Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3545

Appeals PA13-437 & PA13-295-2

Ministry of the Environment and Climate Change

November 17, 2015

Summary: The Ministry of the Environment and Climate Change (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a third party's named wind energy project proposal. The ministry decided to grant access to some records or parts of records, and denied access to others based on the discretionary exemption in section 19(a) (solicitor-client privilege) of the *Act*. The ministry also withheld portions of some records based on sections 21(1)(f) (personal privacy) and 22(a) (available to the public). Both the requester and the third party appealed the ministry's decision on numerous grounds.

In this order, which addresses both appeals, the adjudicator upholds the ministry's application of section 19(a), and partially upholds the ministry's fee decision pursuant to section 57(1). The adjudicator also upholds the ministry's decision not to notify the third party under section 28(1)(a) in relation to certain records. The adjudicator orders the ministry to disclose certain records for which it issued an access decision, and to issue an access decision in relation to certain records for which it has not yet issued a decision. The adjudicator finds that one record is exempt under section 17(1) (third party information), and that the public interest override has not been established for that record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 19, 21(1), 23, 26, 28(1), 29(4) and 57(1); and R.R.O. 1990, Regulation 460, section 6.

Orders and Investigation Reports Considered: PO-1694-I.

Cases Considered: *Merck Frosst Canada Ltd. V Canada (Health),* 2012 SCC 3.

BACKGROUND:

[1] In Ontario, certain types of renewable energy projects (such as most solar, wind or bio-energy projects) require a Renewable Energy Approval (REA). The Ministry of the Environment and Climate Change (the ministry) issues REAs pursuant to Ontario Regulation 359/09, Renewable Energy Approvals under part V.0.1 of the *Environmental Protection Act.*[1]

[2] Applicants are generally required to:

- conduct site assessments and related studies;
- prepare detailed plans and reports; and
- consult with municipalities, Aboriginal communities and the public.[2]

[3] While renewable energy project developers must meet specific notification and consultation requirements, the ministry encourages applicants to work with local communities as much as possible. Community consultation often takes the form of public meetings.

[4] Renewable energy project developers are required to publically post a number of reports and other documentation prior to a project proponent's final public meeting, depending on the type of technology proposed and the class of facility. Class 4 wind turbine project developers must submit the following reports and documents:

- Project Description Report,
- Construction Plan Report,
- Design and Operations Report,
- Decommissioning Plan Report,
- Notice of Proposal,
- Meeting Notices,
- Consultation Report,
- Specifications Report, and
- Wind Farm Noise Report.[3]

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[1] R.S.O. 1990, c. E 19.
[2] See http://www.ontario.ca/page/renewable-energy-approvals.

[5] Upon receipt of a complete REA application, the ministry posts a proposal notice on the Environmental Registry indicating the application is under technical review. As noted by the ministry,

> This is an opportunity for community members to submit comments on the proposal directly to the ministry. The ministry takes all comments received during this period under consideration when making decisions on project applications.

[6] Following the public consultation period, the Director of the ministry may, if in his or her opinion it is in the public interest to do so, issue an REA, or refuse to issue an REA.[4]

OVERVIEW:

[7] These appeals concern a request made to the ministry – then called the Ministry of the Environment – under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a named Class 4 wind energy project (the wind farm) for the time period January 2009 to the date of the request (April 1, 2013).

[8] On July 26, 2013, the ministry issued a decision letter to the requester. In its letter the ministry advised that it would provide partial access to the requested records, with severances of some information pursuant to the exemptions at sections 19(a) (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*, and of other information as being non-responsive or duplicate material, or falling outside the requested time frame. The ministry also advised that as disclosure of some records may affect the interests of third parties, it would be providing notice to those parties in accordance with section 28(1)(a) of the *Act.* As a result, the ministry advised that its decision on access to those records would not be made before August 28, 2013.

[9] In addition, the ministry provided the following information regarding the fee for access:

> In accordance with Section 57 of the [*Act*], detailed below are our charges:
>
> | | |
> |---|---|
> | Search Time 2 hours @ $30/hour | $ 60.00 |
> | Copying 706 pages @ $0.20/page | $ 141.20 |

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[3] See https://dr6j45jk9xcmk.cloudfront.net/documents/915/3-3-1-guide-to-renewal-energy-approvals-en-pdf.pdf at page 213.
[4] *Environmental Protection Act* at section 47.5(1).

Preparation Time 0.25 hour @ $30/hour	$ 7.50
Delivery	$ 3.00
Total	**$ 211.70**

[10] On August 7, 2013, the ministry wrote to 11 third parties. In each of those letters, the ministry notified a third party of the requester's request and sought the third party's views on disclosure of records identified by the ministry as involving the interests of that third party. In response, ten third parties provided submissions to the ministry on disclosure of records identified in the ministry's notices to them.

[11] On September 9, 2013, the ministry issued a final decision to the requester, advising that it would provide partial access to the records, with severances of some names and personal telephone numbers pursuant to the exemption at section 21(1) of the *Act*, and of publicly-available information pursuant to the exemption at section 22(a). The ministry also claimed solicitor-client privilege to withhold some records pursuant to the exemption at section 19(a).

[12] In its decision letter, the ministry also explained that while various third parties had consented to the disclosure of records relating to them, one third party had not consented to disclosure of information sent in confidence. The ministry noted, however, that after considering whether the mandatory exemption at section 17(1) of the *Act* (third party information) applies to the records of the non-consenting third party, the ministry had determined that the test for application of the exemption had not been met. The ministry's decision, therefore, was to disclose these records to the requester. The ministry also advised the requester that the non-consenting third party could itself appeal the ministry's decision to this office, and, as a result, the records would not be disclosed to the requester until October 9, 2013.

[13] At the same time, the ministry communicated its decision on the application of section 17 in a separate letter to the non-consenting third party, which had consented to the disclosure of some, but not all, of the records on which it had been consulted.

[14] The non-consenting third party filed an appeal of the ministry's decision to this office, becoming the appellant (herein referred to as the third party) in Appeal PA13-437 (the third party appeal). In its appeal letter, the third party took the position that the section 17 exemption applies to information it seeks to have withheld from the requester. In addition, the requester filed his own appeal of the ministry's decision to withhold some records, becoming the appellant in the related Appeal PA13-295-2 (the requester appeal).

[15] Despite the ministry's decision to disclose some records, and the third party's consent to disclosure of certain of these, the ministry did not at this point release any

records to the requester. In response to a query from this office, the ministry wrote:

> This letter is further to your request that a partial disclosure package be forwarded to the requester ….
>
> As you know, the [ministry] has reviewed the representations of the various third parties and specifically [the third party], the developer of the wind project. [The third party] objects to the disclosure of most of the records that were supplied to the [ministry] in accordance with the provisions of Section 17 of the [*Act*]. The [ministry] issued its final decision on September 9, 2013 and a letter was sent to both the requester and the third party. The [ministry] received notice of [the third party's] appeal on October 10, 2013. Unfortunately, [the third party's] representations indicate that information that the [ministry] incorporated into its records should also be excluded from disclosure. Notice was not provided for these records.
>
> In order to protect the integrity of third party information and consistent with Order PO-1694-I, the [ministry] cannot provide partial release to the requester at this time without disclosing information that involves the interests of [the third party]. Once the [third party] appeal has concluded, the [ministry] will be in a position to release all non-exempt records to the requester.

[16] During the mediation stage of the appeal process, a mediator from this office had discussions with the requester, the third party, and the ministry, with a view to attempting resolution of the issues raised in both appeals.

[17] The requester advised the mediator that despite having paid the fee, the ministry had not released any of the following responsive records to him: 1) those records that had not been subject to third party notice, and to which the ministry had decided to grant access; and 2) those records that had been subject to third party notice, and for which the third party had consented to disclosure.

[18] In response, the ministry took the position that it could not release any records to the requester until the resolution of both appeals. The ministry elaborated on its position in a December 20, 2013 email to the mediator:

> The [ministry's] priority is to ensure utmost accuracy, thoroughness and consistency in decisions affecting access and protection of proprietary information. The ongoing FOI requests regarding [the wind farm] comprise a complex and sensitive collection of nearly 10,000 pages of records requiring thorough review and processing. Any partial disclosure will detract from the completeness and coherence of these FOI request files and increase the risk of error in our administration of the [*Act*]. An

> incomplete release may also inadvertently jeopardize the interests of affected parties. The [ministry's] position is, therefore, to maintain the practice of disclosing all relevant records as a single release package.
>
> The FOI Office will give notice for any remaining records for which [the third party] is entitled to receive notice … However, sending all records in the request file may affect the interests of other parties, including the requester, whose correspondence was not intended to be received by [the third party]. There is a danger that risking the interests of these other parties is comparable to risking the interests of [the third party], and thus contrary to the purpose of the [*Act*] and the FOI process.

[19] The requester did not accept the ministry's position and this office opened Appeal PA13-295-3 to address the ministry's failure to disclose records. Only those records that had been subject to third party notice and for which the third party had consented to disclosure were at issue in Appeal PA13-295-3. The ministry subsequently disclosed those records to the requester, and, as a result, Appeal PA13-295-3 was closed.

[20] During mediation, the ministry also reviewed those records for which third party notice had not been given and that the ministry had decided to disclose to the requester. The ministry determined that third party notice should be given for certain additional records. By letter dated January 22, 2014, the ministry notified the third party of these additional records and sought its views on disclosure. The third party consented to partial disclosure of those records.

[21] On February 24, 2014, the ministry issued letters to the requester and to the third party, advising of its decision to disclose to the requester all the additional records for which third party notice was given on January 22, 2014. During subsequent discussions with the mediator, the ministry confirmed that it would release to the requester those additional records for which notice had been given and for which the third party had provided consent – namely, pages 72-73, 196, 208, 646-650, 885, 910 and 918-923. As of the close of the mediation stage, these pages had not yet been disclosed to the requester. Accordingly, disclosure of these pages is an issue in the requester's appeal, PA13-295-2.

[22] With its consent, the mediator shared the ministry's index of records with the requester and the third party.

[23] After reviewing the index, the third party advised the mediator that it may have an interest in records on which it had not been consulted and that the ministry has decided to disclose to the requester. The third party takes the position that the ministry should have notified it of these records and sought its position prior to issuing a decision to disclose the records. Therefore, the issue of notice arises in the third party appeal, PA13-437. The third party claims the exemption at section 17(1) (third party

information) in relation to those records for which third party notice was given. It also claims the exemption at section 21 (personal privacy) in relation to a specific portion of information.

[24] After reviewing the index, the requester narrowed the records to which he continues to seek access. In particular, the requester no longer takes issue with the ministry's reliance on section 22 (publicly available) and its claim of non-responsiveness to withhold certain pages. As a result, those pages are no longer at issue.

[25] The requester continues to seek access to pages to which the ministry has denied access on the basis of the exemption at section 19(a) (solicitor-client privilege). The requester also takes issue with the ministry's failure to disclose pages to which it has granted access, and to issue a decision on access on other pages for which the ministry has withdrawn its claim of non-responsiveness. He also appeals the reasonableness of the fee issued by the ministry, and seeks confirmation regarding the applicability of the ministry and third party's claims under section 21 (personal privacy) in relation to two specific portions of information.

[26] As a number of issues remained outstanding at the close of mediation, the appeals were transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. I am the adjudicator in these appeals.

[27] In regard to the requester appeal, I sought and received representations from the ministry and the requester. The ministry also provided supplementary representations on the issue of failure to disclose.

[28] Regarding the third party appeal, I sought and received representations from the third party, the requester and the ministry. In its representations, the ministry notes that it has decided to provide the third party with notice for the records at pages 197, 670, 688[5] and 691-692. The ministry provided the third party with notice of these records on May 4, 2015. Although the third party referenced having received notice of these records in its reply representations, and has provided this office with proposed redactions for portions of pages 197 and 688 under sections 17 and 21, the ministry has not yet provided the requester with an access decision. Additionally, the third party consented to the disclosure of pages 516-517, 651, 687 and 154.

[29] Although the requester appeal and the third party appeal arise out of the same request and involve the same parties, I initially decided to deal with the two appeals separately for the purpose of seeking and exchanging representations, as each appeal contains distinct issues. However, I address all of the outstanding issues in both

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[5] Since receiving these representations, the IPC was advised by the requester that he has obtained court records that overlap with some of the records at issue in his appeals. One of the records in his possession is page 688. I bring this to the third party and the ministry's attention as it will have a bearing on the ministry's access decision.

appeals in this single order.

[30] As of the date of this order, the third party's REA application for the wind farm is still under "technical review" by the ministry.

RECORDS:

[31] The records at issue in the requester and third party appeals consist of correspondence, emails, email attachments, reports and a power point presentation slide deck.

ISSUES:

PA13-295-2 – Requester appeal

A. Was the ministry justified in not disclosing the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923 for which it issued a decision to grant access*?*

B. Has the ministry failed to issue a decision on access within the legislated time frame regarding the records at pages 197, 670, 688-690 and 691-692?

C. Does the discretionary exemption at section 19 apply to the records at pages 95-104, 710-717, 796, 860 and 871?

D. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

E. Does the mandatory exemption at section 21(1) apply to a portion of the information at page 860?

F. Should the fee be upheld?

PA13-437 – Third party appeal

A. Does the mandatory exemption at section 17(1) apply to portions of pages 194-195, 303-304, 452-467, and all of pages 155-157, 217-244, 688 and 701-706?

B. Did the ministry adhere to the notice requirements in section 28(1) of the *Act* regarding the records at pages 3-59, 88-94, 146-153, 198-207, 209-216, 263, 446-451, 685-686, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926 and 928-930?

C. Is there a compelling public interest in the disclosure of the record at pages 194-195 that clearly outweighs the purpose of the section 17 exemption?

D. Is the information claimed as exempt under section 21(1) at page 195 "personal information" within the meaning of the *Act*?

DISCUSSION:

PA13-295-2 – Requester appeal

FAILURE TO DISCLOSE

A. Was the ministry justified in not disclosing the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923 for which it issued a decision to grant access?

[32] Section 26 of the *Act* sets out the obligations of an institution in responding to requests under the *Act*. It reads, in part:

> Where a person requests access to a record, the head of the institution to which the request is made … shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
> >
> > (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[33] The ministry has not disclosed to the requester the above-noted records to which it decided to grant access in a February 24, 2014 letter. The ministry provided the third party with notice pursuant to section 28 in regard to those records on January 22, 2014, and the third party consented to disclosure. During mediation, the ministry confirmed its intention to provide the requester with these records.

Representations

[34] The ministry submits that the requester and third party appeals, alongside a number of related appeals, "comprise a complex and sensitive collection of nearly 10,000 pages of records requiring thorough review and processing." The ministry claims that "any partial disclosure would detract from the completeness and coherence of these FOI request files and increase the risk of error in [the ministry's] administration of

the Act." The ministry also states that "incomplete release could inadvertently jeopardize the interests of affected parties."

[35] The ministry submits that the case management system used to process access requests can only release records to a requester in a single package, and that once a record is entered into the system as "withheld", it is not possible to change the record's status within the system. The ministry's explanation is as follows:

> This system is able to record the Ministry's decision on individual pages of records complete with the relevant sections of the Act, and to release those records as a single package at the time of disclosure based on those recorded dispositions (i.e. only pages marked as full or partial release are exported from the system, while withheld pages are not).
>
> [….]
>
> When the Ministry receives third party submissions in response to a consultation, the third party's views are filed and recorded manually. As the status of each record in our system must accurately record the Ministry's (or IPC's) final disposition on disclosure, there is no electronic mechanism for recording views submitted by third parties that are independent of Ministry decisions. While the Ministry considers third party views carefully under Section 17, it remains important for the Ministry's application of the Act not to be confused with proposed redactions submitted by third parties, and for this information to remain protected until the resolution of the third party appeal.
>
> Given the constraints of our case management system, the high number of pages in these requests, the complexity of the records, and the Ministry's overall request volume, the degree of manual intervention required for a single partial release process poses considerable risk to third party interests…. As this issue of partial and final disclosure is relevant to several of the [wind farm] files, the resources required to comply with multiple 'Failure to Disclose' appeals will once again introduce potential for error with respect to the protection of proprietary information. We therefore respectfully request that, with respect to the files at issue, the Ministry be permitted to disclose the records as a single release package pending the outcome of your disposition in the third party appeals.

[36] The requester submits that the ministry's rationale for withholding records for which the affected party has consented to disclosure is not in accordance with the *Act.* Specifically, the requester states, "[t]he purposes and related provisions of the Act make no provision for the circumstance that the [ministry] has used to withhold the release of documents to me, which release [sic] is in accordance with the Act." The

requester submits that there is no basis in the *Act* for the ministry to rely on issues of record management to justify delay in disclosure. Lastly, he states that the delay in disclosure will result in "irreparable harm" to him and his family.

Analysis

[37] Section 26 requires the issuance of a decision *and* the disclosure of records to which access is to be given, subject to the provisions listed, including sections 27 (time extension) and 28 (third party notice). In regard to the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923, the ministry consulted with the third party, and confirmed that the third party provided its consent to disclose these records in its decision letter of February 24, 2014.

[38] The request giving rise to these appeals is one of many the requester has made to the ministry, covering the same types of records for successive time periods. These requests have in turn given rise to a number of appeals. The ministry's representations suggest that it seeks to defer the release of any additional records to the requester until all of these appeals have been resolved.

[39] If this is indeed the ministry's position, I do not accept it. I recognize the request covers a large number of records and, as well, that the requester has made other requests that relate to a similar volume of records. Section 27 of the *Act* permits reasonable time extensions for responding to requests that: cover large numbers of records; necessitate searches through a large number of records; or where meeting the statutory time limit would unreasonably interfere with the operations of institutions. It also permits such extensions when consultations with a person outside the institution necessitate more time to respond.

[40] Further, section 28 of the *Act* requires a head to give written notice to affected third parties in the circumstances described, and establishes time limits for that process. Sections 28(7) to (9), in particular, address the requirement to issue a decision within a specified time after giving notice to a third party. Unlike the circumstance where no third party is involved, and disclosure of the records accompanies the decision, section 28(9) allows for disclosure to be delayed so that the third party may invoke its right to appeal a decision to disclose records in which it has an interest.

[41] In this case, the request was made on April 1, 2013, and the ministry issued its final decision on access on September 9, 2013. The ministry thus issued its decision within an extended time limit. The ministry's position is, in effect, that it requires a second time extension, following its decision, to effect disclosure of the records. The second time extension is in addition to the delayed disclosure provided for in section 28(9), described above. Further, the ministry wishes to apply this additional time extension to all of the requester's related requests.

[42] I do not find this second extension to be justified. First, it is not clear to me that

the *Act* contemplates such an extension, following the issuance of a decision under section 28(7). The section 28 process for responding to an access decision that involves the interests of a third party incorporates the possibility of a time extension, but only up to the time of giving notice: section 28(3). The rest of its provisions, setting time limits for making the access decision and giving access, do not suggest the possibility of further extensions.

[43] On a plain reading of those provisions, I find that they do not allow for two types of time extensions in the same matter, one before the decision and the other after. I also doubt that the Legislature could have intended to allow for these two types of extensions, both giving rise to a right to appeal to this office, and thus leading to a more cumbersome and prolonged process. It took great care in providing a detailed road-map for responding to requests, both with and without interested third parties. If it had wished to allow for an additional time extension for disclosure following a decision, it could have included such a provision.

[44] The ministry has identified some practical and logistical issues in giving timely access following its decision. While I appreciate that voluminous records present legitimate obstacles, the ministry had the opportunity to take this into account, and did, in the time before making its decision. Once it has decided to grant access, and subject to any third party appeal, it is obliged to provide the records to the requester. It may be that this requires it to manually review the records in order to assemble those the third party gave consent to disclose, and those not covered by any third party appeal. But it is reasonable to assume at least some of this work was required in order to arrive at its access decision in any event.

[45] While I appreciate the shortcomings in the ministry's case management system in facilitating disclosure of records following confirmation of a third party's consent, I do not find that this is a valid reason to delay the requester's access under the *Act.* Having paid the fee and received a decision on access, he was entitled to receive the records not subject to these appeals.

[46] As noted above in the "Background" section of this Order, the requester filed Appeal PA13-295-3 in response to the ministry's refusal to release certain records to the requester following receipt of third party consent. However, the ministry subsequently disclosed the records at issue to the requester during mediation, and the appeal was closed. The ministry's disclosure of the records at issue in PA13-295-3 to the requester demonstrates that the ministry is not incapable of effecting partial disclosure.

[47] I do not put much weight on the ministry's submission about the "considerable risk" associated with partial disclosure. It demonstrates that the ministry needs to take care in preparing its disclosure; it does not suggest that the answer lies in delaying disclosure to the requester. The requester should not have to bear the burden created by the ministry's current case management system.

[48] Accordingly, I find that the ministry is required to provide the requester with partial disclosure of the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923, for which the affected party has provided consent.

DEEMED REFUSAL

B. Has the ministry failed to issue a decision on access within the legislated time frame regarding the records at pages 197, 670, 688-690 and 691-692?

[49] Section 26 of the *Act* states that the head of an institution shall, subject to sections 27 (time extension), 28 (third party notice) and 57 (payment of fees), give written notice of its decision on an access request within 30 days after the request is received.

[50] Where a head fails to issue a decision on access within the legislated time frame, section 29(4) of the *Act* applies. This section states:

> A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[51] During the mediation stage of the requester appeal, the ministry withdrew its claim that certain records are non-responsive to the request, and indicated its intention to issue a decision on pages 689 and 690 after notifying the affected party. The ministry has not yet completed this process.

[52] During the adjudication stage of the requester appeal, the ministry provided the third party with notice for the records at pages 197, 670, 688 and 691-692. Although the third party has provided the ministry with proposed redactions for portions of those records pursuant to section 17(1), the ministry has not yet issued an access decision to the requester.

Representations

[53] The ministry acknowledges that the records at pages 689-690 are covered by the request, and therefore would require notice to the affected party under section 28(1) of the *Act.* In its representations, the ministry stated that it would issue an updated decision to the requester in regard to these records.

[54] In its representations for the third party appeal, the ministry notes that it has decided to provide the third party with notice regarding the records at pages 197, 670, 688 and 691-692. The ministry subsequently provided this office with a copy of the notification letter sent to the third party, and the third party has provided this office with a copy of its response to the ministry.

[55] The requester did not make representations on the deemed refusal issue. However, the requester generally submits that the ministry's delay in disclosing responsive records is not in accordance with the *Act.*

Analysis

[56] As the ministry acknowledged that the records at pages 197, 670, 688-690 and 691-692 are responsive to the request, and the ministry did not issue a decision to the requester within the 30 day statutory requirement pursuant to section 26 of the *Act,* I find the ministry to be in a deemed refusal situation pursuant to section 29(4) of the *Act.* I also find that there have been no exceptional circumstances present to justify the delay.

[57] Accordingly, I will order the ministry to issue a final access decision to the requester in relation to those pages.

SOLICITOR-CLIENT PRIVILEGE

C. Does the discretionary exemption at section 19 apply to the records at pages 95-104, 710-717, 796, 860 and 871?

[58] Section 19 states as follows, in part:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) That was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation […]

[59] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[60] The ministry relies on both the common law privilege at Branch 1 and on the Branch 2 statutory privilege to exempt the records at pages 95-104, 710-717, 796, 860 and 871. First, I will consider whether these records are subject to the common law privilege at Branch 1.

Branch 1: common law privilege

[61] At common law, solicitor-client privilege encompasses two types of privilege: (i)

solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[62] 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.[6] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[7] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[8]

[63] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[9]

[64] 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.[10] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[11]

Litigation privilege

[65] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[12] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[13] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[14] The litigation must be ongoing or reasonably contemplated.[15]

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[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] Orders PO-2441, MO-2166 and MO-1925.
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[11] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[12] *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).
[13] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[14] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[15] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

Loss of privilege

Waiver

[66] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[16]

[67] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[17]

[68] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

Termination of litigation

[69] Common law litigation privilege generally comes to an end with the termination of litigation.[20]

Representations

[70] In the non-confidential portions of its representations, the ministry notes that solicitor-client privilege "has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."[21] The ministry submits that a client's ability to confide in his or her lawyer on a legal matter, without reservation, has been maintained in several orders of this office, and on judicial review.

[71] The ministry states that,

> When one Ministry staff person substantively refers to or passes on the legal advice received by another staff member of the Environmental Approvals Access and Service Integration Branch or another program area

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[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[18] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[20] *Blank v. Canada (Minister of Justice)*, cited above.
[21] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at 53.

> within the Ministry, the "continuum of communications" between a solicitor and client is maintained (please refer to IPC Order PO-3150).

[72] The ministry references the records at pages 717 and 796 as examples of this type of communication.

[73] The ministry submits that its legal counsel are "in a position to provide legal advice to all branches and offices in the Ministry." Consequently, the ministry claims that,

> … all Ministry staff members are the expressed clients of Ministry legal counsel, and the communications exchanged to and from these parties, including all legal analysis, advice and information must be considered in the context of a solicitor-client relationship… so long as the communication was made for the dominant purpose of obtaining legal advice (please refer to IPC Order PO-1663).

[74] In regard to facts and status updates that have been sent to ministry counsel in which no advice or review has been explicitly requested, the ministry submits that "this information has been provided as required background to assist ongoing and future legal review related to the project as a continuum of communication."

[75] The ministry provided the following non-confidential representations regarding the records for which it has claimed solicitor-client privilege:

- Pages 710-716 contain a legal opinion to the Director of the Environmental Approvals Access and Service Integration Branch of the ministry, and reference ongoing litigation;
- Page 717 is an email sent to ministry legal counsel, and the attachment reveals the legal analysis contained in pages 710-716;
- Page 796 is an email sent to ministry legal counsel from the Director of the Environmental Approvals Access and Service Integration Branch, and references the ongoing litigation mentioned above;
- Page 860 is an email exchanged between staff of the Environmental Approvals Access and Service Integration Branch, which was copied to ministry legal counsel; and,
- Page 871 is a request for legal review sent from the ministry's Environmental Approvals Access and Service Integration Branch to ministry legal counsel and another ministry staff member.

[76] The ministry also made confidential representations in relation to a number of records, including the records at pages 95-104.

[77] Although he made no submissions on the specific issue of solicitor-client privilege, the requester generally submits that the subject matter of the records at issue, as outlined in the Index,

> … does not suggest any extraordinary reasons for confidentiality. The Ministry is the **approval agency** not the legal advisor or confidant to [the third party]. The [third party is] well supported by the professions – legal, planning engineering etc., who prepare the documentation in accordance with the regulations, that are posted on the Government of Ontario website.[22]

Analysis

[78] The records at pages 95-104 and 710-716 convey legal advice from a ministry lawyer to the Director of the Environmental Approvals Access and Service Integration Branch. These records would reveal the substance of communications between a solicitor and an individual comprising "the client", made for the purpose of giving legal advice. Accordingly, I have no difficulty finding that these records qualify for exemption under section 19(a).

[79] The record at page 717 consists of an email sent from ministry staff to a ministry lawyer. While the body of the email contains no text, I find that the subject line of the email and the name of the attachment (which is a copy of the record at pages 95-104) would reveal the substance of communications between a solicitor and client, made for the purpose of obtaining legal advice. Consequently, this record qualifies for exemption under section 19(a).

[80] The records at pages 796 and 871 consist of an email sent from the Director of the Environmental Approvals Access and Service Integration Branch to a ministry lawyer, in addition to other ministry staff. I find that these records contain communications between a solicitor and client, made for the purpose of obtaining legal advice. Therefore, these records qualify for exemption under section 19(a).

[81] The record at page 860 consists of an email sent from a ministry staff member to a ministry lawyer and another ministry staff member. As this record contains communications between a solicitor and a client, made for the purpose of obtaining legal advice, it also qualifies for exemption under section 19(a).

[82] I considered the requester's submissions and do not find them persuasive. The ministry's claim of privilege is not based on its relationship with the third party but, rather, on the solicitor-client relationship between ministry staff and ministry lawyers, about which there is no doubt.

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[22] Emphasis in original.

[83] There is no evidence that solicitor-client privilege in relation to the records at issue has been waived.

[84] As I find the records at pages 95-104, 710-716, 717, 796, 860 and 871 qualify for exemption under the common law privilege at Branch 1, I need not consider the application of the Branch 2 statutory privilege.

EXERCISE OF DISCRETION

D. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[85] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to exercise its discretion.

[86] In addition, this office may find that the institution erred in exercising its discretion where, for example,

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

[87] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

Relevant considerations

[88] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- 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

[23] Order MO-1573.
[24] Section 54(2).
[25] Orders P-344 and MO-1573.

  - exemptions from the right of access should be limited and specific
  - 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
- the historic practice of the institution with respect to similar information.

Representations

[89] Regarding the records at pages 95-104, 710-716, 717 and 871, the ministry submits that the Environmental Approvals Access and Service Integration Branch is currently reviewing the affected party's completed application for the wind farm project.[26]

[90] The ministry makes the following submissions in regard to the above-noted records:

> The Ministry has chosen to exercise its discretion to respect the confidentiality of the solicitor-client privilege while the REA review and decision-making process is ongoing.
>
> The Ministry notes that the concerns discussed in these records are current and under debate within the Ministry, and remain at issue between the [third party] and concerned stakeholders…

[26] The ministry's representations indicate that the deadline to issue an approval decision is October 2014. However, this deadline has lapsed, and the ministry's Renewable Energy Projects Listing indicates that the project is still under "technical review": http://www.ontario.ca/environment-and-energy/renewable-energy-projects-listing?drpType=0&drpStatus=0&drpLocation=0.

> To disclose these records presently would compromise the integrity of the solicitor-client relationship and its role informing the discretion of the REA decision-making process with advice and analysis.

[91] The ministry also submits that it has exercised its discretion to apply section 19 to the record at page 796 "[d]ue to the ongoing sensitivity of these communications in relation to the litigation described above." This litigation was outlined in more detail in confidential portions of the ministry's representations.

[92] The ministry made confidential submissions regarding its exercise of discretion to apply section 19 to the record at page 860.

[93] The requester did not provide representations on this issue.

Analysis

[94] Having regard to the submissions before me, I am satisfied that the ministry has not erred in the exercise of its discretion. I find that the ministry did not act in bad faith or for an improper purpose. I am also satisfied that the ministry did not take into account irrelevant considerations or failed to take into account relevant considerations.

[95] Accordingly, I find that the ministry properly exercised its discretion in applying the section 19 exemption, and I uphold its decision to withhold the records at issue pursuant to this section.

PERSONAL PRIVACY

E. Does the mandatory exemption at section 21(1) apply to a portion of the information at page 860?

[96] At mediation, the requester agreed to the ministry's redactions of personal information. However, in his representations, the requester requests confirmation from this office that certain information at page 860 is exempt under section 21(1).

[97] As I uphold the ministry's decision to exempt the record at page 860 from disclosure under section 19, and uphold the ministry's exercise of discretion under section 19, I need not consider whether the personal privacy exemption applies to this information.

FEE

F. Should the fee be upheld?

[98] The requester advised the mediator that he takes issue with the ministry's fee,

which he believes is excessive for various reasons including the fact that he will be paying for and receiving the same records in more than one request, and that he wishes to receive the records electronically and not pay the photocopying fee.

[99] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[100] More specific provisions regarding fees are found in section 6 of Regulation 460. That section reads:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Representations and analysis

[101] As noted above, the requester believes the ministry's fee is excessive, as he will be paying for and receiving the same records in more than one request, and he wishes to receive the records electronically and not pay the photocopying fee.

Search fee

[102] The ministry makes the following submissions in relation to the $60.00 fee charged:

> [It] was calculated cumulatively based on the individual search times recorded from four branches of the Ministry: the Environmental Approvals Branch, Environmental Approvals Access and Service Integration Branch, the Environmental Programs Division, and the Deputy Minister's Office. In accordance with section 6 of Regulation 460, the search times recorded were based on the number of hours spent manually locating responsive records in file folders related to the [wind farm], taking into account how these records were stored and maintained.

[103] The ministry submits that the Environmental Approvals Branch and the Environmental Approvals Access and Service Integration Branch spent a total of five hours conducting a manual search of their records. This included selecting soft copies of emails and "pulling hard copy reports, letters and other documentation from files to be scanned for FOI review."

[104] The ministry also states that the Environmental Programs Division spent approximately two hours conducting an electronic search of its records, using various key word searches to locate responsive records in soft copy file folders.

[105] The ministry notes that it reduced the amount of chargeable search time from 7 hours to two hours to reduce the margin of error and "ensure that the records remained accessible" for the requester.

[106] I find that the $60.00 fee charged for the time spent searching the above-noted ministry branches is reasonable. While portions of the request may overlap with other requests made by the requester, this circumstance alone does not warrant a reduction of the search fees in the present appeal. As the requester did not reduce the scope of his request to account for time periods that are the subject of another access request, I find that the ministry reasonably conducted a search for records responsive to the whole time period stated in the request.

[107] In the circumstances, I am satisfied that the search time has been calculated in accordance with the requirements of the *Act.* Accordingly, I find that this aspect of the ministry's search fee is reasonable, and uphold the ministry's fee of $60.00 for the search time associated with responding to this request.

Copying

[108] The ministry submits that its copying fee of $141.20 was "based on the number of releasable pages identified in full or in part after a review of the total number of records retrieved from each responsive program area."

[109] Of the 939 pages of responsive records, the ministry withheld 136 pages in full under sections 19(1), 21(1) and 22(a). The ministry also identified 42 pages as duplicates and 57 pages as not relevant to the scope of the request. The ministry acknowledges having identified 706 pages in its decision letter to the requester, rather than the actual 704 pages that were "releasable". However, the ministry notes that the significant reduction in the cost of the preparation fees compensates for the discrepancy in the page numbers.

[110] Although the requester's preference for electronic access to the records on CD-ROM was noted in the Mediator's Report and the Notice of Inquiry sent to the ministry by this office, the ministry does not make any submissions on this issue. As noted above in section 6.1 part 2 of Regulation 460, an institution may charge a fee of $10.00 for records provided electronically on CD-ROM. Accordingly, I do not uphold the ministry's photocopying fee of $141.20, and find that the ministry is entitled to charge the requester $10.00 for providing an electronic copy of the records on a CD-ROM.

Preparation

[111] The ministry submits that IPC Orders MO-1169, PO-1721 and PO-1834 established a permitted preparation time of two minutes per page. As the ministry identified 87 pages of records that required "partial severing", the ministry notes that it could have charged for 174 minutes of preparation at a cost of $87.00. However, the ministry charged for 15 minutes of preparation at a cost of $7.50.

[112] I find that the $7.50 fee charged for the time spent preparing the 87 pages of records that required partial severing is reasonable and was calculated in accordance with the requirements of the *Act.* Therefore, I hold up the ministry's fee of $7.50 for the time spent preparing the records for disclosure.

Shipping

[113] The ministry submits that the $3.00 fee charged to the requester for the delivery of "final release package" is based on a $4.35 quote from the ministry's shipping vendor, Purolator. The ministry provided this office with a copy of the $4.35 shipping quote. The ministry states that, "[t]he remainder of releasable records will be shipping at a cost consistent with this estimate subsequent to the resolution of appeals PA13-295-2 and PA13-437."

[114] I find that the $3.00 fee charged for shipping is in accordance with the *Act*, and I uphold this shipping fee.

Fee decision summary

[115] In summary, I find that the ministry is entitled to charge the requester:

- $60.00 for searching for responsive records,
- $10.00 for providing an electronic copy of the records on a CD-ROM,
- $7.50 for preparation time, and
- $3.00 for delivery.

PA13-437 – Third party appeal

THIRD PARTY INFORMATION

G. Does the mandatory exemption at section 17(1) apply to portions of pages 194-195, 303-304, 452-467, and all of pages 155-157, 217-244 and 701-706?

[116] As the third party consented to disclosure of the records at pages 154, 516-517, 651 and 687 in its reply representations, it is not necessary to discuss them here, and I will order their disclosure.

[117] Section 17(1) states in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[118] Section 17(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[27] 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.[28]

[119] 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

Representations

[120] The third party provided confidential and non-confidential representations on the application of section 17(1).

[121] The third party submits that it only generates and supplies information to institutions, such as the ministry, to facilitate its ultimate objective of selling energy from its wind projects. It states that since the records at issue bear upon the commercial viability of the wind farm, the records constitute commercial information. The third party submits that the redacted information is not publically available.

[122] The third party also submits that the records constitute technical information, as the records were prepared by an aviation expert, and contain "operational information" pertaining to the project and a nearby airport, "making specific findings with respect to lighting and zoning requirements, limitations on the height of structures, and the takeoff and landing of planes, among other things."

[123] In its representations, the ministry notes that it agreed with the third party that the information sent to the third party for notification was the result of technical or scientific study.

[124] The requester generally questions whether the records constitute commercial or

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[27] *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.) [*Boeing Co.*].
[28] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

technical information. He also makes a number of other comments which do not directly relate to the type of information, such as the validity of the opinion expressed in reports of the third party's consultant.

Analysis

[125] This office has defined scientific, technical and commercial information as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[29]
>
> *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.[30]
>
> *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.[31] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[32]

[126] I adopt these definitions for the purpose of these appeals.

[127] I find that the records at issue on pages 155-157, 194-195, 217-244, 303-304, 452-467, and 701-706 consist of, or refer to, either technical information prepared by an expert retained by the third party relating to the potential operation of the proposed wind farm alongside a nearby airport, or commercial information relating to the third party's proposal to build the wind farm. Therefore, part 1 of the test under section 17(1) has been met for these records.

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[29] Order PO-2010.
[30] Order PO-2010.
[31] Order PO-2010.
[32] Order P-1621.

Part 2: supplied in confidence

[128] I will first consider whether the records at issue at pages 155-157, 194-195, 217-244, 303-304, 452-467 and 701-706 were supplied by the third party to the ministry. If so, I will then consider whether they were supplied in confidence.

Supplied

[129] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[33]

[130] 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.[34]

Representations

[131] The third party submits that the information at issue was supplied to the ministry by the third party "in the course of ongoing correspondence, mainly in the form of in-person meetings, private letters and emails."

[132] In its representations, the ministry notes that it agrees with the third party that the information at issue was supplied to the ministry in confidence either implicitly or explicitly.

[133] The requester's representations do not address whether the information was supplied to the ministry.

Analysis

[134] The records consist of email chains, letters, reports and slides from a presentation. Based on my review of the information at issue in the records, I find that it was all either supplied directly by the third party to the ministry, or that disclosure would reveal information supplied by the third party to the ministry.

[135] I will now consider whether the information at issue in the records has been supplied to the ministry in confidence.

In confidence

[136] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was

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[33] Order MO-1706.
[34] Orders PO-2020 and PO-2043.

provided. This expectation must have an objective basis.[35]

[137] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[36]

Representations

[138] The third party submits that it had a reasonable expectation that the records, "which were supplied to the ministry in response to aviation issues outside of the established REA application process, would remain confidential." The third party relies on an Alberta Court of Appeal decision, *Imperial Oil Ltd. v Calgary (City)*,[37] discussing the importance of a party's subjective expectation of confidentiality under the Alberta legislation.

[139] The third party also notes that its expectation that the records were supplied in confidence was subjectively held and objectively reasonable as numerous documents were marked as "confidential" and the records were supplied to the ministry "pursuant to a working relationship in which the correspondence was expected to remain confidential."

[140] The third party distinguishes between the public documentation required under the legislation to have a complete REA application, and those "supplementary documents" supplied to the ministry during an ongoing dialogue to "address other matters." It claims that the records at issue constitute the latter type of document. In light of the media attention and public opposition garnered by the wind farm, the third party submits that it reasonably expected that the documents submitted would be kept confidential.

[141] As noted above, the ministry agrees with the third party that the information at issue was supplied to the ministry in confidence.

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[35] Order PO-2020.
[36] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[37] 2014 ABCA 231 [*Imperial Oil*].

[142] The requester submits that the third party should have expected that all emails and letters to the ministry are subject to the *Act*, and disclosure should be expected. The requester also notes that Ontarians have the right of "vocal resistance" in relation to projects that are provincially regulated.

Analysis

[143] I adopt the reasoning applied by this office in previous orders, which have determined that the party resisting disclosure must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. I agree with the principle expressed in those orders that this expectation must have an objective basis.[38]

[144] While a portion of the record at pages 452-467 is marked "confidential", the remaining records at issue are not similarly marked. I also note that the record at pages 155-157 is an attachment to a letter (the record at page 154) which was copied to a Member of Parliament, a Member of Provincial Parliament and two provincial Ministers. Furthermore, the record at pages 155-157 is substantially similar to the record at pages 516-517, for which the third party has agreed to disclosure.

[145] As the third party shared the record at pages 155-157 with numerous parties outside of the ministry's REA process, I find that the third party did not have a reasonable expectation of confidence at the time the information was provided to the ministry. Accordingly, I find that this record does not meet part 2 of the test.

[146] As the record at pages 194-195 is the third party's preliminary view on certain aspects of the regulatory requirements applicable to the proposal, I find that that there is a sufficient objective basis on which to conclude that the third party had a reasonable expectation of confidentiality at the time the information was provided.

[147] Although the third party claims that the remaining information at issue was submitted to the ministry confidentially, it is not clear to me, in light of other information the third party has agreed to disclose to the requester, and publically available information on the third party's website, whether the remaining records at issue constitute the type of information for which it would be reasonable to assume the third party had an implicit expectation of confidentiality. However, due to my determination on part 3 of the section 17(1) test, I find that it is not necessary for me to make a finding with respect to whether the remaining information at issue in these records was supplied "in confidence" by the third party.

Part 3: harms

[148] The party resisting disclosure must provide detailed and convincing evidence

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[38] See Orders PO-2020, PO-2043, PO-2371 and PO-2497.

about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[39]

[149] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[40]

Representations

[150] The third party submits that "[t]here has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario, as well as against the [third party's] projects in particular." The third party references lawsuits filed against it and landowners who have entered into commercial agreements with it, in addition to numerous freedom of information requests, as examples of anti-wind activists' attempts to "thwart wind energy projects."

[151] The third party claims that disclosure of the remaining information at issue, such as the third party's rebuttal to allegations in the media, could be exploited by anti-wind activists and would present a legitimate risk to the advancement of the wind farm. The third party references previous litigation and appeals to the Environmental Review Tribunal (ERT) as support for its argument that disclosure of the information at issue could prejudice the third party in future proceedings that are likely to arise as the development of the wind farm progresses.

[152] In response to the third party's representations, the ministry submits that the third party has not provided sufficiently detailed and convincing evidence that demonstrates a reasonable link between the release of the information at issue and the reasonable expectation of harm in the form of litigation, project delays, or any other harm referenced by the third party. The ministry also notes that "stakeholders and members of the public are entitled to express concern about REA projects", and that "[i]t has not been demonstrated that these communications are prejudicial to the [third] party under the Act."

[153] The requester generally submits that the third party's arguments are "without merit".

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[39] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[40] Order PO-2435.

Analysis

[154] Based on my review of the records and the representations, including the third party's confidential representations, I find that, with one exception, the third party has failed to provide evidence establishing a reasonable expectation of harm from disclosure of the information at issue.

[155] As noted above, the record at pages 194-195 is a letter from the third party to the ministry outlining the third party's preliminary views on certain aspects of the regulatory requirements applicable to its wind farm project proposal. This letter was sent to the ministry in the early stage of the REA process, before more public positions were taken by the third party. I find that disclosure of this record could reasonably be expected to prejudice the third party's competitive position as a wind farm project proponent, both in relation to the third party's ongoing REA with the ministry, and in any future applications. As all three elements of the section 17(1) exemption have been met, I do not uphold the ministry's decision to disclose this record.

[156] I find that the third party has failed to meet the harms portion of the test in relation to the remaining records at pages 217-244, 303-304, 452-467 and 701-706. These records consist of correspondence between the third party and the ministry and the slides from a power point presentation given by the third party to the ministry. The records discuss general details of the third party's proposal and outline stakeholders' and community members' objections to the third party's wind farm proposal. Substantially similar information is publically available on the third party's website and elsewhere, including in the third party's "Consultation Report" and its consultant's assessments.

[157] The third party's assertion that, in light of previous litigation, access to information requests and ERT appeals, the information at issue "could be exploited by anti-wind activists", does not establish a reasonable expectation of harm. The fact that stakeholders and members of the public have expressed concern over the third party's wind farm projects does not in and of itself establish a reasonable expectation of harm. I fail to see how the specific information in these records could reasonably be expected to be used in a manner leading to the harms described in section 17(1). The public availability of substantially similar information leads me to doubt the assertion of harm, in relation to the disclosure of these records.

[158] I find, therefore, that part 3 of the test for exemption has not been met for the records at pages 217-244, 303-304, 452-467 and 701-706. Accordingly, I will order disclosure of these records, in addition to the record at pages 155-157.

NOTICE

H. Did the ministry adhere to the notice requirements in section 28(1) of the *Act* regarding the records at pages 3-59, 88-94, 146-153, 198-207, 209-216, 263, 446-451, 685-686, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926, 928-930?

[159] Section 28(1) sets out an institution's obligation under the *Act* to provide notice of an access request, in the following circumstances:

> Before a head grants a request for access to a record,
>
> > (a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information; or
> >
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[160] In order to discharge his or her responsibilities under section 28(1)(a), a head must provide notice with respect to any responsive records that he or she has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information, in this case, the third party.

Representations

[161] The third party submits that the *Act* imposes a duty on the head to provide notice of a request to the person to whom the information relates. Further, the third party states that since the request is for records relating to the wind farm from January 2009 to April 1, 2013, including records that may have been submitted or produced on behalf of the third party, such as consultant's reports, it is evident that such records relate to the third party as it is the proponent of the project.

[162] The third party states that if the ministry had any doubt as to whether the above-noted records relate to the third party, the ministry should have acted out of an abundance of caution and provided notice so the third party could have the opportunity to review the records and determine whether they are confidential.

[163] The third party notes that,

> Considering that the purpose of the *Act* is to balance the interest of the public to have access to information held by institutions and the interests of third parties to protect certain information from disclosure, it is important [that] the notice requirements in the *Act* [are] strictly adhered to by institutions. Those affected third parties must be given prompt notice by institutions. Accordingly, it is important for the Commissioner to issue an order to clarify and reinforce the notice requirements established in section 28(1) of the *Act.*

[164] The third party asks this office to order the ministry to provide it with notice for the above-noted records before any order is made on the disclosure of the records.

[165] The requester submits that the third party's claims are broad, and that the extent of notice provided to the third party prior to the issuance of an order should be limited to avoid further prejudicing the outcome of the appeals.

[166] The ministry submits that,

> … the above-noted records consist of emails and other documents authored by, and exchanged between, Ministry staff for briefing and other informational purposes that are internal to the Ministry's review process. The Ministry notes that there is no substantive information included in these records related to [the third party's wind farm] that is otherwise unavailable in the proponent's publicly posted documentation.

[167] The ministry also states that as the above-noted records do not contain trade secrets or substantive technical, scientific, commercial, financial or labour relations information, there was no reason to believe the disclosure of those records might affect the third party's interests.

[168] In regard to the third party's assertion that it should have received notice for the above-noted records, the ministry submits that the records for which the ministry did not provide notice were either created internally and/or submitted to the ministry by external stakeholders or members of the public. As the records were not "supplied" by the third party, the ministry submits that the third party is not in a position to claim or confirm the confidentiality of these records.

[169] The ministry describes one group of the records as "status notes and informational correspondence related to internal meetings and briefings." Another group of the records is described as "letters of concern from stakeholders and members of the public about the [wind farm] and Ministry communications and responses, that were not addressed to [the third party] and were exchanged in confidence with the ministry."

[170] The ministry submits that the notification threshold applied was both reasonable and equitable. The ministry states that sending the records to the third party would "reflect a misappropriation of subsection 28(1) and be contrary to the Ministry's

commitment to disclose the majority of Ministry records to the requester."

[171] Lastly, the ministry notes that it has made the decision to notify the third party for the records at pages 197, 670, 688 and 691-692, as those records appear to have been submitted to, or received on behalf of, the third party.

Analysis

[172] As this office has stated elsewhere, the responsibility to fulfill the notification requirements in section 28 rests with institutions, and not this office;[41] in the normal course this office does not play a role in reviewing that decision. In this case, however, the issue has been placed before this office as part of the third party appeal and I have therefore reviewed the above-noted records at issue.

[173] This office considered the threshold for notification under section 28(1) in Interim Order PO-1694-I. In that order, the adjudicator stated:

> In my view, use of the word might in section 28(1)(a) creates a low threshold in determining whether notification is required.
>
> In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.
>
> If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected

[41] Order PO-1694-I.

> persons an opportunity to provide input on this issue before a decision is made regarding disclosure.[42]

[174] The Supreme Court of Canada, in *Merck Frosst Canada Ltd. v Canada (Health)*, also considered the proper threshold for notification of a third party, stating that disclosure without notice is only justified in clear cases where the institution concludes that there is "no reason to believe that the record might contain exempted material."[43] In that case, the court also noted that section 27(1) of the *Access to Information Act* [which is similar to the equivalent notification provision in the *Act*] "does not refer to particular categories of documents but rather to particular types of information that are or may be contained in records otherwise subject to disclosure."[44]

[175] I agree with the approach taken in Order PO-1694-I, and by the Supreme Court in *Merck Frosst,* and adopt the principles expressed there for the purposes of these appeals.

[176] As indicated above, the third party submits that the threshold for notification under section 28 is whether the information "relates" to a third party. I do not find this standard to be mandated by the principles expressed in Order PO-1694-I and the *Merck Frosst* decision. To begin with, notification must be based on an assessment that the records might contain or lead to inferences revealing certain *types* of information about a third party. Second, the threshold for notification must be guided by the provisions of section 17(1).

[177] In this case, the part of section 17(1) that is most relevant to the issue of notification is the protection accorded to information "supplied in confidence" by a third party. The ministry has described the types of records for which it did not seek the third party's submissions through notification under section 28. They include internal ministry documents in which any reference to the third party is consistent with publicly available information. I accept the ministry's assessment that notification was not required for these. Adopting the formulation in the *Merck Frosst* decision, there is "no reason" to believe that these records might contain or reveal information supplied in confidence by the third party. Likewise, I accept the ministry's assessment that communications submitted to the ministry by external stakeholders or members of the public, and that refer to the third party, do not give rise to a duty to notify under section 28. Again, there is no reason to believe that these records might contain or reveal information supplied in confidence by the third party. I accept the ministry's submission that "there is no substantive information included in these records related to [the third party's wind farm] that is otherwise unavailable in the proponent's publicly posted documentation."

[178] In arriving at my conclusion, I have specifically considered the possibility that a

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[42] PO-1694-I at page 6, emphasis in original.
[43] 2012 SCC 3 [*Merck Frosst*] at para 72.
[44] *Merck Frosst* at para 64.

record that was not submitted by the third party to the ministry (such as a record created by a ministry employee) may nevertheless contain the type of information protected by section 17(1), for instance, by incorporating or describing confidential business information originally supplied by the third party. On my review of the evidence and records, I am satisfied that none of these records fall into this category.

[179] Accordingly, I find that the above-noted records did not require notification to the third party pursuant to section 28, and, in accordance with the ministry's decision, may be disclosed to the requester with the exception of any severances of personal information the requester has already agreed to.

PUBLIC INTEREST OVERRIDE

I. Is there a compelling public interest in the disclosure of the record at pages 194-195 that clearly outweighs the purpose of the section 17 exemption?

[180] The requester takes the position that there is a compelling public interest in the disclosure of any withheld information. As I have found that the record at pages 194-195 qualifies for exemption under section 17(1), I will consider the possible application of section 23 of the *Act* to that information.

General Principles

[181] Section 23 reads:

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

[182] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.[45]

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

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[45] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.).

disclosure which clearly outweighs the purpose of the exemption.[46]

Compelling public interest

[184] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[47] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[48]

[185] A public interest does not exist where the interests being advanced are essentially private in nature.[49] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[50]

[186] A public interest is not automatically established where the requester is a member of the media.[51]

[187] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[52]

[188] Any public interest in *non*-disclosure that may exist also must be considered.53 A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[54]

Purpose of the exemption

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

[190] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the

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[46] Order P-244.
[47] Orders P-984 and PO-2607.
[48] Orders P-984 and PO-2556.
[49] Orders P-12, P-347 and P-1439.
[50] Order MO-1564.
[51] Orders M-773 and M-1074.
[52] Order P-984.
[53] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[54] Orders PO-2072-F, PO-2098-R and PO-3197.

information is consistent with the purpose of the exemption.[55]

Representations

[191] The third party cites Order PO-2478, in which the adjudicator determined that there was "no sufficient compelling interest warranting disclosure of commercial information relating to agreements entered into between a developer and landowners to facilitate a wind energy project since there are established processes by which the public can comment and provide input on wind energy projects." The third party notes that its proposal for the wind farm was posted on the Environmental Registry for a 60-day public review and comment period. Accordingly, the third party submits that the established public participation process supports the conclusion that there is no compelling public interest in disclosure that would outweigh the exemptions in section 17(1).

[192] The third party also states that there is an interest in non-disclosure of the records at issue. It submits that protection of the withheld information is necessary to promote wind energy investment as a component of the government's renewable energy initiatives under the *Green Energy Act.*

[193] The requester's arguments on the application of the public interest override generally relate to aviation safety concerns he asserts arise from the proposed wind farm project.

[194] The ministry did not make any representations on this issue.

Analysis

[195] As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the record to which section 17(1) has been found to apply:

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

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

[197] The interests advanced by the requester relate to aviation safety concerns. The

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[55] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

record at issue does not relate to aviation safety. Rather, as noted above, the record relates to the third party's preliminary views on certain non-aviation aspects of the regulatory requirements applicable to its REA proposal. Nonetheless, I accept that there exists a public interest in information about legislated regulatory requirements for wind farm projects, and in discussions about the proper interpretation of those requirements.

[198] I must consider whether this public interest is "compelling" in nature. As determined by previous decisions of this office, in order for a public interest to be "compelling", it must arouse "strong interest or attention."[56] A compelling public interest has been found *not* to exist where another public process or forum has been established to address public interest considerations.[57] In this appeal, the third party submits that the public consultation portion of the REA process provides the appropriate forum for the public interest to be addressed. I have reviewed various documents the third party has publically posted pursuant to the REA process, and, in particular, note the availability of information regarding the third party's position on the regulatory requirement discussed in the record. I find that the record at issue does not add to the information the public requires to make effective use of the REA public consultation process (which has already occurred), or any potential future proceeding at the ERT. Therefore, I find that any public interest in the disclosure of the record is not compelling within the meaning of section 23.

[199] Accordingly, section 23 does not apply in the circumstances of this appeal.

PERSONAL PRIVACY

J. Is the information claimed as exempt under section 21(1) at page 195 "personal information" within the meaning of the *Act*?

[200] As I have found that the public interest override is not applicable to the record at pages 194-195, I need not consider the requester's request that this office verify that the information the third party seeks to have withheld on page 195 "is as represented".

[201] However, in my review of the records, I find that certain information at the following pages is the same as information withheld by the ministry under section 21(1) in other records, and should be redacted for consistency: 708, 834, 836, 868 and 870.

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[56] Order P-984 and Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner),* cited above.
[57] Orders P-123/124, P-391 and M-539.

ORDER:

1. I order the ministry to issue a final access decision to the requester regarding access to the records at pages 197, 670, 688-690 and 691-692 in accordance with the *Act* without recourse to any further time extension, and treating the date of this decision as the date of the request. In order to verify compliance with this order provision, I order the ministry to provide me with a copy of the access decision.

2. I order the ministry to disclose the records at pages 72-73, 154, 196, 208, 516-517, 646-650, 651, 687, 885, 910 and 918-923, with the exception of any severances of personal information the requester has already agreed to, no later than **December 22, 2015.**

3. I uphold the ministry's decision to disclose the records at pages 3-59, 88-94, 146-153, 155-157, 198-207, 209-216, 217-244, 263, 303-304, 446-451, 452-467, 685-686, 688, 701-706, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926 and 928-930 and order the ministry to disclose those records to the requester, with the exception of any severances of personal information the requester has already agreed to and those I have identified in the last paragraph of my decision above, no later than **December 22, 2015** but not earlier than **December 17, 2015.** For the assistance of the ministry, I am providing it with a highlighted copy of the records discussed in the last paragraph of my order indicating the information to be withheld.

4. I order the ministry to withhold the record at pages 194-195 from disclosure.

5. I uphold the ministry's decision to deny access to the records at pages 95-104, 710-717, 796, 860 and 871.

6. I uphold the ministry's fee, in part. The fee is to be reduced to $80.50.

7. In order to verify compliance with order provisions **2, 3 and 5**, I reserve the right to require the ministry to provide me with proof of disclosure to the requester in accordance with order provisions **2, 3 and 5**.

Original Signed by: November 17, 2015

Sherry Liang
Assistant Commissioner