Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3649-I

Appeal PA13-436

Ministry of Natural Resources and Forestry

September 20, 2016

Summary: The issues in this appeal are whether the records that are the subject matter of an access request made under the *Freedom of Information and Protection of Privacy Act* are exempt from disclosure under the discretionary exemptions in sections 18(1)(e) (economic and other interests) and 19 (solicitor-client privilege), and whether the public interest override in section 23 applies. The affected party in this appeal also raised the possible application of the discretionary exemption in section 15 (relations with other governments). In this interim order, the adjudicator upholds the ministry's decision, in part. She finds that all of the records for which section 19 was claimed are exempt from disclosure, and that some of the records for which section 18(1)(e) was claimed are exempt as well. She upholds the ministry's exercise of discretion and finds that the public interest override does not apply to the information that is exempt under section 18(1)(e). The adjudicator remains seized of the appeal to address the issues arising from the affected party raising the application of section 15.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(e), 19 and 23.

OVERVIEW:

[1] This interim order disposes of some of the issues raised as a result of an access decision made by the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to correspondence relating to a specific meeting between Ontario Parks and a named First Nation, including correspondence arranging the meeting, minutes and notes of the meeting, and follow-up comments.

[2] The ministry located responsive records and notified individuals whose interests could be affected by the disclosure of the records, seeking their views on disclosure. After receiving a response from one third party (the affected party), the ministry issued a decision letter to the requester, granting access to some of the records in their entirety, and partial access to others. The ministry claimed the application of the discretionary exemptions in section 14 (law enforcement), 18 (economic and other interests) and 19 (solicitor-client privilege), as well as the mandatory exemption in section 21(1) (personal privacy) with respect to the information it withheld. The ministry then issued a supplementary decision letter, advising that it was withholding additional information, claiming the application of the discretionary exemptions in sections 18(1)(d) and (e). The ministry also withheld some information on the basis that it was not responsive to the request.

[3] The requester (now the appellant) appealed the ministry's decision to this office. During the mediation of the appeal, the appellant advised the mediator that she was not seeking access to: any of the personal information in the records that was withheld under section 21(1); any teleconference phone numbers and codes that were withheld under sections 14 and 18(1)(d); and non-responsive information. Accordingly, these portions of the records and these exemptions are no longer at issue in the appeal.

[4] The appellant also advised the mediator that she continued to seek access to the information the ministry withheld under sections 18(1)(e) and 19 of the *Act*, and that there is a public interest in the disclosure of this information. Consequently, the possible application of the public interest override in section 23 was added as an issue in this appeal.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the file sought and received representations from the ministry, the appellant and the affected party, which were shared in accordance with this office's *Code of Procedure* and *Practice Direction 7*. In its representations, the affected party raised the possible application of the discretionary exemption in section 15 (relations with other governments). The file was then transferred to me for final disposition.

[6] For the reasons that follow, I uphold the ministry's decision, in part. I find that all of the records for which section 19 was claimed are exempt from disclosure, and that some of the records for which section 18(1)(e) was claimed are exempt as well. I uphold the ministry's exercise of discretion, and find that the public interest override does not apply to the information that is exempt under section 18(1)(e). I remain seized of the appeal to address the issues arising from the raising of section 15 by the affected party.

RECORDS:

[7] The records at issue consist of:

- Pages 14-18, 20-24, 31, 33-36, 43-45, 58, 60-61, 63-65, 72-73 and 87-91 in their entirety, withheld under section 18(1)(e);
- Portions of pages 30, 32, 37, 41 and 82 withheld under section 18(1)(e); and
- Pages 75-78 in their entirety, withheld under section 19.

ISSUES:

A. Does the discretionary exemption in section 18(1)(e) apply to the records?

B. Does the discretionary exemption in section 19 apply to the records?

C. Did the ministry exercise its discretion under section 18(1)(e) and/or 19? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption in section 18(1)(e)?

DISCUSSION:

Background

[8] The ministry provided the following background information to the circumstances leading to the access request. Short Hills Provincial Park (Short Hills) is a 660-hectare natural environment class park on the southwest edge of St. Catharines, in the Regional Municipality of Niagara. The park does not provide camping, but is popular with day visitors. Hiking, fishing, horseback riding and bicycling are popular activities in the park. Hunting is not permitted in Short Hills and is not identified as a recreational activity in the park management plan.

[9] In October 2012, a First Nation contacted the local ministry district office, indicating that there was an interest on the part of a group of community members to engage in a harvest of deer in Short Hills. The deer population in the park exceeded the maximum carrying capacity, so the traditional harvest benefitted the park's ecosystem. There were also areas in the part that showed excessive browsing by deer, which negatively affects the ecological integrity of the park.

[10] The First Nation agreed to a Traditional Harvest Safety Protocol and all First Nation harvesters were made aware of the mandatory traditional harvest safety protocol. The deer hunt was held in 2013 for a total of four days, on two successive weekends. The park was closed to the public during this time and the hunters used only archery equipment. Between 12 and 30 hunters (the maximum number permitted) participated daily. Hunters donated the deer to the Elders in their community for distribution. Ontario Parks mailed two separate notices to local residents and businesses that live and/or operate along the boundary of the park.

[11] Although the hunt took place within the park, buffer areas and safety zones were used to protect public property. Signs were posted and barricades were erected at park access points. Park staff and local law enforcement were on-site to ensure the perimeter and entrances were secured and to inform members of the public that the park was temporarily closed.

[12] Protests were held both weekends. The protesters were local residents, non-aboriginal hunters and members of animal rights groups.

Issue A. Does the discretionary exemption in section 18(1)(e) apply to the records?

[13] Section 18(1)(e) states:

> A head may refuse to disclose a record that contains,
>
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[14] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a *valuable government information* exemption in the *Act*:

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

[15] In order for section 18(1)(e) to apply, the institution must show that:

- The record contains positions, plans, procedures, criteria or instructions; and
- The positions, plans, procedures, criteria or instructions are intended to be applied to negotiations; and
- The negotiations are being carried on currently, or will be carried on in the future; and
- The negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[1]

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[1] Order PO-2064.

[16] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.[2]

[17] The terms *positions, plans, procedures, criteria or instructions* are referable to pre-determined courses of action or ways of proceeding.[3] The term *plans* is used in sections 18(1)(e), (f) and (g). Previous orders have defined *plan* as . . . *a formulated and especially detailed method by which a thing is to be done; a design or scheme*.[4] This section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[5]

[18] The ministry reiterates that it is engaged with the affected party with respect to deer culls in the provincial park. The ministry goes on to state:

> This was the second set of negotiations relating to the deer cull in the park and there will likely be deer culls in the future. Thus the latter two parts of the test are met. The records to which severances have been made or records exempted in their entirety pursuant to ss. 18(1)(e), reveal positions, or proposals arising in the context of the above negotiations. A number of the records are drafts of the proposed safety protocol or are minutes of the meeting which set out the position of the Ministry. Other records set out the considerations taken into account or projected in the negotiations. While agreements relating to deer culls in provincial parks are negotiated on a case by case basis, similar agreements are expected in the future with this and perhaps other parks. The conduct of negotiations for the agreement reached with these First Nation (sic) set out a potential bottom line for the Ministry in future agreements with this and with other First Nations. Accordingly, as all parts of the test have been met, it is the position of the Ministry that ss. 18(1)(e) applies to all the records as they relate directly to the negotiations for the agreement . . .

[19] The appellant's representations do not address this issue. While the affected party's representations do not address section 18(1)(e) directly, it does state that the records reveal confidential discussions between governments[6] and their representatives, and that some of the discussions involved responsibilities or actions taken by individuals. It also submits that the parties (being the ministry and the affected party) have an ongoing relationship and that the discussions between them continue.

[20] Generally speaking, section 18 is designed to protect certain economic interests

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[2] Orders PO-2064 and PO-2536.
[3] Orders PO-2034 and PO-2598.
[4] Orders P-348 and PO-2536.
[5] Order PO-2034.
[6] The affected party self-identifies as a government.

of institutions covered by the *Act*. Sections 18(c), (d) and (g) all take into consideration the *consequences* which would result to an institution if a record was released. In contrast, sections 18(a) and (e) are concerned with the *type* of the record, rather than the consequences of its disclosure.

[21] The first part of the section 18(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not its intended use. The authors of the Williams Commission Report, cited previously, commented on the reasoning behind the exemption, at page 321:

> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.
>
> . . .
>
> Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. *Disclosure of this bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.*
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> [emphasis added]

[22] In other words, the first two parts of the test in section 18(1)(e) are met when the record discloses the ministry's bargaining strategy or the instructions given to the officials who carried out the negotiations. In my view, these strategies and pre-determined courses of action would be discussed internally at the ministry, and not shared with third parties.

[23] In this appeal, based on my review of the records, I find that section 18(1)(e) does not apply to most of the information for which this exemption was claimed. The majority of the information consists of email communications, correspondence and notes of meetings between the ministry and the affected party, setting out opinions regarding past negotiations, as well as each of the parties' positions, responsibilities and actions to be taken as negotiated between them. Other records document the results of the negotiations, in the form of various agreements, whether they be in final or in draft

form.[7] In my view, this information does not contain *positions, plans, procedures, criteria or instructions* for the purpose of section 18(1)(e). The withheld information does not contain a *pre-determined course of action* the ministry had decided to take. Instead, the information relates to the development of an actual course of action that was negotiated between the ministry and the affected party, in which the affected party was privy to these communications. The records essentially document the give and take of the negotiation process, rather than set out positions, plans, procedures, criteria or instructions to be applied to those negotiations.

[24] Accordingly, I find that the ministry has not established that parts 1 and 2 of the test for this exemption apply to the information in pages 14-18 (duplicated in 87-91), 20-24, 30-31 (duplicated in 32-33), 34-36, 41, 44-45 (partially duplicated in 58 and 61), 60, 63-65 and 72-73. I therefore find that these pages are not exempt from disclosure under section 18(1)(e).

[25] Conversely, I find that section 18(1)(e) applies to other records at issue. In particular, I find that the withheld information in pages 37, 43 and 82 is exempt from disclosure under section 18(1)(e). These records are internal emails between ministry staff consisting of positions to be taken and criteria to be used in negotiations, thus meeting the threshold for parts 1 and 2 of the test. Concerning parts 3 and 4 of the test in section 18(1)(e), I am satisfied that the positions and criteria set out in these records would apply in future negotiations on behalf of the ministry. Consequently, I find that all four parts of the test have been met and that this information is exempt under section 18(1)(e), subject to my review of the ministry's exercise of discretion.

[26] I note that, in its representations, the affected party raised the possible application of the discretionary exemption in section 15 to the information for which the ministry claimed the application of section 18(1). Consequently, in the specific circumstances of this appeal, I will be seeking further representations from all of the parties on the issues of whether an affected party can raise a discretionary exemption and, if so, whether section 15 applies to the records that I have found not to be exempt under section 18(1).

Issue B. Does the discretionary exemption in section 19 apply to the records?

[27] As previously stated, the ministry has claimed the application of section 19 to pages 75-78 of the records. Section 19 of the *Act* states, in part:

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

[28] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a), and encompasses two heads of privilege, as derived from the common

[7] The ministry refers to draft agreements in its representations.

law: solicitor-client communication privilege; and litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[8] In this appeal, the ministry is claiming that some of the records are exempt because they are subject to solicitor-client communication privilege.

[29] 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.[9] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[10]

[30] The privilege applies to a *continuum of communications* between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[11]

[31] 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.[12]

[32] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive it.[13] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14]

[33] The ministry submits that the information it withheld under section 19 falls within the common law definition of solicitor-client privilege, as it consists of direct and indirect communications between ministry staff and counsel, as well as portions that reveal the legal services provided by ministry counsel. In particular, the ministry advises that it withheld pages 75 and 76, in full, which is an email sent from a ministry staff to legal counsel to set up a meeting to discuss a matter for which legal services would be provided. Further, the ministry states that it also withheld pages 77 and 78 in full, which is an email exchange between ministry staff and legal counsel coordinating counsel's availability for meetings for which legal services were to be provided. The other parties did not provide arguments on this issue.

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[8] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).
[9] *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *Balabel v. Air India*, [1988], 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[13] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[14] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.).

[34] Having reviewed the records for which this exemption was claimed, and taking into consideration the ministry's representations, I uphold the ministry's decision with respect to section 19, subject to my findings on its exercise of discretion. The records consist of emails sent between ministry staff and legal counsel, making arrangements for meetings between staff and legal counsel, in which legal advice was to be given. I am satisfied that these records form part of the continuum of communications, as they reflect confidential communications between a solicitor and his client. Consequently, I find that pages 75 to 78 are exempt from disclosure under section 19 of the *Act*, subject to my review of the ministry's exercise of discretion.

[35] As previously stated, during the mediation of the appeal, the appellant raised the application of the public interest override in section 23. Records which are exempt under section 19 are not subject to the application of section 23. As a result, I am unable to consider whether the public interest override applies to the records I have found to be exempt under section 19.

Issue C. Did the ministry exercise its discretion under section 18(1)(e) and/or 19? If so, should this office uphold the exercise of discretion?

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

[37] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[17]

- The purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;

- The wording of the exemption and the interests it seeks to protect;

- Whether the requester is seeking his or her own personal information;

[15] Order MO-1573.
[16] See section 54(2).
[17] Order P-344 and MO-1573.

- 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; and
- The historic practice of the institution with respect to similar information.

[39] The ministry submits that properly exercised its discretion. It states that in doing so, it attempted to balance the purpose of the exemptions, as well as all other interests and considerations, on the basis of the facts and circumstances of this particular request. The ministry goes on to state that it initially determined whether the exemptions applied, and then took the public interest in the disclosure of the records under consideration. With respect to the exemption in section 19 in particular, the ministry considered the decision of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[18] in which the Court highlighted the importance of solicitor-client privilege in the Canadian legal system.

[40] The other parties did not provide representations on this issue.

[41] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[19] If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[20]

[42] I have carefully reviewed the representations of the ministry and I am satisfied that the ministry exercised its discretion under sections 18 and 19 in a proper manner. I am satisfied that it considered relevant factors, including the nature of the withheld information, the importance of solicitor-client communication privilege, the ability of an institution to negotiate effectively, and the purposes of the *Act*, including the appellant's right of access, in exercising its discretion. I am also satisfied that the ministry did not consider irrelevant factors. Consequently, I uphold the ministry's exercise of discretion under sections 18 and 19.

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[18] [2010] 1 S.C.R. 815.
[19] Order MO-1287-I.
[20] Order 58.

Issue D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption in section 18(1)(e)?

[43] The appellant has raised the application of the public interest override in section 23, which 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.

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

[45] 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.[21]

[46] In considering whether there is a public interest in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.[22] 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.[23]

[47] A public interest does not exist where the interests being advanced are essentially private in nature.[24] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25] The word *compelling* has been defined in previous orders as *rousing strong interest or attention*.[26]

[48] The appellant submits that the records may pertain to public safety and she wishes to review them so that she may disseminate information to the public. The appellant states there were public safety issues with the deer hunt, such as:

- The ministry failed to secure all entrances to the provincial park;

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[21] Order P-244.
[22] Orders P-984, PO-2607.
[23] Orders P-984 and PO-2556.
[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Order P-984.

- The ministry failed to stop the hunt when a non-hunter wandered into the area;
- Children partook in the hunt;
- The hunt was not necessary in the first place;
- The flagging of the affected area was poor and inadequate; and
- Hunters were seen hunting on private property adjacent to the park.

[49] The ministry submits that it has been a long-held principle of this office that the appellant has the burden of establishing the application of section 23. It goes on to state that in determining whether to apply section 23, there must be a weighing of the public interest in disclosure against the purpose of the exemption. In this case, it submits, there does not appear to have been a great deal of media coverage of the issue, and that public debate on aboriginal hunting as a mechanism in controlling deer populations is not dependent or materially hindered by the failure to disclose the *agreement*.

[50] Further, the ministry argues that there is a compelling public interest in the non-disclosure of the *agreement*. It states:

> In fact, it is the position of the Ministry that there is a public interest in the resolution of the issue around aboriginal hunting through the negotiation of agreements such as the one around the Short Hills Provincial Park deer cull . . . That is certainly been the direction of the courts. Release of the records relating to the negotiation of the agreement will be seen as a sign of bad faith by the First Nations with whom the agreement has been made, but also by the First Nations with whom the Ministry is currently negotiating.

[51] The affected party submits that the public interest does not extend to a right of access to the records of confidential negotiations.

[52] As previously stated, I have found that most of the information for which the ministry claimed the application of section 18(1)(e) is not exempt from disclosure. The limited information that I have withheld under this exemption is contained in pages 37, 43 and 82. I find that there is no public interest in the disclosure of these pages, and I further find that there is a public interest in the non-disclosure of the exempt information, as its disclosure would reveal the ministry's internal strategy to the negotiations with the affected party. Consequently, I find that there is not a compelling public interest in the information that I found to be exempt under section 18(1)(e), and that section 23 does not apply.

[53] In sum, I uphold the ministry's decision, in part. I find that the exemption in section 19 applies to the records for which it was claimed, and that section 18(1)(e) applies to some of the information at issue. I uphold the ministry's exercise of discretion

and find that the public interest override in section 23 does not apply. I remain seized of the appeal to address the possible application of section 15, which was raised by the affected party.

ORDER:

1. I uphold the ministry's application of the exemption in section 18(1)(e) to the withheld information in pages 37, 43 and 82 of the records, but not to the remaining information that was withheld under this exemption.

2. I uphold the ministry's application of the exemption in section 19 to pages 75-78 of the records.

3. I remain seized of the appeal to address whether the affected party can raise a discretionary exemption and, if so, whether section 15 applies to the remaining records at issue.

Original signed By: September 20, 2016

Cathy Hamilton
Adjudicator