

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3300

Appeal PA12-392

Ministry of Natural Resources

January 30, 2014

Summary: The appellant sought access to records relating to all verbal and written communication between the Ministry of Natural Resources and an identified company regarding the granting of a contract to the company, including timelines, deliverables and maps. The ministry granted access to some records and denied access to others, either in whole or in part, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) and the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(l) (facilitate commission of an unlawful act), 18(1) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator upholds the ministry's decision, in part, and determines that the exemptions in sections 18(1), 19 and 21(1) apply to the records for which they were claimed. The adjudicator also determines that the exemptions in sections 13(1) and 17(1) apply to some of the information at issue. Lastly, the adjudicator upholds the ministry's exercise of discretion. The ministry is ordered to disclose some of the records at issue to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 13(1), 17(1), 18(1), 19 and 21(1).

Orders and Investigation Reports Considered: PO-2435.

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) operates a number of provincial parks in Ontario through Ontario Parks. These parks are open to the public for a variety of activities, including camping. The Park Reservation and Registrations Service (the PRRS) is jointly managed by the Land & Resource Cluster (LRC) and Ontario Parks. The PRRS provides services relating to provincial parks, including the use of an integrated reservation/accounting tool used to streamline park reservations, which features:

- a staffed call centre;
- an internet reservation website;
- software to process the reservation, issue permits and account for revenues;
- computers at the call centre and park level;
- an ongoing helpdesk; and
- a telecommunications network to move data between the call centre/internet and each provincial park.

[2] The existing PRRS commenced following an RFP process. The ministry entered into an agreement with the first ranked vendor, the requester, to develop and implement the service. According to the ministry, several problems began to emerge with the service and eventually the ministry terminated its agreement with the requester and entered into another agreement with the second ranked vendor. The ministry, the requester and the second ranked vendor are currently engaged in civil litigation in relation to the termination of the agreement.

[3] This order disposes of the issues raised as a result of a decision made by the ministry in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to:

A copy of any and all records in regards to the present contract between MNR and [a named company] including any verbal, written exchanges and/or meeting between MNR and [the named company] in relation to the discussion, negotiation and finalization of the contract between MNR and [the named company].

Any and all records in relation to any verbal or written exchanges and/or meetings in regards to the delivery timelines, deliverables, maps and

other information provided to [the named company] by MNR and any information on the [named company's] campground management implementation including timelines, planned and revised during a specified time period.

[4] The ministry identified responsive records and notified four affected parties to obtain their views regarding disclosure of the records.

[5] Two affected parties provided their consent to partial disclosure, while the remaining two affected parties did not respond to the ministry.

[6] After considering the response from the affected parties, the ministry issued a decision, granting access to some records, in whole or in part. Other records were withheld, in full. The ministry claimed the application of the mandatory exemptions in section 21(1) (personal privacy) and 17(1) (third party information), and the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(l) (facilitate commission of an unlawful act), 18(1) (economic and other interests) and 19 (solicitor client privilege) of the *Act*.

[7] The requester, now the appellant, appealed the ministry's decision to this office.

[8] During the mediation of the appeal, the appellant advised that he was not seeking access to information that is clearly an affected party's personal information, such as personal email addresses or phone numbers. Consequently, the personal information such as personal email addresses and phone numbers is no longer at issue and will not be disclosed to the appellant. The appellant also advised, however, that he was seeking access to information that may state when a ministry employee was on vacation, as this information may be of interest to him.

[9] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry, the appellant and three affected parties. I received representations from the ministry and one affected party, but not the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[10] During the inquiry, the ministry issued a supplementary decision letter to the appellant in which it revised its claim with respect to the exemption in section 19, and disclosed further records to the appellant.

[11] For the reasons that follow, I uphold the ministry's decision, in part, and order it to disclose certain records to the appellant. I also uphold the ministry's exercise of discretion.

RECORDS:

[12] The records consist of faxes, emails, letters, notes, test results, schedules, project reviews, and records described by the ministry as "documents."

ISSUES:

- A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the mandatory exemption at section 21(1) apply to the information at issue?
- C: Does the mandatory exemption at section 17(1) apply to the records?
- D: Does the discretionary exemption at section 18(1) apply to the records?
- E: Does the discretionary exemption at section 19 apply to the records?
- F: Does the discretionary exemption at section 13(1) apply to the records?
- G: Did the institution exercise its discretion under sections 13(1), 18(1) and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[14] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[16] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[18] The ministry submits that records A0163849, A0163852, A0163865, A0163869, A0164094, A0164221, A0164223, A0164637, A0164924, A0165018, A0166509, A0164505, A0164576, A0164920, A0166801, A0164507, A0164501, A0164534, A0164566, A0164603, A0164605, A0164812, A0164867, A0164566, A0164573 and A0165189 contain personal information in that they reveal identifiable ministry employees' and a translator's vacation plans and/or time away from their work with the ministry for personal reasons.⁴

[19] Based on the ministry's representations and my review of the records above, the information that was withheld from the appellant and which remains at issue is information concerning vacation and/or personal time taken by a number of identifiable individuals. I have reviewed the records and find that information about the individuals' vacation and/or personal time is recorded information about them and qualifies as their personal information. I make this finding despite the fact that the named individuals were acting in their professional capacity. I find that information about an individual's vacation and/or personal time would reveal something of a personal nature about them.

[20] The ministry also claims that records A0164597, A0164600, A0164616, A0164627, A0165432, A0166782, A0165932, A0166703, A0166576 and A0165297 also contain personal information. In particular, the ministry submits that these records contain the name, address, arrival date, site number, payment method and billing date of customers who camped at provincial parks. I find that these records also contain the personal information of identifiable individuals. In particular, the information in these records contains their addresses, which falls within paragraph (d) of the definition of personal information in section 2 of the *Act*. In addition, the information about these identifiable individuals' arrival date, site number, payment method and billing date would fall within paragraph (h) of the definition, because it reveals other personal information about them. Therefore, I find that the withheld information in these records qualifies as their personal information.

[21] I will now determine whether the portions of records that contain personal information are exempt from disclosure under section 21(1) of the *Act*.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ The ministry indicates that a translator was contracted by it to assist with the French translation of components of the PRRS.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[22] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[23] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

[24] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[25] The ministry submits that the disclosure of information such as vacations or time away from the office for personal reasons is presumed to be an unjustifiable invasion of privacy, as it relates to one's employment history. The ministry further states that even if the presumption does not arise, balancing the factors in section 21(2) and the circumstances of the request favour non-disclosure of the information at issue. The ministry goes on to argue that disclosure of the customer information at issue would constitute an unjustified invasion of privacy, given that there are no factors in section 21(2) favouring disclosure.

[26] With respect to the presumption in section 21(3)(d) (employment history), past orders of this office have found that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.⁵

[27] I am not persuaded by the ministry's argument that reference to an individual's one-time vacation would on its own qualify as information that would reveal their employment history. I find, therefore, that the presumption in section 21(3)(d) does not apply in this appeal.

⁵ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.

[28] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁶

[29] I have considered the factors in section 21(2) and find that there are no factors either favouring disclosure or non-disclosure of the individuals' vacation and/or personal time to the appellant. I make the same finding with respect to the personal information of the ministry's customers. Because the section 21(1) exemption is mandatory, and there are no factors favouring disclosure, I uphold the exemption and the ministry's decision with respect to the personal information contained in the records. Consequently, those portions of records that were withheld under section 21(1) will not be disclosed to the appellant.

Issue C: Does the mandatory exemption at section 17(1) apply to the records?

[30] The ministry submits that disclosure of certain other records⁷ either in whole or in part, would give rise to a reasonable expectation of the harm identified in sections 17(1)(a) and/or 17(1)(c) of the *Act*. Sections 17(1)(a) and (c) state:

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

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

[31] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.⁸ Although one of the central purposes of the *Act* is to shed light on the operations of

⁶ Order P-239.

⁷ The appellant received a copy of index of records from the ministry, which sets out the records for which this exemption was claimed.

⁸ *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.).

government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁹

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

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

Part 1: type of information

[33] The ministry submits that the information at issue is the technical and/or commercial information of the affected party. These types of information listed in section 17(1) have been discussed in prior orders:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.¹⁰

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.¹¹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹²

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

⁹ Orders PO-1805, PO-2018, PO-2184, MO-1706.

¹⁰ Order PO-2010.

¹¹ See note 9.

¹² P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.¹³

[34] With respect to its assertion that the records contain commercial information, the ministry states that the records relate to the affected party's offer to provide services relating to the operation of a parks reservation system, including information about the performance of its services. The ministry concludes that the records describe the exchange of services for consideration, which qualifies as "commercial" information.

[35] The ministry also submits that the records contain technical information because they contain specific information relating to the technical implementation of the services provided by the affected party. In particular, the ministry states that the records describe discussions of the affected party's software, its capabilities and its implementation.

[36] The affected party provided a list of the records, or portions thereof, which it argues should not be disclosed, claiming the application of section 17(1). The affected party advises that it entered into a commercial agreement with the ministry regarding the implementation of the PRRS. In particular, the affected party processes customers' credit card payments and refunds through its online card payment gateway. The records, the affected party argues, contain the technical specifications regarding the operation and testing of the payment gateway system, which qualifies as technical information for purposes of section 17(1).

[37] I have reviewed the records, and I am satisfied that some of the records for which section 17(1) was claimed contain information that would constitute "financial" information for the purposes of section 17(1). These records contain information relating to money and its use or distribution. In particular, some of the records contain credit card information, account numbers, an invoice and tax information pertaining to the affected party.

[38] Similarly, I find that the vast majority of the records at issue contain "technical" information, as described above. In particular, these records describe:

- computer passwords, URL's, hardware assets and data, source code information, remote access information, booking identification numbers, IP addresses;
- reporting methodology, including incident reporting;
- schematic diagrams of deployment specifications;

¹³ Order PO-2010.

- status reports and action items;
- a data retention and disposal policy;
- quality evaluation information;
- threat risk assessments, security audits and vulnerability testing;
- firewall, server information and host files;
- test results;
- functionality;
- software solutions;
- conference call numbers and passwords; and
- project plans.

[39] This type of information qualifies as technical information for purposes of section 17(1), as it describes the operation or maintenance of a process, specifically the on-line reservation system, including the processing of customers' payments.

[40] As all of the records for which this exemption was claimed contain either "financial" or "technical" information or both, part one of the three-part test has been met and I will go on to determine whether the information was supplied in confidence to the ministry by a third party.

Part 2: Supplied in confidence

[41] 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.¹⁴

[42] 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.¹⁵

[43] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of

¹⁴ Order MO-1706.

¹⁵ Orders PO-2020 and PO-2043.

confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁶

[44] 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; and
- prepared for a purpose that would not entail disclosure.¹⁷

[45] The ministry submits that the information at issue was supplied to it in confidence and states:

The nature of the services provided to the PRRS would suggest that the information was supplied in confidence. There is a significant degree of confidentiality implicit in the process of developing and implementing the reservation system, particularly the technical aspects of it which is part of competitive industry. An examination of the records makes it clear by the candour of the discussion and the information provided that it was communicated in confidence. The records contain detailed technical information relating to the service provided dealing with communication protocols, validation protocols and functionality. The Ministry, in keeping with the norm for customers of this type of service, accepted it in confidence. Given the nature of the business sector in which the party operates, their implicit understanding was reasonable. Consequently, within the context of the exchange of records, there is an objective basis as required by past orders¹⁸ for an expectation of confidentiality with respect to the affected party's information.

[46] The affected party who provided representations on the application of section 17 also submits that the commercial and technical information contained in the records in which it has an interest was supplied in confidence by it to the ministry. In regard to

¹⁶ Order PO-2020.

¹⁷ Orders PO-2043, PO-2371 and PO-2497.

¹⁸ Orders P-582, P-607, P-610, M-258, P-765 and P-788.

these records, the affected party further submits that the information was supplied to the ministry in confidence, in keeping with the norm for customers of this type of service, which accepted the information in confidence.

[47] The affected party goes on to state that a confidentiality provision in the contract between the ministry and it requires the ministry to keep any information disclosed to it by the affected party confidential. The information at issue, the affected party argues, was generated as a result of the contract and was supplied by it to the ministry with the expectation of confidentiality.

[48] Further, the affected party advises that it has not disclosed the information at issue to any party which has not been subject to confidentiality obligations and has consistently treated this information in a manner that indicates a concern for its protection from disclosure. Lastly, the affected party submits that the information at issue has not been otherwise disclosed and is not available from publicly accessible sources.

[49] Having reviewed the records and the representations from the ministry and an affected party, I am satisfied that they have provided sufficient evidence to demonstrate that the majority of the commercial and technical information contained in the records at issue was supplied by the affected party to the ministry, or that the information in the records meets the inferred disclosure exception, as its disclosure would reveal underlying non-negotiated information supplied by the affected party.

[50] However, I also find that the information at issue in several of the records was not supplied to the ministry by an affected party. Upon reviewing the records, it is clear that the information was either supplied to the affected party by the ministry, or shared amongst ministry staff only. Consequently, I find that the information in these records was not supplied to the ministry by a third party and, therefore, does not meet part two of the section 17(1) test. The ministry is claiming the application of the discretionary exemption in section 18 to all of these records except one, which I will consider below. Conversely, as there are no other exemptions being claimed with respect to record A0164444, I order the ministry to disclose it to the appellant.

[51] With respect to the remaining records, because of the nature of the information in these pages and based on the representations of the ministry and an affected party that describe how the information was treated, I find that the parties had a reasonably held expectation that this information was supplied in confidence. I find, therefore, that this information meets part two of the section 17(1) test and I will go on to consider whether any of the harms contemplated in part three of the test might apply to it.

Part 3: reasonable expectation of harm

[52] I will now determine whether the third part of the three-part test applies to the records at issue. The relevant subsections of section 17(1) state:

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

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

...

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[53] To meet this part of the test, the party claiming the exemption must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.¹⁹

[54] 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.²⁰

[55] 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).²¹ 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*.²²

[56] The ministry states that the affected party is in the best position to present argumentative evidence on whether disclosure of the information would prejudice its competitive position, resulting in undue loss or gain. Moreover, the ministry notes that

¹⁹ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

²⁰ Order PO-2020.

²¹ Order PO-2435.

²² Order PO-2435.

the affected parties are in a very competitive business. The ministry argues that disclosure of the records could cause considerable harm to the affected parties, as competitors could use the technical and commercial information contained in the records to their advantage. In particular, the ministry submits that the disclosure of the records would provide insight into the affected party's plan for the provision of service, which could then be used by competitors to address issues with their system or to undermine the affected party in competing for other work. Further, the ministry submits that some of the technical information could be used by computer hackers to break into the affected party's computer system and use it for unauthorized purposes, resulting in undue loss to the affected party.

[57] The affected party submits that the detailed technical and commercial information in the records is in connection with the implementation of the PRRS, and that this information reflects a proprietary process and system functionality which it has developed over significant time and through the expenditure of significant effort. The affected party submits that the information at issue represents certain choices it has made with respect to the payment process, and is based on the culmination of its extensive experience in the online payment processing sector. Should this information be disclosed, the affected party argues, it would represent invaluable information for its competitors, as they would have the opportunity to position their own products, implementations and communications to be better than those of the affected party.

[58] The affected party goes on to argue that disclosure of the proprietary technical information in the records would result in undue gain for its competitors, generating a commensurate loss for it. The affected party states:

In this case, it is consistent with the purpose of the exemption to deny access to this information. The credit and debit card acceptance services sector is extremely competitive, and is populated by a number of highly qualified, sophisticated vendors. In order to be competitive, [the affected party] must devote significant resources to the development of payment products and services which distinguish [the affected party] in the market.

In the context of such a highly competitive market, any non-public information about competing payment companies is very valuable. If that information can also assist in reducing any competitive advantage of any one competitor in responding to both public and private sector procurements, it becomes critically valuable.

In this context, it is of critical importance that no confidential information of [the affected party] be released as a result of the access request, in order to ensure that [the affected party] is not materially prejudiced in the payment processing market.

[59] As well, the affected party provided further representations on this issue, which met the confidentiality criteria of this office's *Practice Direction 7*. I cannot, accordingly, describe these submissions in any detail in this order, though I will rely on them.

[60] Based on my review of the ministry's and one affected party's representations, I find that I have been provided with sufficient evidence to link the disclosure of the majority of the information in the records to the harms alleged under section 17(1)(a) or (c).

[61] I find that the affected party has provided the kind of "detailed and convincing" evidence required to satisfy part 3 of the section 17(1) test. The allegations of harm in its representations have demonstrated that a "reasonable expectation of harm" exists if the information in the records in which it has an interest is disclosed.

[62] Turning to the remaining records at issue, I note that the majority of the records for which this exemption was claimed relate to another affected party, who did not provide representations to this office, although it was given the opportunity to do so. This affected party has not provided any evidence that a "reasonable expectation of harm" exists if the information in the records is disclosed. However, upon my review of the records, I find that given the detail and nature of the technical information that is included on the face of the records themselves, such harm is readily apparent. Therefore, I find that part three of the three-part test has been met and the records are exempt under section 17(1) of the *Act*, with the exception of the withheld information in records A0164268 and A0164396.

[63] Record A0164268 is an invoice for services rendered by an affected party to the ministry. The invoice sets out the hourly rate for a particular service. Record A0164396 contains two defect reports generated by an affected party. As I was not provided with representations from the affected party as to how disclosure of this information could reasonably result in harm to it, and as there is no such evidence of harm on the face of the records, I find that they are not exempt under section 17(1). Moreover, with respect to record A0164268 in particular, in Order PO-2435, Assistant Commissioner Brian Beamish rejected the argument that the disclosure of specific pricing information or per diem rates could reasonably be expected to cause the type of harm contemplated by section 17(1).

[64] As no other exemptions were claimed with respect to records A0164268 and A0164396, I order the ministry to disclose them to the appellant.

Issue D: Does the discretionary exemption at section 18(1) apply to the records?

[65] The ministry is claiming the application of the discretionary exemption in section 18(1)(c) to voluminous records as set out in the index of records sent to the appellant. Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

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

[66] The purpose of section 18(1) is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*²³ explains the rationale for including a “valuable government information” exemption in the *Act*:

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

[67] For sections 18(1)(c) to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.²⁴

[68] 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 18(1).²⁵

[69] Parties should not assume that harms under section 18(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.²⁶

²³ Vol. 2 (Toronto: Queen’s Printer, 1980) (the *Williams Commission Report*)

²⁴ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

²⁵ Orders MO-1947 and MO-2363.

²⁶ Order MO-2363.

[70] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.²⁷

[71] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.²⁸

[72] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.²⁹

[73] In its representations, the ministry organizes the records into three categories, and describes the harm that could reasonably be expected to occur should the information be released:

- the first group of records contains credit card numbers that are held by the Crown, merchant numbers associated with credit cards, or systems relating to credit cards. The ministry submits that release of the credit card information could result in its unauthorized use, resulting in direct charges to the Crown or disruption of the use of credit card transactions relating to the park reservation system;
- the second group of records contains teleconference numbers and passwords, login information, IP addresses and related information. The ministry submits that release of this information would allow persons to enter systems or use teleconference facilities without authorization; and
- the third group of records contains computer system information, such as its implementation, security scans, threat evaluations, and possible weaknesses and solutions. The ministry submits that release of this information would render the PRRS and its system vulnerable to attack or disruption by hackers, impeding the reservation system.

²⁷ Orders MO-2363 and PO-2758.

²⁸ Orders P-1190 and MO-2233.

²⁹ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[74] The ministry concludes that the release of the information described above would cause a loss of revenue and/or increased costs to the ministry and would, consequently, prejudice its economic interests.

[75] I am satisfied that the ministry has provided credible “detailed and convincing” evidence that disclosure of the withheld information in records could reasonably be expected to cause harm to the economic interests of the ministry and the financial interests of the government of Ontario. I also make this finding based on my review of the records. Therefore, I find that the records or portions thereof, for which section 18(1)(c) was claimed, are exempt from disclosure, subject to my findings regarding the ministry’s exercise of discretion.

[76] The ministry claimed the application of the discretionary exemption in section 14 to some of the records for which sections 17(1) and 18(1) were also claimed. As I have found that these records are exempt either under section 17(1) or 18(1), it is not necessary for me to consider the application of the exemption in section 14.

Issue E: Does the discretionary exemption at section 19 apply to the records?

[77] The ministry claims the application of the solicitor-client privilege exemption in section 19 to portions of records A0166844, A0166862, A0166863, A0166870, A0166873, A0166875 and A0166878 on the basis that they are communications relating to the provision of legal services. Therefore, the ministry submits, these records are subject to solicitor-client privilege at common law and are exempt under section 19(a), which states:

A head may refuse to disclose a record,
that is subject to solicitor-client privilege;

[78] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a).

[79] 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.³⁰

³⁰ 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).

[80] 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.³¹

[81] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³²

[82] 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.³³

[83] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.³⁴

[84] 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.³⁵

[85] As stated above, the ministry submits that it applied the discretionary exemption in section 19 to all communications between ministry staff and counsel, as they fall within the ambit of the common law definition of solicitor-client privilege. This privilege, the ministry argues, applies to exempt all records containing the verbal and written communications between solicitor and client related to the seeking, formulating or giving of legal advice or assistance.

[86] In addition, the ministry submits that factual information may be subject to solicitor-client privilege to the extent that it is provided to legal counsel for the purpose of receiving a legal opinion or advice, including all working papers directly relating to the advice or assistance.

[87] The ministry states:

Solicitor-client privilege may extend to communications on a fairly wide range of subjects, even where communications between a solicitor and client may be made on an on-going and protracted basis. Any one particular aspect of this communication may not seem, at first glance, to

³¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³² Orders PO-2441, MO-2166 and MO-1925.

³³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

³⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

be subject to solicitor-client privilege. However, when it is considered in light of the "continuum" concept of legal advice, as set out in *Balabel v. Air India*,³⁶ it becomes apparent that such communications falls within the scope of the privilege. This type of continuum or protracted nature of legal advice is particularly prevalent in the case of "in-house" legal advisors such as government Crown counsel. The privilege remains permanent until it has been waived by the client.

[88] The ministry states that the records are PRRS project meeting minutes with internal staff, and PRRS steering committee minutes. The portions of the minutes which have been withheld, the ministry submits, note the activities of the legal services branch with regard to the project. The ministry argues that the withheld portions reflect communications relating to the provision of legal services and, therefore, are protected from disclosure, as they are subject to solicitor-client privilege.

[89] Having reviewed the records for which this exemption is claimed, and taking into consideration the ministry's representations, I uphold the ministry's decision with respect to section 19, subject to my findings on the ministry's exercise of discretion.

[90] The withheld portions of the records document ministry staff seeking legal advice on a particular issue and in relation to a document. In addition, the withheld portions reveal the legal advice that counsel provided to ministry staff.

[91] Consequently, based on my review of the records, I find that all of the withheld information for which section 19 was claimed forms part of the "continuum of communications," as it reflects confidential communications between a solicitor and his client and is, therefore, exempt from disclosure under the solicitor-client communication privilege aspect of section 19 of the *Act*.

Issue F: Does the discretionary exemption at section 13(1) apply to the records?

[92] The ministry is claiming the application of the discretionary exemption in section 13(1) to eight records. However, I have already found six of those records, or portions thereof, to be exempt under sections 17(1) and/or 18(1) of the *Act*. The remaining two records for which section 13(1) is being claimed are records A0165470³⁷ and A0165507. 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

³⁶ [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

³⁷ I have already found that the withheld information contained in page 2 of this record is exempt under section 17(1).

employed in the service of an institution or a consultant retained by an institution.

[93] The purpose of section 13(1) 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.³⁸

[94] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.³⁹

[95] "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.⁴⁰

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

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴¹

[97] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) 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.⁴²

³⁸ 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.).

³⁹ Order PO-2681.

⁴⁰ 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.

⁴¹ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁴² *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[98] 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.⁴³

[99] 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; and
- a supervisor's direction to staff on how to conduct an investigation.⁴⁴

[100] The ministry submits that where other information is so interwoven with the advice and recommendations contained in a record that it cannot be severed, the exemption may apply to the record in its entirety. In addition, the ministry argues that in order to qualify for exemption, the record must have been prepared by a public servant or person employed in the services of an institution, or a consultant retained by the institution. The nature of the relationship between the author and the institution is a crucial factor in determining whether this exemption applies.

[101] The ministry argues that both records contain advice and meet the criteria of section 13(1). The ministry states that record A0165470 is an email, which contains advice from public servants employed by the ministry, the Ontario Financing Authority or the Land and Resources Cluster, and that record A0165507 is also an email containing advice given to the ministry by one of the affected party's staff members. The ministry argues that the affected party was a consultant/contractor for the ministry.

[102] As previously stated, a head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person

⁴³ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁴⁴ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

employed in the service of an institution or a consultant retained by an institution. One of the purposes of this exemption is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process.

[103] With respect to record A0165470, which is an email, the remaining information at issue is contained in pages 1 and 3. I am satisfied that these portions meet the criteria in section 13(1), as they contain options, followed by a suggested course of action. This recommendation is made from a staff member of another institution under the *Act* to ministry staff. Therefore, I find that the withheld information in this record is exempt from disclosure under section 13(1), subject to my finding regarding the ministry's exercise of discretion.

[104] Conversely, the withheld information in record A0165507 is advice provided by an affected party regarding the wording of a particular document. While I agree with the ministry that the nature of the relationship between the author and the institution is a crucial factor in determining whether this exemption applies, I am not persuaded that the relationship between the affected party and the ministry is one where the affected party is a public servant, or employed by the ministry, or retained as a consultant by the ministry. The author of the letter is entering into a contractual agreement with the ministry, which, in my view, does not meet the three criteria set out above. Consequently, I find that the exemption in section 13(1) does not apply to the information at issue in this record and it is not exempt from disclosure. As no other exemptions have been claimed with respect to record A0165507, I will order the ministry to disclose it to the appellant.

Issue G: Did the institution exercise its discretion under sections 13(1), 18(1) and 19? If so, should this office uphold the exercise of discretion?

[105] The sections 13(1), 18(1) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[106] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[107] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁵ This office may not, however, substitute its own discretion for that of the institution.⁴⁶

[108] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁷

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[109] The ministry submits that in exercising its discretion it attempted to balance the purpose of the exemptions with all other relevant interests and considerations, including the facts and circumstances of this request. The ministry states that its exercise of discretion involved two steps. The first step involved a determination by the head of

⁴⁵ Order MO-1573.

⁴⁶ Section 54(2) of the *Act*.

⁴⁷ Orders P-344, MO-1573.

whether the exemption applied. The second step involved the head evaluating all relevant interests, including the public interest in the disclosure of the information and concluding that disclosure should not be made. In this case, the ministry states, the interest in disclosure was of a private nature, that is, to advance the appellant's interests in litigation, rather than holding the ministry to greater scrutiny on a public issue. In addition, the ministry submits that it severed the records in order to disclose as much information as possible.

[110] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I note that the appellant has not provided representations on this, or any other issue, in this appeal.

[111] I am satisfied that that ministry weighed the appellant's interest in obtaining access to the requested information against the protection of sensitive government information that is subject to solicitor-client privilege, contains advice or recommendations, or whose disclosure could reasonably be expected to cause economic harm to the government. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemptions in sections 13(1), 18(1) and 19 to the records for which I upheld the ministry's decision.

[112] In conclusion, I uphold the ministry's decision, in part. I uphold the application of the mandatory exemption in section 21(1) and the discretionary exemptions in sections 18(1) and 19. I uphold the application of the mandatory exemption in section 17(1) and the discretionary exemption in section 13(1), in part. Lastly, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose records A0164268, A0164396, A0164444 and A0165507 in their entirety to the appellant by **March 7, 2014** but not before **March 3, 2014**.
2. In order to verify compliance with order provision 1, I reserve the right to require that the ministry provide me with a copy of the records sent to the appellant.

Original Signed By:
Cathy Hamilton
Adjudicator

January 30, 2014