorandum between Ministry staff	February 23, 2005	Partial disclosure	18(1)
25	Slide deck entitled "Replacing an Existing EMA's with an Ontario Ethanol Growth Fund Agreement"	March 9, 2006	Withheld	12(1) 13(1) 18(1)
27	Issue paper prepared by the Ministry's Energy Supply and Competition Branch	March 18, 2005	Partial disclosure	17(1) 18(1)
28	Issue paper prepared by the Industrial and Financial Policy Branch	March 21, 2005	Responsive portions withheld	12(1) 13 18(1)
29	Memorandum from Ministry staff to in-house counsel	June 21, 2005	Withheld	17(1) 18(1) 19
30	Letter between Ministry of Agriculture, Food and Rural Affairs and Ministry	June 20, 2005	Partial disclosure	12(1)

31	Slide deck entitled "Imaginary Opening Position"	August 26, 2005	Withheld	13(1) 18(1)
33	Memorandum to Ministry Staff	December 15, 2005	Withheld	18(1)
37	E-mail between Ministry staff	September 7, 2006	Withheld	17(1) 18(1)
38	E-mail between Ministry staff members	September 8, 2006	Withheld	12(1) 17(1) 18(1) 19
39	Draft Report to Treasury Board of Cabinet attached to Record 43	September 8, 2006	Responsive portions withheld	12(1)
40	E-mail between Ministry staff members (memorandum attached)	September 11, 2006 and September 12, 2006	Partial disclosure	12(1) 17(1) 18(1)
41	Slide deck entitled "Ontario Ethanol Growth Fund: Report Back" attached to Record 38	November 20, 2006	Responsive portions withheld	12(1) 13(1)
43	E-mail chain between Ministry and OMAFRA staff	September 12, 2006	Withheld	12(1) 18(1)
44	E-mail chain between Ministry and OMAFRA staff	September 12, 2006	Withheld	12(1) 18(1)
45	E-mail between Ministry staff	September 12, 2006	Withheld	12(1) 18(1)
46	E-mail chain between Ministry and OMAFRA staff	September 12, 2006	Withheld	12(1) 18(1)
47	E-mail chain between Ministry staff	March 7, 2006	Withheld	13(1) 18(1)
48	E-mail between Ministry staff	September 7, 2006	Withheld	12(1) 18(1)
49	Spreadsheet described by Ministry as the "[Third party's] EMA Illustrative Margin Forecast"	Not dated	Withheld	17(1) 18(1)
50	Spreadsheet described by Ministry as the "[Third party's] EMA Reference Oil and Corn Prices"	Not dated	Withheld	17(1) 18(1)

51	Spreadsheet described by the Ministry as the "Third party's Reference Oil Price, CPL" by Ministry	Not dated	Withheld	17(1) 18(1)
52	Briefing Note	Not dated	Withheld	13(1) 17(1) 18(1)
53	Briefing Note	Not dated	Responsive portions withheld	17(1) 18(1)
54	Briefing Note	Not dated	Partial disclosure	13(1) 17(1) 18(1)
55	Slide deck entitled "The Ethanol Dilemma: Where do we go from here?"	Not dated	Partial disclosure	13(1) 17(1) 18(1)
56	Briefing Note	Not dated	Responsive portions withheld	13(1) 17(1) 18(1)
57	Briefing Note	Not dated	Withheld	17(1) 18(1)
58	Briefing Note	Not dated	Partial disclosure	17(1) 18(1)
59	Issue paper prepared by the Ministry's Energy Policy Branch on same issue identified in Record 6	Not dated	Partial disclosure	17(1) 18(1)
60	Issue paper prepared by the Ministry's Energy Policy Branch	Not dated	Partial disclosure	17(1) 18(1)
61	Spreadsheet entitled "[Third party's] EMA Regression Line"	Not dated	Withheld	17(1)

DISCUSSION:

In its representations, the Ministry summarized its position as follows:

In some instances the information in the record, or the record itself, either relates to a Cabinet record or the deliberations of Cabinet or one of its committees [section 12(1)]. In other instances the Records contain advice provided by a public servant, and recommendations which are capable of being accepted or rejected by a decision-maker [section 13(1)].

In many instances, the documents contain valuable commercial information supplied by [the third party] to the Ministry, and the [release] of same would prejudice [the third party's] commercial position, including its ability to conduct competitive negotiations [section 17(1)]. In many instances, the record contains information which contains positions, plans, procedures, criteria or instructions to be applied to negotiations which are to be carried on by an institution, namely negotiations between the Ministry of Agriculture and [the third party] as regards the OEGF [section 18(1)]. Finally, it is submitted that three of the records are exempt as being the subject of solicitor-client privilege [section 19].

Sections 12(1) and 17(1) are mandatory exemptions under the *Act*. This means that if the information at issue is found to be exempt under these sections the Ministry must deny the appellant access. However, if any records are found exempt under sections 13(1), 18(1) and/or 19, the Ministry must demonstrate that it properly exercised its discretion to withhold these records.

I will first determine whether any of the records are exempt under the mandatory exemptions. I will then determine whether the remaining records qualify for exemption under the discretionary exemptions.

CABINET RECORDS

The Ministry submits that Records 19, 20, 25, 28, 30, 38, 39-41, 43-46 and 48 qualify under the mandatory exemption under section 12. In particular, the Ministry relies on the introductory wording of section 12, and on subsections 12(1)(a) and (b). The Ministry also claims that subsection 12(1)(d) applies to Record 20 and that none of the exceptions in section 12(2) apply in the circumstances of this appeal.

Section 12(1), in part, states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

Section 12(2) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

I have carefully reviewed the records and agree that the exceptions in section 12(2) do not apply in the circumstances of this appeal.

Section 12(1): introductory wording

The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry’s representations state that disclosure of the records “would either reveal the substance of deliberations of Cabinet or one of its committees, or contain information which would, if disclosed, allow the drawing of accurate inferences about same.”

In support of its position, the Ministry provided affidavits in which employees of the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) and the Ministry of Finance affirmed that certain records were put before or considered by Cabinet.

In my view, it is helpful to categorize Records 19, 20, 25, 28, 30, 38, 39-41, 43-46 and 48 in the following three groups:

- Slide decks (Records 19, 20, 25 and 41)
- Letter and E-mails (Record 30, 38, 40, 43, 44, 45, 46 and 48)
- Issue Paper and Report (Record 28 and 39)

Slide decks (Records 19, 20, 25 and 41)

I am satisfied that Records 19, 20, 25 and 41 qualify for exemption under section 12(1).

In support of its position that the withheld portions of Records 19, 20, 25 and 41 fall within the scope of the introductory language of section 12(1), the Ministry relies on an affidavit prepared by an OMAFRA employee. A copy of this affidavit was not provided to the appellant due to confidentiality concerns raised by the Ministry. However, the individual providing the affidavit advises that Records 19 and 20 went forward to Cabinet on a particular date and that Record 25 reflects the deliberations of Cabinet.

The Ministry's representations submit that Record 19 reflects consultations between itself, the Ministry of Finance and OMAFRA and that page 13 of that record indicates the specific nature of the decision sought from Cabinet. The Ministry argues that Record 20 is an update and expansion of Record 19.

With respect to Record 25, the Ministry states that "[w]hile the document itself may not have proceeded to Cabinet, the content reflects the deliberations of Cabinet" and that an update of the issues discussed in this record was presented to Cabinet. In support of its position that the information at issue in Record 25 was ultimately put before Cabinet, the Ministry refers to another record at issue - the Draft Report to Cabinet (Record 39). The Ministry argues that the approach discussed in Record 25 is also reflected in the Draft Report, which was created after Record 25.

The Ministry did not provide specific evidence in support of its position that Record 41 falls within the scope of the introductory language of section 12(1).

I have carefully reviewed the slide decks along with the Ministry's evidence and am satisfied that disclosure of the withheld portions of Records 19 and 20 would reveal the substance of deliberations of Cabinet which occurred on the day these records were put before Cabinet. In making my decision, I took into account that the withheld portions of these records clearly identify the issues Cabinet was to decide.

I am also satisfied that Record 25 falls within the scope of the introductory language of section 12(1), even though this record was not actually put before Cabinet. As previously mentioned, a record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506]. In my view, disclosure of the withheld information contained in Record 25 would reveal the substance of deliberations of Cabinet or would permit the drawing of accurate inferences.

Though the Ministry did not provide specific evidence in support of its position that Record 41 falls within the scope of the introductory language of section 12(1), I am satisfied that disclosure of this record would reveal the substance of deliberations of Cabinet or would permit the accurate inferences of the deliberations of Cabinet. In making my decision, I carefully reviewed Record 41 and am satisfied that it contains similar information as contained in Records 19, 20

and 25, which were put before Cabinet. Accordingly, I am satisfied that disclosure of Record 41 would reveal the substance of their deliberations or would permit the drawing of accurate inferences with respect to these deliberations.

Having regard to the above, I find that Records 19, 20, 25 and 41 fall within the scope of the introductory language of the mandatory exemption in section 12(1) and thus qualify for exemption.

Letter and E-mails (Records 30, 38, 40, 43, 44, 45, 46 and 48)

I am satisfied that the withheld portions of Records 30, 38, 40, 43, 44, 45 and 46 qualify for exemption under section 12(1).

The Ministry claims that the first paragraph of the letter (Record 30) expressly “references cabinet discussions and directions.” The Ministry also describes the withheld information contained in the letter as a summary of a decision made by Cabinet. In this regard, the Ministry submits that “disclosure of this portion [of the letter] would reveal the substance of the deliberations of Cabinet in respect of the [the third party’s] EMA and the OEGF.”

The only evidence the Ministry provided in support of its position that the e-mails (Records 38, 40, 43, 44, 45, 46 and 48) fall within the scope of the introductory language of section 12(1) is its general submission to that effect.

The Ministry argues and I agree that the withheld portion of the letter (Record 30) summarizes a decision made by Cabinet. Accordingly, I find that disclosure of this information would reveal the substance of Cabinet’s deliberations.

With respect to the seven e-mails, I note that six of the e-mails contain information exchanged between Ministry and OMAFRA. The first e-mail (Record 38) is between Ministry staff and discusses information the Ministry received from OMAFRA relating to a proposed submission to Cabinet. The remaining e-mails (Records 40, 43, 44, 45 and 46) consist of e-mail chains between Ministry staff and OMAFRA staff about a proposed submission to Cabinet. Having regard to the subject matter of these e-mails, I am satisfied that disclosure of Records 38, 40, 43, 44, 45 and 46 would reveal the substance of Cabinet’s deliberations or would permit the drawing of accurate inferences with respect to these deliberations.

However, I am not satisfied that the seventh e-mail (Record 48) contains information, if disclosed, would reveal the substance of Cabinet’s deliberations. This record was created before the other e-mails and contains background information regarding the subject-matter of the request. I have carefully reviewed this record and find that it does not contain any information that refers to a submission to Cabinet or to any decision to be ultimately decided by Cabinet. Accordingly, I find that this record does not qualify for exemption under the introductory language of section 12(1). I will address the Ministry’s claim that Record 48 is exempt under subsections 12(1)(a) and (b) further in this order.

Having regard to the above, I find that Records 30, 38, 40, 43, 44, 45 and 46 qualify for exemption under the introductory language in section 12(1).

Issue Paper and Report (Records 28 and 39)

I am satisfied that Records 28 and 39 qualify for exemption under section 12(1).

During the representation stage of this appeal, the Ministry contacted the Ministry of Finance, which also submitted representations to this office. The Ministry of Finance's representations support the Ministry's claim that section 12(1) applies to the Issue Paper (Record 28).

The Ministry of Finance describes Record 28 as a "policy analysis on the topic of [the third party's] Ethanol Manufacturer's Agreement." The Ministry of Finance's representations state that while:

.. the subject record has not gone to Cabinet or its committees [it] is a seminal or seed document to a Cabinet Submission that included the same subject with the similar analysis and conclusion as documents which went to Cabinet and to Treasury Board, a committee of Cabinet.

The Ministry of Finance attached an affidavit, prepared by one of its employees, to their representations. In it, the employee advises he conducted a review of the Cabinet and Treasury Board submissions relating to the subject-matter of the request and concluded that the submissions "identified similar issues and came to similar conclusions" to those set out in Record 28.

Having regard to the representations of the Ministry and the Ministry of Finance, I am satisfied that disclosure of Record 28 would reveal the substance of Cabinet's deliberations or would permit the drawing of accurate inferences with respect to these deliberations. In making my decision, I carefully reviewed Record 28 and agree that it identifies issues relating to the subject matter of the request.

With respect to the Draft Report (Record 39), the Ministry's representations state:

Record No. 39 is a draft of a formal Cabinet submission prepared by [OMAFRA and the Ministry] for the purposes of reporting back to Treasury Board of Cabinet on the issue that is the subject matter of the request. Both the title and the footer, which states "Confidential Advice for Cabinet", make this clear on its face.

...

While this particular version of the Cabinet submission did not go forward, the substance of this submission did proceed to Treasury Board of Cabinet ... The submission also refers to and discusses earlier Cabinet decisions and directions

regarding the issue that is the subject of the request... It is submitted, therefore, that disclosure of this record would, on its face, reveal the substance of deliberations of a Cabinet Committee in respect of issues relating to the access request. For this reason, the portions of the record deemed responsive to the request should be exempt under the opening words of section 12(1).

Having regard to the Ministry's representations and the record itself, I am satisfied that Record 39 falls within the scope of the introductory language of section 12(1). In making my decision I took into consideration the subject matter of the record along with the fact that it is clearly identified a Draft Report to go before Cabinet and that its purpose is to provide "Confidential Advice for Cabinet." Accordingly, I find that disclosure of Record 39 would reveal the substance of the deliberations of Cabinet or would permit the drawing of accurate inferences with respect to these deliberations.

Sections 12(1)(a) and (b): agenda, minute or other record of deliberations and policy options or recommendations

The word "agenda" means a specific record created as an official document of Cabinet Office that identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. An entry appearing in another record that describes the subject matter of an item considered or to be considered by Cabinet is not normally considered an agenda [Order PO-1725].

As mentioned above, Record 48 does not contain any information that refers to a submission to Cabinet or to any decision to be ultimately decided by Cabinet. In my view, the e-mail cannot be described as an agenda, minute or other record of the deliberations or decisions of Cabinet. Nor does it contain policy options or recommendations submitted or prepared for Cabinet.

Accordingly, I find that Record 48 does not qualify for exemption under sections 12(1)(a) or (b). I will address the Ministry's claim that this record is exempt under section 18(1) below.

THIRD PARTY INFORMATION

The Ministry claims that Records 5, 6, 18, 27, 29, 37, 38, 40 and 49-61 qualify for exemption under sections 17(1)(a), (b), (c) and (d), with particular emphasis on paragraph (a).

Based on my finding above under section 12(1), I need only consider whether section 17(1) applies to Records 5, 6, 18, 27, 29, 37, 49-61.

Sections 17(1)(a), (b), (c) and (d) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The Ministry submits that the withheld portions of Records 5, 6, 18, 27, 29, 37 and 49-61 contain financial and commercial information. The third party agrees and argues that the records also contain technical information. This type of information has been discussed in prior orders:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The third party's representations state:

Around 2002, the affected party began to explore the possibility of constructing an ethanol production plant in Ontario. One of the many considerations for the affected party in ultimately deciding whether to construct an ethanol plant was whether it could enter into an EMA with the Ontario government.

Starting in 2002, the affected party supplied the Ministry with information about its contemplated ethanol plant.

...

The information was supplied to the Ministry so that it could review the affected party's technical, operational, and business plans for the potential ethanol plant and thereby decide whether the Ministry was prepared to enter into an EMA with the affected party. The affected party ultimately entered into an EMA with the Ministry on April 10, 2003.

The third party advises that it made its representations without having the benefit of reviewing the records at issue. However, it submits that it "has good reason to believe that the disputed documents reveal [its] negotiating position." In support of its position, the third party listed the type of technical, commercial and financial information it thought was contained in the records. The information identified by the third party relates to its operational and business plans relating to the proposed ethanol plant.

The representations submitted by the Ministry support the third party's position.

I have carefully reviewed the records along with the representations of the parties and am satisfied that portions of the withheld information contains commercial and financial information relating to third party. However, I am not satisfied that the records contain technical information or information relating to the third party's operational and business plans for the proposed ethanol plant. Rather, most of the information which refers to the third party relates to the various negotiation positions it took in relation to the subject matter of the request.

As I have found that the records contain commercial and financial information, I find that part 1 of the test for the application of section 17(1) has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations of the Parties

The third party's representations state:

Although most of the disputed documents were created by the government, not by the affected party, there is good reason to believe that such documents contain the technical, commercial, and financial information of the affected party that was supplied in confidence, the disclosure of which could significantly prejudice the competitive position of the affected party and/or result in undue loss to the affected party or undue gain to the Requester and other parties.

The affected party believes it likely that the technical, commercial, and financial information that it supplied to the government in confidence from and after 2002 was incorporated into many of the disputed documents

The third party goes on to state:

... the issue of whether information was "supplied" has to be approached differently as between the EMA (Document 24) which is a contractual document, and the other disputed documents. Although the case law may suggest that a lower standard exists for the production of completed contracts (like the EMA), clearly the other disputed documents – which constitute the vast majority of the documents in issue – contain information that was "supplied" and therefore such part of the test is met.

Even with respect to the EMA, the affected party takes the position that the information in such document was "supplied" and the affected party asks the adjudicator to determine such issue.

The Ministry's representations state:

The Ministry submits that the information redacted ... represents, in many cases, information which was received directly from [the third party] or its consultants,

and was not the subject of further synthesis or manipulation on the part of the Ministry.

...

The Ministry submits that, given the competitive nature of the ethanol industry and the fact that it was the practice of both parties to treat [the third party's] financial and commercial information as "confidential", is itself evidence that the information contained in the above-noted records and which is designated by the Ministry as exempt under section 17, should be viewed by the Commission as having been received in strict confidence from [the third party]. Further, it is submitted that [the third party] had a reasonable expectation that its information would be treated by the Ministry as confidential, given that it was the practice of the Ministry not to share details of financial information of its competitors with [the third party]. The Government placed a premium on the value of this information.

In support of its position, the Ministry attached an affidavit to its representations. The affidavit was prepared by a Ministry employee. The affidavit was not shared with the appellant due to confidentiality concerns raised by the Ministry. The Ministry's employee advises that, in carrying out his duties to advise the Government on energy policies, he relies on confidential commercial information from oil companies, such as the third party. He also submits that some of the records at issue contain information about the third party, its transaction costs and its negotiating position.

Analysis and Decision

a) Supplied

I have carefully reviewed Records 5, 6, 18, 27, 29, 37 and 49-61 and find it helpful to organize them in the following categories:

- Memorandums (Records 5 and 29)
- Issue papers (Records 6, 27, 59 and 60)
- Briefing Notes (Record 52, 53, 54, 56, 57, 58)
- E-mails (Records 18, 37)
- Spreadsheets (Records 49, 50, 51 and 61)
- Slide deck (Record 55)

Memorandums (Records 5 and 29)

I am satisfied that portions of Record 5 contains information the third party supplied to the Ministry.

Record 5 is a memorandum between Ministry employees and Record 29 is a memorandum from the Ministry to Crown Counsel.

The Ministry's representations state that in "Record 5, paragraph 3, reference is made to information provided by [the third party's] consultants or by the company itself." I have carefully reviewed the withheld portions of this record and am satisfied that it contains commercial or financial information supplied to the Ministry by the third party. In particular, I find that this information refers to the third party's negotiating position and current level of profitability. The remaining information contained in this record relates to the Ministry.

However, I am not satisfied that Record 29 contains information the third party supplied to the Ministry. In my view, the information contained in this record relates primarily to the Ministry. As this record has not met the "supplied" portion of the three-part test, it cannot qualify for exemption under section 17(1). I will address the Ministry's claim that this record is exempt under sections 18(1) and/or 19 further in this Order.

Issue papers (Records 6, 27, 59 and 60)

I am satisfied that portions of Records 6, 27 59 and 60 contain information the third party supplied to the Ministry.

The Ministry submits that the Issue Papers identify a specific issue along with the necessary background information which the decision-maker requires to make a determination.

The Ministry submits and I agree that some of the withheld portions of Record 27 contains commercial and financial information supplied by the third party, which relates to future strategies the third party may employ regarding the subject-matter of the request. The remaining information contained in this record relates to the Ministry.

With respect to Record 60, the Ministry argues that this record contains information the third party supplied to them about their "negotiation position as well as a proposal." I have carefully reviewed Record 60 and am satisfied that most of the withheld information refers to information the third party supplied to the Ministry about its negotiation position, capacity of the proposed ethanol plant and how it previously met its ethanol needs. This information is also contained in the withheld portions of Records 6 and 59. I am satisfied that this information was supplied by the third party to the Ministry.

However, I find that the remaining portions of Records 6, 59 and 60 contain information which relates to the Ministry. Accordingly, these portions of the records do not meet the "supplied" portion of the three-part test and thus cannot qualify for exemption under section 17(1). I will address the Ministry's claim that these portions of the records are exempt under sections 13(1), 18(1) and/or 19 further in this Order.

Briefing Notes (Records 52, 53, 54, 56, 57 and 58)

I am satisfied that Record 57 and portions of Records 54, 56 and 58 contain information the third party supplied to the Ministry.

Records 52, 53, 54, 56, 57 and 58 are not issue-specific documents, such as the Issue Papers, but nonetheless discuss the subject-matter of the request. The Ministry refers to these records as Briefing Notes in their representations.

In support of their position that the information contained in the Briefing Notes were supplied by the third party, the Ministry relies on the affidavit of one of its employees, referred to above. This individual advises that Records 54, 55, 57 and 58 contain information about the third party's negotiation position.

I have carefully reviewed the Briefing Notes and agree that Record 57 and portions of Records 54, 56 and 58 contain information relating to the capacity of the proposed plant, how the third party previously met its ethanol needs and the third party's negotiation position, including its identification of an outstanding issue related to the subject-matter of the request. Accordingly, I am satisfied that portions of these records contain the third party's commercial information it supplied to the Ministry. However, not all of the information withheld in Records 54, 56 and 58 relate to the third party. In fact, much of the information relates to the Ministry's negotiation position. Further, other than identifying the Ministry's potential liability under the EMA, Record 52 merely sets out background information such as who signed the agreement and the length and purpose of the agreement. Also, the information contained in Record 53 relates solely to the Ministry's position and approach regarding the subject-matter of the request.

Having regard to the above, I am satisfied that the portions of Records 54, 56, 57 and 58, which refer to the third party's negotiation position, capacity of the proposed ethanol plant and how it previously met its ethanol needs, contain information the third party supplied to the Ministry.

However, I find that Records 52 and 53 and portions of Record 54, 56, 57, and 58 have not met the "supplied" portion of the three-part test as they contain information which was not supplied by the third party. In my view, most of this information relates to the Ministry not the third party. Accordingly, these portions cannot qualify for exemption under section 17(1). I will address the Ministry's claim that these portions of the records are exempt under sections 13(1) and/or 18(1) further in this Order.

E-mails (Records 18 and 37)

I am satisfied that Record 18 contains information the third party supplied to the Ministry.

Record 18 is an e-mail from a Ministry employee to other individuals employed at the Ministry, including in-house counsel. Record 37 is an e-mail from the same Ministry employee to another employee.

The Ministry and third party did not provide specific representations as to whether some of the information in the e-mails was supplied by the third party to the Ministry. However, I have carefully reviewed the e-mails and am satisfied that Record 18 contains information the third party provided the Ministry about its negotiating position. Accordingly, I find that the information contained in Record 18 meets the “supplied” portion of the three-part test.

However, I am not satisfied that the information contained in Record 37 was supplied by the third party to the Ministry. In my view, the e-mail contains information regarding the Government’s obligations under the EMA. In discussing this topic, the writer summarizes some of the terms of the EMA. As previously stated, the contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The third party’s submissions acknowledge the case law, but asks that I make a determination as to whether the terms of the agreement set out in the EMA or elsewhere in the records meet the “supplied” portion of the three-part test. In my view, the portions of the records at issue which refer to the terms of the EMA do not qualify as information having been supplied by the third party to the Ministry, as this information was mutually generated, rather than “supplied” by the third party. [Orders PO-2018, MO-1706]. Accordingly, I find that the portions of Record 37 which summarize the terms of the EMA do not meet the “supplied” portion of the three-part test. As the remaining information contained in Record 37 does not refer to the third party, but rather refers to the Government’s obligations, I also find that these portions do not meet the “supplied” portion of the three-part test.

As Record 37 cannot qualify for exemption under section 17(1), I will address the Ministry’s claim that this record is exempt under section 18(1) further in this Order.

Spreadsheets (Records 49, 50, 51 and 61)

I am not satisfied that Records 49, 50, 51 and 61 contain information the third party supplied to the Ministry.

The Index of Records provided by the Ministry describes the spreadsheets, as follows:

- third party’s EMA illustrative margin forecast (Record 49);
- third party’s reference oil and corn prices (Record 50);
- third party’s reference oil price, by CPL (Record 51); and
- third party’s EMA regression line (Record 61).

The Ministry and third party did not make specific representations regarding these records. After reviewing the records, I wrote to the Ministry and requested an explanation of the fields containing numerical information on Records 49, 50, 51 and 61. The Ministry responded that the spreadsheets are working documents that were used by a former employee who has since retired. The Ministry advises that it was unable to provide this office with specific explanations for some of the information contained in the records. However, the Ministry advises that the numerical

fields contain information calculating historical and future gasoline and ethanol margins, sensitivities, scenarios and possible payments under the EMA.

I have carefully reviewed the records, along with the Ministry's explanation and am not satisfied that the spreadsheets contain information supplied by the third party. Rather, the spreadsheets appear to apply calculations, to published prices, such as Canadian crude oil costs and Wholesale Gasoline prices. It appears that the spreadsheets were created for Ministry purposes only and attempt to forecast and predict future payments the Government may have to pay under the incentives it provides to ethanol producers.

For the reasons above, I am not satisfied that Records 49, 50, 51 and 61 met the "supplied" component of the three-part test. Accordingly, this information cannot qualify for exemption under section 17(1). As the Ministry did not submit that any other exemption applies to Record 61, I will order the Ministry to disclose this record to the appellant. I will address the Ministry's claim that section 18(1) applies to Records 49, 50 and 51 further in this order.

Slide deck (Record 55)

I am satisfied that some of the withheld portions of Record 55 contains information the third party supplied to the Ministry.

In support of its position that this record contains information the third party supplied to them, the Ministry refers to an affidavit provided by one of its employees, referred to above. The individual advises that the third party supplied information about its negotiating position to the Ministry. I have carefully reviewed the withheld portions of this record and am satisfied that portions of it contains information referring to the third party's negotiating position and current level of profitability. As a result, I find that this information meets the "supplied" portion of the three-part test.

However, I am not satisfied that all of the withheld information contains information supplied by the third party to the Ministry. In fact, most of the information relates to different approaches and options considered by the Ministry about the subject-matter of the request. Accordingly, I find that this information does not meet the "supplied" portion of the three-part test and thus cannot qualify for exemption under section 17(1). I will address the Ministry's claim these portions of Record 55 are exempt under sections 13(1) and/or 18(1) further in this Order.

Summary

I am satisfied that some of the information the Ministry identified as third party information was supplied by the third party to the Ministry. In particular, I found that information describing the third party's negotiating position, its current level of profitability, how it previously met its ethanol needs and the capacity of the proposed ethanol contained in the following records meets the second part of the three-part test under section 17(1):

- Portions of the Memorandum at Record 5
- Portions of the Issue papers at 6, 27, 59 and 60
- Briefing Note at Record 57 and portions of Briefing Notes at Records 54, 56 and 58
- E-mail at Record 18
- Portions of the slide deck at Record 55

Accordingly, I will go on to determine whether the third party supplied this information “in confidence” to the Ministry.

b) *In confidence*

As noted above, in order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

Having regard to the representations of the parties, I am satisfied that the information I found was supplied by the third party to the Ministry was supplied “in confidence”. In my view, the third party had a reasonable expectation of confidentiality, implicit or explicit, at the time it supplied the information to the Ministry. I also accept the third party’s representations that this information was treated consistently in a manner that demonstrates its concern for its protection from disclosure. I also accept the third party’s submission that at the time it communicated the information at issue to the Ministry, the information had not been otherwise disclosed or available from sources to which the public has access.

Accordingly, I am satisfied that the “in confidence” portion of the three-part test has been met with respect to this information.

Part 3: harms

I will now determine whether the withheld information contained in Records 5, 6, 18, 27, 54, 55, 56, 57, 58, 59 and 60 meet the third part of the three-part test. As noted above, this information describes the third party’s negotiating position and the capacity of the proposed ethanol plant.

To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

As mentioned above, the Ministry submits that disclosure of the information at issue could reasonably be expected to cause the harm described in sections 17(1)(a), (b), (c) and (d). The third party also submits that disclosure of the information at issue could reasonably be expected to give rise to the harms contemplated in sections 17(1)(a), (b), (c) and (d). However, the Ministry and the third party only provided evidence in support of their position that sections 17(1)(a) and (c) apply.

As noted above, in order to meet the third part of the three-part test, the parties resisting disclosure must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”.

In my view, the harms contemplated in sections 17(1)(b) and (d) do not apply in the circumstances of this appeal. For these sections to apply, the Ministry and the third party must provide “detailed and convincing” evidence to establish that disclosure could reasonably result in similar information no longer being supplied to the Ministry (section 17(1)(b)) or would reveal information supplied to or the report of a conciliator officers, mediator, labour relations officer or other person appointed to resolve a labour relations dispute (section 17(1)(d)). As noted above, the Ministry and the third party did not provide any evidence in support of their position that these exemptions apply in this appeal. Nonetheless, I carefully reviewed Records 5, 6, 18, 27 54, 55, 56, 57, 58, 59, and 60 and am satisfied that the contents of the records do not support a finding that sections 17(1)(b) and (d) apply. Accordingly, I find that sections 17(1)(b) and (d) do not apply to this records, but will go on to determine whether disclosure of the withheld portions of these records could reasonably be expected to attract the harms contemplated in sections 17(1)(a) and (c).

Sections 17(1)(a) and (c): Prejudice to Competitive Position and Undue Loss or Gain

Sections 17(1)(a) and (c) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In support of its position that the harms contemplated in sections 17(1)(a) and (c) apply. The third party states:

If the documents are released, the affected party will be materially prejudiced in both the ethanol market and the gasoline market and its competitors in those markets will experience an undue gain. These concerns are particularly relevant because the affected party has now built and is operating the ethanol plant in respect of which it obtained in EMA.

The third party goes on to explain that some “background information is necessary to explain the harm that may result from the disclosure of the disputed documents.” In this regard, the third party advises that in North America, ethanol is manufactured almost exclusively using corn as feedstock and that ethanol producers attempt to reduce their costs in the following ways:

- minimize feedstock transport costs by locating ethanol plants near feedstock sources, such as corn-producing farms, and major road, water, and rail transport routes;
- market and sell ethanol production by-products, such as carbon dioxide and grain solids; and
- design ethanol plants to minimize input and production costs to maximize revenues and profits.

The third party submits that disclosure of its “strategies, analyses and financial data” along with information about its “proprietary processes and efficiencies” could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c). The third party concludes:

Even if the disputed documents contain only general information about the affected party, other ethanol producers and gasoline refiners could use their industry experience to draw inferences from such information and thereby determine the affected party’s strategies, processes, and financial data.

In conclusion, the release of the disputed documents is likely to harm the affected party in both the ethanol market and the gasoline market and improperly confer an advantage on the affected party’s competitors in those markets.

The Ministry’s representations support the third party’s position. In particular, the Ministry advises that the third party operates in a competitive market and that the third party’s profits are based on the refining or “blending” portion of its business, rather than on the production of ethanol. The Ministry goes on to explain:

This is because the sale price is largely fixed by the regional nature of the ethanol business. Because of the physical properties of ethanol, it can not be shipped for any distance by pipeline without attracting water which would then taint the ethanol, rendering it unfit for usage.

Decision and Analysis

The parties resisting disclosure argue that disclosure of the information at issue could reasonably be expected to significantly prejudice the third party's competitive position (section 17(1)(a)) and/or result in an undue loss or gain (section 17(1)(c)). In support of their position, the third party and the Ministry argue that the information at issue contains information which would reveal information about the third party's strategies, analyses, financial data, proprietary processes and efficiencies regarding its ethanol and gasoline business.

However, I have found above that the information at issue does not contain information about the third party's proprietary processes or the viability of its business.

I have carefully reviewed the representations of the parties along with the records and am satisfied that disclosure of the portions of Records 5, 6, 18, 27, 54, 55, 56, 57, 58 and 60, which contains information about the third party's negotiating position and/or current level of profitability, could reasonably be expected to significantly prejudice its competitive position and/or result in an undue loss or gain. In my view, these portions of the records reveal commercial and financial information about the third party's bargaining position relating to the subject-matter of this request. As the third-part of the three-part test has been met, I find that this information qualifies for exemption under sections 17(1)(a) and/or (c).

However, I am not satisfied that disclosure of the portions of the records which refer to the capacity of the proposed ethanol plant or how the third party previously met its ethanol needs could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and/or (c). In this regard, the parties resisting disclosure failed to provide sufficiently detailed and convincing evidence. In making my decision, I also took into consideration that the capacity of the now completed ethanol plant is public knowledge. In fact, the third party's website indicates that it expects to double its current capacity as a result of its expansion plans which have already commenced. Accordingly, I am not satisfied that the remaining information at issue meets the third part of the three-part test and will order the Ministry to disclose this information. I will address the Ministry's claim that these records are exempt under sections 13(1), 18(1) and/or 19 further in this order.

ADVICE TO GOVERNMENT

The Ministry claims that Records 6, 18, 19, 20, 25, 28, 31, 41, 47, 52, 54, 55 and 56 qualify for exemption under section 13(1).

Based on my findings above under sections 12 and 17(1), I only need to consider whether section 13(1) applies to Records 6, 31, 47, 52, 54, 55 and 56.

General Principles

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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, cited above]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, cited above; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, cited above]

Representations of the Ministry

The Ministry provided general submissions in support of their position that Records 6, 31, 47, 52, 54, 55 and 56 represent the advice and recommendations of public servants relating to the subject-matter of the request. The Ministry submits that the information contained in these records would, if disclosed, allow for accurate inferences to be drawn about the advice or recommendations provided by Ministry staff to their superiors and decision-makers. In support of its position, the Ministry made the following specific arguments:

- The e-mail at Record 47 states the positions of both the Ministry of Finance and OMAFRA and goes on to provide a recommended course of action which can be either accepted or rejected by the decision-maker. This record also contains advice about the timing of the decision in order for it to have a practical effect on the industry.
- The Briefing Notes at Records 52 and 54 make various recommendations about the subject-matter of the request. The recommendations suggest a course of action which can either be accepted or rejected by the decision-maker.

Decision and Analysis

I find that Record 52, the remaining portions of Records 6 and 56, and portions of Records 47, 54 and 55 qualify for exemption under section 13(1).

Earlier in this order, I discussed the Briefing Note at Record 52 and noted that it contained information which solely relates to the Ministry's position and approach regarding the subject-matter of the request. I also found that the portions of Briefing Notes at Records 54, 55 and 56 also contained information about the different approaches considered by the Ministry. I am satisfied that this information contains advice and recommendations or contains information that if disclosed would permit one to accurately infer the advice or recommendations given. Though the Briefing Notes do not identify an author or a specific recipient, I am satisfied that they were prepared by Ministry staff to be considered by decision-makers given the type of information, specifically advice and recommendations, contained in these records. In particular, I note that the information at issue contains explicit advice regarding different approaches the Ministry and the Government may take to address issues arising from the subject-matter of the request.

I also carefully reviewed the Issue Paper at Record 6 and find that it contains advice and recommendations regarding a specific decision the Ministry must make in relation to the subject-

matter of the request. The Issue Paper was prepared by the Ministry's Energy Policy Branch and in it suggests a course of action that will ultimately be accepted or rejected by the person being advised. Accordingly, I find that the remaining portions of Record 6 qualify for exemption under section 13(1).

I also find that the e-mail at Record 47 contains information, if disclosed, would reveal advice or recommendations and thus qualifies for exemption under section 13(1). I carefully reviewed the e-mail and agree with the Ministry's submission that it contains information exchanged between Ministry employees regarding the Ministry of Finance and OMAFRA which identifies a recommended course of action which can either be accepted or rejected by the decision-maker, including the timing of the decision.

However, I am not satisfied that the information contained in the slide deck at Record 31 contains information which, if disclosed, would reveal the advice and recommendations of Ministry staff to decision-makers who have the authority to accept or reject the recommendations contained in the records. In my view, the slide deck contains general information about the ethanol industry. In particular, reference is made to rising prices and other changes to Canada's economy which may affect the ethanol industry. Though it appears that the slide deck may have been prepared to inform decision-makers, in my view, there is no evidence that it contains advice or recommendations that suggest a course of action that will ultimately be accepted or rejected. Accordingly, Record 31 does not qualify for exemption under section 13(1). I will address the Ministry's claim that Record 31 and the remaining portions of Records 47, 54 and 55 are exempt under section 18(1) further in this Order.

ECONOMIC AND OTHER INTERESTS

The Ministry submits that Records 5, 6, 18, 19, 20, 21, 25, 27, 28, 29, 31, 33, 37, 38, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60 qualify for exemption under sections 18(1)(c), (d), (e) and/or (g).

Based on my findings above under sections 12, 13(1) and 17(1), I need only determine whether section 18(1) applies to the portions of Records 5, 21, 27, 29, 31, 33, 37, 48, 49, 50, 51, 53, 54, 57, 58, 59 and 60 remaining at issue.

General principles

Sections 18(1)(c), (d), (e) and/or (g) state:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18(1) (c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Though the Ministry submits that sections 18(1)(c), (d), (e) and/or (g) applies to the records at issue, it only provided evidence in support of its position that sections 18(1)(d) and (e) apply. In particular, the Ministry submits that section 18(1)(e) applies to the records, and in certain circumstances, section 18(1)(d) also applies. However, the Ministry did not identify the portions of the records to which section 18(1)(d) applies.

Given, the nature of the evidence the Ministry has provided, I will commence my discussion with section 18(1)(e)

Section 18(1)(e): positions, plans, procedures, criteria or instructions

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The authors of the Williams Commission Report commented on the reasoning behind the exemption at section 18(1)(e), on page 321:

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution’s ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.

...

Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government’s ability to bargain effectively.

With respect to the types of “negotiations” to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

An agency may refuse to disclose:

A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.

We favour the adoption of a similar provision in our proposed legislation.

In keeping with these comments, previous orders have found that section 18(1)(e) does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflected mandatory steps to follow [Order PO-2034].

Additionally, background information that may form the basis for positions taken during negotiations is not exempt from disclosure under section 18(1)(e) [Order M-862].

The Ministry submits that the withheld information “contain positions and plans of the Ontario Government relating [to the] OEGF, and in particular, in relation to the criteria of qualification for the OEGF.” In support of its position, the Ministry refers to an affidavit prepared by an individual employed at OMAFRA. Portions of the affidavit were not shared with the appellant due to confidentiality concerns raised by the Ministry. The OMAFRA employee providing the affidavit submits that disclosure of the information at issue would result in the Ministry suffering economic harm, including compromising the Ministry’s future negotiations with stakeholders in the ethanol industry

The employee goes on to explain the role of the OEGF and status of the program in the affidavit, as follows:

In July 2007, industry participants were invited to make submissions for funding under a second intake to the Ontario Ethanol Growth Fund (OEGF). The purpose

of the 12 year, OEGF program is to assist ethanol manufacturers in addressing financing challenges when building new plants or expanding existing ethanol plants and also to assist producers of fuel ethanol to manage fluctuating market conditions. The Round 2 intake to the OEGF is intended to assist the government in reallocating funds that have become available in the OEGF program due to the voluntary termination of one of the previously approved projects. The amount available for reallocation is up to \$6 million in capital assistance and operating support for up to 65 million liters annually (worth up to \$7.15 million per year over the duration of the program).

...

All proponents' submissions have been received and the related review and due diligence process is currently in process. A decision by the Minister of Agriculture Food and Rural Affairs with respect to the award of funding under the OEGF Round 2 will follow.

The Ministry provided representations regarding the status of its negotiations with the third party. These portions of the Ministry's representations were withheld due to confidentiality concerns raised by the Ministry.

Part 1: plan, position, procedure, criteria or instructions

I am satisfied that portions of Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58 and 60 contain the Ministry's "positions" or "plans" and thus meets part 1 of the section 18(1)(e) test.

Previous orders have established that a "plan" is a formulated and especially detailed method by which a thing is to be done, or a design or scheme [Order P-229]. Similarly, "position", "procedures", "criteria" and "instructions" have been established as pre-determined courses of action or ways of proceeding [Order MO-1199-F and MO-1264].

In my view, Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58 and 60 contain a "position" or "plan" as the terms have been defined by this office. In particular, this information refers to options and courses of action the Ministry identified to address issues arising from the subject-matter of the request.

However, the remaining information at issue does not contain a "plan", "position", "procedure", "criteria" or "instructions". Rather, this information is comprised of background information or numerical information. The background information identifies information, such as who signed the agreement and the length and purpose of the agreement, including the factors which trigger payment under the agreement. Also identified in these portions is the Ministry's estimate of their potential liability under the EMA. Information about the Ministry's liability is also found in the spreadsheets at Records 50 and 51. Though background information may form the basis for positions taken during negotiations, it is not exempt from disclosure under section 18(1)(e)

[Order M-862]. In my view, disclosure of the remaining information would not reveal the Ministry's negotiating strategy or instructions given to those carrying out the negotiations between the Ministry and the third party. Though some of the remaining information describes the Ministry's liability, disclosure of this information does not reveal the Ministry's negotiating strategy. Accordingly, I find that the background and numerical information does not amount to a "plan", "position" "procedure", "criteria" or "instructions" which establishes a pre-determined course of action or way of proceeding. As this information cannot qualify for exemption under section 18(1)(e), I will determine whether it qualifies for exemption under section 18(c), (d) or (g) further in this order.

Part 2: intended to be applied to negotiations

I am satisfied that the Ministry intended to apply the "positions" or "plans" contained to Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58 and 60 to negotiations with the third party.

In making my decision, I carefully reviewed the portions of the records I found contain the "positions" and "plans" of the Ministry and am satisfied that disclosure would reveal the Ministry's strategy or approach to be applied in negotiations with the third party regarding the subject-matter of the request.

Accordingly, I find that part 2 of the section 18(1)(e) test has been met.

Part 3: negotiations are being carried on currently, or will be carried on in the future

I am satisfied that the "positions" and "plans" contained in Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58 and 60 apply to negotiations that are being carried on currently, or will be carried on in the future.

The Ministry submits that the negotiations relating to the subject-matter of the request are currently being carried on. In support of its position, the Ministry relies on the affidavit prepared by the OMAFRA employee, referred to above. The affidavit indicates that the Minister's review and decision regarding OEGF applications are still pending. However, since the receipt of the Ministry's representations, OMAFRA has posted information on its website indicating that, as of August 2008, a decision to offer OEGF funding to the third party has been made.

I have carefully reviewed the representations of the Ministry along with the records and I am satisfied that despite a decision being made to offer the third party OEGF funding, the "positions" or "plans" contained in the information at issue continue to refer to negotiations that are being carried on currently, or will be carried on in the future. In making my decision, I relied on the confidential submissions of the Ministry and the information at issue. In my view, the information at issue clearly identifies the Ministry's negotiation strategy and makes clear that the negotiations are not fully complete if a decision to offer OEGF funding to the third party is made.

For the reasons stated above, I find that the portions of the records I found to contain the “positions” and “plans” of the Ministry relate to negotiations that are being carried out or will be carried out in the future.

Accordingly, I find that part 3 of the section 18(1)(e) test has been met.

Part 4: negotiations conducted by or on behalf of the Government of Ontario or an institution

Having regard to the Ministry’s representations and the records, I am satisfied that the “positions” or “plans” contained in Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58, 59 and 60 refer to negotiations conducted by or on behalf of the Government of Ontario.

As I have found that all four parts of the section 18(1)(e) test have been met for the “positions” or “plans” contained in Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58, 59 and 60, this information qualifies for exemption under section 18(1)(e).

I will now determine whether the remaining information at issue qualifies for exemption under sections 18(1)(c), (d) or (g).

Sections 18(1)(c), (d) and (g)

The information remaining at issue comprises of:

- background information regarding the EMA (Records 27, 37, 48, 53, 54, 58, 59 and 60);
- the Ministry’s estimate of its liability under the EMA (Records 29, 37, 48 and 53);
- factual and background information about the ethanol industry contained in the slide deck at Record 31; and
- information, including the Ministry’s estimate of its liability under the EMA, contained in the spreadsheets at Records 49, 50 and 51.

As noted above, the Ministry did not provide representations in support of its position that sections 18(1)(c) and (g) apply. With respect to section 18(1)(d), the Ministry provided general submissions only. In this regard, the Ministry states:

The fact that [the third party’s] EMA did contain a confidentiality clause is clear evidence that, from the Government’s perspective, the information was valuable and sensitive, and, if made public, could have very negative implications for the economic position of Ontario.

The Ministry also submits that the withheld information contains “sensitive financial information,” if disclosed, would provide information about the “Government’s potential liability under the EMA over the 15 year term.”

Section 18(1)(c): prejudice to economic interests

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

As previously stated, in order to establish a reasonable expectation of the harm section 18(1)(c) seeks to avoid, the Ministry must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.

The Ministry submits that the information at issue is sensitive and valuable and that its disclosure would result in prejudice to its economic interests. I have carefully considered the Ministry’s representations along with the records and find that the Ministry has failed to provide sufficiently detailed evidence to demonstrate the harms contemplated by section 18(1)(c). In particular, I note that the Ministry failed to adduce any evidence demonstrating that it competes for business or earns money in this particular marketplace. Further, the Ministry did not provide any evidence demonstrating that disclosure of the information at issue could reasonably affect its ability to earn money in the marketplace.

Accordingly, I find that section 18(1)(c) does not apply in this appeal.

Section 18(1)(d): injury to financial interests

I am satisfied that Record 51 and portions of Records 29, 37, 48, 50 and 53 qualify for exemption under section 18(1)(d).

For section 18(1)(d) to apply, the Ministry must demonstrate that disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”.

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the “ability of the Government of Ontario to manage the economy of Ontario”, section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

As previously stated, in order to establish a reasonable expectation of the harm section 18(1)(d) seeks to avoid, the Ministry must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.

The Ministry argues that disclosure of the EMA could reasonably be expected to attract the harms contemplated in section 18(1)(d). However, the EMA is not at issue in this appeal as the appellant has indicated that it does not seek access to the agreement. Accordingly, in my view the portions of Records 37, 48 and 54 which specify terms contained in the agreement are also not at issue. What remains at issue are portions of records which contain references to some of the background information about the EMA. I have carefully reviewed these portions of the records and do not agree that disclosure could reasonably be expected to result in injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy. In making my decision, I also considered the confidential and non-confidential representations of the Ministry along with the information at issue. In my view, disclosure of general information about the EMA could not reasonably be expected to lead to the harm contemplated in section 18(d) as the information does not contain specific financial information relating to payments. Rather, the information contained in the records, which describe the EMA, is general in nature and in most cases merely explains or highlights the need for government incentives to motivate and assist companies producing ethanol in Ontario. Similarly, I find that disclosure of factual and background information about the ethanol industry contained in the records could not reasonably be expected to injure the ability of the Government of Ontario to manage the economy of Ontario. This information is contained in the slide deck at Record 31. Earlier in this order, I indicated that the slide deck contained references to rising prices and other changes to Canada’s economy which may affect the ethanol industry. In my view, disclosure of this information could not reasonably result in injuring the Government’s financial interest or ability of the Government of Ontario to manage the economy of Ontario. Accordingly, I find that this information is also not exempt under section 18(1)(d).

However, I am satisfied that disclosure of the amount the Ministry estimates it could be liable for under the EMA, which is the subject-matter of this request, qualifies for exemption under section 18(1)(d). I am also satisfied that the references contained in Record 51 about the amount the Ministry estimates it may have to pay out to the third party’s competitors qualifies for exemption under section 18(1)(d). In making my decision, I considered the confidential and non-confidential submissions of the Ministry. In particular, I took into consideration the Ministry’s argument that disclosure of this information may have an impact in its future dealings with other ethanol producers. I also considered the nature and purpose of ethanol manufacturing agreements. These types of agreements differ from standard contracts as payment is not received in exchange for a specific service. Rather, the Government’s payment obligations are typically triggered by changes in the market. Accordingly, though due diligence would require the Government to forecast its potential liability before signing the agreement, the Government’s actual liability remains unknown. Having regard to the above, I am satisfied that the information contained in the E-mails, Briefing Notes and Spreadsheets found at Records 29, 37, 48, 50, 51 and 53 describing the Ministry’s estimate of its liability at the time those records were created

could reasonably be expected to injure the Government's financial interest or ability of the Government of Ontario to manage the economy. Accordingly, I find that this information qualifies for exemption under section 18(1)(d).

Section 18(1)(g): proposed plans, policies or projects

As noted above, the Ministry did not provide evidence in support of its position that section 18(1)(g) applies to the records at issue. In order for section 18(1)(g) to apply, the Ministry must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

For the purposes of the first part of the test, a "proposed project" means a planned undertaking that has not already been completed [Order P-772].

The information remaining at issue are the portions of the records that contain background information about the EMA and the ethanol industry or numerical information which does not describe the Ministry's liability to the third party or their competitors. In my view, this information does not reveal a policy decision nor does it contain information about a "proposed project" that has not already been completed. As previously mentioned in this order, the ethanol plant relating to the subject-matter of this request has been long completed and is operational. Accordingly, I find that section 18(1)(g) has no application in this appeal.

Summary

I found that the portions of Records 5, 21, 27, 29, 31, 33, 37, 48, 53, 57, 58 and 60 which contains the Ministry's "plans" or "positions" qualifies for exemption under section 18(1)(e).

I also found that the remaining portions of Records 29, 37, 48 and 53 and the portions of 50 and 51 which identify the estimated amount of the Ministry's liability qualifies for exemption under section 18(1)(d).

However, I found that the remaining information at issue does not qualify for exemption under sections 18(1)(c), (d), (e) or (g). The Ministry claims that one of these records (Record 29) also contains solicitor-client privileged information. Accordingly, I will address this issue further in this order and will order the Ministry to disclose the portions of Records 27, 31, 49, 50, 53, 55, 58, 59, 60 and 61 which do not qualify for exemption under sections 18(1)(c), (d), (e) or (g). For the sake of clarity, highlighted copies of these records will be provided to the Ministry with this order.

SOLICITOR-CLIENT PRIVILEGE

The Ministry's representations submit that Records 6, 18, 29 and 38 contain solicitor-client privileged information under section 19. Based on my findings above under sections 12(1), 13(1), 17(1) and 18(1), I need only consider whether Record 29 contains solicitor-client privileged information.

General principles

Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;
or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19(c) has no application in this appeal. Sections 19(a) and (b) contains two branches as described below. For Record 29 to qualify for exemption under section 19, the Ministry must establish that one or the other (or both) branches apply. The Ministry submits that both branches apply to Record 29.

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

I do not need to consider whether any privilege has been waived as the appellant has not raised this as an issue and I am satisfied that it does not apply in the circumstances of this appeal.

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)].

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.)].

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.)].

The Ministry submits that the memorandum at Record 29 was prepared by one of its employees for Crown Counsel. The Ministry advises that this record was “prepared for the purpose of seeking and obtaining legal advice and, in so doing, providing counsel with information which counsel required in order to furnish appropriate and fullsome advice to his clients.” The Ministry also submits that the memorandum was consistently treated as confidential and that privilege was not waived.

Decision and Analysis

I have carefully reviewed Record 29 and am satisfied that it qualifies under the solicitor-client communication privilege aspect of Branch 1 of section 19. The record is a memorandum prepared by one of the Ministry's employees to Crown Counsel. In my view, the memorandum was prepared for the purpose of seeking legal advice. I also accept the Ministry's evidence that the communication between itself and Crown Counsel was made in confidence and that privilege has not been waived.

I am also satisfied that Record 29 forms part of "a continuum of communications" between the Ministry and Crown Counsel as described in *Balabel*.

Accordingly, I find that Record 29 qualifies for exemption under section 19. As a result of my finding, it is not necessary that I also consider whether Record 29 falls within the ambit of Branch 2.

EXERCISE OF DISCRETION

General principles

Sections 13(1), 18(1) and 19 are discretionary exemptions which permit the Ministry to disclose information, despite the fact that they can withhold it. Accordingly, the Ministry must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

In addition, this office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry did not provide representations specifically addressing their exercise of discretion. However, their submissions in support of the application of sections 13(1), 18(1) and 19 reflect the manner in which discretion was exercised.

Having regard to the Ministry's representations, I am satisfied that the Ministry has properly taken into account only relevant factors, in exercising its discretion to withhold the records I found exempt under sections 13(1), 18(1) and/or 19. I am also satisfied that the Ministry did not

exercise its discretion in bad faith, for an improper purpose or took into account irrelevant factors. In making my decision, I took into account that the Ministry attempted to apply the exemptions they claimed to the responsive records in a limited and specific manner. As a result, a significant amount of information was provided to the appellant.

With respect to the information that was not disclosed to the appellant, I am satisfied that the Ministry properly exercised its discretion to withhold this information having regard that the purposes of the sections 13(1) and 19 exemptions are to protect confidential communications between government employees or government employees and their legal counsel. I am also satisfied that the information I found exempt under section 18(1) is significant and sensitive to the Ministry.

Having regard to the above, I find that the Ministry properly exercised its discretion in deciding to withhold the information I found exempt under sections 13(1), 18(1) and 19.

ORDER:

1. I order the Ministry to disclose the portions of the records that are not exempt under the *Act* by **July 3, 2009** but not before **June 26, 2009**. For the sake of clarity, I have highlighted the portions of the records that should **not** be disclosed in the copy of the records enclosed with this Order to the Ministry.
2. I uphold the Ministry's decision to withhold the remaining portions of the records.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original signed by: _____
Jennifer James
Adjudicator

_____ May 28, 2009