Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3292

Appeal PA12-391

Ministry of Natural Resources

January 14, 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 and any extensions of that contract during its term. 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), 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 19 and 21(1) apply to the records for which they were claimed. The adjudicator also determines that the exemptions in sections 17(1) and 18(1) apply to some of the information at issue. However, the adjudicator finds that the exemption in section 13(1) does not apply. 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, including:

- 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 current service 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 all verbal and written communications pertaining to the granting of a contract between the ministry and the named company, and any extensions to it during its term. The requester also set out the time frame of the contract.

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

[5] One affected party provided its consent to partial disclosure, and another provided the ministry with submissions on which portions of the records it believed should not be disclosed.

[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), 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. 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 two affected parties. I received representations from the ministry, but not the appellant or the affected parties. 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 emails, faxes, correspondence, draft agreements and a manual.

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 19 apply to the records?

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

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

G: Did the institution exercise its discretion under sections 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]

[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 A0165602, A0166650 and A0166646 contain personal information in that they reveal identifiable ministry employees' vacation plans and/or time away from the ministry for personal reasons. I also note that portions of records A0165582, A0166664 and A0166707 were withheld under section 21(1), although these records are not referred to in the ministry's representations. As section

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

21(1) is a mandatory exemption, I will consider whether these records contain personal information and, if so, whether the exemption in section 21(1) applies. The type of information that was withheld in these three records also reveals identifiable individuals' vacation plans and/or time away from the ministry.

[19] Based on the ministry's representations and my review of the records, 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] I will now determine whether the portions of records that contain personal information, specifically an individual's vacation and/or personal time, is exempt from disclosure under section 21(1) of the *Act*.

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

[21] 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.

[22] 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.

[23] 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).

[24] 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.

[25] 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.[4]

[26] 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.

[27] 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.[5]

[28] 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. However, as 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?

[29] The ministry submits that disclosure of records A0163775, A0163777, A0163780, A0163782, A0166724, A0166725, A0166726, A0166727, A0165571, A0165603, A0165608, A0166721 and A0166722, 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;
>
> . . .

[4] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.
[5] Order P-239.

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

[30] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[7]

[31] 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

[32] 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.[8]
> *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

[6] *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.).
[7] Orders PO-1805, PO-2018, PO-2184, MO-1706.
[8] Order PO-2010.

application to both large and small enterprises.[9] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]

[33] The ministry describes the records as follows:

- A0163775 is a letter from the affected party to the ministry and another third party, confirming receipt of the soft escrow agreement between the two parties. The withheld portion is the account number used in the escrow account;
- A0163777 is a draft outlining the review of the affected party's proposal by Ontario Parks;
- A0163780 is a chart outlining Ontario Parks' evaluation of the affected party's proposed software;
- A0163782 contains the minutes of an interview conducted by the ministry with the affected party as part of an RFP process;
- A0166724, A0166725, A0166726 and A0166727 are emails between the ministry and the affected party and describe negotiations between the parties;
- A0165571 is a letter and series of documents from the affected party to the ministry, detailing service remedies;
- A0165603 is an email and attachments, including a procedure manual and a helpline document;
- A0165608 is a letter from the affected party to the ministry, providing an update on a project; and
- A0166721 and A0166722 are emails between the ministry and a company, discussing the draft escrow agreement.

[34] With respect to 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. The ministry concludes that the records describe the exchange of services for consideration, which qualifies as "commercial" information.

[9] See note 9.
[10] P-1621.

[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] As previously stated, the affected parties did not provide representations in this appeal.

[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 "commercial" information for the purposes of section 17(1). These records contain information relating to the buying, selling or exchange of merchandise or services. In this case, there is information in the records about the affected party's proposed provision of services to the ministry and the substance of negotiations between the affected party and the ministry.

[38] Similarly, I find that other records contain "technical" information, as described above. In particular, some of the records describe technical problems and how they were proposed to be resolved, as well as implementation plans, validation protocols and functionality. 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 processing of customers' payments using the on-line reservation system.

[39] As all of the records for which this exemption was claimed contain either "commercial" 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

[40] 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.[11]

[41] 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.[12]

[42] 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

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

confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[43] 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.[14]

[44] 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 orders[15] for an expectation of confidentiality with respect to the affected party's information.

[45] Further, the ministry submits that record A0163777 contains information that was provided by the affected party in its proposal. The ministry advises that the

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[13] Order PO-2020.
[14] Orders PO-2043, PO-2371, PO-2497.
[15] Orders P-582, P-607, P-610, M-258, P-765 and P-788.

proposal submitted by the affected party contains a section on confidentiality. In particular, Part One of the proposal at page 5 states:

> Should the Ministry of Natural Resources be called upon under the Freedom of Information and Protection of Privacy Act, or for any other reason, to disclose any part of this proposal, [the affected party] considers any disclosure of the following items to infringe upon its intellectual property rights, trade secrets, or competitive advantage:
>
> 1. Any description of how data is stored, the format it is stored in, or how data is transmitted over a network;
>
> 2. Any description of software functionality not apparent in the software user interface, software manuals, or other public software description;
>
> 3. Any description of software or data exchange algorithms;
>
> 4. Any pricing or cost information which would prejudice [the affected party's] ability to bid on equal terms with other entities on future projects of similar nature;
>
> 5. Any system design work such as plans or specifications prepared by the company or its sub-contractors or consultants.
>
> [The affected party] considers that disclosure of any part or all of this proposal in such a way that any entity could be competing against [it] in similar projects in the future, would materially prejudice [the affected party's] competitive position.

[46] Having reviewed the records and the representations from the ministry, I am satisfied that it has provided sufficient evidence to demonstrate that 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.

[47] I also find, because of the nature of the information in these pages and based on the representations of the ministry that describe how the information was treated, that the parties were under the assumption 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: harms

[48] 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;

[49] 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.[16]

[50] 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.[17]

[51] 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).[18] 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*.[19]

[52] The ministry states that the affected party is in the best position to present argumentative evidence on whether disclosure of the information would prejudice an affected party's competitive position resulting in undue loss or gain. However, the ministry notes that the affected party is in a very competitive business. The ministry

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

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 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.

[53] With respect to record A0163775, the ministry states that the withheld information is the escrow account number. If this number was released, the ministry argues, outsiders would be able to access the account through an internet portal, which is held by an independent company that provides protection for intellectual property. The ministry states:

> Within the account is the source code for software produced by [the affected party]. If the software, which is the intellectual property of [the affected party], were accessed by a competitor or a malicious person, there would be a risk in that it could be copied or tampered with. Security of the software is the very purpose of having it stored in the "vault" of the third party company. The fact that companies use and pay the neutral company for providing the service demonstrates that the risk is real.

[54] I gave two affected parties the opportunity to provide representations on this exemption, but neither submitted representations. However, when notified of the request by the ministry under section 28, one affected party responded that records A0163775, A0166721 and A0166722 contain sensitive commercial and financial information. According to this affected party, the disclosure of this information would significantly prejudice its competitive position in future dealings with the government and in the market generally, as it would provide competitors with information about pricing and contracting practices.

[55] Based on my review of the ministry's representations, one affected party's general comments to the ministry at the request stage, and the absence of representations from the other two affected parties, I find that I have not been provided with sufficient evidence to link the disclosure of the information in the records to the harms alleged under section 17(1)(a) or (c), with the exception of the escrow account number in record A0163775.

[56] I find that the affected party who responded to the ministry has not 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 comments to the ministry have not demonstrated that a "reasonable expectation of harm" exists if the information in the records is disclosed, nor is such harm apparent on the face of the records themselves.

[57] Further, the affected party's argument that disclosure of the record could reduce competitiveness in future dealings with the government and in the market generally has been rejected in previous orders of this office. In Order PO-2435, Assistant Commissioner Beamish commented as follows on the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" under section 17(1):

> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:
>
> > …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money.

. . .

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). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [e-Physician Project], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA [Service Level Agreement] and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

While I can accept the Ministry's [Ministry of Health and Long-Term Care] and SSHA's [Smart Systems for Health Agency] general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a), (b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding

> process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs . . . The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[58] In Order PO-3183, Adjudicator Donald Hale, relying on Order PO-2435, came to a similar conclusion with respect to a proposal submitted in response to an RFP for the provision of legal services to a hospital. In ordering the proposal disclosed, Adjudicator Hale found that "the fact that disclosure of the proposal may result in a more competitive bidding process in the future does not result in significant prejudice to the affected party's competitive position or result in an undue loss to it."

[59] In addition, I note that the records at issue are over fifteen years old and it is reasonable to assume that pricing and technical information has changed over this time, such that disclosure of this information would be of less assistance to an affected party's competitor at this time.

[60] Consequently, I agree with and adopt the reasoning of Assistant Commissioner Beamish and find that part 3 of the test under section 17(1) has not been met with respect to all of the information for which this exemption was claimed, with one exception. I accept the ministry's argument that disclosure of the escrow account number in record A0163775 could reasonably be expected to result in the type of harm contemplated in section 17(1), in that it could cause undue loss to the affected party. Therefore, I uphold the exemption in section 17(1) with respect to the withheld information in this record only.

[61] 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, nor is such harm apparent on the face of those records either. Therefore, I find that part three of the three-part test has not been met and the records are not exempt under section 17(1) of the *Act*, with the exception of the withheld information in record A0163775.

[62] The ministry has also claimed the application of the discretionary exemptions in:

- Section 19 with respect to records A0166721 and A0166722, in part;
- Section 18(1) with respect to records A0165571 and A0165603; and
- Section 13 with respect to record A0165608, in part.

[63] I will consider these exemptions below.

[64] As no other exemptions were claimed with respect to records A0163777, A0163780, A0163782, A0166724, A0166725, A0166726 and A0166727, I order the ministry to disclose them to the appellant.

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

[65] The ministry claims the application of the solicitor-client privilege exemption in section 19 to several records, which I will describe below, on the basis that they are communications between ministry staff and both internal and external legal counsel. Therefore, the ministry submits, these records are subject to solicitor-client privilege at common law and are exempt under section 19, which states, in part:

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

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

[67] 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.[20]

[68] 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.[21]

[69] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[22]

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[20] 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).
[21] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[22] Orders PO-2441, MO-2166 and MO-1925.

[70] 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.[23]

[71] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[24]

[72] 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.[25]

[73] 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 verbal and written communications between solicitor and client related to the seeking, formulating or giving of legal advice or assistance.

[74] 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.

[75] 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 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,*[26] 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.

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[23] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[24] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[25] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[26] [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[76] The ministry goes on to describe the records as follows:

- Records A0163902, A0163903, A0163904, and A0164032 are email exchanges between ministry staff and the ministry's legal services branch regarding its provision of legal services. The ministry also states that these email exchanges were copied to counsel at the Ministry of the Attorney General, who was assisting in the provision of legal services;

- Records A0166654, A0166655 and A0166735 are emails and attachments between ministry staff, internal legal counsel and external legal counsel retained to provide legal services with respect to contracting issues. These records consist of communications relating to the provision of legal services; and

- Records A0166656, A0166670, A0166671, A0166672, A0166673, A0166674, A0166675, A0166676, A0166677, A0166678, A0166681, A0166682, A0166721 and A0166722 are emails between the ministry's legal counsel, or on its behalf and ministry staff relating to the provision of legal advice or services to the ministry by legal counsel.

[77] I also note on the index of records provided by the ministry that it is also claiming this exemption with respect to record A0166650.

[78] 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.

[79] The records consist of emails sent to legal counsel by ministry staff, seeking a legal opinion or legal advice on a particular legal issue, and emails sent to ministry staff from legal counsel, providing legal advice and attaching written materials drafted and reviewed in conjunction with ministry staff.

[80] Consequently, I find that all of the records for which section 19 was claimed form part of the "continuum of communications," as they reflect confidential communications between a solicitor and his client and they are, therefore, exempt from disclosure under section 19 of the *Act*.

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

[81] The ministry is claiming the application of the discretionary exemption in section 13(1) to record A0165608. 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.

[82] 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.[27]

[83] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[28]

[84] "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.[29]

[85] 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.[30]

[86] 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.[31]

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[27] 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.).
[28] Order PO-2681.
[29] 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.
[30] 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).
[31] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[87] 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.[32]

[88] 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.[33]

[89] 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.

[90] The ministry states that it withheld portions of record A0165608 under section 13(1). This record is a letter from an affected party to the ministry, providing an update on the PRRS and containing a recommendation to the ministry. The ministry advises that the affected party was providing services to the ministry under the terms of a contract it had entered into.

[91] 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 employed in the service of an institution or a consultant retained by an institution. One

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[32] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[33] 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).

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.

[92] The withheld information at issue is advice provided by an affected party to the ministry as part of the negotiation between them. In the record, the affected party describes its position and what steps it is willing to take in order to complete the contract. 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 and it is not exempt from disclosure. As no other exemptions have been claimed with respect to this record, I will order the ministry to disclose it to the appellant.

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

[93] The ministry is claiming the application of the discretionary exemption in section 18(1)(c) to records A0165603 and A0165571. 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;

[94] 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*[34] 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.

[34] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

[95] 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.[35]

[96] 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).[36]

[97] 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*.[37]

[98] 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.[38]

[99] 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.[39]

[100] 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.[40]

[101] The ministry states that record A0165603 is an email with attachments, including the PPRS Procedure Manual and a helpline document, and that section 18 was claimed with respect to a portion of the record, namely the help line telephone number which the ministry pays the affected party to maintain to resolve technical issues. This telephone number, the ministry advises, is used only by ministry staff when they are

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[35] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[36] Orders MO-1947 and MO-2363.
[37] Order MO-2363.
[38] Orders MO-2363 and PO-2758.
[39] Orders P-1190 and MO-2233.
[40] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

unable to resolve a problem. The ministry argues that if the number was released, members of the public could use it to call the affected party directly, rather than ministry staff. The ministry goes on to state that the affected party would then, in turn, charge the ministry more for this service; thus prejudicing the ministry's economic interests.

[102] With respect to record A0165571, the ministry advises that it consists of a letter and a series of documents from the affected party, detailing service remedies and setting out vulnerabilities and problems within the system. The harm argument advanced by the ministry states:

> If someone wanted to disrupt the systems, the information would facilitate as the person or persons would know the database weaknesses. Computer hacking is an increasing problem in our society and so to the Ministry, this is a very real concern and possibility. If the PPRS is disrupted as a result of hacking, this would adversely affect the Ministry's ability to take reservations which would in turn adversely affect its economic interests. In addition, either staff or contractors would have to take time to restore the system should it be hacked which would result in added costs to the Ministry, either directly or indirectly.

[103] With respect to the helpline telephone number that was withheld by the ministry, I am not persuaded that its disclosure could reasonably be expected to cause the type of economic harm to the ministry contemplated by section 18(1). I find that the ministry's argument is speculative, at best, and does not meet the "detailed and convincing" evidence threshold established by past orders of this office. Consequently, I find that the helpline telephone number is not exempt from disclosure under section 18(1), subject to my findings with respect to the ministry's exercise of discretion.

[104] Conversely, I find that the ministry has provided "detailed and convincing" evidence that disclosure of the withheld information in record A0165571 could reasonably be expected to cause undue loss to the ministry. Therefore, I find that this record is exempt from disclosure under section 18(1)(c).

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

[105] The sections 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.[41] This office may not, however, substitute its own discretion for that of the institution.[42]

[108] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[43]

- 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.

[41] Order MO-1573.
[42] Section 54(2) of the *Act*.
[43] Orders P-344, MO-1573.

[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 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. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemption in sections 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). I do not uphold the application of the mandatory exemption in section 17(1), with the exception of the escrow account number in record A0163775. I uphold the application of the discretionary exemption in section 19. I also uphold the application of the discretionary exemption in section 18(1) to record A0165571. I do not uphold the application of the discretionary exemption in section 13(1). Lastly, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose records A0163777, A0163780, A0163782, A0165603, A0165608, A0166724, A0166725, A0166726 and A0166727 in their entirety to the appellant by **February 18, 2014** but not before **February 13, 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: January 14, 2014
Cathy Hamilton
Adjudicator