Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3154

Appeal PA10-30

Ministry of Economic Development and Innovation

January 18, 2013

Summary: The appellant submitted a request to the Ministry of Economic Development and Innovation for access to records pertaining to the reduction of General Motors Canada Limited's dealerships in Ontario. The ministry denied access to the information under the mandatory third party information exemption under section 17(1) and the discretionary solicitor-client exemption in sections 19(a) and 19(b) of the *Freedom of Information and Protection of Privacy Act*. The appellant appealed the decision, also claiming that there was a compelling public interest in the disclosure of the records as contemplated by section 23. In this order the adjudicator finds that while some of the information does qualify for exemption under sections 17(1)(a) and 19(a) of the *Act*, other information does not meet the third party test under section 17(1) and the common interest exception to waiver of privilege does not apply to some of the information claimed to be subject to solicitor-client privilege. In addition, the adjudicator finds no compelling pubic interest in the disclosure of the records that are determined to be subject to section 17(1)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), 17(1)(b), 17(1)(c), 19(a), 19(b) and 23, *The Constitution Act*, 1867.

Orders Considered: MO-1338, MO-1452, MO-1476, MO-1678, MO-1994, MO-2274, P-48, P-532, P-568, PO-1973, PO-1803, PO-1983, PO-2435, PO-2490, PO-2569. PO-2626, PO-2734 and PO-2827.

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] 27 F.T.R. 194 (F.C.T.D); *Ottawa Football Club v. Canada (Minister of Fitness & Amateur Sports)*, [1989] 2 F.C. 480 (F.C.T.D.); *Archean Energy Ltd. v. Canada (Minister of National Revenue* (1997), 98 D.T.C. 6456 (Alta. Q.B.); *Stevens v. The Prime Minister of Canada (the Privy Council)*, [1997] 2 F.C. 759 (F.C.T.D.) affirmed at [1998] 4 F.C. 89 (F.C.A); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (S.C.J.); *College of Physicians of B.C. v. British Columbia (Information and Privacy Comm'r)*, 2002 BCCA 665 [leave to appeal refused at [2003] S.C.C.A. No. 83], *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344; *Astrazeneca Canada Inc. v. Health Canada*, 2005 FC 1451 (F.C.T.D.); *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (F.C.T.D.); *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 S.C.R. 809, 2004 SCC 31; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 FCA 378; *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

OVERVIEW:[1]

[1] This appeal arises from events that occurred in May 2009. With per capita auto purchases falling to fifty-year lows, General Motors Corp. ("GM") in the United States, and General Motors of Canada Limited ("GMCL"), its Canadian subsidiary, experienced plummeting sales, draining them of liquidity to fund their operations. GM filed for protection from creditors under Chapter 11 of the United States *Bankruptcy Code*. GMCL did not file for protection under the Canadian counterpart to Chapter 11, the *Companies Creditors Arrangement Act* (CCAA). A financial bailout from governments in the United States and Canada was their only hope of avoiding insolvency.

[2] This government financial aid was conditional on the automaker addressing some of its more pressing problems, including a dealer network which was in urgent need of rationalization. Faced with the insistence of the federal and Ontario governments that it had to become leaner, GMCL informed 240 of its 705 dealer franchisees that their dealer agreements would not be renewed on their expiry on October 21, 2010, and offered them a wind-down package. Some 202 dealers accepted the offer within the six day deadline imposed by GMCL.

[3] As a result of Canada and Ontario's loan extension both governments became significant equity holders in, as well as creditors of, GMCL and NGMCO Inc. (the new GM) in the United States. On June 1, 2009, the new GM owed $1.3 billion (USD) in debt to the governments of Canada and Ontario. All previous debt owed to the governments of Canada and Ontario was exchanged for 11.7 per cent in common equity in the new GM, with the federal government taking a 7.9 per cent ownership stake and the Ontario

[1] This overview borrows liberally from the background set out by G.R. Strathy J. in *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, an authority cited in the appellant's book of authorities. Portions of the overview are also sourced from the ministry's representations.

government taking a 3.8 per cent ownership stake. The governments of Canada and Ontario also received $400 million (USD) in preferred stock in the new GM.

[4] Since that time the new GM had a widely subscribed initial public offering of shares and repaid the loan portion in full. The Ontario and Canadian governments remain common and preferred shareholders. Furthermore, there were a number of civil actions that arose out of the restructuring of GMCL.

[5] Negotiations relating to the restructuring were complex and information was exchanged to facilitate a due diligence review of the viability plan and to determine if loan assistance would be provided. Government parties in the restructuring negotiations included the U.S. Treasury Department, Industry Canada for the federal government and the Ministry of Economic Development and Innovation (the ministry) for Ontario. In addition, Ontario and Industry Canada utilized Export Development Canada (EDC) as the delivery agent for Canadian and Ontario government loan funds. All parties involved in the negotiations retained Canadian and United States legal counsel.

[6] The ministry explained in its representations that because of the scope and complexity of the transactions, and the large number of legal issues that arose, lawyers representing GMCL and the government parties were mutually involved in meetings, negotiations and related discussions about the transactions. The ministry submits:

> In this regard, counsel for the various parties communicated client positions, commented on documents prepared as part of the transactions, and shared views and positions on legal issues that arose during the restructuring process.

[7] The ministry also submits that because of the commercial sensitivity of the information that was shared between GM, GMCL and the Ontario government, the ministry entered into a non-disclosure agreement with GMCL "as is typical in commercial loan and equity transactions". This is discussed in more detail below.

[8] At issue in this appeal is a request made by the appellant[2] under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) , for access to "all documents related to the Government of Ontario's participation in the restructuring of [GMCL] as it pertains to the [GMCL] dealers in Canada". The request provided:

> In particular, we request all documents related to the Government's knowledge and consideration of, and participation, if any, in the decision to eliminate [GMCL] dealers or reduce [GMCL's] dealer network in Canada.

[2] The appellant is a law firm representing former GMCL dealers.

> We further request all documents related to the Wind-Down Agreement sent by [GMCL] to approximately 240 [GMCL] dealers on or about May 20, 2009.
>
> This request covers all documents related to [GMCL] dealers both before and after the Government's decision to become an investor in [GMCL].

[9] In response, the ministry issued a fee estimate for access to the requested information. The appellant paid the fee and, after extending the time to respond to the request under section 27(1) of the *Act* and notifying third parties whose interests may be affected by disclosure, the ministry issued an access decision. The ministry granted access in part to records it identified as responsive to the request. The ministry initially relied on the mandatory exemptions at sections 17(1)(a) and (c) (third party information) and the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* to deny access to the portion it withheld. An index accompanying the access decision also set out that certain portions of the records were not responsive to the request.

[10] The appellant appealed the ministry's decision.

[11] At mediation, the parties addressed the ministry's inadvertent disclosure of a portion of a record at issue[3] and the appellant raised the potential application of the public interest override provision at section 23 of the *Act*. Accordingly, the possible application of section 23 of the *Act* was added as an issue in the appeal.

[12] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[13] I commenced the inquiry by seeking representations from the ministry and certain affected parties that had been previously notified by the ministry, on the facts and issues set out in a Notice of Inquiry. In the Notice of Inquiry, I asked the ministry to provide a final index of records clearly identifying all the records, or portions thereof, to which the section 17(1)(a) and (c) and 19 exemptions apply, as well as any non-responsive portions of the listed records, in a form that could be shared with the appellant.

[14] The ministry and all but one of the notified affected parties (the responding affected parties) provided responding representations. The ministry also provided the requested revised Index of Records. The responding affected parties indicated that a copy of their representations was forwarded to the affected party which did not respond to the Notice of Inquiry, who was asked to send any additional comments to this Office. None were received.

---

[3] This will be addressed as a preliminary issue below.

[15] In their representations, the responding affected parties consented to the disclosure of a portion of the records that had been withheld. This included the attachments to an email that together comprised record B4. The attachments included copies of a wind-down agreement offered to the non-retained dealers, as well as a template letter. The responding affected parties maintain that the draft wind-down agreements that were exchanged in the context of a potential CCAA proceeding should continue to be withheld.

[16] After being advised of the consent, the ministry issued a supplementary decision letter disclosing additional information to the appellant. As a result, those records, or portions of records, are no longer at issue in the appeal.

[17] A Notice of Inquiry, along with the non-confidential representations of the ministry and the responding affected parties was then sent to the appellant. The appellant provided representations, which were then sent to the ministry and the responding affected parties. The ministry and the responding affected parties provided reply representations. I subsequently sought representations from Industry Canada, the Department of Justice Canada and EDC on the potential application of solicitor-client privilege and the common interest exception to waiver of privilege,[4] only. Only Export Development Canada provided relevant responding representations.[5]

RECORDS:

[18] The records at issue consist of letters, presentations, information and briefing notes, emails and attachments, as set out in the ministry's last Revised Index of Records.

PRELIMINARY ISSUE:

[19] In the course of the processing of the appeal the ministry forwarded to the appellant a copy of certain records in a version that the ministry was prepared to disclose. Certain records, or portions of the records, were withheld. Through inadvertence, the ministry sent the appellant a copy of a briefing note at issue in the appeal (pages A24c and A24d) versions of which had been reproduced at other pages of the records disclosed to the appellant, although with additional information withheld under section 17(1) of the *Act*. Unlike the other versions of the briefing note, the one disclosed to the appellant only had a small portion withheld under section 19 (solicitor-client privilege) of the *Act*.

---

[4] This is addressed in more detail below.

[5] Industry Canada's representations were not responsive to the facts and issues raised in the Notice of Inquiry. The Department of Justice Canada did not provide responding representations.

[20] The appellant notified the ministry of the inadvertent disclosure and took the position that unless the ministry commenced a court application, it would disclose the information to its clients. The ministry advised the appellant that it would not be bringing a court application with respect to the inadvertently disclosed information. As a result, and in accordance with certain notations made by the mediator on the other versions of the briefing note in the records at issue, in the course of mediation this information was removed from the scope of the appeal. Accordingly, only the information withheld under section 19 of the *Act* that is contained on page A24d and in the other versions of that page of the briefing notes remains at issue in the appeal.[6]

[21] I now turn to the remaining issues in the appeal.

REMAINING ISSUES

A. Does section 17(1) apply to the information contained in the records?

B. Do records contain information that is subject to solicitor-client privilege?

C. Does solicitor-client privilege exist in the information that was shared with third parties?

D. Does the public interest override in Section 23 of the *Act* apply?

E. Did the ministry appropriately exercise its discretion?

DISCUSSION

A. Does section 17(1) apply to the information contained in the records?

Third Party Information

[22] Both the ministry and the responding affected parties ultimately took the position that sections 17(1)(a), (b) and (c) of the *Act* applies to all, or portions of, the following records:

> A3 (pages A3c, A3g to A3p), A10 (page A10), A12 (pages A12t to A12hh, A12kk to A12yy and A12zz), A14 (pages A14a, A14e, A14i to A14r), A25 (page A25), A33 (pages A33 to A33hhhh), A34 (pages A34 to A34f), A37 (page A37), A40 (page A40), B1-B3 and B5-B9

[6] Found at pages A4b, A8a, A11b, A13d, A16b and A24a of the records at issue.

[23] Sections 17(1)(a), (b) and (c) read:

> 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.

[24] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

[25] For sections 17(1)(a), (b) or (c) to apply, the parties resisting disclosure must satisfy each part of the following three-part test:

> 1. the record must reveal information that is commercial or financial 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 information must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

---

[7] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)].
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Do the records reveal information that qualifies as commercial or financial information?

[26] Both the ministry and the responding affected parties submit that information in the records withheld under section 17(1) qualifies as commercial and/or financial information.

[27] The responding affected parties provide the following examples of commercial or financial information that are found in the records that are claimed to be subject to the section 17(1) exemption:

- details regarding GMCL's restructuring efforts, including details pertaining to the non-retained dealers
- information about the process utilized by GMCL to identify the retained and non-retained dealers
- draft documentation that GMCL intended to utilize in the event that GMCL filed for court supervised restructuring under the CCAA

[28] The appellant suggests that the information at issue relates to specific details of GMCL's plan to remove dealers from its network. In the appellant's opinion, this does not qualify as commercial or financial information for the purposes of the *Act*.

[29] I find that all of the records claimed to be subject to section 17(1) contain information relating to the commercial reorganization and financial restructuring of GMCL that qualifies as commercial and/or financial information as defined in past orders of this office for the purposes of section 17(1).[9] Accordingly, the requirements of Part 1 of the section 17(1) test have been established.

[9] 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].

Was the information in the records supplied in confidence either implicitly or explicitly?

Supplied

[30] 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.[10] 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.[11]

[31] The ministry submits that the information withheld under section 17(1) was supplied both implicitly and explicitly in confidence by GMCL or its solicitors to the ministry to enable the ministry to perform its due diligence in relation to the contemplated financial assistance to GMCL. The ministry submits that the circumstances are very similar to those that were at issue in the appeal that resulted in Order PO-2827, where Adjudicator Diane Smith found that the information at issue in that appeal had been supplied in confidence to Infrastructure Ontario.

In confidence

[32] In order to satisfy the "in confidence" component of this part of the section 17(1) test, 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.[12]

[33] 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

[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] Order PO-2020.

- prepared for a purpose that would not entail disclosure[13]

[34] As discussed in the background above, GMCL and the ministry entered into a written Non-Disclosure Agreement pertaining to the provision of "confidential information", as defined in the agreement, by a "disclosing party". Paragraph 10 of the Non-Disclosure Agreement provided that:

> For greater certainty, nothing in this Non-Disclosure Agreement affects any of the rights of the Crown in right of Ontario pursuant to the *Proceedings Against the Crown Act* or other relevant law; nor does this Agreement affect [the ministry's] legal responsibilities pursuant to the *Freedom of Information and Protection of Privacy Act*.

[35] The responding affected parties further explain that a similar non-disclosure agreement was entered into between GMCL and Industry Canada. The responding affected parties submit that under the terms of these agreements, GMCL supplied information in respect of its financial affairs and restructuring plan in confidence. The responding affected parties submit that, in turn, the ministry and Industry Canada, respectively, agreed to maintain the confidentiality of records in accordance with relevant legislation, including *FIPPA*. I pause to note here that there was no evidence before me that a similar non-disclosure agreement was entered into between the ministry and Industry Canada, the Department of Justice Canada and Export Development Canada or between the American and Canadian governments.

[36] The responding affected parties also submit that certain records were accompanied by letters indicating that they were provided in confidence. The ministry states that all of the documents that were provided to it by GMCL had express notations of confidentiality.

[37] The responding affected parties further submit and the ministry confirms that access to the information GMCL provided was limited. The ministry explains that:

> … access to the records submitted to the ministry from GMCL was limited only to those parties who participated in the restructuring negotiations of GMCL and this access was limited. The pace of the restructuring and loans necessitated that confidential information be shared between GMCL, the ministry, the Canadian government and the American government for the purpose of restructuring negotiations. The records were not disclosed to anyone who was not part of the restructuring negotiations.

[13] Order PO-2043.

[38] The responding affected parties further point out that GMCL employees are required to treat confidential information as confidential and to protect against its disclosure:

> GMCL publishes a policy governing employee conduct entitled *Winning with Integrity: Our Values and Guidelines for Employee Conduct* to remind employees of their obligation to protect confidential information.

[39] The responding affected parties submit that in light of the limitations placed on disclosure, GMCL had a reasonable expectation that confidentiality would be maintained and that the information withheld under section 17(1) would only be used internally by the ministry in the course of its review of GMCL's viability plan.

[40] The appellant takes the position that labeling records as confidential, agreeing that records are confidential or relying on the terms of the Non-Disclosure Agreement is not sufficient to insulate the records from public disclosure. The appellant states that the express statutory provisions of the *Act* cannot be overridden by agreement.

[41] In addition, the appellant cites a number of authorities in the Federal jurisdiction[14] in support of its assertion that because GMCL was attempting to influence the decision-making process and seeking financial assistance or a concession or "special action in its favour" from a government, the expectation of confidentiality is diminished. The appellant submits that this is particularly so when that action involves approval of legislation or appropriations of some kind.

[42] The responding affected parties submitted in reply that:

> … the clear expectation of GMCL was that the [withheld information] would be used by the ministry for internal purposes only as part of their due diligence in its review of GMCL's viability plan provided to the Governments of Ontario and Canada for approval and to determine if loan assistance would be provided – this was not an exercise in influencing public policy or requesting a change in regulations. The case relied upon by the appellant, *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, is very different from the current situation. In the *Heinz* case, the company supplied financial information to the government voluntarily, without a non-disclosure agreement, relating to certain proposed regulatory changes that would apply to the industry at large. The *Heinz* case did not involve the supply of sensitive commercial and financial information in response to a request by the ministry as part of their due diligence in evaluating potential loan assistance to the supplier.

---

[14] For example, *Ottawa Football Club v. Canada (Minister of Fitness & Amateur Sports),* [1989] 2 F.C. 480 (F.C.T.D.), *Astrazeneca Canada Inc. v. Health Canada*, 2005 FC 1451 (F.C.T.D.), *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 FCA 378.

[43] The short answer to this is that the Federal caselaw referred to by the appellant appears to have a formulation of a confidentiality test that contains a consideration that is not worded the same way in the section 17(1) test applied in Ontario jurisprudence. Namely, that "the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication".[15]

[44] In making my findings in this appeal, I will be applying the 17(1) test as formulated in jurisprudence applicable to the Ontario legislation, rather than adopting the tests and language from its federal counterpart.

[45] That is not to say that the roles of the parties and the circumstances under which the restructuring and financing took place should be ignored. These are considered throughout my analysis.

[46] The appellant also submits that there should be no expectation of confidentiality because of the amount of information in the public domain. The appellant submits that the "bailout was widely reported nationally and internationally" and that information about the "bailout" and the restructuring plan could be located by any member of the public and/or is publicly available on the Internet. The appellant submits:

> GM did not treat its financial or commercial information before or during the bailout in strict confidence. This information was widely reported in the national and international media. Canada's bailout of GM created significant controversy and public discourse. Now, the Government's role in the terminations of over 200 Canadian-owned dealerships must be exposed.

[47] In reply, the ministry takes issue with the appellant's assertion that it attempted to contract out of the *Act* through the Non-Disclosure Agreement and refers in that regard to paragraph 10 of the Non-Disclosure Agreement, reproduced above.

[48] Also in reply, the responding affected parties agree with the appellant that the restructuring plans submitted to the ministry "contains a plethora of information which might be of a confidential nature and yet is publicly available on the Internet", but states that consent has already been given to the disclosure of this type of information. The responding affected parties submit:

---

[15] See *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] 27 F.T.R. 194 (F.C.T.D) at paragraph 45.

> The Redacted Records do not consist of information available on the Internet or can be found elsewhere in the public domain, and is still commercially sensitive in today's reality and should not form part of the public record. GMCL thoroughly reviewed the records delivered to us by the ministry to determine what, if any, elements were already in the public domain and this type of public information was not included in the [withheld information].

Analysis and Findings

[49] I have reviewed the records claimed to be subject to section 17(1) and considered the representations and I find that with the exception of records B3 and B7, I am satisfied that they contain information that was supplied by GMCL, or their lawyers, to the ministry. The attachment to Record B3 is a document that appears to have originated with the lawyers for Industry Canada. Furthermore, in my view, based on the nature of the record which points to missing information, rather than what is present, I find that its disclosure would not reveal or permit the drawing of accurate inferences with respect to information supplied by GMCL. Accordingly, record B3 does not satisfy the "supplied" component of part two of the three part test under section 17(1).

[50] Record B7 and the attachment to record B7 clearly emanated from the lawyers for Industry Canada, as well. Again, in my view, based on the nature of the record, I also find that its disclosure would not reveal or permit the drawing of accurate inferences with respect to information supplied by GMCL. In my view the record consists of requested information, rather than information that would reveal or permit the drawing of accurate inferences with respect to information that was supplied by GMCL. Accordingly, record B7 does not satisfy the "supplied" component of part two of the three part test under section 17(1).

[51] With respect to the "in confidence" component of part two of the section 17(1) test, previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision; but also that the existence of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties.[16]

[52] I acknowledge that, in certain circumstances, unsolicited submissions for assistance or the role of a party in active lobbying to facilitate regulation or policy change can result in a lessened expectation of confidentiality. In this instance, however, the information was provided by GMCL under the auspices of a confidentiality agreement and with an understanding by all participants that the information provided by GMCL was to be treated in confidence.

[16] See Orders MO-1476 and PO-2569.

[53] Considering the circumstances of this appeal including the existence of the Non-Disclosure Agreements, notations on the bulk of the records, the nature of the transaction, and the submissions of the parties on the issue, I find that, subject to the exceptions above, the information claimed to be subject to section 17(1) was supplied to the ministry by GMCL with a reasonably held expectation of confidentiality.

[54] In my view, therefore, GMCL had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.[17] Furthermore, I find that the records have been prepared for a purpose that would not entail disclosure and have been treated consistently in a manner that indicates a concern for their protection from disclosure by GMCL prior to being communicated to the ministry.

[55] Furthermore, in the circumstances of this appeal, the provision of the records to other parties to the transaction, or their legal counsel, does not result in the inability to claim confidentiality, for the purposes of the section 17(1) test, over the information that was supplied.[18]

[56] I have also considered the submissions of the appellant that the withheld information and/or records are in the public domain. The appellant's submissions are very general in this regard. I do not agree with the appellant, rather, I accept the responding affected party's submission that the records or information that is in the public domain is not that which the ministry is now withholding. I find that the withheld information and/or the records at issue, has not been disclosed or been made publicly available.[19]

[57] With respect to records B3 and B7, I found that the information in these records was not supplied by GMCL to the ministry, nor do they contain information that if disclosed would reveal or permit the drawing of accurate inferences with respect to information supplied by GMCL. Accordingly, the supplied portion of the section 17(1) test has not been satisfied with respect to records B3 and B7. As all three parts of the section 17(1) test must be satisfied for the information to be exempt, I find that section 17(1) does not apply to the information at issue in records B3 and B7. I will consider whether the information in records B3 and B7 is exempt under section 19 of the *Act*, below.

[58] Therefore, in all the circumstances, I find that part 2 of the three part section 17(1) test has been met with respect to all the other records for which section 17(1) was claimed.

---

[17] Order PO-2020.
[18] See in this regard Order P-48.
[19] Order PO-2043.

Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

[59] 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.[20]

[60] 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.[21]

[61] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[22]

[62] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[23]

Section 17(1)(a)

[63] With respect to the section 17(1)(a) harms, the ministry submits that disclosing the withheld responsive information would cause prejudice to GMCL's competitive position in the marketplace. In that regard, the ministry adopts the bulk of the responding affected parties' submissions on harms. In a nutshell, the ministry submits that disclosing the withheld responsive information would:

- prejudice GMCL's efforts to re-establish itself;
- diminish the reputation that GMCL has been recently rebuilding;
- prejudice ongoing litigation related to the dealer network consolidation;
- prejudice its ongoing relationship with its current dealer network;
- harm GMCL's position in certain contract negotiations;

---

[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] Order PO-2020.
[22] Order PO-2435.
[23] Order PO-2435.

- prejudice GMCL's competitive position/reputation by suggesting to car buyers that GMCL continues to be in a precarious financial position. The ministry submits that this would likely impact a potential car buyers' decision regarding whether to purchase a GM vehicle.

[64] The ministry submits that in Order PO-2734, an order that addressed a request for access to automobile rate filings and insurance survey records relating to five insurance companies, this office held that disclosing the details of insurers' financial position, company marketing strategy, experience and assumptions would prejudice the position of the insurers relative to their competitors.

[65] The responding affected parties submit that disclosing the withheld information will significantly prejudice GMCL's position in the marketplace and adversely impact its relationship with its dealers and its customers. The responding affected parties submit that disclosing the withheld responsive information would:

- conflict with the discovery rules in ongoing litigation with the non-retained dealers, thereby providing an inappropriate opportunity to the appellant to gain information outside the civil discovery process. The responding affected parties submit that the level of detail regarding the dealer network consolidation and decision-making process contained in the records has not been made public;

- reveal the identities of non-retained dealers and the number of employees at each such dealership. The responding affected parties submit that while the majority of non-retained dealers have ceased operations, some have not, and their identities and number of employees, if not already disclosed in a specified civil action, are confidential;

- reveal the process used by GMCL to identify the retained and non-retained dealers thereby prejudicing its ongoing relations with the retained dealers and seriously jeopardizing its efforts to restructure its dealer network, which it says is a critical component of its overall restructuring;

- in the case of the draft documentation that GMCL intended to use if there was a CCAA proceeding, reveal sensitive financial and commercial information necessarily setting out the then precarious financial status of GMCL. This, it is submitted, would thereby enable competitors to more fully understand GMCL's then financial outlook and its contingency planning. The responding affected parties further submit that disclosing the draft wind-down agreement relating to the potential CCAA proceeding would cause "undue controversy" in the retained dealer network and may impede the successful outcome of GMCL's dealer restructuring plans;

- suggest to potential car buyers and consumers that GMCL is in a precarious financial situation and affect car-buyers' decisions "perhaps discouraging sales of GM vehicles".

[66] The responding affected parties also submit that disclosing the information may also harm certain specified contract negotiations. The particular submissions with respect to these contract negotiations were not shared due to confidentiality concerns.

[67] The appellant submits that to the extent that section 17(1) of the *Act* did apply in 2009, which the appellant denies, the information is now dated and disclosing it would not have any undue economic effect on GMCL or any other affected party.

[68] The appellant further submits:

> The release of documentation on which Ontario made the decision to bailout GM will not provide GM's competitors with information relevant to them which they cannot already access. Even if such information is not in the public sphere, GM's commercial and financial standing has greatly improved since the 2009 bailout and the release of information related to its standing at the time of the bailout will not provide its competitors with information which they can use to GM's disadvantage at the present time.
>
> Neither the ministry nor GM has provided a sufficient basis beyond mere speculation of how the release of the documents identified to be responsive but not produced could affect GM's commercial position. The effect of the disclosure on existing litigation or GM's relationship with remaining dealers is not adequate grounds for section 17 protection. In any event, no clear evidence of such harm has been provided. Speculative claims that the release of the documents could have an effect on labour negotiations or a "likely impact on the public's decision to purchase a GM vehicle" … is insufficient.

[69] The appellant submits that the "importance of transparency in government decision making is amplified when the government receives no direct benefit from a decision to give money to a corporation" but rather assists a foreign-owned corporation in its private financial pursuits.

[70] In reply, the responding affected parties provide additional confidential information in support of their assertion that disclosing the withheld information would adversely affect certain litigation matters and imperil an initiative, thereby causing the section 17(1)(a) harms alleged. In addition, the responding affected parties provide non-confidential submissions that:

- disclosing the identities of non-retained dealers and the number of their employees will erroneously attribute a much larger loss of employment due to dealer restructuring than actually occurred, because many of those employees would be in demand at retained dealers. This, the responding affected parties submit, could cause damage to GMCL's reputation;

- just because the financial information is now slightly dated does not mean that disclosure of the draft CCAA documentation would not cause harm. "Its release could still negatively impact GMCL by allowing its competitors to learn more about GMCL's business, potential weaknesses, etc."

[71] Finally, in reply, the responding affected parties submit:

> While the restructuring of GM and GMCL have been reported on widely in the mainstream media, more recently reporting on the company's improved financial situation has provided balance. Additionally, since the earlier representations were submitted, General Motors has undertaken a successful IPO that resulted in the company being more widely held than immediately after the restructuring. The IPO was a significant threshold for the company in moving forward on a new footing with its customer base. Disclosure of this detailed financial information related to the company's preparation for a CCAA filing would suggest to customers that GMCL, despite the progress made in the intervening years since the restructuring, continues to be in a precarious financial situation and would affect their decision-making when purchasing a vehicle, perhaps discouraging sales of General Motors vehicles. The fact that GM and GMCL were in financial difficulty in 2009 was well known, however given both companies' efforts to regain its business and competitive place in the economy, and the ministry's assistance in doing so, to reveal the companies' confidential commercial and financial information at this time would prejudice the efforts at re-establishing themselves and their customer base and jeopardize and diminish the reputation they have been rebuilding….

Analysis and Finding

[72] It must be kept in mind that revealing information is not harm *per se*, rather revealing the information at issue has to be the cause of the harm. This is an important distinction. As set out above, to meet this part of the section 17(1) test, the institution and/or the responding affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" from disclosure. Evidence amounting to speculation of possible harm is not sufficient.

[73] The comments of Assistant Commissioner Brian Beamish in Order PO-2435, involving a request for records from the Ministry of Health and Long-Term Care and the Smart Systems for Health Agency (SSHA), are instructive in understanding this office's approach to the harms issue. He wrote:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> …
>
> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

[74] In my view, the above-quoted analysis and findings of Assistant Commissioner Beamish in Order PO-2435 apply to this case.

[75] The harms alleged by the ministry and GMCL in the current appeal share some similarities and overlap. In the discussion that follows, I have organized the allegations of harm under a number of sub-headings. Furthermore, my conclusions with respect to section 17(1) harms are limited to the parameters of that section. Whether some

records also qualify for exemption under section 19 of the *Act* is addressed in the section on solicitor-client privilege, below.

Will disclosure of the draft CCAA documentation reveal sensitive financial and commercial information?

[76] Based on the evidence provided to me, it would have been obvious to any reasonable person that GMCL was in a precarious financial state in 2009. That said, I am satisfied that the disclosure of a great deal of the information contained in the draft CCAA documentation and the discussion of this information set out in certain emails would reveal the process and strategy to be adopted in any CCAA proceeding, and provide a complete template of GMCL's operation, including any weaknesses and strengths. This information, which covers a wide variety of topics ranging from financial to strategic, is very specific, extensive and detailed, the collection of which would allow GMCL's competitors to gain an insight into the business of GMCL and would provide a competitor with a competitive advantage that they would not have if the information were not revealed.

[77] Accordingly, I find that disclosing the following information in the following records could reasonably be expected to prejudice significantly GMCL's competitive position and, therefore, qualifies for exemption under section 17(1)(a) of the *Act*:

A12 (pages A12t to A12hh, A12kk to A12yy and A12zz)
A33 (pages A33d to A33hhh), B1, B2, B5, B6 and B8

[78] Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The key question raised by section 10(2) is reasonableness and a head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered where an individual could ascertain the content of the withheld information from the information disclosed.[24]

[79] Based upon my review of the records that I have found to fall within section 17(1)(a) of the *Act*, any potential severance would either reveal exempt information, allow an individual to ascertain the content of the withheld information from the information disclosed or result in disconnected snippets of information being revealed.

[80] As all three parts of the section 17(1) test have been met with respect to these records, it is not necessary for me to also consider whether disclosing the information in the above noted records would also result in harms under sections 17(1)(b) and/or 17(1)(c). I will address the appellant's arguments that it is in the public interest that the

[24] Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

records be disclosed in the section on the application of section 23, the public interest override, below.

[81] I will now turn to consider the application of sections 17(1)(a), (b) and (c) to the remaining records that are claimed to be subject to section 17(1).

Section 17(1)(a)

Will disclosure of the remaining records prejudice GMCL's efforts to re-establish itself and/or diminish its reputation?

[82] In my view, the parties resisting disclosure have failed to provide sufficiently clear and cogent evidence to support this allegation of section 17(1)(a) harm in relation to the remaining records that were claimed to be exempt under section 17(1).

[83] Clearly, the evidence supports the conclusion that GMCL was in dire straights in 2009. This fact was the subject of extensive media coverage. GM in the US entered Chapter 11 protection. GMCL considered a CCAA proceeding, but was able to avoid the possible stigma of this process by arranging alternative financing. The state of GMCL in Canada was widely reported at the time, and its renaissance has also been the subject of media coverage. The restructuring of GMCL has already taken place and there has been a very successful IPO. While a car manufacturer's reputation is important to maintain, in light of the great steps taken forward by GMCL, and the content of the records at issue, I am not satisfied that disclosing the remaining information at issue will cause that reputation harm or prejudice significantly GMCL's competitive position.

[84] Furthermore, unlike many of the appeals that resulted in a finding that section 17(1) harms were present, such as PO-2734, the remaining records do not contain detailed risk projections, algorithms, future profit and loss statements or future income projections or otherwise sensitive information relating to a potential CCAA proceeding, such as that contained in the records that I have found to be subject to section 17(1)(a), above.

[85] If the responding affected parties' concern is that the information remaining at issue reflects the state of GMCL in 2009 and disclosing it now would be misleading, the fact that a record may contain information that may be misleading does not fit within the harms described in section 17(1)(a), or for that matter 17(1)(c).[25]

[25] See Orders MO-1452, MO-2274, PO-1803 and PO-1973. See also *Air Atonabee Ltd. v. Canada (Minister of Transport),* [1989] 27 F.T.R. 194 (F.C.T.D). See also the comments of Cromwell J. writing for the majority of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paragraph 224.

[86] In any event, the responding affected parties remain free to counter this effect by arranging with the institution to include with any disclosure an explanation as to why the information may be misleading. Simply put, if the responding affected parties are concerned about changes which have occurred, it can convey this information to the appellant via the institution in order to avoid misinterpretation.

Would disclosure prejudice ongoing litigation?

[87] There is a recurrent theme in the responding affected parties' representations that if information is disclosed harm will result to ongoing litigation involving GMCL, including litigation relating to the consolidation of its dealer network. This is framed in a variety of ways, including that releasing information would conflict with the discovery rules in ongoing litigation with the non-retained dealers thereby providing an inappropriate opportunity to "gain" information outside the discovery process, or result in an "unnecessary encroachment" on Ontario's rules of civil procedure. One of the concerns that is mentioned by the responding affected parties is that disclosing the decision making process "relative to the dealer network" and the related commercial and financial information, would allow the appellant access to information beyond the scope of what would be relevant at discovery and provide an undue advantage in litigation.

[88] With respect to other litigation, without revealing the confidential nature of the representations, the broad allegation is that releasing financial information would be damaging and could "imperil" a certain initiative. That said, the responding affected parties do not go the extra step to provide detailed and convincing evidence to explain how that suggested harm could be reasonably expected to occur by disclosure of the information remaining at issue.

[89] The impact of disclosure on a litigant's competitive position was addressed by former Senior Adjudicator John Higgins in Order PO-2490 where he wrote:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.

The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled *Public Government for Private People* (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the *Act* and made the following comment:

> … It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable.… Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
>
> …

> *The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.* [Emphasis added.]

It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.

Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:

> Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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, and MO-1706]. [Emphasis added.]

Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure.

[90] In my view, this reasoning is equally applicable to the appeal before me. In addition, I find that the responding affected parties have failed to provide sufficient detailed and convincing evidence to establish how the alleged harms could reasonably be expected to occur by disclosure of the information in relation to the remaining records that were claimed to be exempt under section 17(1).

Would disclosure prejudice ongoing relationship with GMCL's current dealer network or reveal the process used by GMCL to identify the retained and non-retained dealers?

[91] The ministry submits that disclosing the information will prejudice GMCL's relationship with its current dealer network and relies on the responding affected parties submissions in that regard.

[92] The responding affected parties state that disclosing the information will reveal the process used by GMCL to identify the retained and non-retained dealers. The

responding affected parties further submit that disclosing this information is likely to prejudice their ongoing relations with their current dealer network. However, the responding affected parties do not go the extra step to explain how that could reasonably be expected to occur. For example, there is no evidence before me that the formula used to identify the retained and non-retained dealers is unique and unexpected and that the disclosure of the information would cause dealers to withdraw from the current dealer network or seek to renegotiate the terms of their agreement, to GMCL's competitive disadvantage.

Would disclosure harm GMCL's position in contract negotiations?

[93] The responding affected parties provide confidential representations in support of this allegation of harm. However, I am not satisfied that those submissions provide sufficiently detailed and convincing evidence to establish the harm alleged. I have not been provided with the factors which would demonstrate that the information at issue fits within the type of information the disclosure of which would cause the harm alleged. In any event, I would think that the current and future state and financial health of GMCL is more important a factor in the contract negotiations, rather than past history. The parties to these negotiations are sophisticated enough to know and understand the difference. Finally, based on current media reports, it appears that these negotiations may in fact be concluded.

Would disclosure of the identities of non-retained dealers and the number of employees at each such dealership lead to an erroneously attributed larger loss of employment as a result of restructuring?

[94] Although the responding affected parties explain in reply how this harm might occur it is, in my view, highly speculative. If the concern is revealing information that is litigation related, that issue has been addressed above. If the concern is that the information is misleading, that has also been addressed above. Furthermore, there is a list of the number of Ontario dealers with associated employee numbers in an appendix to a public report that the appellant referred to in its representations. It would be a simple matter to observe which of those remained open and then calculate the employee loss. I am not satisfied that revealing the information remaining at issue that is claimed to be subject to section 17(1) would cause the section 17(1)(a) harm alleged.

Would disclosure discourage GM car sales?

[95] The alleged impact that disclosing the information would have on potential car buyers is, in my opinion, also highly speculative. I suspect that a great many factors influence the purchase of a car, including GM products. These allegations are not supported by any specific evidence, such as for example, marketing studies, pertaining to what factors influence a car buyers' choice, or how releasing the information at issue would influence that decision. I am not satisfied that I have been provided sufficiently

detailed and convincing evidence that disclosing the remaining information at issue that is claimed to be subject to section 17(1) could reasonably be expected to be one of them.

Section 17(1)(b)

[96] With respect to the harms that fall within the scope of section 17(1)(b), the ministry submits that disclosing the information would be "detrimental to its ability to provide aid to companies in situations such as the present appeal."

[97] The ministry submits that:

> In the event that such information is disclosed, it is the ministry's position that GMCL and other such companies would not be willing to provide detailed confidential and sensitive financial and commercial information to the Government of Ontario in similar circumstances. This would result in Ontario not having the kind of detailed information that it requires to be able to properly assess whether to provide a loan or some other type of assistance.
>
> The ministry submits that it is in the public interest to have companies be able to provide the Government with their confidential financial and commercial information in order for the Government to properly assess risk and ultimately be able to provide aid to companies who require it in similar situations.

[98] The responding affected parties submit:

> GMCL's detailed information was required to support the ministry's evaluation of whether a potential investment by the Province in GMCL could be justified through the avoidance of negative impacts on, and the maintenance of, a critical sector in Ontario's economy. In the event that such information was subsequently disclosed, GMCL and other companies might not be willing to provide confidential information to the Government of Ontario (or other Governments) if they cannot reasonably expect that such information will be continued to be maintained in confidence. As a result, the Government of Ontario (and other Governments) may not have access to detailed financial and commercial information for their use in decision-making about government policies and programs in the future.

[99] The appellant disagrees that disclosing the requested information could result in other private companies' unwillingness to provide confidential information to Ontario which could affect future policies and programs.

[100] The appellant submits that:

> The GM bailout was unique and unprecedented in both the quantum granted to GM and the public concern surrounding the bailout. In such situations the government must be held accountable for its decisions to invest public funds into private corporations.

[101] In reply, the responding affected parties submit that the appellant is incorrect and that:

> GMCL itself would rethink the type of documentation it supplies to the ministry in the future if the redacted documents are disclosed to the appellant, and if this production becomes a public fact, GMCL submits that other private companies will exercise extreme caution in this regard in the future.
>
> Full complete disclosure of financial and other confidential information to the ministry is of critical importance in the relationship between industry and government when determining eligibility for programs, financing etc. GMCL and other companies might not be willing to provide confidential information to the Government of Ontario (or other governments) if they cannot reasonably expect that such information will be continued to be maintained in confidence. The ministry is vital in ensuring Ontario's economy is a healthy and flourishing one and its relationship with industry needs to be strong, without the uncertainty of potential disclosure of confidential and/or financial information, in order that the ministry can fulfill its role.

[102] In reply, the ministry submits that:

> … the production of the records required to be supplied by GMCL to the government, if revealed, will make it more difficult for the government to obtain that information in future from business and industry. Part of the Ontario government's mandate is to ensure the economy of Ontario is a healthy one. This often involves working with major industries in Ontario and ensuring that those businesses and industries which provide key products or services or provide for large amounts of employment in the province or a region are supported. This can only be done effectively if the business supplies key confidential information.

Analysis and Findings

[103] The restructuring and financing of GMCL was unprecedented and unique. Hopefully, Ontario's and GMCL's economic circumstances have improved to a degree

that this will never occur again. However, given the strong incentive to submit the information to obtain financing, in my view, revealing the information remaining at issue that is claimed to be subject to section 17(1) would be unlikely to result in a disinclination on the part of GMCL or on similarly placed companies' to provide information or result in them limiting the information that is provided to satisfy due diligence requirements.

[104] Accordingly, I am not satisfied that revealing the information remaining at issue that is claimed to be subject to section 17(1) could reasonably be expected to cause the section 17(1)(b) harms alleged.

Section 17(1)(c)

[105] With respect to the harms that fall within the scope of section 17(1)(c), the ministry submits:

> … the benefit that resulted through the process of providing information to the ministry to assist the government to make a determination on their investment could be defeated if competitors were to find out confidential commercial and financial information about GMCL's business that would effectively make it difficult for GMCL to be able to compete in the marketplace.
>
> It is also the ministry's position that the disclosure of the records would result in undue gain to GMCL's competitors, and an undue loss to GMCL, because it would enable competitors to more fully understand GMCL's financial outlook and potentially impact the success to date of the dealer network restructuring efforts. The ministry submits that the impact of disclosing information that would result in undue gain to GMCL's competitors is exacerbated given GMCL's efforts to become competitive again after its well-known recent difficulties.

[106] The responding affected parties submit:

> … the disclosure of this information would result in the undue gain to the appellants in ongoing litigation against GMCL. The use of Ontario's Freedom of Information legislation in this regard, when such disclosures are comprehended legitimately in the court process through the discovery process, would result in an unnecessary encroachment to Ontario's rules of civil procedure, not to mention a serious disconnect with the underlying intention of Freedom of Information legislation. Consequently, this disclosure would result in undue loss to GMCL and also to GMCL's network as a whole.

[107] The appellant submits that the existence of ongoing litigation against GMCL cannot be used as a bar by the ministry to avoid disclosing the responsive records.

Analysis and Findings

[108] To meet the section 17(1)(c) test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[26]

[109] For essentially the same reasons set out in my analysis of the section 17(1)(a) harms above, I am not satisfied that the ministry has provided sufficiently detailed and convincing evidence to establish that revealing the information remaining at issue that is claimed to be subject to section 17(1) would cause the section 17(1)(c) harms alleged. The ministry and the responding affected parties have made assertions of undue gain to GMCL's competitors, but have failed to provide sufficiently detailed and convincing evidence to support them.

[110] Finally, the allegation that disclosure of information would result in undue gain in litigation was also addressed by former Senior Adjudicator Higgins in Order PO-2490. He wrote:

> The appellant submits that the reference in this section to "undue loss or gain" is not limited to undue loss or gain in the marketplace and that disclosure of the records at issue will give the requester an advantage in the lawsuit.
>
> I have analysed the relationship between the harms intended to be protected against under section 17(1)(a), above, and civil litigation. My reasoning under section 17(1)(a) stems from the view that section 17(1) is intended to protect the "informational assets" of businesses and others in the context of the marketplace. In my view, it applies with equal force in the context of section 17(1)(c).
>
> In addition, it is in my view a curious and unsustainable argument to suggest that the outcome of a lawsuit before the civil courts could produce an "undue" loss or gain. The whole purpose of litigation, and the unswerving ambition of the Canadian judiciary, is to produce results that are fair and just. In my view, this argument cannot be upheld. Section 17(1)(c) cannot possibly include "undue gain or loss" in the context of litigation.

[26] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[111] I agree with his analysis. But even if I had reached a different conclusion, having considered the information remaining at issue, and the submissions, I am not satisfied that disclosure of the information remaining at issue that is claimed to be subject to section 17(1) could reasonably be expected to cause the section 17(1)(c) harm alleged.

Conclusion on Section 17(1) of the Act

[112] I have found above that only records A12 (pages A12t to A12hh, A12kk to A12yy and A12zz), A33 (pages A33d to A33hhh), B1, B2, B5, B6 and B8 qualify for exemption under section 17(1)(a) of the *Act*.

[113] I have also found that the withheld portions of records A3 (pages A3c, A3g to A3p), A10 (the responsive portion of page A10), A14 (pages A14a, A14e, A14i to A14r), A25 (page A25), A33 (pages A33 to A33c), A34 (pages A34 to A34f), A37 (page A37), A40 (page A40), B3 and B7 do not qualify for exemption under section 17(1)(a),(b) or (c) of the *Act*.

[114] As section 19 of the *Act* is not claimed to apply to the information and no other mandatory exemption applies to them, I will therefore order that the withheld portions of records A3 (pages A3c, A3g to A3p), A10 (the responsive portion of page A10), A14 (pages A14a, A14e, A14i to A14r), A25 (page A25), A34 (pages A34 to A34f), A37 (page A37) and A40 (page A40) be disclosed to the appellant.

[115] I will now consider whether section 19 of the *Act* applies as claimed.

B. Do records contain information that is subject to solicitor-client privilege?

[116] 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[117] 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 or a hospital, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[118] 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.[27]

Solicitor-client communication privilege

[119] 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.[28]

[120] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[29]

[121] 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.[30]

[122] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[31]

[123] 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.[32]

---

[27] 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).
[28] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[29] Orders MO-1925, MO-2166 and PO-2441.
[30] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[31] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[32] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

[125] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or a hospital, "for use in giving legal advice."

Statutory litigation privilege

[126] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or a hospital, "in contemplation of or for use in litigation."

[127] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[33]

[128] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[34]

Loss of privilege

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

[130] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege[35]

[131] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[36]

---

[33] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[34] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[35] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[36] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

[132] Waiver has been found to apply where, for example:

- the record is disclosed to another outside party[37]
- the communication is made to an opposing party in litigation[38]
- the document records a communication made in open court[39]

[133] The application of branch 2 of section 19 has been limited on the following grounds as stated or upheld by Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*[40] (*Big Canoe*)) and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[41]

[134] The ministry submits that the records generally fall within the following two categories:

- category one consists of communications between ministry counsel and employees of the ministry, or external counsel retained by Ontario with ministry counsel and/or ministry employees. These records form part of the "continuum of communications" between a solicitor and client and are thus subject to solicitor-client privilege at common law.
- category two consists of records that were provided to the ministry by counsel representing other parties to the restructuring transaction or that originated with the ministry, but were shared with other parties. The ministry submits that these records qualify for privilege under the doctrine of "common interest" exception to waiver of privilege, as they are communications between counsel representing parties with a common interest in the restructuring transaction.

[135] For the purposes of the analysis that follows, I am treating each email communication in an email string as a discreet communication in order to track its source of origin.

---

[37] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[38] Orders MO-1514 and MO-2396-F.
[39] Orders P-1551 and MO-2006-F.
[40] [2006] O.J. No. 1812 (Div. Ct.)
[41] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[136] The ministry submits that records B10 and B11 are communications between ministry counsel and clients within the ministry providing legal advice regarding the restructuring. The ministry further submits that Records A33 (pages A33 to A33c), B3, B4 (the attachment is not at issue), B7 and B9 contain legal advice.[42]

[137] EDC submits that with respect to records A33 (pages A33 to A33c) and B3, it supports the position taken by the ministry and that:

- the documents contain confidential privileged communications involving both EDC counsel and the external counsel retained to assist EDC with the restructuring negotiations
- the documents represent a continuum of communications between Legal counsel and clients in respect of the seeking and provision of legal advice
- the documents have been consistently treated as confidential

[138] With respect to section 19(b) of the *Act*, the ministry submits that Records B10 and B11 also qualify for exemption under section 19(b) because they were created by or for Crown counsel for use in giving legal advice.

[139] The ministry submits that in *Ontario (Attorney General) v. Big Canoe*[43]:

> The Divisional Court held that the only test that must be met for records to qualify for exemption under section 19 (now 19(b)) was whether the record fit within the plain wording of the exemption; namely that a particular record was prepared for Crown counsel for use in giving legal advice. In this regard, Justice Lane wrote:
>
> > Where through *FIPPA*, documents are sought which fit the description in the second branch of section 19, the question of whether they are, or ever were, privileged at common law is not the test. The test is the definition in the section. It may be though that this gives the head an overly broad discretion, but in my view this is what the statute says.

[140] I will first address the communications exchanged between ministry counsel and employees of the ministry, or external counsel retained by Ontario with ministry counsel and/or ministry employees. In addition, I will consider the records the disclosure of

[42] The nature of which is set out in a portion of the ministry's representations that could not be shared because it would reveal the nature of the content of the record.
[43] [2006] O.J. No. 1812 (Div. Ct.).

which would reveal the substance of a solicitor-client communication and thereby also qualify for exemption under section 19(a) of the *Act*.

[141] Section 19(a) is claimed to apply to records A33 (pages A33 to A33c), A41 to A46, B3, B4 (the attachment is not at issue), B7, B9 to B13 and the withheld portions of pages A4b, A8a, A11b, A13d, A16b, A24a and A24d. The ministry further clarifies that disclosure of the withheld portions of pages A4b, A8a, A11b, A13d, A16b, A24a and A24d would enable the appellant to infer the legal advice that was provided to the ministry from their solicitor.

[142] The ministry explains that its legal director was the lead lawyer with respect to the GMCL transaction and his role was to provide advice to ministry clients. In that capacity, the ministry says, he frequently liaised with other lawyers and received communications which, in turn, were communicated to ministry clients. The ministry submits that any correspondence or documentation received by its legal director or by a named counsel at the ministry qualifies as part of the continuum of communication between a solicitor and client with respect to the GMCL restructuring.

[143] Furthermore, the ministry submits that certain records qualify as a continuum of communication between the ministry's outside counsel and its legal services branch, or clients within the ministry.

[144] The appellant submits that to the extent that any of the information contains advice given to Ontario by its legal counsel, it does not dispute that such communications are privileged. The appellant submits, however, that solicitor-client privilege does not apply to the records that GMCL provided to the province, which the ministry's legal counsel then used in evaluating how to advise Ontario. This is addressed in more detail below.

[145] I have carefully reviewed the records and considered the submissions on this issue and find that the first three emails on pages A33 and A33a of record A33, records A41, A42, A43, A44, A45, A46, the first email in record B3, the first email in record B4 (the attachment is not at issue), the first two emails in record B7, the first two emails in record B9, the first two emails in record B10, record B11, record B12 and record B13 consist of communications between the ministry's outside counsel and the ministry's legal services branch or other representatives of Ontario ministries involved in the matter or between the ministry's legal services branch and clients in the ministry or other representatives of Ontario ministries involved in the matter. In my view, they contain information that represents a continuum of communications between a solicitor and client made for the purpose of giving or seeking legal advice.

[146] I also find that disclosing the portion of the briefing notes at pages A4b, A8a, A11b, A13d, A16b, A24a and A24d, withheld under section 19(a) of the *Act*, would

reveal the substance of a communication between a solicitor and client, made for the purpose of obtaining or giving professional legal advice.

[147] I am satisfied that there has been no waiver of privilege with respect to the above-noted information.[44] Accordingly, I find that this information qualifies for exemption under section 19(a) of the *Act*. As I have found that this information qualifies for exemption under section 19(a) it is not necessary for me to consider whether it also qualifies for exemption under section 19(b) of the *Act*.

[148] Finally, based upon my review of the information that I have found to fall within section 19(a) of the *Act*, any potential severance would either reveal exempt information, allow an individual to ascertain the content of the withheld information from the information disclosed or result in disconnected snippets of information being revealed.[45]

[149] I now turn to consider the category two records, being information that was provided to the ministry by counsel representing other parties to the restructuring transaction or that originated with the ministry, but was shared with other parties.

C. Does solicitor-client privilege exist in the information that was shared with third parties?

[150] The ministry explained in its representations that because of the scope and complexity of the restructuring and loan transaction, as well as the large number of legal issues that arose, lawyers representing GMCL and the government parties were mutually involved in meetings, negotiations and related discussions with respect to the contemplated transactions. The ministry submits:

> In this regard, counsel for the various parties communicated client positions, commented on documents prepared as part of the transactions, and shared views and positions on legal issues that arose during the restructuring process.

[151] It submits that the restructuring plans had to be approved by two sovereign governments and in Canada by both the Federal and Provincial governments. It states that there were additional complexities because of the difference between the bankruptcy and restructuring law in the US and Canada. The ministry says that the records were shared to allow Ontario to conduct its due diligence to assess loan risk, as well as to provide ministry counsel with the ability to provide legal advice to their client.

---

[44] In the context of solicitor-client privilege it has been held that disclosure within government does not constitute waiver. See paragraphs 23 and 24 of *Stevens v. The Prime Minister of Canada (the Privy Council)*, [1997] 2 F.C. 759 (F.C.T.D.) affirmed at [1998] 4 F.C. 89 (F.C.A).

[45] See footnote 24, above.

The parties, the ministry says, shared a self-same common interest in the records at issue, which was sufficient to withstand any waiver of privilege.

[152] In support of its position the ministry refers to a number of authorities including *Archean Energy Ltd. v. Canada (Minister of National Revenue)*[46] (*Archean*) where a common interest was found to apply to documents shared for the purpose of furthering a restructuring and *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*[47] (*Fraser Milner*), which the ministry describes in reply as relating to a "complex transaction with cross border issues". The ministry also relies on Order MO-1678.

[153] The ministry states, in summary:

> … records A33, B1-B6 and B8 to B9 qualify for privilege in two different ways. First, the records were communicated to counsel in the ministry in his capacity as internal legal advisor to the Ontario government on the General Motors restructuring and loan transaction. As such, they form part of the continuum of communications between the ministry counsel and his clients on matters relating to the restructuring and loan. The records also formed the basis of advice the lawyer was providing to his ministry client, accordingly, disclosure of the records, on their face, would also reveal the subject matter and nature of the legal advice ministry counsel was providing to his ministry clients.
>
> The records also qualify for privilege under the common law doctrine of shared privilege. In this regard, the documents were prepared by lawyers for other parties to the transaction and contain the legal advice and opinions of those lawyers, to their respective clients. The records were shared with the [ministry] lawyer by the lawyers of other parties to the transaction, in confidence, and at the direction of their respective clients, in order to inform [the ministry] about issues and matters relating to the restructuring. [The ministry] required the information in order to properly assess risks and other issues relevant to the Ontario government's decision to loan money to General Motors and GMCL. In this circumstance the ministry respectfully submits that the ministry shares privilege in the records with the originating parties, under the doctrine of common interest privilege, precisely because the records were shared with [the ministry] in confidence in order to facilitate and further the common interest of all the parties – the successful completion of the loan transaction. […], the Court held in *Fraser Milner*, [that] it is in the parties'

[46] (1997), 98 D.T.C. 6456 (Alta. Q.B.).
[47] 2002 BCSC 1344.

> common interest in the successful completion of the transaction that is the element that gives rise to the common interest.

[154] As set out above, EDC submits that with respect to the information remaining at issue in records A33 (pages A33a to A33c) and B3, it supports the position taken by the ministry and that:

- the communications contained in the documents are between legal counsel representing parties with a common interest in the restructuring transaction
- the attachment to record B3 represents a draft, common work product of the corresponding legal counsel
- the documents have been consistently treated as confidential

[155] The responding affected parties submit that GM and GMCL were asked by the ministry and Industry Canada to provide records outlining the companies' financial status as well as a comprehensive restructuring and viability plan. They submit that the information was provided to allow for due diligence and risk assessment regarding the monies to be advanced. Due to the scope and complexity of the transaction, they say, lawyers representing GM and GMCL and the government parties were actively involved in the process and shared their positions.

[156] The responding affected parties submit that the information remaining at issue in records A33 (pages A33a to A33c), B3, B4 (the attachment is not at issue), B7 and B9 were either:

> (i) provided to counsel for the ministry or for Industry Canada and forwarded to counsel for the ministry on a privileged and confidential basis, or
>
> (ii) internal memos prepared by counsel for the ministry or Industry Canada for use by their internal clients providing legal advice and recommendations regarding the information and draft documentation provided by GMCL in the due diligence process.

[157] The responding affected parties submit that the documents shared by GMCL's solicitors were not distributed broadly and were only shared with entities that shared a common interest with GMCL. They submit that some withheld information relates not simply to dealer restructuring, but rather to all aspects of GMCL's strategic plans if a CCAA filing had occurred. The responding affected parties submit that the information was provided in order to facilitate the Government of Canada and the Government of

Ontario's completion of its due diligence in the loan negotiation and the review of GMCL's viability plan.

[158] The appellant denies the existence of any common interest.

[159] The appellant submits that the documents were provided prior to Ontario's decision to "bail out" GMCL and, therefore, did not form part of a continuum of communication between the province of Ontario and its legal counsel.

[160] The appellant further submits that solicitor-client privilege does not apply to the records that GMCL provided to the province, which the ministry's legal counsel then used in evaluating how to advise Ontario. The appellant submits:

> Such records are not privileged as they are not communications between a solicitor and client, but rather documents received from a third party by Ontario's counsel. The issue in respect of the records over which section 19 privilege is claimed is therefore whether that section applies to investigations in which the lawyer was involved and documents which the lawyer received.

[161] The appellant submits that documents were provided to Ontario by GM and/or GMCL in the context of an investigation involving ministry counsel and the communications were not between a solicitor and client for the purpose of providing legal advice. The appellant relies on the *College of Physicians of B.C. v. British Columbia (Information and Privacy Comm'r)* (*BC College of Physicians*)[48] in support of its position.

[162] As set out above, the appellant submits that the documents were received from GM and/or GMCL by ministry solicitors who reviewed and then summarized them. The appellant submits that any legal advice that was ultimately provided was based on that review and summarization. The appellant takes the position that while the summary may be privileged (which the appellant does not admit) the documents "used in arriving at the advice cannot be shielded by section 19." The appellant submits that the facts in *Archean* and *Fraser Milner* are distinguishable. The appellant also notes that in *Archean* a number of records were found not to be subject to solicitor-client privilege.

[163] Finally, the appellant submits that the ministry did not have a joint interest in GMCL at the time the communication took place and, accordingly, there was no joint interest in any communication. In support of its position, the appellant relies on an excerpt from Order PO-1983, where adjudicator Laurel Cropley wrote:

---

[48] 2002 BCCA 665 [leave to appeal refused at [2003] S.C.C.A. No. 83].

In Order MO-1338, Senior Adjudicator David Goodis commented on the purpose of the solicitor-client privilege exemption (in the context of a claim that the principle of common or joint interest applied to them). In my view, his comments are applicable generally to the types of records I have described here:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]

> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]
>
> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. [Emphasis in original]

[164] The ministry submits in reply that *BC College of Physicians* dealt with a completely different set of facts, namely access to documents created in the course of an investigation into a complaint of professional misconduct. The ministry submits that in *BC College of Physicians* the British Columbia Court of Appeal determined that the services of an expert were incidental to the seeking and obtaining of legal advice, and the documents were ordered disclosed. The ministry submits that the appellant has mischaracterized the nature of the connection between the solicitors involved in the transactions at issue in this appeal. The ministry submits that in this instance the legal advice sought, on the ministry's clients' instructions, was on whether or not to participate in a corporate restructuring. The ministry submits that it did not simply receive documents from a private corporation which its counsel then used to provide legal advice. It submits that its solicitors were performing functions that were essential to the operation of the solicitor-client relationship between the ministry lawyers and their client.

[165] With respect to *Archean* the ministry submits that as set out at paragraph 26 of the judgment the records that were found not to be subject to privilege were not solicitor-client communications but "were generally reports prepared by one employee of one of the companies in question to a senior employee." The ministry submits that these are not the facts of this appeal. Finally, the ministry also submits that the record in dispute in MO-1338 was a prepared legal opinion that WWF, a public interest organization, shared with the City. The ministry submits that WWF was seeking to ensure that the City adopted an environmentally sensitive by-law. The ministry submits that these are not the facts of this appeal.

Analysis and Findings

[166] In the analysis that follows I will first consider the arguments under the common law privileges set out in Branch 1 of section 19 (section 19(a)), and, if necessary, then the statutory privileges under Branch 2 (section 19(b)).

Section 19(a)

[167] With respect to a communication between a client and a third party or a solicitor and a third party, in *General Accident Assurance Co. v. Chrusz*,[49] Doherty J.A observed that the authorities establish two principles.[50]

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and

- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as they meet the criteria for the existence of the privilege.

[168] Justice Doherty went on to hold that where a third party is not a channel of communication:

> … the applicability of [the privilege] should depend on the true nature of the function the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the solicitor-client relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.[51]

[169] If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the solicitor-client relationship.[52]

[170] On the other hand, if the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance and operation of the solicitor-client relationship and should not be protected.[53]

---

[49] (1999), 45 O.R. (3d) 321 (C.A.).
[50] *General Accident Assurance Co. v. Chrusz*, supra, at page 352.
[51] *General Accident Assurance Co. v. Chrusz*, supra, at page 356.
[52] *General Accident Assurance Co. v. Chrusz*, supra, at page 356.
[53] *General Accident Assurance Co. v. Chrusz*, supra, at pages 356 to 357.

[171] One of the ways that it is suggested that these communications are privileged is the assertion that there is a shared common interest that covers these common communications. In *Pritchard v. Ontario (Human Rights Commission),*[54] Major J., for the court wrote the following in addressing whether a legal opinion prepared by Commission counsel for Commission staff and sought by the complainant was subject to privilege:

> The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest", or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.
>
> The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:
>
> > The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .
>
> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

[54] [2004] 1 S.C.R. 809, 2004 SCC 31.

[172] Although the doctrine of common interest privilege is characterized in a number of ways in the jurisprudence cited by the parties, in the absence of a fiduciary or like duty, including trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue in the appeal before me, my view is that the argument is better framed as to whether there is a common interest that is sufficient to withstand waiver of any solicitor-client privilege that might have existed in the information remaining to be considered in this appeal.

[173] In *Fraser Milner*, an authority cited by the ministry, Lowry J., of the British Columbia Supreme Court emphasized the following basis for application of common interest exception to waiver of privilege:

> … To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.
>
> …
>
> There is no sound basis on which it can be said that the common interest privilege which the petitioners assert over the documents in question ought not to be recognized by this court. It is a privilege that is justifiable on the basis of preserving the confidentiality of documents containing legal advice, or documents prepared for the purpose of obtaining legal advice, that are disclosed to third parties in the kind of circumstances where the courts of other Canadian jurisdictions have held that the privilege has not been waived.

[174] In Order MO-1678, Adjudicator Donald Hale reviewed the authorities as they existed at that time. He wrote:

> The starting point for most cases dealing with the question of the "common interest privilege" is the judgement of Lord Denning in the English case of *Buttes Gas and Oil Co. v. Hammer*, [1980] 3 All E.R. 475 (C.A.):
>
> > … I must go on to consider the claim for legal professional privilege. The arguments became complicated beyond belief. Largely because a distinction was drawn between Buttes (who are the party to the litigation) and the ruler of Sharjah

(who is no party to it). Such as questions as to who held the originals and who held the copies and so forth. Countless cases were cited. Few were of any help.

I would sweep away all those distinctions. Although this litigation is between Buttes and Occidental, we must remember that standing alongside them in the selfsame interest are the rulers of Sharjah and UAQ respectively. McNeill J thought that this gave rise to special considerations, and I agree with him. There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of the anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

In the present appeal, it is clear that although the Municipality and the plaintiffs are all concerned about the noise created by the Dragway, they do not have the "selfsame" interest. For example, the plaintiffs would share in any award of damages, while it appears that the Municipality would not. However, in my view, the fact that the interests are not identical is not a bar to the existence of a common interest in the context of the Canadian authorities.

One such authority is the majority judgement of Carthy J.A. in *General Accident Assurance Co.* (cited above). Mr. Justice Carthy quoted the above passage from *Buttes* with approval, but his later quote (also with approval, at 337-8) from *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300) indicates that in the context of litigation, "common interest" does not require that those claiming it must be co-parties:

> ... The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary [emphasis added.]

Other Canadian authorities also indicate a broader basis for common interest, which may exist outside the context of litigation privilege and encompass situations involving solicitor-client communication privilege. For example, in *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), Farley J. found that common interest privilege could apply to communications by a bank's outside counsel with a third party in the context of a commercial transaction. He formulated the following test for common interest (at para. 27):

> It would also seem to be that a useful test might be whether for there to be a common interest, would it be reasonably possible for the same counsel to represent both. It is not necessary that the same counsel actually represent both as there may be, for example, historical reasons not to do so,

> other interests which might be affected, the desire to have an established loyalty of reporting or perspective, etc.

In *Archean Energy Ltd. v. Canada* (1997), 202 A.R. 198 (Q.B.), common interest privilege was claimed by a group of companies some of whom were shareholders of others, and some of whom were joint venturists with others, in connection with tax advice they had received from a single law firm. The court found that common interest privilege could exist in those circumstances. It stated its finding in this regard as follows:

> I have reviewed each of those documents. Given that the group of companies shared the law firm for tax advice purposes and so have a common interest in the privilege claim raised, it is clear that the following documents are privileged as being solicitor client communications, part of a solicitor's brief or the solicitor's work product. I have heard no claim to waiver or loss of privilege in respect of any these documents. Accordingly, they are privileged . . .
>
> A substantial number of these documents are communications between the law firm which provided the tax advice and other law firms acting for the various clients in their corporate capacities. Such communication does not constitute waiver of privilege in the circumstances of this case. The communication was apparently made for the purpose of obtaining instructions and giving common advice to a common client or group of clients.
>
> I have reviewed the following documents and conclude that they are not privileged. They are not solicitor client communications but are generally reports prepared by one employee of one of the companies in question to a senior employee. …

And in *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties needed legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):

> As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the

> documents in dispute has somehow been lost -- through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations and, in that sense, the opinions are for the benefit of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.

[175] In that decision, the court added:

> However, the cases do not say, as I read them, that the mere existence of a commercial transaction is sufficient on its own to insulate all shared solicitor-client communications from attempts to gain access to them. There may well be cases where the parties to a commercial transaction disclose privileged documents in circumstances that suggest that there has indeed been a loss or waiver of privilege. As mentioned, in the commercial setting it is less clear than in Lord Denning's example which parties have common interests. Therefore, it is more difficult to make a hard and fast rule. I agree with the observation of Slatter J. in *Pinder v. Sproule*, [2003] A.J. No. 32 (QL)(Q.B.) that "[p]otential parties to a merger or other business transaction are in many ways adverse in interest, and it strains the common interest exception to try and fit disclosures between such parties within that exception" (at para. 62).
>
> Still, in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position. They will seek legal advice from reputable solicitors whose opinions will be respected by the other parties. Indeed, the solicitors may represent more than one party to the deal. The sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way. The advice may be provided for one or more party on the understanding that others should be provided copies. The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it. Such circumstances, in my view, create a presumption that the privilege attaching to the solicitor-client communications remains intact notwithstanding that they have been disclosed to other parties.

[176] In *General Accident Assurance Co.*, Carthy J.A. also considered the impact of a confidentiality agreement on common interest, writing that:

> When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.[55]

[177] An authority relied upon by the ministry is *Maximum Ventures Inc. v. De Graaf*[56] (*Maximum Ventures*), where, as in many of the authorities in this area, a legal opinion, albeit in draft form, was at issue. MacKenzie J., for the British Columbia Court of Appeal wrote at paragraph 14:

> Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them. In my view, the ambit of the common interest privilege is aptly summarized in the Sopinka on evidence 2d ed., Supp. of 2004 @ p. 133 which cites the case of *Pitney Bowes of Canada Ltd. v. Canada* 2003 FCT 214 (CanLII), (2003), 225 D.LR. (4th) 747, 2003 FCT 214 quoted by the chambers judge at para. 31 of his reasons. Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.

[178] While the *BC College of Physicians* case raised by the appellant touches on elements of loss of privilege, the BC Court of Appeal in that case was considering confidentiality in an investigative process involving an investigator hired by the college. The BC Court of Appeal held that third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client.[57] However, the main issue before me, which was not at issue in *BC College of Physicians*,

---

[55] *General Accident Assurance Co. v. Chrusz*, supra, at page 338.
[56] 2007 BCCA 510.
[57] *BC College of Physicians*, supra at paragraph 50.

is whether the common interest exception to waiver of privilege applies in the context of communications and the exchange of documentation between parties to the various transactions and potential CCAA proceeding under consideration in this appeal. That said, as set out below and as discussed in *BC College of Physicians*, the nature of the information under consideration and how it arose is an important element to consider.

[179] Considering the above authorities in my opinion, the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:

> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[180] The determination of the existence of a common interest is highly fact dependent[58] and has been expressed in a number of ways, including:

- "seeing the deal done"[59]
- benefitting financially from the transaction[60]

[181] Parties may have a common interest even if they do not have identical interests. The possibility that parties might at some future point in time become adverse in interest is insufficient in denying a common interest at present.[61]

[182] Remaining at issue in the appeal are the remaining emails on pages A33a and A33b of record A33 and the balance of records B3, B4 (the attachment is not at issue), B7, B9 and B10. All of this information originated with sources outside the ministry and was then sent to it.

Section 19(a)

[183] The ministry retained an Ontario law firm and a US law firm with respect to the loan and restructuring. None of the relationships or communications between third parties who did not act for the Ontario government and the Ontario government is a function which is essential to the existence or operation of the solicitor-client relationship between the Ontario government and its counsel.

---

[58] *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).
[59] *Archean Energy Ltd. v. Canada (Minister of National Revenue* (1997), 98 D.T.C. 6456 (Alta. Q.B.).
[60] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510.
[61] *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (SCJ).

[184] In addition, as set out in the first condition for the recognition of the common interest exception to waiver of privilege above, a communication between a third party and counsel that does not originate in privilege cannot be cloaked in privilege by the existence of a common interest, even if the latter existed. It is only a communication that originated in privilege that would be subject to the common interest exception to waiver of that privilege (e.g., a privileged opinion shared with another party with a common interest) Otherwise, routine communications among counsel for various parties to a transaction advancing some position would be cloaked in common interest privilege. In my view, that is the type of routine communication that is at issue in the information remaining at issue here.

[185] Accordingly, I find that the shared communications set out above are not privileged solicitor-client communications at first instance.

[186] However, even if they were, in the circumstances before me, I find that the common interest exception to resist waiver would not apply to this information remaining at issue.

[187] Although it may be said that the various parties had a shared interest in seeing this transaction completed, they were at all material times operating at arm's length, each advocating for and seeking to advance their own interests during the negotiation of the transactions. This is clearly borne out by the records that document the ebb and flow of the negotiations between the various parties.

[188] The interests of the ministry and GMCL do not coincide such that they share a common interest in the shared communications. While their fortunes in seeing the deal done may be tied together, their interests are not common. This is not a joint venture between the government and GMCL, nor was it framed as such by the ministry or the responding affected parties.

[189] In its representations, the ministry stated that it entered into a confidentiality agreement with GMCL "as is typical in commercial loan and equity purchase transactions". Throughout this appeal the ministry and the responding affected parties have stated that the purpose of providing the information to the ministry was to allow the government of Ontario to conduct a due diligence review of GMCL's viability plan and to determine if loan assistance would be provided.

[190] The roles of the participants were defined. GMCL was asking for assistance. The province was determining if, in the best interest of Ontarians, the assistance would be provided, and on what terms. In reviewing the transaction and deciding whether to grant assistance, the ministry was acting in furtherance of the public trust to manage the economy.

[191] The government's primary mission is to manage the economy. GMCL has no role in managing Ontario's economy. GMCL's mission is to run a business and maximize shareholder's wealth or conversely minimize shareholder's losses. GMCL's interest throughout the transaction was to ensure its economic survival through government funding. The government of Ontario's role was to ensure that the transaction would be of benefit to Ontario, in furtherance of its mandate. The province acted in the interests of its citizens, GMCL acted in the interests of its shareholders.

[192] This is not a case where one lawyer could act for both GMCL and the government of Ontario especially where the purpose of the exchange of communication was, as Ontario and GMCL says, for the purposes of due diligence.

[193] In addition, although the responding affected parties take the position that "this was not an exercise in influencing public policy or requesting a change in regulations" it would be naïve to think that GMCL was not attempting to influence Ontario to advance the funds. In this case, GMCL sought an outcome that was key to its continued survival. The government was interested in maintaining and protecting a key sector of its economy. Part of its mandate, as set out in the ministry's reply representations, is to "ensure the economy of Ontario is a healthy one".

[194] Furthermore, although a CCAA proceeding could be considered a form of litigation, even this is not sufficient in my view to bring it within the exception. The parties were simply exchanging materials relating to a large scale commercial transaction. Nor could it be said that they were engaging in litigation together against a common adversary. Again, I am not satisfied that this is what the common interest exception to waiver of privilege was intended to cover, nor could privilege otherwise exist by attempting to characterize the information remaining at issue as comprising "working papers" or a "draft common work product of the corresponding legal counsel".

[195] Finally, while both Canada and Ontario were committed to investigate the financing and would be both advancing funds, each was pursuing their own agenda. Each has distinct powers under *The Constitution Act, 1867* and answer to their independently elected legislative assemblies. Furthermore, the Federal government was acting in the interests of all Canadians and had to consider its responsibilities to other regions and provinces and how the potential benefits and risks affect this larger constituency. Ontario had other geographic and demographic interests in mind. Therefore, while they may have sometimes presented a common front, this was not sufficient, in my view, to create a common interest between the two governments. Accordingly, I also find that the relationship between Canada and Ontario in the transaction did not give rise to the common interest exception to waiver of privilege as to the information remaining at issue that was exchanged between them.

Section 19(b)

[196] As set out above, the ministry submits that the remainder of record B10 also qualifies for exemption under section 19(b) because it was created by or for Crown counsel for use in giving legal advice.

[197] In my view, the information remaining at issue in record B10 does not fit within the scope of Branch 2 of the section 19 solicitor-client exemption. This is information that is being exchanged between multiple parties in the course of a commercial transaction, and, in my view, is not the type of information that falls within the scope of section 19(b).

[198] In any event, based on the analysis set out above, I find that there is no cognizable zone of privacy sufficient to resist the application of the principle of waiver under section 19(b) of the *Act*.

Conclusion on Sections 19(a) and (b)

[199] I have concluded above that the following information qualifies for exemption under section 19(a) of the *Act*:

- the first three emails on pages A33 and A33a of record A33, records A41, A42, A43, A44, A45, A46, the first email in record B3, the first email in record B4 (the attachment is not at issue), the first two emails in record B7, the first two emails in record B9, the first two emails in record B10, and records B11, B12 and B13

- the portion of the briefing notes at pages A4b, A8a, A11b, A13d, A16b, A24a and A24d, withheld under section 19(a) of the *Act*

[200] I also find that any privilege that may have existed under sections 19(a) or 19(b) of the *Act* was waived with respect to the information remaining at issue in records A33 (pages A33a to A33c), B3, B4 (the attachment is not at issue), B7, B9 and B10. Accordingly, I will order that this information be disclosed to the appellant.

D. Does the public interest override in Section 23 of the *Act* apply?

[201] The appellant suggests that there is a public interest in the disclosure of the information that I have not ordered disclosed. The public interest override found at section 23 of the *Act* reads as follows:

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

[202] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption. Section 23 does not apply to section 19 of the *Act*.

[203] In considering whether there is a "public interest" in disclosure of the information, the first question to ask is whether there is a relationship between the information and the *Act*'s central purpose of shedding light on the operations of government.[62] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[63]

[204] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[64]

[205] Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.[65]

[206] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[66] 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.[67] The ministry submits that there is no public interest that outweighs the application of section 17(1) and refers to Order PO-2734 in that regard.

[207] The ministry and the responding affected parties submit:

- the appellant seeks the information to assist in litigation, which is a private interest rather than a public interest

[62] Orders P-984 and PO-2607.
[63] Orders P-984 and PO-2556.
[64] Order P-984.
[65] Order P-1398.
[66] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[67] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

- a court process provides for disclosure and the reason for the request is to obtain records for a civil proceeding[68]

- a significant amount of information has already been disclosed which is adequate to address the public interest[69]

- there has already been wide public coverage of the issues and disclosure of the information remaining at issue would shed no further light on the matter[70]

[208] The ministry further submits that there is a public interest in non-disclosure. It submits that it is not in the public interest to reveal information that would prejudice GMCL's efforts to re-establish itself at a time when it is in the public interest for GMCL to regain its competitive stature. The ministry also submits that disclosure of the information would also serve to remind consumers of the GMCL's past difficulties at a time when "they deserve to play on a level playing field in the marketplace." The ministry submits that it is in the public interest for GMCL to rebuild customer loyalty and confidence so they can continue to employ Ontario workers, purchase goods and services from Ontario companies and contribute positively to the growth of Ontario's economy.

[209] The responding affected parties submit that there is a significant amount of information that has already been disclosed by GMCL and the governments of Ontario and Canada. Furthermore, information about the restructuring has been filed with market regulators in the US and there has been extensive media coverage of the restructuring.

[210] The appellant submits that the largest government subsidy ever given to a private company in Canadian history is at issue. The appellant submits that "in order to receive billions of dollars of funding [GMCL] was required to terminate over 200 [dealerships]." The appellant asserts in its section 17(1) representations that the governments were complicit in or instrumental in the closures and the public's right to know "is a fundamental component of responsible government".

[211] In reply, the ministry submits that enough information on the negotiations between the federal government, Ontario and GMCL was public to provide meaningful understanding of the activities of government and relies in that regard on Order PO-2626. Finally, the ministry submits that while the public has an interest in the activities of government and how taxes are spent, the termination details are not sufficiently compelling to meet the test.

---

[68] The ministry refers to orders M-249 and M-317 in support of its position.
[69] The ministry refers to orders P-532 and P-568 in support of its position.
[70] The ministry refers to Order P-613 in support of its position.

[212] The responding affected parties' state in their reply submissions:

> When one considers the extent and nature of the information provided in the press, public statements and press releases by both the Governments of Canada and Ontario, and GMCL and GM, and in the various documents filed with the US Securities Commission and in General Motors Company's Initial Public Offering last fall (the IPO), the appellant's claim of public interest does not withstand scrutiny.

[213] In my view, the appellant has not established the existence of a compelling public interest in the disclosure of the information that I have determined should be withheld under section 17(1)(a). The submissions of the appellant focus on how disclosure would allow there to be a better scrutiny of the transactions. In my view, while disclosing the information that I have ordered withheld might serve the purpose of allowing the appellant, and perhaps others, to better scrutinize certain mechanics of the transactions and/or the potential CCAA proceeding, it would not "serve the purpose of informing the citizenry about the activities of government".

[214] I also find that a great deal of information pertaining to the non-retained dealers that was originally withheld under section 17(1)(a) has already been disclosed to the appellant under this request. Further information retaining to the non-retained dealers will also be disclosed as a result of this order. In my view, this is adequate to address any public interest considerations.[71]

[215] Accordingly, in all the circumstances, I am not persuaded by the evidence that there exists a public interest in the withheld information that I have not ordered disclosed that is sufficient to override the section 17(1)(a) exemption.

E. Did the ministry appropriately exercise its discretion?

[216] The section 19(a) exemption is discretionary and permits the ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[72]

[217] However, pursuant to section 54(2) of the *Act,* this office may not substitute its own discretion to that of the institution.

---

[71] Orders P-532 and P-568.
[72] Orders PO-2129-F and MO-1629.

[218] The ministry refers to the decision of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[73] as outlining the principles to consider when exercising discretion under section 19(a) of the *Act*. The ministry submits that it considered the following factors in its exercise of discretion:

- the need for the Crown to freely exchange documents in the course of negotiating commercial transactions and to assess loan risk without fear of jeopardising the confidence that is critical to obtaining and providing legal advice

- the emails were privileged and confidential to allow candid conveyance of information and advice

- the records contain information that also relates to GM and GMCL and disclosure of that information is tantamount to waiving privilege on the records for those other parties

- there is a larger societal interest in maintaining confidentiality in solicitor-client privileged communications

[219] The appellant submits that the ministry erred in the exercise of its discretion on a number of grounds, including failing to consider the purpose of the *Act*, that the documents are a matter of public record as a result of Ontario's decision to make its taxpayers shareholders of GMCL, and that disclosure of the withheld information will increase public confidence and enhance transparency.

[220] I have reviewed the circumstances surrounding this appeal and the representations pertaining to the manner in which the ministry exercised its discretion. I have considered the appellant's position and the fact that additional information will be disclosed to the appellant as a result of this order. In all the circumstances, I am satisfied that the ministry has not erred in the exercise of its discretion not to disclose to the appellant the information that I have found to qualify for exemption under section 19(a) of the *Act*.

ORDER:

1. I order the ministry to disclose to the appellant the following information, by sending it to the appellant by **February 25, 2013** but not before **February 20, 2013**:

   > The withheld portions of records A3 (pages A3c, A3g to A3p), A10 (the responsive portion of page A10), A14 (pages A14a, A14e, A14i

[73] 2010 SCC 23.

to A14r), A25 (page A25), A34 (pages A34 to A34f), A37 (page A37), A40 (page A40) and the highlighted portions of records A33 (pages A33a to A33c), B3, B4, B7, B9 and B10 that I have highlighted on a copy of those pages that I have sent to the ministry along with this order

2. I uphold the decision of the ministry to deny access to the balance of the information at issue in this appeal.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the ministry to provide me with a copy of the pages of the records as disclosed to the appellant.

Original signed by: January 18, 2013
Steven Faughnan
Adjudicator