Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3624

Appeals PA13-368-2 and PA13-485

Ministry of the Environment and Climate Change

June 29, 2016

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 exemptions in sections 12(1) (Cabinet records), 19 (solicitor-client privilege), 21(1)(f) (personal privacy) and 22(a) (available to the public). Both the requester and the third party appealed the ministry's decision. In this order, which addresses both appeals, the adjudicator upholds the ministry's application of section 19(a) as well as its fee decision, and partially upholds the ministry's application of section 12(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.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1), 12(1)(c), 19, 26, 28(1) and 57(1); and R.R.O. 1990, Regulation 460, section 6.

Orders and Investigation Reports Considered: Orders P-880, PO-1694-I, PO-1742-I, PO-3545.

Cases Considered: *Merck Frosst Canada Ltd. V Canada (Health)*, 2012 SCC 3, *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197.

BACKGROUND:

[1] These appeals concern a request made to the Ministry of the Environment and Climate Change (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 April 1 to June 6, 2013.

[2] 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 issues REAs pursuant to Ontario Regulation 359/09, Renewable Energy Approvals under part V.0.1 of the *Environmental Protection Act*.[1]

[3] 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]

[4] 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.

[5] 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,

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

- Consultation Report,
- Specifications Report, and
- Wind Farm Noise Report.[3]

[6] 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,

> …[t]his 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.

[7] 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:

[8] As noted above, these appeals arise out of a request for access to records related to a named wind farm. The request is related to a number of others by the same requester, in relation to the same wind farm. Many of these have also resulted in appeals to this office.

[9] On August 9, 2013, the ministry issued an interim access and fee decision to the requester, as well as a notice of time extension in light of the volume of material to be reviewed and prepared for disclosure. Its preliminary decision was to provide partial access to the requested information, with severances of personal information pursuant to the exemption at section 21(1) (personal privacy) of the *Act*. The ministry also advised that "corporate confidential information will require notice to the third party (Section 17(1)(a), (c) [third-party information] of the Act)."

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

> In accordance with Section 57 of the [*Act*], the estimated fee is:
>
> Search Time 3 hours @ $30/hour $ 90.00

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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).

Copying approximately 600 pages @ $0.20/page	120.00
Preparation Time 1 hour @ $30/hour	30.00
Delivery	3.00
Total	**$ 243.00**
50% deposit now due	**$ 121.50**

[11] On September 11, 2013, the ministry wrote to a third party to notify it of the request, and to seek its views on disclosure of certain records that the ministry identified as involving the interests of the third party. In response, the third party provided representations to the ministry, consenting to the disclosure of some, but not all, of the records for which notice was provided. The third party relied on the exemption at section 17(1) (third-party information) in objecting to disclosure of certain information to the requester.

[12] On October 11, 2013, the ministry issued a final decision letter to the requester. The ministry advised that it would provide partial access to the records for which it had provided third-party notice, with severances of some information pursuant to the exemption at section 21(1) of the *Act* (personal privacy). The ministry also explained that it had considered, but rejected, the third party's claim that the exemption at section 17(1) applies to these records.

[13] With respect to the remaining records (namely, those for which the ministry did not provide third-party notice), the ministry's decision was to provide partial access, with severances of information pursuant to the exemptions at section 12(1)(c) (Cabinet records), 19(a) (solicitor-client privilege), 21(1) (personal privacy) and 22(a) (publicly-available information) of the *Act*. The ministry also withheld other information in the records that it identified as falling outside the requested search parameters or as being non-responsive or duplicate material.

[14] In its decision letter to the requester, the ministry also explained that the third party could file its own appeal of the ministry's decision to this office, and, as a result, the records would not be disclosed to the requester until November 11, 2013.

[15] Also on October 11, 2013, in a corresponding letter to the third party, the ministry informed the third party of its decision to provide full access to the information submitted by the third party.

[16] The requester was dissatisfied with the ministry's decision to withhold some of the records from him and appealed that decision to this office, resulting in Appeal PA13-368-2. In addition, the third party filed an appeal of the ministry's decision to disclose

records, becoming the third-party appellant in the related Appeal PA13-485.

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

[18] 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. The ministry explained its position in a December 20, 2013 email to the mediator, addressing this issue in a number of appeals including the two appeals discussed in this order:

> 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] With its consent, the mediator shared the ministry's index of records with both appealing parties.

[20] 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.

[21] 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 sections 22 (publicly-available) and 21 (personal privacy), as well as its claim of non-responsiveness, to withhold certain pages. The requester continues

to seek access to pages to which the ministry has denied access on the basis of the exemptions at sections 12(1)(c) (Cabinet records) and 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 the fee estimate issued by the ministry.

[22] At the conclusion of mediation, records for which third-party notice was given but for which the third party claimed the exemption at section 17(1) (third-party information) remained at issue.

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

[24] In regard to the requester's appeal, I sought and received representations from the ministry and the requester. Regarding the third party appeal, I sought representations initially from the third party. In its representations, the third party consented to the release of the remaining records at issue under section 17, but indicated that it was pursuing the issue of notice and would be relying on its submissions made on that issue in the related appeals PA13-437 and PA13-454-2. I then sought representations from the ministry and the requester, as well as reply representations from the third party. Because the third party consents in its representations to the disclosure of records for which it previously claimed the application of section 17(1),[5] the sole substantive issue remaining in Appeal PA13-485 is the issue of notice.

[25] In its representations, the ministry notes that it has decided to provide the third party with notice for additional records. The ministry provided the third party with notice of these records on May 4, 2015. The third party referenced having received notice of these records in its reply representations, but did not take a position on their disclosure, which was addressed in the ministry's initial access decision.

[26] In its representations on the requester's appeal, the ministry addressed the application of section 19 to pages 1 and 16-19 but did not refer to pages 11-15, which it had originally included in its section 19 claim. I sought clarification from the ministry, and the ministry explained that it had revised its position with respect to those pages. It had decided to disclose page 11, and stated that pages 12-15 contain a published article which it was withholding under section 22(a) (publicly available) but that it would provide the requester with reference information for those pages. The requester is content with obtaining pages 12-15 in this manner and it is unnecessary for me to consider the application of section 22(a) to these pages.

[27] Although the requester's appeal and the third party's appeal arise out of the same request and involve the same parties, I initially decided to deal with the two

[5] These pages are now at issue in the related Appeal PA13-368-2 under the heading of failure to disclose.

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 appeals in this single order.

[28] During the inquiry into this matter, the third party's REA application for the wind farm was still under "technical review" by the ministry. However, it has come to my attention that the third party's REA application was subsequently approved in a "Renewable Energy Approval" issued on February 11, 2016. This approval does not have any bearing on my findings in this order.

RECORDS:

[29] The records remaining at issue consist of emails and attachments to emails, including spreadsheets, flow charts and tables. More detailed descriptions are found in the discussion of the issues below.

ISSUES:

PA13-485 – Third party's appeal

A. Did the ministry adhere to the notice requirements in section 28(1) of the *Act* regarding the records at pages 24, 27, 28, 163-173 and 176?

PA13-368-2 – Requester's appeal

B. Was the ministry justified in not disclosing the records for which it issued a decision to grant access?

C. Does the mandatory exemption at section 12 apply to the responsive portions of the records at issue in pages 179-401?

D. Does the discretionary exemption at section 19 apply to the records at pages 1 and 16-19?

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

F. Should the fee be upheld?

DISCUSSION:

PA13-485 – Third party's appeal

NOTICE

A. Did the ministry adhere to the notice requirements in section 28(1) of the *Act* regarding the records at pages 24, 27, 28, 163-173 and 176?

[30] This issue originally covered a broader range of records. However, during adjudication, the ministry provided notice to the third party for pages 33, 52, 151, 162 and 175.

[31] 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.

[32] 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

[33] In its submissions made in related appeals (and relied on in this appeal), 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 a specified time frame, 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.

[34] 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.

[35] The third party notes that,

> …[c]onsidering 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.*

[36] 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.

[37] 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. He also states that he does not have adequate information to comment on whether or not the identified pages fall within any exemption or require notice. He expresses concerns about the delay that would result from giving notice at this late stage.

[38] Having provided notice to the third party of a number of records originally in dispute under this issue, the ministry's representations on the notice issue pertained to the remaining pages – 24, 27, 28, 163-173 and 176.

[39] The ministry submits that

> … the above noted records consist of emails and other documents authored by, and exchanged between, Ministry staff 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.

[40] 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.

[41] 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 and exchanged 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.

[42] The ministry describes the above-noted records as "status notes and informational correspondence related [to] project updates and timelines, as well as

correspondence from external stakeholders." It states that it did not deem it reasonable to provide notice for communications that were not addressed to the third party.

[43] 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 all releasable Ministry records to the requester."

[44] Lastly, the ministry notes that it made the decision to notify the third party for the records at pages 33, 52, 151, 162 and 175, as those records appear to have been submitted by, or on behalf of, the third party.

[45] In reply to the ministry, the third party submits that the ministry's decision to provide it with notification of additional records during this appeal suggests that the "ministry admits to failing to adhere with the notice requirements in the first instance". The third party pointed to the ministry's duty under the *Act* to provide notice "to the person to whom the information relates" and reiterated its view that the records "are clearly related to [the third party] as [they] pertain to the Project and [the third party] is the proponent of the Project." The third party also emphasized the use of the word "might" in section 28(1)(a), as follows:

> To trigger the notice requirement under section 28(1), [the third party] does not need to provide definitive proof that a record contains information contemplated by either subsection 17(1) or clause 21(1)(f) but only that it "might" contain such information. In other words, [the third party] only needs to show that there is the possibility that [the records] contain information referred to in subsection 17(1) or clause 21(1)(f) of the Act.
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> Although the purpose of the Act is intended to balance the public's right of access to information under the control of the government against the interests of the third parties in protecting certain information from disclosure, the language in subsection 28(1) is abundantly clear in requiring the MOE to provide notice to [the third party] where there might be confidential information in [the records]. Accordingly, it is important for the IPC to issue an order to clarify and reinforce the notice requirements established by the Act. [emphasis in original]

Analysis

[46] This office has affirmed that the responsibility to fulfill the notification requirements in section 28 rests with institutions, and not this office;[6] in the normal course this office does not play a role in reviewing that decision. In this case, however,

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[6] Order PO-1694-I.

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.

[47] 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 persons an opportunity to provide input on this issue before a decision is made regarding disclosure.[7]

[48] 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.[8] 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

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[7] PO-1694-I at page 6, emphasis in original.
[8] 2012 SCC 3 [*Merck Frosst*].

or may be contained in records otherwise subject to disclosure."[9]

[49] 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.

[50] As indicated above, the third party submits that the threshold for notification under section 28 is whether the information "relates" to a third party, and that the notice requirement is triggered if the record "might" contain information contemplated by section 17(1). 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).

[51] 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."

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

[53] Accordingly, I find that the ministry was not required to notify the third party of the above-noted records (24, 27, 28, 163-173 and 176) pursuant to section 28. In accordance with the ministry's decision, they must be disclosed to the requester with the exception of any severances of personal information the requester has already

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[9] *Merck Frosst* at para 64.

agreed to.

PA13-368-2 – Requester's appeal

FAILURE TO DISCLOSE

B. Was the ministry justified in not disclosing the records for which it issued a decision to grant access*?*

[54] 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.

[55] The requester takes issue with the ministry's failure to disclose to him: 1. those records that were not subject to third-party notice, and to which the ministry has decided to grant access; and 2. those records that were subject to third-party notice, and for which the third party has consented to disclosure.

[56] The first category of records includes the ones that were at issue in the related third-party appeal, on the ground of lack of notice. I concluded above that the ministry was not required to give notice to the third party of those records. The ministry's decision not to give notice during its processing of the request was thus correct. The result of this finding is that, for the reasons below, the ministry should have disclosed these records to the requester when it made its access decision.

[57] The second category of records comprises page 46, which the ministry decided to disclose to the requester with third-party consent.

[58] It is unnecessary for me to engage in an extensive discussion of the issue, since I addressed this in my decision in Order PO-3545 which involved the same parties and similar circumstances. In that decision, I stated as follows:

> . . . 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.
>
> 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.
>
> ….
>
> 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.

[59] For the same reasons, I find that the ministry was required to provide the requester with disclosure of the records for which it decided to grant access on October 11, 2013, and for which it had either decided (and I have confirmed here) that notice was not required, or for which it gave notice and the third party consented to disclosure.

[60] As indicated above, the ministry decided after its access decision, and during the course of this appeal, to give notice to the third party of additional pages of records. The question therefore arises whether it should have disclosed those records, when it made its decision to grant access to them, and whether its subsequent decision to give notice vindicates its refusal to disclose any of the records to the requester. As I observed in my discussion of the notice issue, this office has affirmed that the responsibility to fulfill the notification requirements in section 28 rests with institutions, and not this office;[10] in the normal course this office does not play a role in reviewing

[10] Order PO-1694-I.

that decision.

[61] These appeals did not proceed "in the normal course" and the issue of whether or not the threshold for notice under section 28 was met was placed before me. My expectation is that, having been given guidance on this issue, the ministry will make its own determination in accordance with the principles expressed in this order in future cases, and if it determines that notice under section 28 is not required and grants access to records, that it will disclose them as required by the *Act*.

CABINET RECORDS

C. Does the mandatory exemption at section 12 apply to the responsive portions of the records at pages 179-401?

Responsiveness

[62] Before turning to the application of the exemption for Cabinet records, I will determine which portions of the records at pages 179-401 are responsive to the request.

[63] In its submissions, the ministry commented on the relevance of the information in these pages of the records to the request:

> The Ministry also notes that much of the information in records 179-401 relates to other REA projects and is therefore not responsive to the request. In the event that the IPC does not uphold the Ministry's application of section 12(1), this information should be removed prior to the release of the records.

[64] The requester did not withdraw his request for the information identified by the ministry as non-responsive. However, he described his interest in the records in the following manner:

> … I respectfully submit that, if any of the 222 pages of records pertain to an Assumption and Assignment Agreement among the OPA and [the third party], to amend FIT Contract #F000672, or any other attempted amendments, please be advised that these records are not Non-Relevant to my requests. They are directly relevant to my access requests, and my legal and financial position, this file, my interests and my legal and financial position.

[65] This office then sought clarification from the ministry on its claim of non-responsiveness. In an email from April 2015, the ministry submits:

> The records exempt under Section 12(1) of the Act consist of lists, calculations, flowcharts and other data that name various Renewable

> Energy Projects that were or are currently under review by the Ministry of the Environment and Climate Change. It is noted in the introductory section of the Ministry's representations that the original FIPPA request asks for information specifically related to the [third party's wind farm]. The Ministry therefore took the position in its representations that information related to other projects – including names, contract numbers, status and other data – is not responsive to the scope of the request.

[66] The issue of the responsiveness of records was addressed in Order P-880. That order dealt with a re-determination of the issue of responsiveness following the decision of the Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197. In that case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance.

[67] In Order P-880, the adjudicator noted the court's guidance and commented as follows:

> The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

[68] I agree with the above approach. Upon my review of the records at pages 179-401, I agree with the ministry that much of the information is not responsive to the access request. The vast majority of the spreadsheets and other email attachments contain information regarding numerous wind farm or other REA projects, the particular wind farm at issue here being but one among many of such projects.

[69] The requester sought information specifically in regards to one wind farm, and accordingly information regarding the numerous other wind farm and/or other REA projects is not responsive to his request. To the extent, however, that information about the wind farm in question is included in a larger spreadsheet that is attached to an email, the content of the email is responsive in that it provides the context for the information in the spreadsheets. Similarly, column headings and titles of any documents which contain information about the wind farm in question are also responsive, since they also give context for that information.

The Cabinet records exemption

[70] The ministry claimed the exemption at section 12(1) generally, and 12(1)(c) in particular, to withhold all of pages 179-401 from disclosure. Given my conclusion that

the only responsive information in the records is that related to the wind farm in question, as well as cover emails, column headings and titles of documents, it is only necessary to consider the Cabinet records exemption for those portions of the records.

[71] The relevant provisions, which provide an exemption from disclosure for Cabinet records, read as follows:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> ….
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

[72] Previous decisions of this office have established that the use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).[11]

[73] A record that has never been placed before Cabinet or its committees may still qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[12] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[13]

Representations

[74] In its index, the ministry describes these records as: "Internal [ministry] correspondence with charts listing REA applications, FIT [Feed-in Tariff] contracts and corresponding statuses." In its representations, the ministry further describes these records as "detailed spreadsheets and flowcharts of the various REA projects in progress", and "spreadsheets and listings of REA projects".

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[11] Orders P-22, P-1570 and PO-2320.
[12] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[13] Order PO-2320.

[75] The ministry submits that disclosure of the records would reveal the substance of deliberations of Executive Council (Cabinet) or its committees because the information was "used in the creation of a slide deck... that was submitted to the Executive Council on June 26, 2013." The title of the slide deck was not shared with the requester (and is not referenced in this order) due to confidentiality concerns.

[76] The ministry states that the slide deck was created in April to June 2013, jointly by the ministry and the Ministry of Energy and Infrastructure. The ministry states that the slide deck was created "for the purpose of briefing the Executive Council (Cabinet) on the status of REA projects currently under review..." More information about the purpose of the briefing is found in the confidential portions of the ministry's representations.

[77] The ministry notes that those REA projects are pending approval by the ministry, and therefore section 12(1)(c) was applied to exempt the information prior to the final REA decisions being made and implemented. The ministry also indicates that it received confirmation that the spreadsheets and listings of REA projects included in these records were "directly incorporated" into the slide deck placed before Cabinet on June 26, 2013.

[78] Regarding the exceptions to section 12(1) at section 12(2), the ministry notes the records are less than 2 years old, and it did not seek consent from the Executive Council with respect to disclosure because many of the REA projects included in the Cabinet submission deck were still under review by the ministry. Also, there is ongoing discussion about the REA program as demonstrated in part by the title of the slide deck, therefore the ministry had no reasonable expectation that Cabinet would not withhold its consent to disclosure pending the conclusion of the decision-making process.

Analysis

[79] As indicated above, the use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).[14]

[80] I accept the ministry's submission that the information was used in the creation of a slide deck submitted to Cabinet on June 26, 2013. The content of the emails themselves provide evidence of the intended use of this material. It is apparent from them that the slide deck was to be used at a meeting of Cabinet, to brief it on the status of REA projects currently under review. The broader purpose of this briefing is described in the ministry's confidential representations.

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[14] Orders P-22, P-1570 and PO-2320.

[81] The fact that information in the records was placed before Cabinet, however, is not sufficient to establish that the section 12(1) exemption applies. In order to meet the requirements of the introductory wording of section 12(1), an institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[15]

[82] Most of the information in the records consists of background information about the status of a large number of REA projects then still under review, including the named wind farm project. Approval of specific REA projects is not a matter for Cabinet decision and the purpose of placing this information before Cabinet was not for the purpose of approving these projects. In its confidential representations, the ministry has described the nature of the matters under consideration by Cabinet, to which this background information was relevant. Without disclosure of any contextual information about the purpose of placing the background information before Cabinet, disclosure of this information in itself does not reveal the substance of Cabinet deliberations. Accordingly, I do not find that factual information relating to the status of the wind farm project is exempt under the introductory wording of section 12(1).

[83] My conclusion is similar to that reached in Order PO-1742-I, with respect to records of a similar nature:

> Records C127, C137 and C139 are interoffice memoranda, primarily containing factual information regarding the issue of the regulation of osteopaths. Again, the Ministry has not explained how any of this information relates directly to the substance of Cabinet deliberations on this issue nor is any such connection evident from the contents of the records themselves. Consequently, in my view, disclosure of these records would neither reveal the substance of deliberations of Cabinet nor permit the drawing of accurate inferences regarding the substance of any deliberations, and I find that Records C127, C137 and C139 do not qualify for exemption under the introductory wording of section 12(1) of the *Act*.

[84] Some limited information in these pages is of a type and quality which does qualify for exemption under the introductory wording of section 12(1). Where the records contain information about the purpose of placing the factual information before Cabinet, such as analyses of the potential impact of a Cabinet decision on the projects listed, this information could reveal, or allow accurate inferences to be made about, the "substance of deliberations." Accordingly, I find that this limited information is exempt under section 12(1).

[85] The ministry also relies on the section 12(1)(c) exemption, which covers records that contain background explanations or analyses:

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[15] Order PO-2320.

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

[86] This section is prospective in its application. It applies to exempt background explanations or analyses of problems before decisions are made and implemented, but will not apply to exempt such records after the fact.[16]

[87] I accept the ministry's submission that a final version of a slide deck submitted to Cabinet included versions of the spreadsheets and flowcharts attached to the emails. While the records show revisions of these attachments as information in them was updated, these changes are minor and the essential content and format from one version to another remained the same. I accept that the information compiled in these attachments was "submitted" or "prepared for submission" to Cabinet. Based on the ministry's submissions, I also find that Cabinet decision-making with respect to the matters discussed at the June 26, 2013 Cabinet meeting is still ongoing.

[88] The exemption does not apply unless the records at issue contain "background explanations or analyses of problems". I find that a compilation of factual information about the status of REA projects, without any analysis by ministry staff, does not equate with either "background explanations" or "analyses of problems".

[89] On my review, the only portions of the spreadsheets that qualify as "background explanations" or "analyses of problems" are those where ministry staff have added their own analysis to the factual information about the status of the REA projects. I find that these portions qualify for exemption under section 12(1)(c).

[90] In conclusion, I find that most of pages 179-401 do not qualify for exemption under the introductory wording to section 12(1) or section 12(1)(c). Limited parts of the records are exempt under the introductory wording to section 12(1) and section 12(1)(c). As no other exemption has been claimed for these parts, I will order them to be disclosed.

SOLICITOR-CLIENT PRIVILEGE

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[16] Orders PO-2554 and PO-2677.

D. Does the discretionary exemption at section 19 apply to the records at pages 1 and 16-19?

[91] Section 19 provides an exemption for records covered by solicitor-client privilege, stating, 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; or

[92] 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.

[93] The ministry relies on both the common law and statutory privileges to exempt the records at pages 1 and 16-19. First, I will consider whether these records are subject to the common law privilege at Branch 1.

[94] While the ministry initially relied on section 19 to also exempt pages 11-15, it did not pursue this exemption in relation to those pages in its representations, as described above.

Branch 1: common law privilege

[95] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. At issue in this appeal is the solicitor-client communication privilege.

Solicitor-client communication privilege

[96] 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.[17] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[18] 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

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

keeping both informed so that advice can be sought and given.[19]

[97] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[20]

[98] 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.[21] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[22]

Loss of privilege

Waiver

[99] 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.[23]

[100] 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.[24]

[101] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[25] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[26]

Representations

[102] The ministry submits 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."[27] 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.

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[19] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[20] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[21] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[22] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[23] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[24] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[25] 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.).
[26] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[27] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at 53.

[103] The ministry asserts, accordingly, that communications and correspondence exchanged with, or forwarded to, legal counsel from Ministry staff members fall within the scope of solicitor-client privilege detailed in section 19(a) of the *Act* so long as the communication was made for the dominant purpose of obtaining legal advice.

[104] 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."

[105] The ministry made submissions with respect to the specific records at issue, as follows:

- Pages 1 and 18 are correspondence between [name withheld] and staff of the Environmental Approvals Access and Service Integration Branch;
- Page 16 – [confidential];
- Pages 17-18 are the subject matter of ongoing legal review and advice exchanged within the ministry;
- Page 19 – the information exempt under section 19 is a duplicate copy of the email correspondence exempt in page 1.

[106] The ministry also made confidential representations in relation to these pages.

[107] The requester contends that the third party and the ministry have failed to ensure that the requirements of O.Reg 359/09, pertaining to REA projects, have been complied with. He submits that claims of solicitor-client privilege and confidentiality for records that "contained errors and omissions" are not credible.

Analysis

[108] The record at page 1 consists of an email sent from a ministry staff member to a ministry lawyer seeking comment regarding a particular court case, and the ministry lawyer's response. This record 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 find that this record qualifies for exemption under section 19(a).

[109] The record at page 16 consists of an email exchange between a ministry staff member and a ministry lawyer regarding external correspondence. I find that this record contains communications between a solicitor and client, made for the purpose of obtaining legal advice. Therefore, this record qualifies for exemption under section 19(a).

[110] The records at pages 17-18 consist of emails exchanged between a ministry

lawyer and a ministry staff member regarding a particular court case. 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).

[111] The withheld information on page 19 duplicates a portion of email correspondence from page 1 which I have already found exempt. As above, I find that this record contains communications between a solicitor and client, made for the purpose of obtaining legal advice. Therefore, this record qualifies for exemption under section 19(a).

[112] With respect to the requester's submissions, I find that his allegations of "errors and omissions" on the project application and ostensible failure to comply with the requirements of O.Reg 359/09 do not bear on a determination of whether solicitor-client privilege at section 19 applies.

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

[114] As I find the records at pages 1 and 16-19 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

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

[115] 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.

[116] 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.

[117] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[28] This office may not, however,

[28] Order MO-1573.

substitute its own discretion for that of the institution.[29]

Representations

[118] The ministry's submissions on the exercise of discretion focus on the status of the wind farm project at the time of its decision. In its submission, disclosure of the records would compromise the solicitor-client relationship, at a time when advice was being given about the REA decision-making process.[30] It also submits that the privileged information in these records is relevant to other REA projects, noting that the advice provided in the context of this particular wind farm also has impacts for other projects.

[119] The ministry also made confidential submissions regarding its exercise of discretion to apply section 19 to the records at pages 1, 16 and 18.

[120] The requester's representations on the exercise of discretion under section 19 address what he believes to be "errors, omissions and misleading declarations" in the processing of the REA. He describes his concerns with the wind farm project, and focuses and expands upon on his contention that the project and the process have been flawed throughout.

Analysis

[121] 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.

[122] 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.

FEE

F. Should the fee be upheld?

[123] 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. In his representations, the requester's fee submissions focus on the lengthy delays he has

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[29] Section 54(2).

[30] As noted above, on the ministry's website, the project is now listed as "approved": http://www.ontario.ca/environment-and-energy/renewable-energy-projects-listing

experienced due to "systemic flaws in the Ministry's administration of the Act".

[124] It did not appear that the ministry had issued a final fee decision in the request leading to Appeal PA13-368-2, despite advising the requester in its October 11, 2013 letter that it would do so after the expiry of the third party appeal period. Accordingly, I asked the ministry to confirm that the fee or fee estimate at issue is the fee estimate set out in its August 9, 2013 interim access and fee decision. In its representations, detailed below, the ministry revised its fee to $155.00. Since the requester had paid the original 50% deposit of $121.50, the outstanding balance was $33.50.

[125] 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.

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

> 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.

Search fee

[127] The ministry makes the following submissions in relation to the $90.00 fee charged for search time:

> [It] was calculated cumulatively based on the individual search times recorded from three branches of the Ministry: The Environmental Approvals Branch, Environmental Approvals Access and Service Integration Branch, and the Environmental Programs Division. 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.

[128] The ministry submits that the Environmental Approvals Branch and the Environmental Approvals Access and Service Integration Branch spent a total of one hour 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."

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

[130] The ministry notes that it reduced the amount of chargeable search time from a cumulative total of four hours to three hours in order to "account for any margin of error in these calculations" and "ensure that the records remained accessible" for the requester.

[131] I observe that when calculating the search fee the ministry reduced a cumulative total of four hours search time to three hours and charged the rate of $7.50 for each 15 minutes as prescribed by Regulation 460. The ministry's search involved multiple branches and yielded 800 pages of records. I find that the $90.00 fee charged for the time spent searching the above-noted ministry branches is reasonable.

[132] 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 $90.00 for the search time associated with responding to this request.

Copying

[133] The ministry submits that its copying fee of $120.00 was "based on the Ministry's estimation of the number of pages that would be releasable to the [requester] after a review of all records retrieved from each responsive program area."

[134] Of the 800 pages of responsive records, the ministry withheld 275 pages in full under sections 12(1), 19(1), 21(1) and 22(a). The ministry also identified 26 pages as duplicates and 339 pages as not relevant to the scope of the request. The ministry then notes that 160 releasable pages remain in full or in part and, if its application of sections 12(1) and 19(1) is upheld, the updated copying fee is $32.00.

[135] 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, notwithstanding the ministry's reduction from the original estimate of $120, I do not uphold the ministry's updated photocopying fee of $32.00, 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

[136] 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 43 pages of records that required "partial severing", the ministry notes that it could have charged for 86 minutes (or approximately 1.4 hours) of preparation at a cost of $42.00. However, the ministry charged for 1 hour of preparation at a cost of $30.00. The ministry states that it "has worked to reduce costs to the [requester] wherever possible."

[137] I find that the $30.00 fee charged for the time spent preparing the 43 pages of records that required partial severing is reasonable and was calculated in accordance with the requirements of the *Act.* Therefore, I uphold the ministry's fee of $30.00 for the time spent preparing the records for disclosure.

Shipping

[138] The ministry submits that the $3.00 fee charged to the requester for the delivery of the "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 entirety of releasable records will be shipped at a cost consistent with this estimate subsequent to the resolution of appeals PA13-368-2

and PA13-485."

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

Amended Fee

[140] The ministry concluded its fee submissions by stating that:

> The Ministry will amend its request for outstanding fees to the appellant to reflect the revised copy cost noted above. Please note that the total cost for the request is now $155.00, and the appellant has already paid $121.50. Provided that the Ministry's decisions are upheld in the present adjudication, the outstanding balance on the request file is now $33.50.

Fee decision summary

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

- $90.00 for searching for responsive records,
- $10.00 for providing an electronic copy of the records on a CD-ROM,
- $30.00 for preparation time, and
- $3.00 for delivery.

[142] This totals $133.00. Since the requester has already paid $121.50, the outstanding balance is $11.50.

[143] I have considered the requester's submissions about why the fee is excessive. For the reasons given above, the fees assessed by the ministry are consistent with the requirements of the *Act* and Regulation. I do not find anything persuasive in the requester's submissions to establish grounds for reducing those fees.

ORDER:

1. I order the ministry to disclose the records at pages 11 (and the reference information regarding pages 12-15), 25, 33, 35-52, 149-151, 157, 162 and 175 with the exception of severances of personal and non-responsive information, no later than **August 5, 2016**.
2. I uphold the ministry's decision to disclose the records at pages 24, 27, 28, 163-173 and 176 and order the ministry to disclose those records to the requester, with the exception of severances of personal and non-responsive information.

3. I uphold the ministry's decision to deny access to the records at pages 1 and 16-19.

4. I uphold the ministry's decision to deny access to the records at pages 179-401, with the exception of certain portions, which I order it to disclose. For ease of reference, I have provided the ministry with a copy of these pages, showing in highlighting the portions to be disclosed.

5. I uphold the ministry's fee, in part.

6. Disclosure under Provisions 1, 2 and 4 shall be made by **August 5, 2016** but not before **July 29, 2016**. In order to verify compliance with those order provisions, I reserve the right to require the ministry to provide me with proof of disclosure to the requester.

Original Signed by: June 29, 2016

Sherry Liang
Assistant Commissioner