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

ORDER PO-2884

Appeal PA09-34

Ministry of Natural Resources

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BACKGROUND:

The Ministry of Natural Resources (the Ministry) provided the following information as background to assist in my understanding of this appeal. As the appellant did not dispute the Ministry's background, I have included it in this in order to provide a framework for understanding the appellant's request.

> The appellant is an owner of a dam. There has been a long and contentious history with the Ministry and the appellant in relation to the operation of the dam and the Ministry's water management planning process. In the vicinity of the dam a rare species of beetle (Hungerford's Crawling Water Beetle) has been identified. With the announcement of the Species at Risk Stewardship Program the appellant made an application for funding with the hope that the Fund could be used to fund the acquisition of the appellant's property by the Ministry. The appellant had meetings with Ministry staff [on specified dates], but the appellant's application for funding under the Fund was rejected. The appellant is of the belief that the Species at Risk Stewardship Fund Guidelines were changed shortly after that meeting to exclude his application from consideration.

NATURE OF THE APPEAL:

The appellant made a request to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to the Species at Risk Stewardship Fund. Specifically, the appellant sought access to the following information:

1. [All] information associated with the changes made to the Guidelines for the Species at Risk Stewardship Fund. These changes were made from 2007/2008 Funding Program to the 2008/2009 Funding Program. These changes include the eligibility criteria for candidate species as well as Guideline changes to the Objectives with the removal of the 2007/2008 Objective *"Support the securement of the SAR habitat by working with willing landowners"*. I am requesting all correspondence associated with these changes including meeting minutes or notes, telephone conversations, emails and any written correspondence.

2. [All] communication (telephone conversations, emails, written correspondence or meeting notes) between [named individual] (MNR) and/or [named individual] (MNR) and anyone associated with the Species At Risk Stewardship Fund for either 2007/2008 or 2008/2009.

3. [All] information (telephone conversations, emails, written correspondence or meeting notes) associated with the decision made on the Species at Risk Stewardship Fund application submitted by [the requester] and [named individual] for the 2008/2009 program.

The Ministry issued a fee estimate and an interim decision which advised as follows:

- A fee estimate of $792.80 was provided in connection with release of 514 pages of responsive records;
- A deposit of $396.40 or $250 (for records on CD) was required to continue processing the appeal;
- Certain exemptions may apply: sections 13(1) (advice or recommendation), 17(1)(third party information) and 21(1) (personal information);
- A time extension was required of an additional 45 days; and
- Affected parties would have to be given notice under section 28 of the *Act*.

Following notification of the affected parties and receipt of the $396.40 deposit, the Ministry issued the requester a final decision advising that access had been granted in full to some records, along with partial access to others. The Ministry further advised that access had been denied pursuant to sections 12 (Cabinet records), 13 (advice or recommendation), 14 (law enforcement), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*, and that several records in an electronic archived format had not been addressed in the decision as they could not be retrieved.

The Ministry went on to advise that a revised fee of $903.60 had been charged for processing 1068 pages of records, and that the amount of $507.20 remained to be paid.

Upon receipt of payment, the Ministry released the records to which access had been granted, and advised that five emails and four attachments could not be retrieved due to technical difficulties within its record-keeping systems.

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

During mediation, the appellant confirmed that he is interested in the five emails and four attachments that could not be retrieved and as a result, reasonable search is an issue in the appeal. Further, the appellant indicated that he is interested in some portions of the records marked non-responsive by the Ministry. Finally the appellant indicated that he is not interested in the information severed under sections 12 and 21 and some of the information withheld under section 13(1) of the *Act*.

As mediation did not resolve all of the issues under appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I began my inquiry by sending a Notice of Inquiry to the Ministry setting out the facts and issues on appeal. The Ministry provided representations. I then set the appellant a Notice of Inquiry along with a copy of the Ministry's representations. The appellant also provided representations. Finally, I provided the Ministry with an opportunity to reply to the appellant's representations and it did so.

RECORDS:

The records at issue consist of email discussions and attachments and are set out as follows:

Responsiveness of Records

- Page A0089634 _1-000531
- Page A0089658_1-000586
- Page A0089670_1-000610
- A0090028 (pages 1057 – 1059)

Section 13(1)

- Pages A0089652_1-000573 and 1-000574
- Page A0089729_1-000841
- Page A0091131_7-001224

Section 19

- Pages A0090066_1-001119 to A0090066_13-001131

DISCUSSION:

RESPONSIVENESS OF RECORDS

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

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

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

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Ministry submits that the portions of the records which it has identified as non-responsive either post-date the appellant's request or refer to a different program (Ontario Heritage Trust Program) and thus are not relevant to the appellant's request. Specifically the Ministry states:

> Records A0089634_1-000531 and A0089658_1-000586 are e-mail messages that were forwarded electronically by the program area to the Information and Privacy Unit as part of the record retrieval process. Portions of the message or records which are communications to the Information and Privacy Unit were severed. The severed portions are both printed from the computer of the Information and Privacy Unit's administrative assistant and clearly post-date the appellant's request, and as such, not relevant and does not deal with the subject matter of the appellant's initial request.
>
> Record A0089670_1-000610 is a page of handwritten notes. The portion severed from the page as being non-responsive refers to the Ontario Heritage Trust Program, and not the Species at Risk Stewardship Fund. The subject matter of the notes does not in any touch upon the subject matter of the request; therefore, they are not relevant to the request.
>
> The Record A0090028_1-001057 is a three page e-mail chain and all the e-mails are dated November 5th and 6th, 2008. Accordingly, they post-date the request which was made on October 10, 2008. Therefore, they are not relevant to the request.

The appellant submits that the portion of the record dealing with the Ontario Heritage Trust Program is relevant to his request. He states:

> It should be noted that I also put in an application to the Ontario Heritage Trust for the sale of my dam to [the Ministry]. In consultation with [the Ministry], Ontario Heritage Trust rejected my application as well. Therefore there is a relevant overlap between the two programs with the rejection of my Species at Risk application dependent to some extent on my earlier application to Ontario Heritage Trust. The same issue (sale of my dam to [the Ministry]) is inherent in both programs.

In response to the appellant's representations, the Ministry submits:

> The wording of the appellant's request was clear and specific. It made no reference to the Ontario Heritage Trust, or the Appellant's application to the Trust. Furthermore, he had plenty of opportunity to clarify his request when he was consulted by the FIPPA unit or during mediation stage of the appeal…The Ontario Heritage Trust is administered by another Ministry. If the appellant

> wanted records relating to his application to that Trust, his request or part of it would have been transferred. It would be unfair to the Ministry given its obligations under the Act, and to the process to allow the requester at this stage to broaden the scope of his request.

Based on my review of the records and the representations I find that the portions of the records that the Ministry has identified as non-responsive are in-fact non-responsive to the appellant's request. The portions of Records A0089634_1-00531, A0089658_1-000586 and A0090028_1-001057 that are non-responsive post-date the appellant's request and relate to the records retrieval process by the Ministry's Information and Privacy Unit in responding to the appellant's request. This information does not reasonably relate to the appellant's request and as such, I find it to be non-responsive.

The Ministry submits that the portion of the Record A0089670_1-000610 that it has claimed is non-responsive relates only to the Ontario Heritage Trust Program and not the Species at Risk Stewardship Fund which is the basis of the appellant's request. The appellant submits that as the rejection of his Species at Risk application may be dependent upon his Ontario Heritage Trust application being rejected; this information should be responsive to his request. Based on my review of the appellant's request and the information in the record, I find that the information in the record is not responsive to the appellant's request. I find that the information in the record does not reasonably relate to the appellant's request for information about the Guidelines for the Species at Risk Stewardship fund or the appellant's application. Accordingly, this information is not responsive to the appellant's request.

Accordingly, I uphold this portion of the Ministry's decision.

ADVICE TO GOVERNMENT

The Ministry applied the exemption at section 13(1) to exempt portions of records A0089652_1-000573, A0089652_1-000574, A0089729_1-000841 and A0091131_001224. 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.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"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 see also Order PO-1993, upheld on judicial review in *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, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

In support of its position that section 13(1) applies to the withheld information in the records the Ministry submits the following with reference to Records A0089652_1-000573, A0089652_1-000574 and A0091131_001224:

> The email dated January 23, 2008 was sent by one member of the Species at Risk Project Team staff to other members of the Project Team. The email sets out options presented with respect to an application for a grant. In particular, the severed portion is the advice of the author regarding their response to the application for funding. Those options being presented are advice or recommendations to the alternate course of action mentioned earlier in the e-mail, that of outright rejection of the application. In other words, the advice or recommendation is to do Options A, B or C rather than do Option D. As this advice is being presented [in] an email from one public servant to another, it clearly falls within Section 13 as it is advice to Government. The Ministry considered not exercising its discretion in exempting the Record, but was of the view that to do so would inhibit the free flow of advice between public servants dealing with sensitive issues.

The appellant submits that the mandatory exception in sections 13(2)(a) and (l) may apply to the information exempted by the Ministry. He submits:

> It is respectfully submitted that the severed section labelled as "Options?" more than likely contained factual or background information; analytical information;

> evaluative information; notifications or cautions or views rather than "advice" or "recommendations".
>
> …
>
> It also appears that Section 13(2)(l) has relevance here…In this case, the options that were severed from the record more than likely related to the reasons that were offered for MNR's ultimate rejection of my application. Also inherent in this email are other reasons for rejecting my application offered by [named individual].

In its reply representations, the Ministry submits that the exception at section 13(2)(l) does not apply, as the email does not set out the reasons for the final decision and it is not written by the person who made the decision with respect to the appellant's application.

The section 13(2)(a) and (l) exceptions referred to by the appellant are as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> …
>
> (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
>
> (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
>
> (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

Based on my review of the information withheld by the Ministry I find that the information withheld under the title "Options?" in Records A0089652_2-000574 and A0091131_7-001224 constitutes advice and recommendation for the purposes of section 13(1). The information under the title "Options?" suggests a course of action that will ultimately be accepted or rejected by the

person being advised. The fact that the appellant's application was ultimately rejected means that disclosure of the withheld information would permit the appellant to accurately infer the advice or recommendation given.

Further, I find that the mandatory exceptions in sections 13(2)(a) and (l) do not apply to this information. The withheld information does not contain factual information about the appellant's application. In addition, as submitted by the Ministry, the information does not contain the reasons why the appellant's application was rejected such that section 13(2)(l) would apply. Accordingly, I find that the withheld information qualifies as advice or recommendations for the purposes of section 13(1) and is exempt from disclosure, subject to my finding on the Ministry's exercise of discretion.

On the other hand, I find that the withheld information on Records A0089652_1-000573 and A0089729_1-000841 is not advice or recommendation for the purposes of section 13(1). The information withheld by the Ministry from these two records does not suggest a course of action to be ultimately accepted or rejected by the person being advised. The information on these records contains the email authors' views or evaluation, and as such does not consist of advice or a recommendation. I find that this information is not exempt under section 13(1). As the Ministry did not claim other exemptions, this information should be disclosed.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 applies to exempt records A0090066_1-001119 to A0090066_13-001131 from disclosure. 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 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies. In this case, the Ministry submits that only section 19(a) is relevant.

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 [Orders PO-2441, MO-2166 and MO-1925].

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

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

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

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

In support of its position that Records A0090066_1-001119 to A0090066_13-001131 are confidential solicitor-client communications, the Ministry states:

> Section 19 was applied to all communications between Species at Risk staff and Ministry Counsel, and to all versions of the draft legal agreement text. It is the position of the Ministry that the Records identified fall within the ambit of the common law definition of solicitor client privilege…The email from Ministry Counsel to staff is a communication relating to advice and legal services provided by counsel and as such are subject to Solicitor-Client Privilege. Privilege has not been waived.

The appellant's submission on section 19 relates to the Ministry's exercise of discretion, rather than the application of the exemption. I will address the appellant's submission below.

I have reviewed Records A0090066_1-001119 to A0090066_13-001131, which consist of an email and attached document. The email is from counsel at the Ministry to a number of individuals in the Ministry and provides advice on various draft legal documents and their use. I find that these records consist of confidential communications between a solicitor (Ministry

counsel) and her client (Ministry employees) on the content and use of the document being reviewed by counsel. Accordingly, I find that these records are solicitor-client communication privileged under Branch 1 and qualify for exemption under section 19, subject to my finding on the Ministry's exercise of discretion.

EXERCISE OF DISCRETION

The sections 13 and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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)].

In support of its exercise of discretion to deny access to portions of the record which it has claimed are exempt under section 13(1), the Ministry submits that it considered the purpose of the section 13(1) exemption and the interests it seeks to protect. It further considered the principles of the *Act* and endeavoured to release as much of the records as it could without "jeopardizing the proper application of the exemption".

Regarding section 19 of the *Act*, the Ministry submits that in exercising its discretion to withhold the records under this exemption, it considered the purpose of the exemption and the interests it seeks to protect and the historical practice of the institution with respect to similar information.

The appellant submits that the Ministry erred in exercising its discretion under sections 13(1) and 19 and that the Ministry acted in bad faith in doing so. The appellant submits that the Ministry's rejection of his Species at Risk Stewardship Fund application is evidence of the Ministry's bad faith in exercising its discretion under the *Act*. Specific examples of how the Ministry acted in bad faith include:

- The Ministry changing the guidelines immediately after his meeting with Ministry officials and the use of these changes to reject his application.

- The Ministry's actions after receiving the appellant's application reveal that the Ministry was attempting to hide information in the processing of his application. This is evidenced by information in Record A0091131_7-0001224.

- The Ministry's loss of certain emails relating to the appellant's application.

In response, the Ministry submits that it appreciates the appellant's frustration at having his application rejected, but that his frustration is not evidence of the Ministry's having acted in bad faith. The Ministry further states:

> In terms of the actual decision itself, it should be noted that almost all the records that the Appellant sought were disclosed. In the very few cases where exemptions were applied, the Ministry to the extent possible, released as much of the records as it could without jeopardizing the proper application of the exemption. These actions are consistent with the Ministry's stated commitment to the Act and belie the Appellant's suggestion of bad faith or that the Ministry wants to thwart the principles or letter of the Act.

Finally, the Ministry submits that the appellant's allegations of bad faith relate to a particular individual at the Ministry, whereas the access decision at issue in this appeal was made by the Ministry's Freedom of Information and Protection of Privacy Coordinator. The Ministry submits that the appellant does not suggest or provide evidence to support the argument that the Freedom of Information Coordinator, the decision-maker, acted in bad faith or exercised her discretion for an improper purpose.

Based on the representations of the parties and my review of the records, I find that the Ministry properly exercised its discretion in exempting the portions of records that I have found to be exempt under section 13(1) and 19. The appellant suggests that I review the Ministry's actions against him in processing his Species at Risk Stewardship fund application and in the processing of his access request. I wish to emphasize to the appellant that I do not have the jurisdiction to consider whether the Ministry acted in bad faith in denying his application. Further, based on my review of the appeal, I find that I have not been provided with sufficient evidence to suggest that the Ministry acted in bad faith in processing the appellant's access request and exercising its discretion to deny the appellant the records under section 13(1) and 19.

I find that the Ministry took into account the relevant and proper considerations in exercising its discretion and did not take into account irrelevant considerations.

REASONABLE SEARCH

The appellant submits that the Ministry's search for five emails and attachments which it has identified as responsive but is unable to retrieve was unreasonable.

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

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

In support of its search for the missing five email records, the Ministry provided the following explanation which I have summarized:

- The employee who was the acting Education and Outreach Coordinator for the Ministry's Species at Risk Program and was involved in the Species at Risk Stewardship Fund was informed of the request and began search for responsive records to be forward to Information and Privacy Unit.

- The employee located fourteen archived email messages that were potentially responsive to the request but he was unable to retrieve these messages from the email archive.

- The employee, with help of the Lands and Resource Cluster, was able to locate some of the irretrievable archived email messages, but at the time of the deadline for the access decision, was still unable to retrieve 5 of the emails.

- The Ministry's Information and Privacy Unit and the Infrastructure and Technology Services section of the Ministry of Government Services discussed ways in which to retrieve the five emails. The employee had discussions with representative of the Infrastructure and Technology Services.

- The employee had been in a previous Ministry position and had copied all of computer folders related to his work in his previous position into a different folder. Some of that copied material may have included archived emails. The employee deleted contents of original folders and may have unintentionally deleted the irretrievable emails.

- Client trace on the remaining irretrievable emails has taken place but they could not be located.

As further evidence of its search, the Ministry provided affidavits from the Education and Outreach Coordinator for the Ministry's Species at Risk Program and the Senior Systems Administrator with the Data Operations Branch at the Infrastructure and Technology Services. Both of these individuals provide details of the above searches and describe their actions in trying to locate the emails.

The appellant submits that the Ministry's representations on the searches undertaken do not take into consideration the following:

- Lost email of January 23, 2008 was sent to 5 other individuals yet; the Ministry was unable to locate this email.

- Lost email of November 27, 2008 was sent to individual who is the Coordinator of IT Service Management for the Ministry but there is no mention of this person being contacted to locate email.

The Ministry did not address these two particular points raised by the appellant in its reply representations.

Based on my review of the representations, I find that the Ministry's search for the remaining irretrievable emails to be reasonable, except for the two emails specified in the appellant's representations.

As stated above, the Ministry is not required to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. I accept the Ministry's submissions and the affidavits of the two employees regarding the efforts made to locate the responsive emails. I find that the Ministry's search for the responsive records, including the emails, to be reasonable.

However, I find that the appellant provides a reasonable basis for his belief that the two "lost" emails from January 23, 2008 and November 27, 2008 may be retrieved from other individuals who had received the emails from the employee in question. I will order the Ministry to conduct a search for these two emails by contacting the recipients of the email as suggested in the appellant's representations.

ORDER:

1. I order the Ministry to disclose the portions of Records A0089652_1-000573 and A0089729_1-000841 by providing a copy of the records to the appellant by **May 18, 2010**. For the sake of clarity, I have enclosed a copy of these records identifying the information that should be disclosed to the appellant.

2. I uphold the decision of the Ministry to deny access to the remaining records.

3. I order the Ministry to conduct a further search for emails dated January 23, 2008 and November 27, 2008 by contacting the recipients of these emails.

4. After conducting the searches referred to in order provision 3 of this Order, I order the Ministry to provide a decision letter to the appellant in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request.

5. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to order provision 1, above.

Original signed by: April 27, 2010
Stephanie Haly
Adjudicator