Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3240

Appeal PA12-127

Ministry of Natural Resources

August 22, 2013

Summary: A request was made to the Ministry of Natural Resources for specific information relating to an Adaptive Management Plan submitted by a named company in support of a licence application to expand a quarry. The ministry identified an email responsive to the request and denied access to it, in its entirety, pursuant to the discretionary exemption for advice or recommendations at section 13(1) of the *Act*. The requester appealed the decision taking the position that the exemption at section 13(1) did not apply and, if it did, the exceptions at section 13(2) (a) and (d) or the public interest override provision at section 23 applied to permit disclosure. The requester also took the position that the ministry did not conduct a reasonable search and that additional records responsive to the request should exist.

This order finds that the information at issue consists of advice or recommendations that are exempt from disclosure pursuant to section 13(1) but finds that, pursuant to section 23, a compelling public interest in the disclosure of that information overrides the purpose of the exemption and the information is ordered disclosed. This order also upholds the ministry's search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 13(2) (a), 13(2) (d), 23, and 24; *Environmental Bill of Rights, 1993*, S.O. 1993, c.28.

Orders and Investigation Reports Considered: Orders P-1398, PO-1688, PO-1852, PO-2028, PO-2084, PO-2115, PO-2172, PO-2355 and PO-2399.

Cases Considered: *R v. Canadian Pacific Ltd.* (1995) 125 D.L.R (4th) 385 (S.C.C.).

OVERVIEW:

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

> In a letter dated December 12, 2011 to [a named individual of a named company] from [named individual], Supervisor, Aurora District Office of [the ministry], provided additional comments and suggested revisions to the Adaptive Management Plan (AMP) for the [named company] licence application in Case N0. 08-030. I request the following records that relate to the December 12, 2011 letter of the [ministry] regarding the AMP:
>
> > All records, including emails, meeting minutes, and phone records of ministry staff pertaining to revisions of the AMP related to the Jefferson Salamander Breeding Ponds 13032 (also known as the "Hilltop Pond") and 13033, including monitoring, mitigation or contingency plans to address unanticipated impacts from extraction adjacent to these ponds, and including ministry biologist technical analysis and/or evaluation of the proposed monitoring, mitigation and/or contingency plans for wetlands 13032 (the "Hilltop Pond") and 13033.

[2] The ministry located one responsive record and issued a decision letter, denying access to the record on the basis of the application of section 13 (advice or recommendations) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to withhold the responsive record. In her appeal letter, the appellant advised that she was of the view that the public interest override in section 23 was applicable and that further records should exist. Accordingly, the application of the public interest override and reasonable search were added as issues in this appeal.

[4] During mediation, the ministry confirmed its position that there was only one record responsive to the request. It also advised that during the search for responsive records, the email accounts and hard copy files of three staff members were searched. The appellant maintained her position that further records must exist, including possible minutes from a telephone conversation involving the named company and the ministry.

[5] As further mediation could not resolve the appeal, it was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

Prior to the beginning of the inquiry, the ministry issued two additional decision letters to the appellant advising that it had located additional responsive records. None of these records are at issue in this appeal.

[6] Subsequently, the adjudicator assigned to this appeal sought and received representations from the ministry, initially. The ministry's representations were shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction 7*. The appellant submitted representations in response. As her representations raised issues which the adjudicator believed the ministry should be provided an opportunity to respond to, they were shared with the ministry and the ministry submitted reply representations. Finally, the appellant submitted sur-reply representations.

[7] The appeal was then transferred to me to complete the inquiry and issue a decision. For the reasons that follow, in this order I find that:

- The discretionary exemption at section 13(1) of the *Act* applies to the record at issue;
- the ministry appropriately exercised its discretion under section 13(1);
- the public interest override provision at section 23 applies in the circumstances of this appeal; and
- the ministry conducted a reasonable search for responsive records.

RECORD:

[8] The record at issue consists of a four-page email authored by a ministry Management Biologist regarding environmental mitigation strategies described in an Adaptive Management Plan (AMP) filed in support of an application for a licence to expand an existing quarry.

ISSUES:

A. Does the discretionary exemption at section 13(1) of the *Act* apply to the record?

B. Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

C. Is there a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the section 13(1) exemption?

D. Did the ministry conduct a reasonable search for responsive records?

DISCUSSION:

A. Does the discretionary exemption at section 13(1) of the *Act* apply to the record?

General principles

[9] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[10] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[1]

[11] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[2]

[12] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[3]

[13] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4]

---

[1] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).
[2] Order PO-2681.
[3] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[4] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *ibid*; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *ibid.*

[14] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines*[5] that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[6]

[15] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[7]

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

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views;
- a supervisor's direction to staff on how to conduct an investigation.[8]

Representations

[17] The ministry takes the position that section 13(1) applies to exempt the email at issue, in its entirety, from disclosure. It relies upon the Court of Appeal decision in *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*[9] (referred to above) which stated, at paragraph 26:

> What section 13 protects is the deliberative process. During that process the position of the civil service will undoubtedly evolve and this evolution will be reflected in the advice and recommendations in the particular document…

---

[5] *Ibid.*
[6] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).
[7] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, *ibid*.
[8] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *supra,* note 3; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*, note 3.
[9] *Supra*, note 6.

[18] The ministry also quotes the Court's comment in paragraph 30:

> Section 13(1) protects advice and recommendations. One of the most important functions performed by a civil service in a properly functioning Parliamentary democracy is to provide advice to Ministers of the Crown. Advice comes in different forms and one form is advice as to the range of possible actions. This permits the decision-maker to make the best and most informed decision. It would be counter-productive and inconsistent with the policy behind section 13(1) to strip away this form of advice and protect only advice which is entirely directory.

[19] The ministry submits that the email at issue in this appeal meets all of the requirements to qualify for exemption pursuant to section 13(1). It submits:

> It is from one public servant to another. It set outs a number of recommendations some of which were followed. It is frank and clearly part of the deliberative process to deal with issues around the Adaptive Management Plan that had arisen during the hearing. It is exactly the type of record to which section 13 was created to protect. Therefore, section 13 exempts this record from disclosure.

[20] The appellant submits that the email at issue does not contain the "advice or recommendations" of a public servant as those terms and the exemption have been interpreted by this office and the courts. She points to Order PO-2084 in which former Assistant Commissioner Tom Mitchinson reviewed information sharing between governments in the context of the application of this exemption. In that order he stated:

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, no other kinds of information such as factual, background, analytical or evaluative material, which could [if disclosed] reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

[21] The appellant also points to Order PO-2028, in which former Assistant Commissioner Mitchinson drew a distinction between advising on, or recommending a course of action which would qualify for exemption pursuant to section 13(1) and simply drawing matters of potential relevance to the attention of the decision-maker which would not.

[22] Specifically addressing the record at issue in this appeal, the appellant submits:

> The email at issue contains comments provided by the biologist to MNR staff with respect to [named company's] proposed AMP. They do not relate to a suggested course of action that would ultimately be accepted or rejected by the recipients. Rather, the email contains "mere information," including analytical and/or evaluative information which the IPC in previous orders [including orders PO-2084 and PO-2028] has determined do not qualify as "advice or recommendations."
>
> Furthermore, section 13 is designed to protect the process of *government* decision-making and policy making as opposed to the decision making and policy making process of non-government bodies like [named company]. The alleged advice is not given for the benefit of MNR, but rather for the benefit of a third corporate party, [named company], in relation to their application for a licence to extend its existing quarry. It therefore does not qualify for the exemption.

[23] In reply, the ministry submits that the email at issue "does not merely recite facts, nor are there portions of the email which merely recite facts." The ministry states that "background and analysis is interwoven with the advice and recommendations in the email" and therefore, that the exception at section 13(2)(a) does not apply.

Analysis and findings

[24] As previously stated, in order for information to qualify as "advice or recommendations," it must suggest a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

[25] I have carefully reviewed the record at issue and conclude that the ministry has properly applied section 13(1) to exempt it from disclosure, in its entirety. I accept the ministry's submissions that the disclosure of the information contained in the email would reveal the advice or recommendations of a ministry employee, or, would permit one to accurately infer the advice or recommendations provided by that individual.

[26] The record at issue is an email communication between three employees of the ministry's Aurora District. The email is prepared by the Management Biologist and is addressed to both the District Planner and the Supervisor of Planning and Information Management. In my view, and based on the content of the email, it was prepared by the Management Biologist for other ministry staff for the purpose of providing his advice and recommendations with respect to environmental impact mitigation strategies in the named company's AMP. The email reveals clear and specific advisory language including the suggested and, in many cases the preferred, courses of action with respect to various issues raised in the AMP. Based on the way in which the email is

drafted, the language used, and the recipients, it is clear that this advice and these suggested courses of actions form part of the ministry's deliberative process and will ultimately be accepted or rejected by its recipients.

[27] Much of the information contained in the email consists, in and of itself, of advice and recommendations. I acknowledge, however, that some of the information can be described as factual in nature in that, prior to clearly outlining the suggested course of action with respect to various, the Management Biologist paraphrases information on that issue that was taken from the AMP. Nevertheless, having reviewed this information closely, in my view, given the way in which the Management Biologist describes, in his own words, the information that originates from the AMP, disclosure of this information could reasonably be expected to result in the drawing of accurate inferences as to the nature of the advice and recommendations given.

[28] I find that the information at issue clearly reveals the advice and recommendations provided by the Management Biologist to other ministry staff to assist the ministry in its deliberative process regarding changes to be made to the named company's AMP. Accordingly, I find that the exemption for advice or recommendations found at section 13(1) of the *Act*, applies to the email at issue.

[29] Although I find that the exemption at section 13(1) has been established, the appellant has claimed the possible application of the exceptions in sections 13(2)(a) and (d) of the *Act*. If either of these exceptions applies, the ministry is precluded from relying on section 13(1) to deny access. As a result, I will now examine the possible application of these exceptions to the record at issue.

Sections 13(2) (a) and (d) – exceptions to the exemption

[30] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). The appellant submits that the exceptions at sections 13(2)(a) and (d) apply. Those sections state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (d) an environmental impact statement or similar record;

[31] Section 13(2)(a) contemplates that the records contain factual material. Factual material refers to a coherent body of facts separate and distinct from the advice and

recommendations contained in the record.[10] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[11]

[32] Section 13(2)(d) contemplates a documented review of the environmental consequences of a proposal expected to have significant environmental consequences, that is prepared or procured by the proponent under guidelines established by a panel or the government.[12]

[33] As previously mentioned, if the requirements of section 13(2)(a) or (d) are established, the ministry would be precluded from relying on section 13(1) to deny access to the information that I have found exempt in the record at issue.

[34] The appellant submits that even if the record consists of "advice or recommendations" the information that it contains falls within the exemption at section 13(2)(a), as it contains factual material, and section 13(2)(d), as it can be characterized as an environmental impact statement or similar record.

[35] She submits that the record meets the definition of an environmental impact statement "as it is a documented assessment of environmental consequences of" the named company's revised AMP. She submits that the named company sought and obtained the ministry's comments on its revised AMP. In the alternative she submits that it is a "similar record" within the meaning of section 13(2)(d).

[36] The appellant does not make any specific representations on the application of the exemption at section 13(2)(a).

[37] In its reply representations, the ministry points to Orders PO-1852 and PO-2355 which establish that records produced as part of an internal discussion did not fall within the definition of "an environmental impact statement" or similar records. The ministry submits that the email at issue is of the same nature as the records in those orders and "forms part of the internal discussion process of the ministry."

[38] In Order PO-1852, former Assistant Commissioner Mitchinson reviewed the possible application of section 13(2)(d) to records relating to environmental hazards. He stated:

> The *Dictionary of Environmental Law and Science*, edited by William A. Tilleman, Chair of the Alberta Environmental Appeal Board defines the term "environmental impact statement" as follows:

[10] Order 24.
[11] Order PO-2097.
[12] Order PO-1852.

> 1. A document required of federal agencies by the National Environmental Policy Act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. 2. A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. 3. An environmental impact assessment report required to be prepared under [Alberta's *Environmental Protection and Enhancement*] *Act*. 4. A detailed written statement of environmental effects as required by law.

Although established in the context of another province's environmental protection legislation, I find that this is an appropriate definition to adopt for the purposes of interpreting the same term in section 13(2)(d) of the *Act*.

[39] Former Assistant Commissioner Mitchinson applied this definition subsequently in Order PO-2115 and Adjudicator Bernard Morrow also applied in it Order PO-2355. I accept this definition and adopt it for the purposes of the current appeal.

[40] Applying the definition from Order PO-1852, I accept the ministry's view that the record at issue cannot be considered to be an "environmental impact statement or similar record" for the purpose of section 13(2)(d). The record is not a document prepared according to legislative requirements but is rather, a communication between ministry staff prepared for internal purposes. Although the email comments on the environmental consequences of the named company's revised AMP, I do not accept that it was "prepared or procured by the proponent in accordance with guidelines established by a panel." Additionally, as an internal record, I do not accept that the email fits the characterization of a "similar record" to an environmental impact statement. In my view, it is an internal document prepared by the ministry for its own internal purposes and I find that it does not amount to the type of document contemplated by the exception at section 13(2)(d).

[41] With respect to the possible application of the exception at section 13(2)(a), as discussed above, although the email does contain some factual information, that information is not a coherent body of facts, separate and distinct from the advice and recommendations, but is inextricably intertwined with information that I have found to be properly exempt pursuant to section 13(1). As a result, I find that the exception at section 13(2)(a) does not apply.

[42] Accordingly, I find that neither of the exceptions at sections 13(2)(a) or (d) of the *Act* has any application in the circumstances of this appeal. Therefore, the ministry is not precluded from relying on the exemption at section 13(1), to deny access to the email at issue in this appeal. Subject to the ministry's exercise of discretion and the possible application of the public interest override discussed below, the email at issue is exempt pursuant to that section.

B. Did the ministry exercise its discretion under section 13(1)? If so, should this office uphold its exercise of discretion?

[43] The exemption at section 13(1) is discretionary, and permits the ministry to disclose the record despite the fact that the exemption applies. An institution must exercise its discretion. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

[44] This office may find that the ministry erred in exercising its discretion to withhold the director's report where, for example,

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

[45] In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] However, this office may not substitute its own discretion for that of the institution.[14]

[46] The ministry submits that in exercising its discretion to exempt the record it considered:

- the purpose of the *Act*,
- the purposes of section 13(1), and
- the circumstances of the request.

[47] The ministry submits:

> Mindful of these considerations, including the fact that there had been a hearing into the issues around the aggregate application which dealt with the adaptive management plan, and the Court of Appeal's decision in

[13] Order MO-1573.
[14] Section 54(2) of the *Act.*

> [*Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*][15] in which the Court highlighted the important function performed by a civil service in providing advice to Ministers of the Crown in a properly functioning parliamentary democracy, the Ministry applied its discretion to apply the exemption.

[48] The appellant submits that pursuant to section 10(2) of the *Act*, the ministry is required to disclose as much of a record as is reasonably possible without disclosing information that is exempt. She submits:

> It is notable that the [ministry] has refused to disclose the email at issue in its entirety. [The appellant] questions the reasonableness of [the ministry's] decision in this regard.
>
> It is important that institutions exercise their discretion properly and in keeping with the purposes of the *Act* to ensure that the maximum amount of information is disclosed. [The appellant] submits that by claiming that section 13 applies to the entire email, [the ministry] failed to exercise its discretion properly.

[49] In its reply representations, the ministry submits:

> An examination of the record shows that the analysis contained in the email is so interwoven with each recommendation and with the advice contained therein that it would be impossible to separate it without revealing the advice and recommendations. Therefore, the ministry after exercising its discretion to apply subsection 13(1) had no choice but to exempt the whole record.

[50] In this appeal, I have found that the discretionary exemption at section 13(1) applies to the record at issue, in its entirety. Having considered the nature of the information that it contains and the purpose of the exemption, I am satisfied that the ministry has properly exercised its discretion to withhold the entire email pursuant to section 13(1). I accept that it has considered relevant considerations and I have no evidence before me to suggest that it has taken into account irrelevant ones.

[51] Accordingly, I uphold the ministry's exercise of discretion to withhold the records at issue pursuant to the exemption at section 13(1).

[52] I will now determine whether the compelling public interest override at section 23 of the *Act* has any application in the current appeal.

---

[15] 2012, O.N.C.A. 125 (CanLII).

C. Is there a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the section 13(1) exemption?

[53] The appellant takes the position that there is a compelling public interest in the disclosure of the information that has been withheld by the ministry. I have found that the record at issue qualifies for exemption under section 13(1). As a result, I will consider the possible application of section 23 of the *Act* to that information.

[54] Section 23 reads:

> 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. [Emphasis added]

[55] 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.[16]

[56] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[17]

Compelling public interest

[57] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[18] 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.[19]

---

[16] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.).
[17] Order P-244.
[18] Orders P-984 and PO-2607.
[19] Orders P-984 and PO-2556.

[58] Any public interest in *non*-disclosure that may exist also must be considered.[20] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[21]

[59] A public interest does not exist where the interests being advanced are essentially private in nature.[22] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[23]

[60] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[24]

[61] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[25]
- the integrity of the criminal justice system has been called into question;[26]
- public safety issues relating to the operation of nuclear facilities have been raised;[27]
- disclosure would shed light on the safe operation of petrochemical facilities[28] or the province's ability to prepare for a nuclear emergency;[29]
- the records contain information about contributions to municipal election campaigns.[30]

[62] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations;[31]

---

[20] *Ontario Hydro v. (Ontario) Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).
[21] Orders PO-2072-F and PO-2098-R.
[22] Orders P-12, P-347 and P-1439.
[23] Order MO-1564.
[24] Order P-984.
[25] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, *supra* note 16.
[26] Order PO-1779.
[27] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, *supra* note 20, Order PO-1805.
[28] Order P-1175.
[29] Order P-901.
[30] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[31] Orders P-123/124, P-391 and M-539.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[32]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[33]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[34]

- the records do not respond to the applicable public interest raised by appellant.[35]

Purpose of the exemption

[63] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[64] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[36]

Representations

[65] The ministry acknowledges that there has been public interest in the particular licence application to which the record relates. However, it submits that it is clear that the appellant and her family are seeking disclosure of the record principally as it relates to two wetland areas on their family property adjacent to the proposed expanded quarry site and the lack of consultation with them about mitigation plans as they may relate to their property. The ministry submits that the appellant's interest seems to be "more focused on her status as adjacent property owner than the perhaps more 'public' interest in preserving Jefferson salamander habitat."

[66] The ministry also submits that the release of the record is not necessary to address any public interest that might exist:

---

[32] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[33] Orders M-249 and M-317.
[34] Order P-613.
[35] Orders MO-1994 and PO-2607.
[36] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, *supra* note 16.

> Where there are public processes or fora, in which the issues of public interest can be addressed or aired out, the public interest is outweighed by the purpose of the exemption. In the present case it can be argued that the Joint Board hearing provides the appropriate forum for the public interest in the issues.
>
> In the present case, the author of the record at issue was called as a witness at the Joint Board hearing and was available for cross-examination. So, in effect, his professional expertise and opinions on the issues that are of public interest were subject to public scrutiny before the Joint Board.

[67] The appellant takes the position that there is a compelling public interest in the disclosure of the email at issue that clearly outweighs the purpose of section 13(1) of the *Act*. She disputes the ministry's submission that her request is private in nature and submits:

> While the information in the email relates to wetlands on [the appellant's] family property, the email was created in context of a review of [named company's] AMP. Section 12 of the *Aggregate Resources Act*[37] provides that in considering whether to issue a quarrying licence, [the ministry] or the Ontario Municipal Board (in this case, the Joint Board), as the case may be, must consider, among other things, the effect of the operation of the quarry on the environment and on nearby communities, effects on ground and surface water resources, and planning and land use considerations. The information [the appellant] seeks is to ensure that proper consideration has been made to [named company's] quarry application and mitigation strategies.
>
> The public has an interest in knowing whether the Biologist was supportive of [the named company's] mitigation plan and whether the measures proposed for the Wetlands known to contain Endangered Species are sufficient…

[68] In support of her position that there is great public interest in the disclosure of the information at issue in this appeal, the appellant submits as evidence to two letters from the Executive Director of Environmental Defence, a letter from the President & Waterkeeper of Lake Ontario Waterkeeper and an article written by the appellant and posted by the Huffington Post regarding the request.

[69] The appellant also states that she co-founded an organization called PERL (Protecting Escarpment Rural Land) which was a party in the proceedings before the

---

[37] R.S.O. 1990, c. A.8.

Joint Board. She submits that at the hearing she provided evidence in support of the disclosure of the email in her personal capacity and has publicly expressed her concerns relating to the application and mitigation strategies as it relates to her family property, as well as to the general public and the environment as a whole.

[70] In addition, the appellant points to several of her other advocacy efforts which have received wide-spread publicly, including a tour "where she and her band … [hiked] the Bruce Trail and [performed] at theatres and community halls in towns along the way," which was made into a documentary, interviews and various high profile speaking engagements she has conducted about her efforts to protect the escarpments. As a result, the appellant submits that her interests are not merely private in nature but "coincide with the public interest in protecting the environment in which we all live."

[71] The appellant relies on to several prior orders in support of her position:

- Order PO-1688, in which Senior Adjudicator David Goodis found, in the context of records relating to an application for a certificate of approval under the *Environmental Protection Act*, that where a private interest also coincides with the greater public interest of the community and the general public as a whole, the disclosure of the records will be in the public interest.

- Orders PO-1688, PO-2355 and PO-2399 which have recognized that the public has an interest, from the perspective of protecting the natural environment and protecting health and safety, in seeing that government institutions conduct a full and fair assessment before granting environmental approvals, including approvals under the *Aggregate Resources Act*.

- Order PO-2399, in which Adjudicator John Swaigan found that there was a compelling public interest in the disclosure of a report relating to a proposed quarry application stating:

> In my view, the public interest in this case is the interest in ensuring the integrity of the various legislated planning and approval processes and public consultation processes in relation to a serious public concern – the protection of the environment and public health…

[72] In response to the ministry's assertion that the Management Biologist's comments in the email were already put before the public at the hearing before the Joint Board, the appellant submits that access to the email was specifically denied. She submits:

> Where a public process does not result in disclosure of a document that has the potential of being important in analyzing environmental issues arising out of a quarry proposal, it will be disclosed.

[73] The appellant points again to Order PO-2399 in which Adjudicator Swaigan stated:

> I do not agree that the appellant has received or will receive all the information it requires to participate in public discussion of the proposed quarry through other public information sessions and regulatory processes referred to earlier in this order. The submissions and evidence before me indicate that none of the regulator processes and public consultation processes to date have resulted in the disclosure of the draft report or of the existence of the recommendation referred to above, which, as I have stated, appears to me to be potentially important in analyzing the environmental issues arising out of the quarry proposal.

[74] The appellant also relies upon Order PO-2172 in which former Senior Adjudicator David Goodis addressed the disclosure of records related to underwater logging where he stated:

> In my view, there is a compelling public interest in the disclosure of any information that would shed light on the serious environmental and health and safety issues raised by the practice of underwater logging in Ontario. I am persuaded by the appellant's representations that there are legitimate concerns about the practice of underwater logging, to the extent that it has potential impacts on both the environment (including the habitat of fish and other species) and public health and safety (including the integrity of the water supply). These concerns are reflected not only in the appellant's representations but also in many of the records at issue, including media reports and statements by environmental groups, government agencies and the municipal, provincial and federal levels, and other individuals and organizations. The ministry's submission that underwater logging does not have significant potential impacts on the environment and health and safety is strongly contradicted by the material before me.

[75] The appellant concludes her representations by submitting that:

> The Supreme Court of Canada has "also emphasized in a number of decisions the importance of fairness and comprehensiveness of environmental approval processes, informing the public about the potential effects should approvals be granted and ultimately enhancing environmental protection and public health and safety. These decisions

> recognize that individually and collectively, we are responsible for preserving the natural environmental and that the environment is a fundamental value of our society.
>
> The fact that [the ministry] has refused to disclose the email raises a fundamental public interest concern about the adequacy of the government review process. The email will shed light on the operations of government by providing an opportunity for the public to assess the adequacy of the review of [named company's] AMP by [the ministry] with respect to the environmental concerns of the proposed quarry expansion.

[76] In its reply representations, the ministry submits:

> [T]he appellant greatly over emphasizes the importance of the record. It provided advice and recommendations with respect to the ministry's decision. However, while considered and in large part adopted, it was not the determinative record. It was one part of the deliberative process used to arrive at the final decision. The rationale for the ministry's position on the AMP is set out in the ministry's letter of December 12, 2011 [which was attached to the ministry's representations]. Accordingly, weighing the public interest in understanding the position and the purpose of section 13 which is to protect the deliberative process of government decision making, the need for staff to freely give advice and recommendation outweighs the public interest in the release of one email which relates to the government decision around an aggregate application which has already undergone the scrutiny of a public hearing.

Analysis and finding

[77] As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the portions of the records to which section 13(1) has been found to apply:

- There must be a compelling public interest in the disclosure of the information; and
- this interest must clearly outweigh the purpose of the exemption.

Is there a compelling public interest in the disclosure of the email?

[78] In determining whether a compelling public interest in the disclosure of exempted information exists, I must first consider whether the interest being advanced is a public or private interest. As mentioned above, a public interest does not exist where the interest being advanced are essentially private in nature.

[79] The ministry submits that the appellant's interest in the disclosure of the record is principally private in nature as it relates to wetland areas on her family property and that her submissions focus on the lack of consultation with them about how any mitigation plans may relate to their property. I disagree. As mentioned above, previous orders have found that where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.

[80] For example, this was specifically found (as noted by the appellant) in Order PO-1688, where former Senior Adjudicator Goodis addressed records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In that order, former Senior Adjudicator Goodis stated:

> In my view, there is a public interest in the disclosure of the record at issue in this case. The requester and the requester's engineer have stated, and I accept, that release of this record is required in order to conduct a technical review of the material submitted … in support of the proposal which, in turn, is required in order to make meaningful submission to the ministry on whether or not it should grant the appellant's application for a certificate of approval. *Although the requester clearly has a personal, private interest in making submissions on the appellant's proposal, the appellant's interest also coincides with a greater public interest of the community surrounding the appellant's plant and the general public as a whole…*
>
> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal… will impact the environment.
>
> [Emphasis added]

[81] Also in Order PO-1688, former Senior Adjudicator Goodis noted that a general public interest in the protection of the natural environment is supported by both the *Environmental Bill of Rights*[38] and the Supreme Court of Canada decision *R v. Canadian Pacific Ltd.*.[39] The overall purpose of the *EBR* is described in its preamble:

---

[38] S.O. 1993, c.28 (*EBR).*
[39] [1995] 2 S.C.R. 1031.

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a healthful environment.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

[82] In *Canadian Pacific Ltd.,* the Supreme Court of Canada stated:

> Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment* [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p.8 that:
>
> > … a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
> >
> > … environmental protection [has] emerged as a fundamental value in Canadian society …[40]

[83] Following Order PO-1688, in Order PO-2355, Adjudicator Morrow found that although the appellant in that appeal was an environmental group formed specifically for the purpose of becoming informed about the details of a proposal to expand a licensed quarry and to articulate residents' concerns about the impact of the proposed expansion there existed a public and not a private interest.

[84] The information in the email at issue consists of a Management Biologist's recommendations regarding environmental impact mitigation strategies described in an AMP filed in support of an application to expand a quarry. In my view, although the appellant does have a private interest in the information given the proximity of her property to the proposed expanded quarry, the subject matter of the record involves the protection of the natural environment and species that have been identified as

[40] *Ibid*, at para 55.

endangered, her interest coincides with the greater public interest of not only the community in the proximity of the proposed expansion, but also that of the public of Ontario as a whole. I accept that there exists a general public interest in ensuring that appropriate mitigation strategies have been considered regarding the effect of the operation of the expanded quarry on the local environment, specifically, whether the mitigation measures for wetlands known to contain endangered species are sufficient.

[85] Moreover, the appellant has also adduced evidence in the form of letters from environmental interest groups other than the one affiliated with her to demonstrate that her concern regarding the sufficiency of the mitigation strategies in the AMP and the public interest in the Management Biologist's recommendations regarding the endangered species found in the wetlands on her family property is shared by other public interest groups.

[86] As noted above, also relevant to the determination of whether there is a "public interest" in the disclosure of a record pursuant to section 23 is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government. As explained by the ministry, the email was one part of the deliberative process used to arrive at the final decision and not all of the recommendations in the email were implemented or addressed in the ministry's final position with respect to the AMP. The recommendations of the Management Biologist contained in the email would, in my view, serve to address legitimate public concerns as to whether the government is doing what it is capable of to minimize the impact of the quarry expansion on the local environment.

[87] I find, therefore, that there exists a public interest in the disclosure of the information at issue.

[88] As I have established that there is a public interest in the disclosure of the information at issue, I must now consider whether this public interest is "compelling" in nature. In Order P-1398, former Senior Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "arousing strong interest or attention." I agree that this is an appropriate definition for this word in the context of section 23.

[89] This definition was upheld by the Court of Appeal of Ontario in *Ontario (Ministry of Finance)*[41] and I will adopt it for the purposes of this appeal.

[90] In the present circumstances, I accept that the information contained in the email rouses "strong interest or attention." As outlined above, the information responds to concerns expressed by a number of public interest groups regarding the

[41] *Supra* note 16.

government's position on specific environmental mitigation strategies. In my view, the nature of the environmental concerns to which the recommendations relate and the importance of safeguarding the integrity of the public consultation and regulatory processes on environmental issues, make the public interest in the disclosure of the Management Biologist's recommendations on the sufficiency of environmental impact mitigation strategies (particularly as they relate to matters involving an endangered species), a compelling one.

[91] A compelling public interest has been found *not* to exist, where another public process or forum has been established to address public interest considerations.[42] In this appeal, the ministry submits that the Joint Board hearing provides the appropriate forum for the public interest to be addressed because the author of the record at issue was called as a witness and was available for cross-examination which provided the public with an opportunity to scrutinize his professional expertise and opinion on the issue. In response, the appellant relies upon the reasoning in Order PO-2399.

[92] In that decision, Adjudicator Swaigan considered whether there was a compelling public interest in the disclosure of a draft geological report regarding a proposed quarry despite the fact that a number of public information sessions and regulatory processes had taken place to debate the proposed quarry. He found that a compelling public interest in the disclosure existed because none of the other regulatory or public consultation processes resulted in the disclosure of the existence of certain recommendations that he believed to be potentially important in analyzing the environmental issues arising out of the quarry proposal. He stated:

> Although there is a possibility that differences between the draft and final reports will ultimately be revealed through hearings of the Ontario Municipal Board, in my view it is in the public interest not to leave the questions of disclosure to the uncertainties of future proceedings…

[93] I find that the circumstances of this appeal are similar to those in Order PO-2399. As in that order, in the circumstances before me, I do not agree that the public has or will receive all of the information that it requires relating to the Management Biologist's recommendations with respect to certain revisions to be made to the AMP dealing with mitigating the environmental impact on the wetlands. Despite the fact that the Management Biologist who authored the email was subject to cross-examination before the Joint Board, the email was drafted following his testimony, and it does not appear that the public was given an opportunity to consider and comment on his later opinion. In my view, following Adjudicator Swaigan's reasoning, given that these recommendations are potentially important in analysing the government's response to environmental issues that arise from the quarry expansion there is a compelling public interest in their disclosure. It is not clear to me whether the hearings before the Joint

[42] Orders P-123/124, P-391 and M539.

Board have concluded, however even if they have not, as found in Order PO-2399, in my view, "it is in the public interest not to leave the questions of disclosure of this information to the uncertainties of future proceedings," if any such proceedings are even contemplated.

[94] Although the ministry submits that the AMP was subsequently revised and that "for the most part, [the] recommendations [outlined in the Management Biologist's email] were incorporated into ministry recommended changes to the proponent's AMP" the ministry concedes that some suggestions made by the Management Biologist were not included due to the difficulty of implementation or other reasons. As, in my view, the entirety of the Management Biologist's recommendations are relevant to the analysis of the government's response to the named company's mitigation strategies outlined in the AMP addressing the environmental issues raised by the quarry expansion, there is a compelling public interest in the disclosure of the email, in its entirety.

[95] I am satisfied, therefore, that there is a compelling public interest in the disclosure of the Management Biologist's recommendations. The appellant has clearly demonstrated that there is a public interest, rousing strong interest or attention, in the disclosure of his recommendations regarding the sufficiency of the strategies outlined in the AMP to mitigate the environmental impact of the quarry expansion, and specifically, its impact on wetlands known to contain an endangered species.

Does the compelling public interest outweigh the purpose of the section 13(1) exemption?

[96] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[97] In this appeal, the ministry submits that any public interest that might exist does not outweigh the purpose of section 13(1) which is to protect the deliberative process of government decision making and the need for staff to freely give advice and recommendation.

[98] I accept that the purpose of section 13(1) is to ensure that those employed in public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making. However, I find that in the particular circumstances of this appeal, the interest in disclosure outweighs the purpose of the section 13(1) exemption.

[99] The ministry states that the appellant has greatly over-emphasized the importance of the record. Having considered the information that it contains, I disagree. The recommendations made by the Management Biologist address elements of the AMP

that could have significant implications on the environment and wetlands that contain an endangered species. In my view, this type of information is clearly of great interest and importance to the public.

[100] As explained by the ministry, the Management Biologist testified at the Joint Board hearing and was available to be cross-examined. The ministry states that he testified that some additional changes to the proposal would be reasonable and submits that any issues of public interest were subject to public scrutiny at that time. The Management Biologist's testimony preceded his email which outlined his specific recommendations and without access to his testimony I do not know whether he made any specific recommendations before the Joint Board. However, had he done so, he could have been cross-examined at that time on the changes that he would recommend and the public would have had an opportunity to consider them. Keeping this in mind, in the circumstances of this appeal, I find that any future "chilling effect" on the free flow of recommendations made by public servants in similar contexts, caused by the disclosure of the email containing his recommendations, would be minimal and outweighed by the significant public interest in the information.

[101] Given these circumstances, I am satisfied that the compelling public interest that would be served by the disclosure of the Management Biologist's recommendations clearly outweighs the purpose of the section 13(1) exemption.

[102] In conclusion, I find that section 23 applies in the circumstances of this appeal. Accordingly, notwithstanding my finding that the discretionary exemption for advice and recommendations in section 13(1) applies to the Management Biologist's email, I am satisfied that a compelling public interest in its disclosure not only exists, but also clearly outweighs the purpose of the exemption in this case. I will order the record disclosed.

D. Did the ministry conduct a reasonable search for responsive records?

[103] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[43] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[104] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[44] To be responsive, a record must be "reasonably related" to the request.[45]

---

[43] Orders P-85, P-221 and PO-1954-I.
[44] Orders P-624 and PO-2559.
[45] Order PO-2554.

[105] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[46]

[106] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[47]

[107] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[48]

[108] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[49]

Representations

[109] The ministry submits that it has met its obligations under section 24 to conduct a search for records responsive to the request. It states that it is not required to prove with absolute certainty that further records do not exist, but must offer evidence that a reasonable effort has been made to identify and locate responsive records.

[110] In support of its position that it discharged is obligations under section 24 and made reasonable efforts to locate records responsive to the request and that additional records "simply do not exist," the ministry provided affidavits sworn by the three individuals "with the most knowledge" of the application referred to in the request and the issues surrounding the AMP, who conducted the searches: the Management Biologist, the Supervisor of Planning Management and the District Planner for the ministry's Aurora District.

[111] The Management Biologist submits that he was directly involved in the ministry's review of the licence application referred to in the request and also testified and the Joint Board hearing related to that application. He elaborates that his duties required him to report and provide advice and recommendations to the Supervisor of Planning and Information Management for the Aurora District. He submits that he searched his email records, his electronic files and his hard copy files relating to the licence application. He states:

---

[46] Orders M-909, PO-2469 and PO-2592.
[47] Order MO-2185.
[48] Order MO-2246.
[49] Order MO-2213.

> The only responsive records I located was my email dated November 28, 2011 to [Supervisor of Planning and Information Management] and [District Planner for the Aurora District], the record that is the subject of the present appeal. I wrote this email to provide my recommendations to Mr. Farrell for revisions to the AMP.
>
> During the processing of the present appeal I conducted another search for records responsive to the request while considering a liberal interpretation of the language of the request. As a result of this search, I located three other records responsive to the request.

[112] He explains that two of the records were emails that he sent to a named individual, were dated November 28, 2011. He submits that these emails are the only documents that he authored, following his testimony before the Joint Board, relating to the amendments to the AMP before December 31, 2011. He submits that the third record is an email that he received from a named individual, dated November 3, 2011. He states that the ministry's information and privacy unit advised him that these records have been identified as TIFF # A0168663, TIFF # A0168664, and TIFF # A0169309, respectively, which were disclosed to the appellant.

[113] He concludes his affidavit by stating:

> After my testimony before the Joint Board and prior to December 31, 2011, I did not receive from [two named individuals] or other ministry staff any written communications, electronic or hard copy, relating to the amendments to the AMP requested in [named individual's] letter of December 12, 2011, other than a draft of [name individual's] letter of December 12, 2011 of which I did not keep a copy and the November 3, 2011 email identified as TIFF # A0169309.

[114] The Supervisor of Planning and Information Management submits that he was responsible for the ministry's position regarding the Aggregate Resources licence application to expand a quarry in the City of Burlington and licence application. He submits that he searched his email records, his electronic files and his hard copy files relating to the licence application. He states:

> After [named Management Biologist] testified at the Joint Board hearing related to the application and prior to my December 12, 2011 letter to the [named aggregate company], [the Management Biologist] provided me with his recommendations for revisions to the Adaptive Management Plan (AMP) of the applicant in his email of November 28, 2011. I considered the advice and recommendations contained in that email when the letter of December 12, 2011 to [named aggregate company] was drafted. I also considered the advice and recommendations of other [ministry] staff,

> such as [named individual], Aurora District Planner, that I received verbally, as input to my December 12, 2011 letter.

[115] He further states that during the processing of the present appeal he conducted a further search for responsive records considering a liberal interpretation of the language of the request, and located four additional records. He identifies the two emails sent to him by the Management Biologist dated November 28, 2011. He also identifies an email dated December 16, 2011, from the District Planner to another individual, on which he was copied, which was identified by the ministry's information and privacy unit as TIFF # A0168662. The fourth records that he located was an email dated November 3, 2011 that has been identified as TIFF # A0169309.

[116] He concludes his affidavit by submitting:

> I can confirm that after receiving [the Management Biologist's] email of December 31, 2011, I did not receive any written communication from [the Management Biologist, the District Planner] or any other ministry staff relating to the amendment to the AMP ultimately requested in my letter of December 12, 2011 to [named company].

[117] The District Planner submits that he was responsible for coordinating the review of the licence application on behalf of the ministry and, as such, is familiar with the records held by the ministry relating to the application. He submits that he searched his email records, his electronic files and his hard copy files for records relating to the licence application.

[118] He further states that during the processing of the present appeal he conducted a further search for responsive records considering a liberal interpretation of the language of the request, and located four additional records. He submits that these four records were emails sent to him by the consultant acting on behalf of the applicant company. He states that the emails were dated November 3, 2011, December 1, 2011, December 12, 2011, and December 16, 2011 and that they have been identified as TIFF # A0169309, TIFF # A0168665, TIFF # A0168666, and TIFF # A0168662, which were disclosed to the appellant.

[119] He also submits that on December 1, 2011, he had a telephone call with the consultant to discuss the revisions of the AMP that the ministry was going to request. He submits that he took no notes of that telephone conversation.

[120] He concludes his affidavit by stating:

> I can confirm that, other than the November 28, 2011 email from [the Management Biologist] to myself and [the Supervisor of Planning and Information Management] that is the subject of this appeal, I did not

> receive any written communication from [the Management Biologist, the Supervisor of Planning and Information Management] or any ministry staff before December 31, 2011 relating to the amendments to the AMP ultimately requested in [the Supervisor of Planning and Information Management's] letter of December 12, 2011.

[121] The appellant continues to take the position that additional records responsive to her request should exist. In her representations, she submits that records that were provided to her during the adjudication stage "reveal that further records still exist that are responsive to the request."

[122] The appellant submits that the records demonstrate that there were two discussions that took place between representatives of the company that submitted the licence application and ministry staff. First, in an email dated December 1, 2011, the District Planner expresses his wish to speak with the consultant and asks the consultant to call him. In his affidavit, the District Planner submits that he took no notes of this conversation. Second, an email dated December 16, 2011 refers to a discussion that took place the day before, however, the appellant submits that the ministry provides no evidence that this discussion took place or whether notes or minutes of that discussion were taken.

[123] The appellant also submits that in an email dated November 3, 2011, the consultant wrote to ministry staff, including the Management Biologist, requesting a meeting to discuss the ministry's final comments. The appellant submits that the consultant gave evidence at the hearing that "he participated in a teleconference call of [ministry] experts to discuss [the ministry's] evaluation of the mitigation plans and that he was given the assignment of "minute taker" for the call." The appellant submits that it is likely that the ministry would have received a copy of these minutes.

[124] Finally, the appellant submits that in an email dated November 28, 2011 from the Management Biologist to the Supervisor of Planning and Information Management, the biologist indicates that he has one other point to include in his AMP recommendations and that he would provide it the following day. The appellant submits that this suggests that an email from the Management Biologist to the Supervisor of Planning and Information Management dated November 29, 2011, should exist.

[125] In its reply representations, the ministry makes brief additional representations on its search. It submits:

> The appellant, in paragraph 10 of its representations, refers to a characterization by a [named individual] during his testimony before the OMB as a minute taker. It is the ministry's recollection that he referred to himself as a "note taker" in his testimony. However, the distinction is irrelevant. The purpose of the meeting was to discuss [the ministry's]

> desired changes to the AMP as part of the process described in the previous paragraph.[50] If [named individual] was taking "minutes" or more logically "notes," he was doing so for the applicant's purposes only, i.e. to understand [the ministry's] concerns and desired changes.

[126] The ministry further submits that "as evidenced by the affidavits in [its] original submission, [it] has no record of "minutes" or "notes" by [named individual]."

Analysis and finding

[127] As noted above, where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request. In the circumstances of this appeal, I accept that the ministry's search for responsive records was reasonable.

[128] The ministry conducted several search for responsive records and a number of records were located. I accept that searches for responsive records were conducted by three ministry employees who had the most knowledge of the licence application and the AMP and that they expended a reasonable effort to locate records reasonably responsive to the request.

[129] The appellant submits that the ministry should have copies of notes taken by a consultant from the named company involved in the licence application during teleconferences regarding the AMP. In their affidavits, the ministry staff involved in these teleconferences state that they took no notes during these discussions. The ministry submits that if notes were taken by the consultant during these teleconferences they were for the named company's own purposes and were not provided to or sought by the ministry. I have no evidence before me to dispute the ministry's position.

[130] Additionally, I acknowledge that from the records it appears that there should be a follow-up email to the record that is at issue as in a separate email that was disclosed to the appellant, the Management Biologist states that he has "just one other point to include on [his] AMP recommendations" and that [he will] send last point on wetland modifications tomorrow." However, I have not been provided with any evidence to

---

[50] The ministry submits that it had "certain concerns with the draft [AMP]" and that it "had discussions with the proponent about the concerns and what changes would be required to address those concerns." It further submits that it "was not a collaboration in which the two sides worked closely together to produce a joint product" but that it was "part of a review and comment process for the development of the final AMP."

demonstrate that this last point was indeed communicated in writing or was communicated at all.

[131] As previously stated, in responding to access requests, the *Act* does not require the ministry to provide with absolute certainty that further records do not exist. The ministry must simply provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records reasonably related to the request. As previously stated, in my view, the ministry has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[132] Given that I am satisfied that experienced ministry employees, knowledgeable in the records relating to the licence application and the AMP expended reasonable efforts to identify and locate records which are reasonably related to the appellant's request, I find that the ministry's search for reasonable records was reasonable. Accordingly, I uphold it.

ORDER:

1. I order the ministry to disclose the record at issue to the appellant in its entirety by **September 23, 2013**.

2. 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 records that are disclosed to the appellant.

3. I uphold the ministry's search and dismiss this aspect of the appeal.

Original signed by: August 22, 2013
Catherine Corban
Adjudicator