Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3645

Appeal PA14-57

Ministry of the Environment and Climate Change

August 31, 2016

Summary: The Ministry of the Environment and Climate Change received a request from the City of Burlington for access to information concerning an agreement between the ministry and the owner of the Burlington Airpark to submit a plan for groundwater investigation. The ministry relied on sections 13(1) (advice and recommendations), 17(1)(b) (third party information), 19(a) and (b) (solicitor-client privilege) and 21(1) of the *Act* to deny access to the portions it withheld. The city claimed that disclosing the information was in the public interest, thereby raising the application of the public interest override at section 23 of the *Act*. The Airpark's reply representations raised the possible application of section 17(1)(c) (third party information) to certain information. In the course of adjudication consents were received from an individual and the Airpark to release certain information relating to them and the individual's company. The adjudicator orders that this withheld information be disclosed to the appellant. The adjudicator also finds that sections 17(1)(b) or (c) do not apply to certain information but that certain withheld information does qualify for exemption under sections 13(1) and 19(a). However, the adjudicator finds that it is in the public interest that information withheld under section 13(1) be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(b) and (c), 13(1), 13(2), 13(3), 19(a) and 23.

Orders Considered: PO-2172 and PO-2557.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R 815, 2010 SCC 23; *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

OVERVIEW:

[1] The Ministry of the Environment and Climate Change (the ministry) received a request from the City of Burlington (the city) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information concerning an agreement between the ministry and the owner of Burlington Airpark (Airpark) to submit a plan for groundwater investigation (the agreement).

Specifically, the request was for the following information:

- General correspondence between [ministry] staff and the Airpark owner.
- Copies of any signed agreement/documents pertaining to the agreement.
- The proposed monitoring plan and all supporting information (i.e. plans, studies, etc.).
- All results obtained to date, including any professional reports or summaries prepared as a result.

[2] The ministry identified records responsive to the request and issued an initial access decision. The initial decision set out that responsive records had been located in the ministry's Halton Peel District Office, Investigations and Enforcement Branch, Sector Compliance Branch and Safe Drinking Water Branch. The letter also set out the ministry's estimated fee for processing the request and advised that it was granting partial access to the responsive records, relying on section 21(1) (invasion of privacy) of the *Act* to deny access to certain information. In addition, the ministry advised that it would be providing notice to a corporation under section 28 of the *Act* prior to rendering its decision regarding information that it viewed as potentially being subject to sections 17(1)(a) or (c) (third party information) of the *Act*.

[3] After notifying the Airpark and receiving its position on disclosure, the ministry issued its final access decision. The ministry granted partial access to the responsive records, ultimately relying on sections 13(1) (advice and recommendations), 17(1)(b) (third party information), 19(a) and (b) (solicitor-client privilege) and 21(1) of the *Act* to deny access to the portions it withheld. The ministry's letter further advised that:

> The ministry appreciates the city's interest in Burlington Airpark's groundwater monitoring plan. The ministry has also considered the public interest override outlined in section 23 of the *Act*. The ministry has decided that, based on the current available information, there is no compelling public interest in disclosure that clearly outweighs the purpose of the exemptions and the application of sections 13 and 17.
>
> The ministry and Halton Health have monitored the drinking water wells that are at the highest risk of contamination from the airpark and there

> were no exceedances of the Ontario Drinking Water Quality Standards for the parameters tested. Based on the parameters tested and the results received, there were no concerns identified. The groundwater monitoring plan will help determine any off-site impacts and whether the ministry needs to require any further action from the airpark.

[4] The city appealed the ministry's decision. In the Appeal Form the city wrote:

> … The city believes all information regarding the sampling plan, monitoring plan and any analysis or discussions should be made available as these items are of the public interest (i.e. potential contamination of soil, groundwater, etc.)

[5] During mediation, the city agreed that it would not be seeking access to pages 37, 78, 133 and 134 of the records at issue, which the ministry had withheld under section 21(1) of the *Act.* Accordingly, that information is no longer at issue in this appeal. The city further advised that it would not be pursuing access to duplicate records and some documents that appeared to be general correspondence, being pages 138, 141, 142, 168-179 and 204-213 of the records at issue. Accordingly, those duplicate pages and that information is also no longer at issue in the appeal.

[6] The matter was not resolved at mediation and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending the ministry and two affected parties, comprised of an individual and the Airpark, a Notice of Inquiry setting out the facts and issues in the appeal. The ministry and the two affected parties provided representations in response. The ministry asked that certain portions of its representations not be shared with the appellant due to confidentiality concerns. The individual consented to the release to the city of any information pertaining to her or her company. The Airpark consented to the release to the city of its information found on pages 139, 140, 144, 146-167, 183-197 and 202-203 as set out in the Index of Records.

[8] I then sent a Notice of Inquiry to the city along with the ministry's non-confidential representations. The city provided responding representations.

[9] I determined that the city's representations raised issues to which the ministry should be provided an opportunity to reply. Accordingly, I sent a letter along with a complete copy of the city's representations to the ministry, inviting their reply representations. The ministry provided representations in reply.

Preliminary matters

Possible Personal information

[10] As set out above, the city advised at mediation that it was not seeking access to

certain information withheld under section 21(1) of the *Act*.

[11] The city set out the following in its representations:

> The city has not intentionally sought the personal information of another individual in its request. If records at issue in this appeal are found to contain personal information, the city has no interest in seeing this information or having it disclosed, unless consent to its release has already been provided by the individual …

[12] In the course of adjudication, the city confirmed that it does not seek access to any possible personal information that may appear on page 201, which contains a small amount of information that may qualify as the personal information of a ministry employee who wrote an email as well as page 196, being a portion of an email that the affected party individual consented to disclose, which also contains a small amount of information that may qualify as the personal information of identifiable individuals other than the affected party individual. There is also a small amount of information on page 197 that is similar to information on page 196.

[13] I will order that these small amounts of personal information be severed from any records that may be disclosed to the city pursuant to this order. I have highlighted this information in green on a copy of pages 196, 197 and 201 that I have provided to the ministry along with this order.

The consents of the two affected parties and sections 17(1)(b) and (c)

[14] The consents of the two affected parties discussed in the background above were summarized in the Notice of Inquiry sent to the city. In response, the city provided responding representations to this office and also sent a letter to the ministry asking that the information covered by the consents be disclosed.

[15] After the city's representations were shared with the corporation and the ministry, both the ministry and the Airpark provided reply representations to this office. The Airpark was the first to provide reply representations and also sent a copy of its reply representations to the ministry.

[16] In its reply representations the Airpark confirmed its earlier consent regarding the information at pages 139, 140, 144, 146-167, 183-197 and 202-203. However, with respect to the information at issue on pages 180, 181, 182, 199, 200 and 201, which the ministry also withheld under sections 13(1) and/or 17(1)(b) and/or 19(a) and (b), the Airpark submitted that:

> We repeat our advice to your office … that information and documents ("Information") were voluntarily supplied to the Ministry of the Environment, as it then was (the "Ministry"), by [the Airpark] expressly on the condition that this information would be treated as confidential and

> would not be disclosed to any third-parties. The information that was voluntarily supplied to the Ministry under this condition was not otherwise available to the Ministry but, we believe, aided the Ministry in fulfilling its mandate.
>
> The [Airpark's] previous limited consent, notwithstanding, since the Airpark has no knowledge of what information is contained [on those pages], the [Airpark] is not able to assess its statutory rights in respect of these pages. It is possible that the release of this information could result in pecuniary or other harm to the [Airpark] and result in the [Airpark] reconsidering whether, in the future, to voluntarily share information with the ministry.
>
> The [Airpark], therefore, objects to the disclosure of the pages listed above until such time as the respondent has first been provided with these pages for review and is able to consider its statutory rights with respect to these pages.

[17] After receiving a copy of the Airpark's reply representations, the ministry then provided its own reply representations. In the discussion regarding the potential application of section 17(1)(b) of the *Act*, the ministry wrote:

> The ministry acknowledges that the third party no longer has any objections to the disclosure of the information that it supplied to the ministry.
>
> At the time of its decision, the ministry was concerned about the considerable time and resources needed to obtain information from a federally regulated organization (Burlington Air Park) and its future dealings with this organization.
>
> It is only with the passage of significant time that has allowed the third party to consent to the disclosure of the information.
>
> As a result, the ministry elected to invoke section 17(1)(b) of the *Act* given the circumstances of this case.
>
> The third party has informed the ministry that with the passage of time, all of the information that was exempt has become known to the appellant.

[18] I then forwarded the individual affected party's consent to the ministry along with a letter requesting that the ministry issue a revised decision letter disclosing to the city the two affected parties' information covered by their consents. In the letter I wrote that, "[t]his will narrow the issues in the appeal and assist in the decision making process". The ministry did not issue a new decision letter or otherwise disclose this

information to the city.

[19] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[20] Sections 17(1)(b) and (c) state that:

> 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,
>
> > (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.

[21] The party resisting disclosure under sections 17(1)(b) and (c) must provide detailed and convincing evidence 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.[3]

[22] 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.*[4]

[23] 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.[5] Information may qualify as "supplied" if it was directly supplied to an institution by a

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[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[4] Order PO-2435.
[5] Order MO-1706.

third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[6]

[24] In the order that follows I find that certain information in pages 156, 181, 183, 194 and 202 qualifies for exemption under section 19(a) of the *Act*. Therefore, there is no need to review the possible application of sections 17(1)(b) and/or (c) with respect to that information. As well, the information on pages 181 and 182 that the ministry claimed was subject to section 17(1)(b) is a duplicate of information on pages 156, which the Airpark consented to disclose.

[25] With respect to information on pages 199, 200 and 201, the Airpark takes the position that it is unable to provide its consent to disclosure because it is unaware of the content of those pages. The ministry claimed the application of section 13(1) for this information. As a result, it was unable to provide the records to the Airpark for its review. However, in the decision that follows I find that it is in the public interest that the information withheld under section 13(1) pertaining to certain comments be disclosed. I have accordingly, considered whether in light of this determination the Airpark should be provided with an opportunity to review those records prior to disclosure. In the unique circumstances of this case, I find that it is not necessary to do so.

[26] The Airpark has consented to the release of information on pages 139, 140, 144, 146-167, 181 and 182 (being a duplicate of the information on page 156 that it consented to release), 183-197 and 202-203. Although raised by the ministry, no evidence was provided by the ministry to establish the application of section 17(1)(b) with respect to those pages and I find that it does not apply.

[27] Pages 147 to 155 and 158 to 167 are early drafts of a Proposal for Groundwater Monitoring. The comments made on pages 199, 200 and 201 emanated from the ministry, not the Airpark. Accordingly, they were clearly not supplied by the Airpark. However, that does not end the analysis because it may still qualify as supplied if its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the Airpark. In this unique case, the Airpark has consented to disclose the information that was commented upon. Hence, to the extent that disclosing the information in pages 199, 200 and 201 would reveal any information supplied by the Airpark, it has already consented to the disclosure of that information. Accordingly, the information at issue in these pages was not supplied by the Airpark or if it was, the Airpark has consented to its disclosure. As a result, it is not necessary to provide the Airpark with an opportunity to review those records prior to disclosure.

[28] In accordance with the above, I will order that the information pertaining to the individual affected party, or her company, as well as any information pertaining to the

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[6] Orders PO-2020 and PO-2043.

Airpark that is not remaining at issue be disclosed to the city. This information is found in pages 139, 140, 144, 146-167, 181-197 and 202-203. As a result of the above, the application of section 17(1)(b) or 17(1)(c) to these pages and the application of section 21(1) in general, is no longer at issue in the appeal. My determination regarding the ministry's position that section 13(1) applies to information on pages 199, 200 and 201 is set out below.

RECORDS REMAINING AT ISSUE:

[29] Pages 156, 180, 181, 183, 194, 199, 200, 201 and 202 as set out in the Index of Records remain at issue in the appeal.

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to information on pages 199, 200 and 201 of the records?

B. Do the discretionary exemptions at sections 19(a) and/or (b) apply to information on pages 156, 180, 181, 183, 194 and 202 of the records?

C. Is there a compelling public interest in disclosure of the information on pages 199, 200 and 201 that clearly outweighs the purpose of the section 13(1) exemption?

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

DISCUSSION:

Issue A: Does the discretionary exemption at section 13(1) apply to information on pages 199, 200 and 201 of the records?

[30] The ministry takes the position that one paragraph and five bullets points on page 199, which is duplicated on page 200, as well as four paragraphs on page 201 of the records, fall within the scope of section 13(1) of the *Act*. The ministry submits that none of the mandatory exceptions at sections 13(2) and (3) apply to this information.

[31] Section 13(1) states:

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

[32] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[7]

[33] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[34] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [8]

[35] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[9]

[37] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[10]

[38] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information;[11] a supervisor's

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[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[8] See above at paras. 26 and 47.
[9] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[10] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[11] Order PO-3315

direction to staff on how to conduct an investigation;[12] and information prepared for public dissemination.[13]

[39] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

The ministry's representations

[40] The ministry initially submitted that the withheld portion of page 199, which is duplicated on page 200, consists of advice or recommendations or contains information that, if disclosed, would permit the drawing of accurate inferences with respect to the nature of the advice or recommendations provided by one staff member of the ministry to other staff members.

[41] The ministry explains that:

> Records pages 199-200 contain correspondence exchanged between [named individual], District Engineer of the Halton Peel District Office to [named individual], Issues Project Coordinator of the same office.
>
> The advice presented by [the first named individual] would be accepted or rejected by line staff in communicating with both Burlington Airpark and their consultants, [named consultant].

[42] The ministry submits that although words such as "advice" and "recommendations" do not appear in the records, the ministry notes that the statement "we do have the following comments that we would like to see incorporated into the plan" is the type of information that has been found to meet the requirements of section 13(1).[14]

The city's representations

[43] The city submits that:

> The ministry provides no evidence or explanation of how pages 199 and 200 contain advice and recommendations as described in section 13(1) of the *Act*. Simply referring to the record itself (which the city has not had the benefit of being able to do) shifts the onus for proof that exemptions have been applied effectively to the adjudicator, when it is rather the

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[12] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[13] Order PO-2677.
[14] The ministry cites Order P-1290 in support of this submission.

> ministry's responsibility to offer evidence towards this determination.[15] [A specified portion of the ministry's representations] do not provide sufficient explanation of how the many exemptions described in sections 13(2) and (3) do not apply to these records. …

[44] The city submits that the ministry has not addressed two direct questions posed in the Notice of Inquiry, namely "What is the advice?" and "What is the recommended course of action?

[45] The city also argues that the ministry provided no representations whatsoever on the application of section 13(1) to the withheld portion of page 201.

The ministry's reply representations

[46] The ministry submits in reply that:

> Page 201 contains, in part, an exchange between [named individual], Ministry Hydrogeologist and [named individual], District Engineer of the Halton Peel District Office.
>
> [The first named individual] is providing her advice in relation to the [named consultant's] proposal about the Burlington Air Park.

[47] The ministry then makes similar arguments to those that it made as the basis for withholding the portion of pages 199 and 200 under section 13(1) of the *Act*.

[48] The ministry submits that:

> The advice presented by [the first named individual] could either be accepted or rejected by [second named individual] in communicating with both Burlington Air Park and their consultants, [named consultant].

Analysis and finding

[49] Based on my review of the information at issue in the record, I agree with the ministry that it contains advice or recommendations within the meaning of section 13(1). In particular, the information at issue consists of recommendations of a public servant that relate to suggested courses of action that will ultimately be accepted or rejected by the person being advised. In my view, there is a sufficient degree of proximity between the advice or recommendations and the decision-making that the advice or recommendations are meant to inform so as to establish the application of section 13(1)[16].

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[15]The city cites Orders MO-2183, P-257, P-706, P-1001 and PO-1852 in support of this submission.
[16] The concept of proximity was discussed by Adjudicator Jenny Ryu in Order MO-3265.

[50] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.[17] The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. The mandatory exception in section 13(3) will apply to records that are more than twenty years old or contain advice or recommendations publicly relied on by an institution as the basis for making a decision.[18]

[51] I have reviewed the information that I have found to be subject to section 13(1) of the *Act* and find that none of the possible exceptions in sections 13(2) or 13(3) apply.

Conclusion

[52] As no exceptions in sections 13(2) or 13(3) apply, I find that, subject to my review of the public interest override, one paragraph and five bullets points on page 199, which is duplicated on page 200, as well as four paragraphs on page 201 of the records is exempt under section 13(1) of the *Act*.

Issue B: Do the discretionary exemptions at sections 19(a) and/or (b) apply to information on pages 156, 180, 181, 183 and 202 of the records?

General principles

[53] The ministry takes the position that page 156 (top portion), which is duplicated on pages 181, 183 and 202, as well as information on pages 180 and 194 of the records at issue, fall within both branches of the solicitor-client exemption; namely, section 19(a) - solicitor-client privilege; and section 19(b) - prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for the use in litigation.

[54] Section 19 of the *Act* states as follows:

> 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
> >
> > (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

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[17] *John Doe v. Ontario (Finance)*, cited above, at para. 30.
[18] Order PO-2668.

[55] 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.

Branch 1: common law privilege

[56] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[57] 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.[19] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[20] 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.[21]

[58] 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.[22] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[23]

Branch 2: statutory privileges

[59] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The ministry's representations

[60] The ministry provided confidential and non-confidential representations in support of its position that sections 19(a) and (b) apply to the withheld information.

[61] In the non-confidential portion of its representations, the ministry relies on

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[19] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] Orders MO-1925, MO-2166 and PO-2441.
[21] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[22] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[23] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Ontario (Public Safety and Security) v. Criminal Lawyers' Association[24] and submits that the person identified in the records at issue is legal counsel for the ministry located within Central Region who was in a position to provide legal advice to his clients, being the staff of Central Region, including the Halton Peel District Office. The ministry submits that the communication between the staff listed on the records and the identified legal counsel is considered part of a continuum of communication between a solicitor and client and falls within the scope of the exemption.[25] The ministry adds that it "has become involved in a dispute between the City of Burlington and the Burlington Airpark including litigation between them" and that it is not possible to disclose a part of a record without revealing information that is privileged.

[62] In its representations on the exercise of discretion, the ministry submitted that staff have not waived this privilege to date and have consistently treated the information in a confidential manner.

The city's representations

[63] The city submits that it continues to have an interest in pages 180 and 181 of the records, and takes the position that the possible existence of one privileged paragraph within a record is not sufficient justification to withhold that record in its entirety. The city submits that the principle of access dictates that, where it is not possible to release a complete record, any exemptions from access should be limited and specific.

[64] The city submits that:

> In this spirit, the Ontario Divisional Court has found that severance may apply to records that "combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice."[26]

[65] With respect to the litigation alluded to by the ministry, the city submits that:

> In the previous year, the city and a third party were involved in litigation related to the Burlington Airpark, and the ministry appears to have been aware of this fact. However, there is not and never was any litigation proceeding between the city and the ministry in relation to the Burlington Airpark. It is therefore the city's position that [this] does not apply to any records at issue in this appeal, because the ministry had no requirement to contemplate or prepare for litigation.

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[24] [2010] 1 S.C.R 815, 2010 SCC 23.
[25] This ministry refers to Order PO-3150 in this regard.
[26] In support of this submission the city refers to *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

The ministry's reply representations

[66] In reply, the ministry acknowledged that there is no litigation involving the province with respect to the Burlington Airpark. It adds:

> The [city] has specifically raised access to records, pages 180-181 and the ministry confirms that [named individual], legal counsel for the ministry located within Central Region requested that ministry line staff address certain issues which they did in the last two responses in the email chain at the top of page 180.
>
> The response provides instructions to counsel with respect to his communications with counsel for Burlington Airpark.

Analysis and finding

[67] I find that records 156 (top portion), duplicated on pages 181, 183 and 202, as well as pages 180 and 194 where the withheld information is found, are emails between internal legal counsel and one or more employees of the ministry, either copied or not copied, to other ministry employees. I find that internal legal counsel was acting as legal counsel in the course of the exchanges, and in no other capacity. I find that the exchanges form part of the continuum of communications aimed at keeping both internal legal counsel and the client informed so that legal advice may be sought and given as required. In my view, disclosing this information would reveal the confidential privileged communications. Accordingly, I find that the records, or portions of the records, where the withheld information is found qualifies for exemption under Branch 1 of section 19(a).

[68] Accordingly, as I have found that section 19(a) applies to the information for which it is claimed, subject to my discussion on the exercise of discretion below, I uphold the ministry's decision to withhold these records, or portions of these records, pursuant to section 19(a) of the *Act*. I have highlighted the portions to be withheld in yellow on a copy of pages 156, 181, 183, 194 and 202 provided to the ministry along with this order.

[69] As I have found that section 19(a) applies, it is not necessary for me to consider whether these records, or portions thereof, also qualify for exemption under section 19(b).

[70] I am also satisfied that the undisclosed portions of the records cannot be reasonably severed, without revealing information that is exempt under section 19(a) or

resulting in disconnected snippets of information being revealed.[27]

Issue C: Is there a compelling public interest in disclosure of the information on pages 199, 200 and 201 that clearly outweighs the purpose of the section 13(1) exemption?

General principles

[71] Section 23 states:

> 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.

[72] Section 19 does not appear as one of the sections to which section 23 applies. Furthermore, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[28] the Supreme Court of Canada held that the legislature's decision not to make documents found to be exempt under section 19 of the *Act* subject to the section 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[29] Accordingly, the analysis that follows applies only to the information that I found to be exempt under section 13(1) of the *Act*.

[73] For section 23 to apply to the information that I have found to be exempt under section 13(1), two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[74] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[30]

Compelling public interest

[75] 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

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[27] See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).
[28] [2010] 1 SCR 815, 2010 SCC 23.
[29] Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11
[30] Order P-244.

central purpose of shedding light on the operations of government.[31] 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.[32]

[76] A public interest does not exist where the interests being advanced are essentially private in nature.[33] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[34]

[77] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[35]

[78] Any public interest in *non*-disclosure that may exist also must be considered.[36] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[37]

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

- another public process or forum has been established to address public interest considerations[38]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[39]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[40]
- the records do not respond to the applicable public interest raised by appellant[41]

Purpose of the exemption

[80] 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

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[31] Orders P-984 and PO-2607.
[32] Orders P-984 and PO-2556.
[33] Orders P-12, P-347 and P-1439.
[34] Order MO-1564.
[35] Order P-984.
[36] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[37] Orders PO-2072-F, PO-2098-R and PO-3197.
[38] Orders P-123/124 and P-391.
[39] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[40] Order P-613.
[41] Orders MO-1994 and PO-2607.

established exemption claim in the specific circumstances.

[81] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[42]

The ministry's representations

[82] The ministry made no specific representations on the application of section 23 of the *Act*.

The city's representations

[83] The city submits that fill operations at the Burlington Airpark have been a subject of public interest since approximately September, 2008, by which time an estimated 50,000 cubic meters of soil had been transported to the Airpark site. The city submits that concerns over the impacts of the fill operation - including noise, dust, drainage and impact on groundwater - were expressed by members of the public from 2008 onwards and by 2013, these concerns had become a matter of significant public interest. The appellant states that a review by city staff revealed that:

> Fill operations remained ongoing and had not ended in 2009 as originally stated by the Airpark owner;
>
> More than 500,000 cubic metres of fill had been deposited on the lands, being over 250,000 cubic metres beyond what had been originally proposed by the Airpark owner;
>
> The Airpark owner had begun selling dumping tickets and accepting fill from projects throughout the Greater Toronto Area; and no soil test reports had been received by the Region of Halton or the City since 2009.
>
> On June 11, 2014, the Ontario Court of Appeal upheld the decision of the Ontario Superior Court of Justice that the City's Site Alteration By-law applies to the Burlington Executive Airpark, including the fill operations on Airpark lands.

[84] The city submits that operations at the Burlington Airpark have generated significant public interest, political debate, media coverage and other public discourse. The city provided the following examples:

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[42] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

- 16 "Burlington Airpark Updates" issued from May 13 - November 1, 2014, sent to all members of City Council, posted to a unique page on the city's website designed to share information on all matters related to the Burlington Airpark … and copied to Conservation Halton, the ministry, Halton Region and Transport Canada.

- 9 media releases issued from July 2013 - June 2014, also posted on the same site.

- Over 300 emails received from concerned residents since January 1, 2013.

- Formation of the Rural Burlington Greenbelt Coalition; as of November 2014, this group's site … showed 140 followers. Further interest in Burlington fill operations has been expressed by additional community organizations, including The Ontario Soil Regulation Task Force (OSRTF); Lakeridge Citizens for Clean Water; STORM Coalition (Save The Oakridges Moraine); Earthroots; Clarington Citizens for Clean Water and Soil; Tottenham Citizens for Clean Water; East Gwillimbury Citizens for Clean Water; Concerned Citizens of King Township; Citizens Against Fill Dumping.

- Ongoing media coverage, including a feature on CBC's The National entitled "Pay Dirt.

- The CBC's written coverage of this issue generated 143 comments before closing to further submissions.[43]

- 15 residents signed up to receive email updates from the city on this topic.

- Issues were addressed by the Mayor directly to residents, offering summary via blog.

[85] The city submits that:

> … the volume of these communications, updates and reports is unusually high for our municipality, and provides evidence of a clear and compelling public interest within the Burlington community to understand more about what is occurring at that site. Members of the public have described significant challenges related to noise, dust, inconvenience and safety; residents are also concerned about the potential impact of fill operations on groundwater quality, which supplies local wells. The potential impact of groundwater contamination would be deep and significant: Order PO-1909

[43] For further examples of coverage by media outlets between Hamilton, Burlington and Toronto, the appellant referred to appendix B of its representations.

> found that, by their very nature, matters related to the quality of air and water do raise concerns that are in the public interest.

[86] Referring to Order PO-2355, the city submits that the public's interest has been found to override section 13(1) when considered in regards to local water quality and safety, which are aspects of public concerns with fill operations at the Burlington Airpark.

[87] The city submits that:

> … Given that two of the [ministry's] stated objectives are "working with other governments, Aboriginal groups and organizations, industry, stakeholders and the public" and "monitoring and reporting to track environmental progress over time" based on science and research, any advice and recommendations related to fill operations at the Burlington Airpark should be permitted to flow in an open and transparent manner.[44]
>
> Similarly, Order PO-2557 found that citizens should receive the "maximum amount of information with respect to programs to deliver safe drinking water," even if a third party exemption has been applied to the records under section 17.

[88] The city submits that it has been trying for several years to establish a base of evidence on which appropriate responses can be provided to resident concerns, and actions taken if groundwater contamination has or is likely to occur and that submitting a Freedom of Information request under the *Act* was one aspect of this effort.

[89] The city submits that:

> The ministry has withheld records from disclosure on matters that we believe are in the public's interest. The city is therefore proceeding with this appeal in an attempt to obtain additional information relevant to the groundwater monitoring program, address the stated concerns of local residents, and satisfy a compelling public interest.

Reply representations

[90] The ministry provided no representations in reply.

Finding and Analysis

[91] Although the ministry provided no specific representations on section 23, its position appears to be set out in its initial decision letter as follows:

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[44] The ministry submits that this is sourced from the ministry's website and that Senior Adjudicator John Higgins applied a similar principle when applying section 23 in Order PO-2681.

> The ministry and Halton Health have monitored the drinking water wells that are at the highest risk of contamination from the airpark and there were no exceedances of the Ontario Drinking Water Quality Standards for the parameters tested. Based on the parameters tested and the results received, there were no concerns identified. The groundwater monitoring plan will help determine any off-site impacts and whether the ministry needs to require any further action from the airpark

[92] In Order PO-2557, Adjudicator Colin Bhattacharjee considered whether section 23 applied to records relating to the treatment of water in Wiarton, Ontario. He wrote:

> … In May 2000, the drinking water system in the town of Walkerton became contaminated with deadly bacteria. Seven people died, and more than 2,300 became ill. The Ontario government subsequently appointed the Honourable Justice Dennis O'Connor to lead a Commission of Inquiry into the circumstances that led to the tragedy in Walkerton and to make recommendations with respect to the safety of public drinking water in Ontario.
>
> After conducting his inquiry, Justice O'Connor released two reports that were widely praised and that led to the strengthening of the statutory regime governing public drinking water in Ontario. In the second part of his report, he emphasized the importance of transparency and providing citizens with access to information relating to the safety of public drinking water:
>
> > … because of the importance of the safety of drinking water to the public at large, the public should be granted external access to information and data about the operation and oversight of the drinking water system. In my view, as a general rule, all elements in the program to deliver safe drinking water should be transparent and open to public scrutiny.
>
> In short, I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in this appeal, because they also deal with the safety of public drinking water.

[93] Previously, in Order PO-2172, Senior Adjudicator David Goodis considered the environmental and health and safety issues relating to the practice of underwater logging, in applying section 23 in the circumstances of that appeal. He wrote:

A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues. In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:

> In considering the factors listed above to the information which is the subject of these appeals, I find that the subject matter of the responsive records is a matter of public, rather than private interest. In addition, I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
>
> I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. …

In Order PO-1688, I dealt with an appeal involving certain records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In concluding that there is a compelling public interest in the disclosure of the records under section 23 of the *Act*, I stated:

> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.

…

> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added in original]
>
> …

The right to a safe environment was also emphasized in the Supreme Court of Canada decision in *R. v. Canadian Pacific Ltd.* (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), where the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment* [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
>
> . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .[45]

[94] In all the circumstances, I am satisfied that there is a compelling public interest in disclosure of the information withheld under section 13(1). The venture that is the

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[45] This was followed in Order PO-2355.

subject of the records has and continues to rouse strong interest and attention in this community, and has been the subject of public debate, litigation and judicial scrutiny. I find that in these circumstances, there is a compelling public interest in having the information in the records made available for public scrutiny.

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the exemption?

[95] I am also satisfied that the compelling public interest in disclosure clearly outweighs the purpose of the section 13(1) exemption. In the circumstances, I am satisfied that there is a significant public interest to be served in disclosing to the community the comments at issue. This information is clearly of considerable interest to the public and the well monitoring program has significant implications on the environment and the health and safety of a great number of residents. The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[46] In my view, however, in the circumstances of this appeal, the interest in disclosure outweighs the purpose of the section 13(1) exemption.

[96] In conclusion, I find that section 23 applies to the information on pages 199, 200 and 201 that was withheld under section 13(1). Notwithstanding the application of section 13(1), a compelling public interest in the disclosure of the withheld information on pages 199, 200 and 201 clearly outweighs the purposes of this exemption in this case.

[97] Accordingly, I will order that this information be disclosed to the city.

Issue D: Did the institution exercise its discretion under section 19(a)? If so, should this office uphold the exercise of discretion?

General principles

[98] The section 19(a) 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, the Commissioner may determine whether the institution failed to do so.

[99] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

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[46] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[100] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[47] This office may not, however, substitute its own discretion for that of the institution.[48]

Relevant considerations

[101] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[49]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- 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.

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[47] Order MO-1573.
[48] Section 54(2).
[49] Orders P-344 and MO-1573.

The ministry's representations

[102] The ministry submits that it considered the release of portions of the records, despite the existence of the exemptions, however, the legal advice was provided on a confidential and privileged basis and the possibility of waiving privilege was considered and rejected due to the nature of specific advice given in the record. The ministry submits that to disclose the records that it claims are subject to section 19, "would compromise the integrity of the solicitor-client relationship and its role to inform ministry staff who are actively working on the well water monitoring program."

The city's representations

[103] The city submits that this office has found that transparency and the public interest should be considered in the exercise of discretion.

[104] The city submits that in defending its exercise of discretion in regards to section 19, the ministry takes into account the irrelevant consideration of litigation between the city and Burlington Airpark, which does not directly involve the ministry. The city also argues that the ministry provides no evidence to demonstrate how the release of records at issue could compromise a privileged relationship or solicitor-client advice with respect to the ongoing well water monitoring program.

[105] The city submits that:

> As sections 13 and 19 require an institution to consider all relevant factors in its exercise of discretion, the city proposes that the ministry has not considered a very relevant factor in its exercise of discretion: the desire of municipalities and their constituents to request and obtain information from government institutions in an open and transparent manner. …

The ministry's reply representations

[106] The ministry submits in reply that:

> To disclose the records exempted in accordance with section 19 would compromise the integrity of the solicitor-client relationship and its role to inform ministry staff who are actively working on the well water monitoring program.
>
> The exercise of discretion acknowledges the complexities of the issues raised in a federally controlled site and its impact on provincial/municipal jurisdictions.
>
> Were it not for these complexities, legal counsel would not have been involved in the process.

Analysis and findings

[107] I uphold the ministry's exercise of discretion to deny access to these records on the basis of section 19(a) of the *Act*. I am satisfied that the ministry did not err in exercising its discretion to withhold this information. I accept that considerations relevant to its exercise of discretion in these circumstances include the importance of maintaining solicitor-client privilege and the sensitivity to its recipients of information subject to legal privilege. I find that the ministry did not consider any irrelevant factors.

[108] In all the circumstances, I uphold the ministry's exercise of discretion with respect to the information that I have found to qualify for exemption under section 19(a) of the *Act*.

ORDER:

1. I uphold the ministry's decision that information on pages 156, 181, 183, 194 and 202 is exempt under section 19(a) of the *Act*. I have highlighted the portions of pages 156, 181, 183, 194 and 202 to be withheld in yellow on a copy of those pages provided to the ministry along with this order.

2. I do not uphold the ministry's decision to withhold information on pages 199, 200 and 201.

3. I order the ministry to disclose to the city the remaining withheld information in pages 139, 140, 144, 146-167, 182-197, 199, 200, 201, 202 and 203, with the exception of the information that I have found to be subject to section 19(a) and the information on pages 196, 197 and 201 that the the ministry claimed to be exempt under section 21 of the *Act* by sending it to the city by **October 4, 2016**, but not before **September 28, 2016**. I have highlighted the information that ministry claimed to be exempt under section 21 of the *Act* in green on a copy of pages 196, 197 and 201 that I have provided to the ministry along with this order.

4. In order to ensure compliance with paragraph 3 of this order, I reserve the right to require the ministry to send me a copy of the pages that I have ordered to be disclosed to the city.

Original Signed by: August 31, 2016

Steven Faughnan
Adjudicator