Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3778

Appeal PA15-567

Ministry of the Environment and Climate Change

October 26, 2017

Summary: The records at issue in this appeal relate to the Ministry of the Environment and Climate Change's decision not to conduct an independent environmental assessment as part of its Whiskey Jack Forest Management Plan. The ministry granted partial access to the records, claiming the application of the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), and advised the appellant that portions of the records were not responsive to the access request. The appellant raised the issues of reasonable search and the possible application of the public interest override in section 23. In this order, the adjudicator upholds the ministry's decision, in part, finding that portions of the records are not responsive to the request and that other records are exempt from disclosure, either in whole or in part, under sections 13(1) and 19. However, she further finds that some of the records for which section 13(1) was claimed are not exempt. She upholds the ministry's exercise of discretion, but not its search for records. Lastly, she finds that the public interest override in section 23 does not apply in these circumstances.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 19, 23 and 24.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of the Environment and Climate Change (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for all records contained in the ministry's confidential file containing the

Whiskey Jack 2012-2022 Forest Management Plan project[1] and any other records which the ministry relied on in making the decision on the request for individual environmental assessments of the Forest Management Plan submitted by the appellant and the Grassy Narrows First Nation.

[2] After issuing an interim access and fee decision, the ministry issued a final fee and access decision, granting partial access to more than 2,000 pages of records. The ministry withheld some records, either in whole or in part, claiming the application of the mandatory exemption in section 21(1) (personal privacy), as well as the discretionary exemptions in sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 22 (publicly available). The ministry also claimed that other information was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to this office. After extensive mediation, the appellant confirmed to the mediator that it was no longer seeking the information that was withheld under sections 19, 21(1) or 22, nor any blank pages, records sent by the appellant itself and records post-dating the request.

[4] The appellant also advised the mediator that it is pursuing access to the records withheld or severed under section 13(1) and claims that the public interest override in section 23 applies if the ministry's exemption claim is upheld. The appellant further advised the mediator that it is of the view that further records should exist, raising the issue of reasonable search, and challenged the withholding of information as not being responsive to the request. As a result, the issues of reasonable search, responsiveness of the records, and the possible application of the public interest override were added to the 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 appeal sought and received representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the ministry advised that there are some duplicate records.[2] It also advised that the *Manager approved responses* that were withheld on pages 1640-1641, 1642-1643 and 1652-1653 were actually disclosed to the appellant on pages 215-216. The ministry also clarified that pages 415, 542 and 954-955 were withheld under section 19, and not section 13(1) as had been indicated on the index of records.

[6] Also during the inquiry, the ministry issued a supplementary decision letter to the appellant, advising that it had conducted a further search for records, and located 21 additional pages of records. The ministry granted partial access to the records, advising the appellant that portions were withheld because they contain legal advice (claiming section 19), or that they related to other projects and were, therefore, not responsive to the request. The ministry also withheld duplicate records. Given that the ministry has

[1] Excluding records that the requester submitted to the ministry.
[2] Specifically, pages 1612 and 2054 are duplicates of page 223, and page 935 is a duplicate of pages 216 and 217.

now claimed the application of the discretionary exemption in section 19 to these records, it was added as an issue in this appeal.

[7] The file was then transferred to me. For the reasons that follow I uphold the ministry's decision, in part. I find that portions of the records are not responsive to the request and that other records are exempt from disclosure, either in whole or in part, under sections 13(1) and 19. I also find that some of the records for which section 13(1) was claimed are not exempt. I uphold the ministry's exercise of discretion, but not its search for records. Lastly, I find that the public interest override in section 23 does not apply in these circumstances.

RECORDS:

[8] The records consist of internal ministry emails and correspondence, emails and correspondence between ministry staff and the Ministry of Natural Resources and Forestry, a rationale for concurrence, timelines, a contingency plan proposal and other issues, notes, reviews, legal documents, meeting minutes, and draft Questions and Answers.

ISSUES:

A. What records are responsive to the request?

B. Did the ministry conduct a reasonable search for records?

C. Does the discretionary exemption in section 13(1) apply to the records?

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

E. Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

F. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the sections 13(1) and 19 exemptions?

DISCUSSION:

Issue A. What records are responsive to the request?

[9] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[10] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[3]

[11] To be considered responsive to the request, records must *reasonably relate* to the request.[4]

[12] The ministry states that when it received the appellant's access request, it contacted the appellant to discuss options for revising the scope of the request. At that time, the appellant confirmed that any documents in the public file could be excluded from the scope of the request.

[13] The ministry submits that it took a liberal interpretation of the scope of the access request, and, as stated above, worked with the appellant to clarify the request and confirm the scope of the request. The ministry then goes on to specify the portions of the records that it withheld as not responsive to the request and why they are not responsive. In general, these portions were withheld as they relate to: non-business matters; to different projects; to staff schedules; or to teleconference dial-in information.

[14] The ministry further submits that, with respect to this issue, it only withheld specific and limited information relating to personal staff matters and issue/projects not related to the Whiskey Jack Forest Management Plan.

[15] The appellant states that it accepts the ministry's explanations regarding the portions it withheld as not responsive, with some exceptions. The appellant submits that pages 579-583, should be disclosed because, according to the index, they relate to section 35 of the *Fisheries Act*, which appears relevant to the request. In addition, the appellant submits that the withheld portions of pages 223, 1612 and 2054 should be disclosed because they appear to relate to whether a ministry project evaluator consulted with certain parties during the individual environmental assessment process. The appellant also indicates that portions of the records that were withheld as part of the second group of records that were disclosed were labelled as not responsive, but that the ministry has not explained why they are not responsive to the request. These

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[3] Orders P-134 and P-880.
[4] Orders P-880 and PO-2661.

portions are located at pages 2097, 2099, 2106, 2107, 2110 and 2116.

[16] I have reviewed the pages referred to above. I note that the portions of pages 223 and 2054 that were withheld were done so under section 13(1) and that the portions of pages 2097, 2107 and 2116 that were withheld were done so under section 19, and not identified as not responsive the request. Accordingly, I will review those pages when addressing whether the exemptions claimed apply.

[17] Turning to the remaining pages, I find that pages 579-583 in their entirety, and the portions withheld on pages 1612, 2099, 2106 and 2110 are not responsive to the appellant's request. Pages 579-583 relate to an entirely different project and while there is reference to the *Fisheries Act* in these records, I find that the information in these records is not reasonably related to the appellant's access request. Similarly, the portions of pages 2099, 2106 and 2110 that were withheld concern other projects unrelated to the Whiskey Jack Forest Management Plan. With respect to page 1612, one sentence was withheld, which contains the personal information of the author.

[18] In sum, I find that the records (or portions thereof) that were identified as not responsive to the appellant's request were, in fact, not responsive to the request.

Issue B. Did the ministry conduct a reasonable search for records?

[19] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search as required by section 24.[5] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[20] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[6] To be responsive, a record must be "reasonably related" to the request.[7] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[8]

[21] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[9]

[22] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable

[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.

basis for concluding that such records exist.[10]

[23] The ministry submits that it conducted a reasonable search for records that were responsive to the request. The ministry provided part of its evidence by way of an affidavit. The affiant is a ministry staff member who was one of the Project Evaluators assigned to the access request.[11] He indicates that he has personal knowledge of the facts set out in his affidavit.

[24] The affiant advises that the search for records was conducted in two stages. The first search was led by the other Project Evaluator on the file, and the second search was led by the affiant. The first search yielded 2,096 pages of records. The second search involved six ministry staff members and 22 additional pages of records were located as a result of this search.[12]

[25] The ministry also notes that during the request stage of the process, the appellant was advised that the ministry's Environmental Approvals Branch is the main program area responsible for issuing environmental assessments and has access to records in the files for the Whiskey Jack Forest Management Plan. It further states that the appellant was asked to advise the FOI office as to whether it wanted an additional search to be conducted for records from the Minister's Office, the Communications Branch or the Legal Services Branch. The ministry goes on to state:

> In his email of [date], the requester indicated that he did not wish for the search for FOI request [number] to be extended to other program areas in the Ministry. However, the requester asked the FOI Office to forward request [different number] for search to other program areas, including the Minister's Office, the Communications Branch and the Legal Services Branch.

[26] The ministry states that the second request was forwarded and that records were subsequently disclosed to the appellant relating to that request. Consequently, the ministry submits that it ensured that a thorough search was conducted for all responsive records relating to the Whiskey Jack Forest Management Plan and the Director's decision to deny the individual environmental assessment request from all the relevant program areas within the ministry.

[27] The appellant submits that the ministry has not completed a reasonable search for records, and that the affidavit does not provide sufficient evidence to demonstrate that the ministry made a reasonable effort to locate responsive records. The appellant states that it has a reasonable basis to believe that further records exist, including the following:

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[10] Order MO-2246.

[11] In particular, the affiant is a Project Evaluator within the Project Review Unit, Environmental Assessment Services, Environmental Approval Branch of the ministry.

[12] I note that the second search took place during the mediation of this appeal.

- Attachments to emails that were disclosed – the appellant then lists specific emails that have attachments that were not disclosed to her, including drafts of the attachments;

- Records relating to telephone calls and meetings – the appellant submits that additional notes or records should exist from the participants in the substantive meetings and teleconferences between the ministry and the Ministry of Natural Resources and Forestry or calls amongst ministry staff relating to the individual environmental assessment decision. The appellant then lists the specific meetings/calls for which a further search should be conducted for records relating to them; and

- Other paper records, text messages or voicemail messages – the appellant submits that the vast majority of the records appear to be from computer files rather than paper, text messages or voicemail messages.

[28] The appellant further submits that the ministry's decision-making process with respect to the independent environmental assessment decision took a full year and involved significant scientific, environmental and mercury-related health issues. These complexities, the appellant argues, are not reflected in the records currently disclosed.

[29] In reply, the ministry maintains its position that it conducted two reasonable searches for records responsive to the request, and that it did not locate any additional records relating to the meetings/teleconferences held on the dates specified by the appellant.

[30] On my review of the representations provided by the ministry, with two exceptions, I am satisfied that it conducted two reasonable searches for records responsive to the request, taking into account all of the circumstances of this appeal. As previously stated, a reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request. The ministry has provided an explanation of the nature and extent of the searches conducted in response to this request. The second search, in particular, yielded some of the type of records that the appellant was of the view should exist, namely notes taken at meetings. I also accept the ministry's statement that it did not locate further notes relating to the specific meetings/calls that the appellant referred to in its representations.

[31] Conversely, I find that the ministry's representations have not addressed the issue of whether it conducted a search for text messages and voicemail messages. I accept the appellant's representations that these types of records may exist, given the extent of consultations that took place regarding the request for the individual environmental assessment. Consequently, I will order the ministry to conduct a further search for records responsive to the request, focusing the search on text messages and voicemail messages of staff members.

Issue C. Does the discretionary exemption in section 13(1) apply to the records?

[32] 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.

[33] The purpose of section 13(1) 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.[13]

[34] 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.

[35] 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.[14]

[36] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Examples of the types of information that have found not to qualify as advice or recommendations include; factual background information;[15] a supervisor's direction to staff on how to conduct an investigation;[16] and information prepared for public dissemination.[17]

[37] There are exceptions to section 13(1), which are listed in section 13(2). These exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.[18] The first four paragraphs of section 13(2) 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

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[13] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.
[14] Orders O-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.
[15] Order PO-3315.
[16] 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.).
[17] Order PO-2677.
[18] *John Doe v. Ontario (Finance)*, cited in note 12.

information on matters that are largely factual in nature.

[38] The remaining exceptions in section 13(2) will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[39] The word *report* appears in several parts of section 13(2). This office has defined report as a formal statement or account of the results of the collation and consideration of information. Generally, speaking, this would not include mere observations or recordings of fact.[19]

[40] The ministry submits that the information withheld under section 13(1) would reveal the substance of advice or recommendations provided by staff of the Environmental Approvals Branch, or would permit the drawing of accurate inferences with respect to the nature of the advice or recommendations provided. The advice relates to the Environmental Approvals Branch Director's decision to deny the request for the individual environmental assessment for the Whiskey Jack 2012-2022 Forest Management Plan.

[41] The ministry then provides more particulars, which I have included in a table format, for ease of reference.

Section 13(1)

Page numbers	**Type of record**	**Explanation for the application of s. 13(1)**
1 and 214	Emails	Reveal advice and recommendations made by public servants
263 and 1183	Rationale Concurrence	Contain a suggested course of action communicated by staff to the Director
1521	Decision Note	Contains a suggested course of action communicated by staff to the Director
215, 216, 223-224, 225-226, 423, 1613, 1616-1617, 1639, 1644, 1651, 1653-1654, 1656, 1657-1658, 2023, 2042, 2043, 2054-	Emails	Contain suggested responses drafted by staff to questions posed by the Deputy and Ass't Deputy Ministers' Offices.

[19] Order 24.

2055		
1151	Email	Contains key messages for a draft response to an MPP request.
414 and 968	Emails	The Director is suggesting a course of action during a deliberative process of government decision-making.
1063 and 1549-1550	Emails	Contain draft conditions, the disclosure of which would reveal differences between final and proposed versions of conditions, containing changes that have been recommended, accepted or rejected.
236	Email	Contains the names of external non-Ministry experts on methyl mercury and forestry. The intent is to advise staff about the qualifications of these individuals. The Manager could, in turn, accept or reject soliciting these recommended experts as part of the deliberative process before forwarding it to the Director for the final decision. This is not simply factual information, as it contains an evaluative component.[20]
533-535	MOE Delayed WJ Annual Work Schedule	Was prepared and supplied by the Ministry of Natural Resources and Forestry, and provides a rationale why the ministry should not delay a decision on

[20] See Order PO-3470-R.

		concurrence, outlining the potential social and economic impacts of such a delay. Disclosure of this record would permit one to accurately infer advice or recommendations.[21]
3, 221, 230, 263, 523, 1055, 1065-1066, 1073, 1151, 1155-1156, 1531, 1533, 1536, 1543, 1545, 2023 and 2042-2043	Proposed responses, draft messages, suggested questions and answers and recommended editions	Disclosure of draft communications reveals differences between final and proposed versions of communications, containing changes and revisions that have been recommended, accepted or rejected.
5-14, 16-19, 23-24, 1805-1810, 1874-1879, 1916-1921, 1983-1987, 2011-2015 and 2078-2081	Draft information notes	Contain track change revisions, editorial changes, comments and recommendations made by staff to draft versions of these records.
1045-1054	Draft decision note	Contain track change revisions, editorial changes, comments and recommendations made by staff to draft versions of these records.
1069-1071, 1076-1078, 1080-1084, 1086-1089 and 1092-1096	Draft questions and answers	Contain track change revisions, editorial changes, comments and recommendations made by staff to draft versions of these records.
189-197 and 199-207	Draft Whiskey Jack IEA review	Contain track change revisions, editorial changes, comments and recommendations made by staff to draft versions of these records.

[21] See Order PO-3150.

558-561 and 1620-1623	Draft template for Initial Review of an IEA Request	Contain track change revisions, editorial changes, comments and recommendations made by staff to draft versions of these records.
573, 575, 911, 1939-1940, 1957 and 1959-1960	Drafts of communications to stakeholders and members of the public	These records are pending review and approval and contain suggestions for proposed communications that are to be accepted or rejected by the recipient of the drafts.
856-857, 858-859, 860-861, 874-883, 1554-1571 and 1660-1661	Drafts of letters to stakeholders	These records are pending review and approval and contain suggestions for proposed communications that are to be accepted or rejected by the recipient of the drafts.

[42] The ministry further submits with respect to the draft documents, that while all of the drafts were finalized prior to the ministry's decision, the fact that a decision was made in the form of a finalized response does not affect the applicability of the exemption to the draft responses before these responses were revised, approved and issued to the respective respondents.[22] In addition, the ministry states that the final versions of the proposed communications were disclosed to the appellant. The ministry then goes on to list these records.

[43] Lastly, the ministry advises that some of the records are duplicates, namely the following:

- Pages 1612 and 2054 are duplicates of page 223;
- Page 935 is a duplicate of pages 216 and 217; and
- The information that was severed on pages 1640-1641, 1642-1643 and 1652-1653 was disclosed to the appellant on pages 215-216.

[44] The appellant submits that the ministry applied section 13(1) too broadly because the scientific review, names of external experts, question and answer

[22] See Orders P-920 and P-1037; see also *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (Ont. C.A.), upheld by the Supreme Court of Canada (2014) SCC 36.

documents and information notes are best categorized as background or factual documents under section 13(2)(a). The appellant also submits that draft documents are not necessarily subject to section 13(1), and that the ministry has not established that drafts of records should be withheld, where final versions have been disclosed.[23]

[45] Further, the appellant argues that records shared between the ministry and the Ministry of Natural Resources and Forestry are not exempt where the relationship between the two ministries is not one of advisor and decision-maker. In this instance, the records between the two ministries relate to the impacts of clear-cut logging and are best categorized as factual or background information under section 13(2)(a).

[46] In particular, the appellant submits that the following types of records should be disclosed: records containing factual information and updates on the case; the drafts of records which were released in their final form; and communications between the ministry and the Ministry of Natural Resources and Forestry about the decision.

[47] With respect to records containing factual information and updates on the case, the appellant lists the following records:

- Draft information notes or comments about information notes do not lead to a decision, but are internal government documents outlining the facts of the case. The ministry has disclosed the final version of these notes, but has not explained why drafts should be categorized as advice or recommendations.

- Draft question and answer documents, messaging and other communications also contain factual information about the process.

- Emails confirming facts are properly characterized under section 13(2)(a).

- The names of the experts. There is no discussion of the qualifications of the experts and no evaluative component to this email.

- An email at page 1531 that provides an explanation of the independent environmental assessment process.

- Drafts of responses and emails relating to key messages relate to providing information regarding the independent environmental assessment review to stakeholders and are, therefore, factual.

- Ministry letters to private individuals are not advice to government.

[48] In addition, the appellant argues that the drafts of records that were disclosed in their final form should be disclosed.

[49] Concerning the communications between the two ministries, the appellant

[23] These records include draft decision notes, drafts of Appendices 1 and 6, draft conditions, rationale for the concurrence decision and meeting minutes of May 224, 2012.

submits that the following records should be disclosed:

- The ministry's review of the Ministry of Natural Resources and Forestry submissions at pages 189-197 and draft science document at pages 199-207.
- The ministry's Delayed WJ Annual Work Schedule, which was prepared by the Ministry of Natural Resources and Forestry.
- A letter sent to the Ministry of Natural Resources and Forestry by the ministry.
- Any records relating to the ministries' discussion about the conditions to be imposed on the Ministry of Natural Resources and Forestry in the ministry's decision.
- Any other records which relate to discussions between the two ministries about the decision-making process.

[50] In reply, the ministry maintains its position that section 13(2)(a) does not apply to the advice presented in the records and that this advice or suggested course of action was communicated by ministry staff during the deliberative process of government decision-making. Further, the ministry argues that the disclosure of the draft communications, proposed responses, suggested questions and answers containing changes and revisions that were recommended, accepted or rejected as part of the decision-making process would inhibit staff from making full and frank recommendations.

[51] Having carefully reviewed the records, I am satisfied that most of the records that the ministry withheld either in whole, or in part, are exempt from disclosure under section 13(1), subject to my findings regarding the ministry's exercise of discretion. These records contain advice and recommendations made by ministry staff to the decision-maker, which in this case is the Director. I further find that these records either contain the actual advice or recommendations made by staff, or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. The advice and recommendations relate to the decision to not conduct an independent environmental assessment and to the communications with stakeholders surrounding that decision.

[52] Conversely, I find that some of the records at issue are not exempt under section 13(1), as follows:

Pages 199-207

[53] This record is scientific review that was conducted by the Ministry of Natural Resources. I find that it contains factual and background information, and does not contain advice or recommendations. While the review draws conclusions, I find that these conclusions are factual and scientific and do not provide advice or recommendations to the Director, nor would its disclosure permit the drawing of

accurate inferences as to any advice or recommendations made. Therefore, I find that this record is not exempt from disclosure under section 13(1).

Page 230

[54] This record is part of an email, and two sentences were withheld under section 13(1). I find that these sentences do not provide advice and recommendations to the decision maker, but actually provide direction to staff from management. Therefore, these sentences, I find, are not exempt under section 13(1).

Page 236

[55] This record is an email, a portion of which was withheld. The information that was withheld lists external experts in the field of forestry and mercury. I find that this list consists of factual information and only a portion of it has an evaluative component, which I find is exempt under section 13(1), as it is a recommendation. Conversely, the remaining information in this email is not exempt under section 13(1).

Page 414

[56] This record is an email, and one sentence was withheld. I find that this sentence consists of the decision maker's opinion on a topic and does not consist of advice or recommendations from staff to the decision maker. Consequently, I find that this sentence is not exempt from disclosure under section 13(1). This information is duplicated on page 968.

Pages 533-535

[57] This record sets out the impacts of a delayed decision and was authored by the Ministry of Natural Resources. There are two portions of this record that set out either advice or a policy option, and I find that this information is exempt under section 13(1). However, the remainder of the record consists of background information and the projected impacts of the delay. In my view, it does not contain advice or recommendations from the Ministry of Natural Resources to the decision maker, but rather consists of factual information.

Pages 1055, 1065, 1066, 1536, 1543 and 1545

[58] These records are emails in which a portion of each was withheld under section 13(1). I find that these portions are not exempt under section 13(1) because, in each case, the author of the email is the decision-maker, who is giving direction to staff, and not receiving advice or recommendations from them, nor could any advice or recommendations be inferred.

Pages 1660-1661

[59] This record is a letter from the ministry to the Ministry of Natural Resources, seeking information from the Ministry of Natural Resources. I find that this letter

contains no advice or recommendations and is, therefore, not exempt under section 13(1).

Pages 1874-1879

[60] This record is an information note on the Whiskey Jack Forest Management Plan that provides background and factual information, as well as an update on the status of the request for the independent environmental assessment. This information note does not contain any advice or recommendations and appears to be in its final form, as there are no track changes or comments made in the record. I find that this note does not, on its face, contain revisions that would permit one to infer advice or recommendations. I also note that while the ministry has disclosed other final information notes to the appellant (which it listed in its representations), the ministry did not include this note, which post-dated the other final information notes that were disclosed to the appellant. Therefore, I find that this note is not exempt from disclosure under section 13(1).

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

[61] Section 19(a) of the *Act* states as follows:

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

[62] Section 19 contains two branches as described below. Branch 1 arises from the common-law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The ministry must establish that at least one branch applies.

[63] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common-law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for Branch 1 to apply, the ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[24]

[64] 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.[25] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[26]

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

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[24] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).
[25] *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] Orders PO-2441, MO-2166 and MO-1925.

> . . . 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.[27]

[66] 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.[28]

[67] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive the privilege. An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[29]

[68] Generally, disclosure to outsiders of privileged information constitutes a waiver of privilege.[30]

[69] The ministry submits that portions of pages 415, 542, 954-955, 2097, 2106-2107, 2113 and 2115-2116 are exempt from disclosure under section 19 because they contain legal opinions and advice received from Crown counsel, which was provided on a confidential and privileged basis, forming part of the continuum of communications between a solicitor and client. The ministry goes on to state that it considered the possibility of waiving the privilege, but did not do so due to the nature of the specific advice, and not merely on a broad principle.

[70] The appellant submits that even if a record was reviewed by counsel, or counsel suggested changes to a record, section 19 does not necessarily apply.[31]

[71] Having reviewed the portions of the records for which the ministry claimed the application of section 19, I find that these portions are exempt from disclosure under section 19, subject to my findings on the ministry's exercise of discretion.

[72] I am satisfied that the withheld information is exempt under Branch 1 of section 19, because it is subject to the common law solicitor-client communication privilege. The portions that were withheld include parts of emails and handwritten notes. In each case, ministry staff are seeking legal advice from legal counsel, and the advice provided by legal counsel is contained in some of these records. I find that this information forms part of the continuum of communications, as they reflect confidential communications between a solicitor and their client. This information, therefore, is exempt from disclosure under section 19. I note that some of the information at issue is duplicated

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[27] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[28] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[29] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[30] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[31] See, for example, PO-3026-I and PO-2895-I.

within this set of records. I also note that the public interest override in section 23 cannot apply to information exempt from disclosure under section 19.

Issue E. Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[73] The sections 13(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, this office may determine whether the institution failed to do so.

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

- It does so in bad faith;
- It takes into account irrelevant considerations; or
- It fails to take into account relevant considerations.

[75] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] This office may not, however, substitute its own discretion for that of an institution.[33]

[76] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:[34]

- The purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right 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 own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;

[32] Order MO-1573.
[33] See section 54(2).
[34] Orders P-244 and MO-1573.

- Whether disclosure will increase public confidence in the operation of the institution;

- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

- The age of the information; and

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

[77] The ministry states that it disclosed as much information to the appellant as could reasonably be disclosed under the *Act*, while balancing the harms of disclosing the information under section 13(1). In addition, the ministry advises that it took the following factors into consideration in its exercise of discretion:

- The information within the records is recent, namely from 2014 to 2015;

- The information within the records relates to the ministry's decision to deny the individual Environmental Assessment Request for the Whiskey Jack 2012-2022 Forest Management Plan. A judicial review application was filed in relation to the ministry's decision (to deny the environmental assessment request). This matter is currently before the Divisional Court;

- The appellant's interests. The ministry decided to disclose a sufficient number of records (including draft records) that would shed light on how the EAB Director's decision to deny the environmental assessment request was made; and

- The purpose of section 13(1), which is to protect information so that persons employed in the public sector are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take action and make decisions without unfair pressure.

[78] The appellant submits that the ministry failed to take into account that public confidence in the ministry's environmental assessment request decision and the purposes of section 13(1) would be served by the disclosure of the records. The appellant further submits the records that have been disclosed reveal that the ministry (the decision-maker) and the Ministry of Natural Resources and Forestry collaborated extensively on the decision not to conduct an environmental assessment. The appellant states:

> The neutrality of the public service throughout the process is called into question by the records and would be better protected by allowing public scrutiny and transparency with respect to the decision-making process.

[79] The appellant also argues that the ministry's decision to apply section 13 does not preserve the decision-maker's ability to take action or make decisions without unfair pressure. In fact, the appellant states, because of the collaboration between the two ministries, the ministry's ability to make a decision without unfair pressure is better

preserved by disclosing the records that would allow the public to understand the role of the two ministries in this process.

[80] In addition, disclosure of the records can provide information about the ministry's understanding of the serious health risks posed to Grassy Narrows. Lastly, the appellant notes that the application for judicial review proceeding is irrelevant because no evidence has been filed by the ministry in response to that application.

[81] I have carefully considered the representations of both parties. I find that the ministry took into account relevant factors in weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that they considered the appellant's position and circumstances and balanced it against the importance of solicitor-client communication privilege and the ability of staff to provide free and frank advice to decision makers. I am also mindful that the ministry has disclosed many records either in whole or in part to the appellant.

[82] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion with respect to the information which I have found to be exempt from disclosure under sections 13(1) and 19 of the *Act*, and I uphold its exercise of discretion.

Issue F. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

[83] 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.[35]
>
> [emphasis added]

[84] 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.

[85] 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, this office will review the records with a view to determining whether there could be a compelling public interest

[35] Note that the public interest override in section 23 does not apply to information found exempt under section 19 of the *Act*.

in disclosure which clearly outweighs the purpose of the exemption.[36]

[86] In considering whether there is a public interest in the 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.[37] 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.[38]

[87] A public interest does not exist where the interests being advanced are essentially private in nature.[39] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[40]

[88] The word *compelling* has been defined in previous orders as *rousing strong interest or attention*.[41]

[89] Any public interest in non-disclosure that may exist must also be considered.[42] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of compelling.[43]

[90] A compelling public interest has been found to exist where, for example: the records relate to the economic impact of Quebec separation;[44] the integrity of the criminal justice system has been called into question;[45] public safety issues relating to the operation of nuclear facilities have been raised;[46] disclosure would shed light on the safe operation of petrochemical facilities[47] or the province's ability to prepare for a nuclear emergency;[48] or the records contain information about contributions to municipal election campaigns.[49]

[91] 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

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[36] Order P-244.
[37] Orders P-984 and PO-2607.
[38] Orders P-984 and PO-2556.
[39] Orders P-12, P-347 and P-1439.
[40] Order MO-1564.
[41] Order P-984.
[42] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[43] Orders PO-2072-F, PO-2098-R and PO-3197.
[44] 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.).
[45] Order PO-1779.
[46] Order 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.) and Order PO-1805.
[47] Order P-1175.
[48] Order P-901.
[49] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

considerations;[50] a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[51] a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[52] there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[53] or the records do not respond to the applicable public interest raised by the appellant.[54]

[92] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. 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.[55]

[93] The ministry submits that there is not a compelling public interest in the disclosure of the records that outweighs the purpose of section 13(1), which is to protect information such that persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take action and make decisions without unfair pressure.[56] The ministry also submits that it disclosed a sufficient number of records to the appellant and that these records shed light on the ministry's decision-making process.

[94] Lastly, the ministry advises that another public process has been established to address public interest considerations. It states that the appellant filed an application for judicial review of the ministry's decision to not require an individual environmental assessment in respect of the Whiskey Jack Forest Management Plan.

[95] The appellant submits that there is a compelling public interest in the disclosure of the records that outweighs the purpose of the exemption in section 13(1). In fact, the appellant argues, this is exactly the type of information that should be the subject of a rigorous public debate.[57] The records relate to a significant health risk posed to Grassy Narrows and a non-transparent independent environmental assessment process. The appellant also states that there is intense public concern about the ongoing mercury contamination issues in Grassy Narrows, including media coverage.

[96] The appellant further states that research that has been conducted suggests that members of Grassy Narrows have been poisoned by methylmercury, and that there is a

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[50] Orders P-123/124, P-391 and M-539.
[51] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[52] Orders M-249 and M-317.
[53] Order P-613.
[54] Orders MO-1994 and PO-2607.
[55] 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.).
[56] Orders P-1690 and PO-2554.
[57] See Order PO-3645.

high rate of residents with neurological symptoms. Other research has found that clearcut logging in boreal forests, like the Whiskey Jack forest, results in increased mercury and methylmercury levels in area waters and fish.

[97] The appellant states that the purpose of the independent environmental assessment was to study the impacts of clearcut logging in the Whiskey Jack forest because members of the Grassy Narrows consume fish from the waters in that area. Disclosure of the records, including the ministry's comments about the Ministry of Natural Resources and Forestry's science review and the names of the external experts identified by the ministry, will allow the public to scrutinize the scientific underpinnings of the decision. In addition, the records that were disclosed reveal that the ministry collaborated extensively with the Ministry of Natural Resources and Forestry without the knowledge or participation of the appellant or of Grassy Narrows. Disclosure of the records, the appellant submits, would shed light on the extent of that collaboration.

[98] With respect to the application for judicial review, no documents other than a Notice of Appearance have been filed by the ministry, and there is no certainty about what records, if any, will be disclosed in that proceeding.

[99] Lastly, the appellant states:

> The significant public interest in disclosure outweighs the purpose of preserving the neutrality of the public service, which in any event is not served by exempting these records from disclosure. The [ministry's] representations improperly give no consideration to the severe health and environmental risks to Grassy Narrows, or the public benefit to be gained by disclosure of information that would shed light on its non-transparent decision-making process.[58]

[100] Past orders of this office have found that certain matters relating to the environment raise serious public health and/or safety issues.[59] I am satisfied that there is a compelling public interest in the Whiskey Jack Forest and the effects of the use of that forest on the Grassy Narrows community, including the issue of mercury contamination in Grassy Narrows. This topic has been widely covered by the press, and has been the subject of public debate. However, the consideration of the public interest override in section 23 involves more than simply the subject matter of the records. I must also take into consideration whether there is a compelling public interest in the disclosure of the particular records at issue.

[101] I note that the ministry has disclosed several records to the appellant, either in whole or in part. I further note that I have found other records not to be exempt under section 13(1), and I will order the ministry to disclose these records to the appellant. In my view, there is not a compelling interest in the disclosure of the remaining information at issue. Given the amount of information that has already been disclosed, I

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[58] P-984, PO-2556 and PO-3645.
[59] See, for example, Orders P-474, PO-1909, PO-2557, PO-2172.

find that the disclosure of the remaining information would not add 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.

[102] Consequently, I find that there is not a compelling public interest in the disclosure of the information I have found to be exempt under section 13(1) and that section 23 does not apply in these circumstances.

[103] In sum, I uphold the ministry's decision, in part. I find that portions of the records are not responsive to the request and that other records are exempt from disclosure, either in whole or in part, under sections 13(1) and 19. I also find that some records for which section 13(1) was claimed are not exempt from disclosure. I uphold the ministry's exercise of discretion, but not its search for records. Lastly, I find that the public interest override in section 23 does not apply in these circumstances.

ORDER:

1. I order the ministry to disclose pages 199-207, 230, 414, 573, 968, 1055, 1065, 1066, 1536, 1543, 1545, 1660, 1661 and 1874-1879 to the appellant in their entirety before **November 30, 2017** but not before **November 24, 2017**.

2. I order the ministry to disclose pages 236 and 533-535 in part to the appellant by **November 30, 2017** but not before **November 24, 2017**. I have included copies of these pages with this order. The highlighted portions are not to be disclosed to the appellant.

3. I reserve the right to require the ministry to provide this office with copies of the records it discloses to the appellant.

4. I order the ministry to conduct a further search for voicemail and text messages responsive to the request as worded, treating the date of this order as the date of the request. If the ministry locates further records, it is to issue a decision letter to the appellant. If no further records are located, the ministry is required to inform the appellant of the details of its search by way of letter.

Original signed by | October 26, 2017

Cathy Hamilton
Adjudicator