Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3811

Appeal PA16-2

Ministry of Tourism, Culture and Sport

January 30, 2018

Summary: The appellant made a request to the ministry for cultural impact records related to a wind project. This order addresses the ministry's decision to withhold information under sections 13(1) (advice or recommendations), and 19(a) and (b) (solicitor-client privilege) and the appellant's claim of the public interest override in section 23. The adjudicator upholds the ministry's decision to withhold records under section 13, in part and upholds its claim of section 19 in full. The adjudicator finds that section 23 does not apply in the circumstances.

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

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Tourism, Culture and Sport (the ministry) for access to cultural heritage impact records related to a specific wind project. Specifically, the appellant sought access to the following information:

> …all documents, minutes of meetings, email and other correspondence (internal and external) and comment letters for/from the Ministries of Tourism, Culture and Sport, Environment and Climate Change, and Natural Resources with respect to all aspects of the heritage impact reporting by [named consulting company] or any other consultant for, and the review of such reporting by any government staff related to, the proposed [named company's wind project] in Prince Edward County. I

> also require any and all such heritage impact information in relation to any Renewable Energy Application filed by [named company] for the [named wind project].
>
> I also request all documents, minutes of meetings, email and other correspondence (internal and external) with respect to any financial or environmental constraints on the relocation or elimination of [named project] turbines to prevent heritage impacts in the [named wind project] Area.

[2] The ministry responded initially by issuing an interim decision and fee estimate. Next, the ministry informed the appellant that it was claiming a time extension. Subsequently, the ministry advised the appellant that it was notifying a third party whose interests could be affected to give the third party an opportunity to make representations concerning disclosure of certain records.

[3] In a decision, the ministry granted the requester partial access to the requested records, but denied access to the remaining information under sections 21(1) (personal privacy), 13(1) (advice or recommendations) and 19(a) and (b) (solicitor-client privilege) of the *Act*. The ministry advised the appellant that the third party objected to the disclosure of some of the information at issue and had 30 days to appeal. In follow-up correspondence, the ministry indicated that the third party had not appealed and provided the appellant with partial access to the records in accordance with its earlier decision.

[4] The appellant appealed the ministry's decision. At mediation, a number of issues were resolved. As a result, only the application of sections 13(1) and 19 to some of the records remaining at issue.

[5] During the inquiry into this appeal, the adjudicator sought and received representations from the appellant and the ministry. Representations were exchanged in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] In this order, I uphold the ministry's claim of section 19 for all the records for which it is claimed. Further, I uphold the ministry's claim of section 13 in part. Lastly, I find that section 23 does not apply to override the section 13 exemption.

RECORDS:

The records remaining in issue are identified in the ministry's index of records as 1–152, 154–156, 162, 164, 165b, 172, 173a, 178, 179, 180, 186, 191, 192, 193a, 196, 196a, 198–200, 203, 204d, 206-210b, 211-214, 216, 217, and 221.

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the records?

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

C. Was the ministry's exercise of discretion under section 13 and 19 proper in the circumstances?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

Issue A: Does the discretionary exemption at section 13(1) apply to the records?

[7] 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.

[8] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[1]

[9] *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.

[10] *Advice* has a broader meaning than *recommendations*. It includes policy options, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[2]

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

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

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[1] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36, at para. 43.
[2] See above at paras. 26 and 47.

- 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.[3]

[13] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply, as that intention is inherent to the job of policy development, whether by a public servant or consultant.[4]

[14] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[5]

Parties' representations

[15] The ministry notes that the wind project which is the subject matter of the records and the request is a proposed 29 turbine project in Prince Edward County. The ministry also provided a brief background of the Renewable Energy Approval regulatory framework and its role within that framework as it relates to the wind project.

[16] Applications for renewable Energy approvals (REA) are governed by the *Environmental Protection Act (*the *EPA)* and the associated regulation, O. Reg. 359/09 Renewable Energy Approvals under Part V.0.1 of the Act (the Regulation). The REA is issued by the Director at the Ministry of the Environment and Climate Change (MOECC) who is appointed by the Minister of the MOECC pursuant to the *EPA*.

[17] Under the *EPA*, the Director has the authority to issue an REA, with or without conditions, or can refuse to issue such an approval. If the Director's decision is to refuse to issue the approval, or to issue the approval with conditions, the project proponent may appeal the decision to the Environmental Review Tribunal. If the Director's decision is to issue the approval, private parties with an interest in the heritage conservation issues may seek a judicial review of that decision.

[18] Section 23 of the Regulation sets out the requirements relating to conducting a heritage assessment report. A heritage assessment report is required where a project

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[3] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation)* v. *Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[4] *John Doe* v. *Ontario (Finance)*, cited above, at para. 51.
[5] *John Doe* v. *Ontario (Finance)*, cited above, at paras. 50 – 51.

may impact either a heritage resource[6] located at the project location and/or may impact an abutting property that is protected under the *Ontario Heritage Act*. The heritage assessment report must also identify any abutting protected properties and any potential heritage resources located at the project location.

[19] Heritage assessment reports are then submitted to the ministry for review. As part of the REA process, the ministry reviews these reports to determine whether or not project proponents have met the regulatory requirements outlined in section 23 of the Regulation. Throughout the review process the ministry may send review letters to, or have discussions with, the person who conducted the heritage assessment and request further assessment or revisions to the report. Once the ministry is satisfied that the report meets the regulatory requirements, the ministry will issue a written comments letter which the project proponent is required to include as part of its submissions to MOECC for a REA.

[20] The ministry's role as it relates to section 23 takes place prior to a proponent submitting its application for a REA to the MOECC. However, the ministry also provides advisory support to MOECC during MOECC's technical review process of the REA application. The ministry's role includes reviewing comments submitted by the public through the Environmental Registry and/or reviewing additional materials provided by the proponent, and providing comments and advice with respect to cultural heritage matters. MOECC may also request the ministry review and provide comment on draft conditions of approval that relate to cultural heritage resources. The ministry emphasizes that the MOECC and the Director use and consider the ministry's advice and recommendations regarding cultural heritage impacts of projects when making a decision on the REA application.

[21] To that end, the ministry submitted the following regarding its advisory role to the MOECC:

> On December 16, 2014, as part of the technical review, MOECC requested in writing the ministry's advice and recommendations about the cultural heritage component of the project in response to public comments about the project and additional information provided by the project proponent. MOECC's letter to the ministry explicitly stated that all comments provided by the ministry would be assessed by MOECC and would be considered by its Director in making a decision on the REA application. The ministry ultimately concluded that the proponent's proposed measures to mitigate impacts from two of the proposed turbines were not sufficient or appropriate and that conclusion and analysis were subsequently provided to MOECC for the director's consideration.

[22] The ministry makes additional specific representations on the application of section 13(1) to the records at issue. I will set these out below in my findings.

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[6] A heritage resource is defined in the Regulation as "real property that is of cultural heritage value or interest and may include a building, structure, landscape or other feature of real property."

[23] The appellant submits that the ministry has applied the section 13 exemption too broadly and argues that if every record is part of the deliberative process for the purpose of providing advice or recommendations then no document from the approval process would ever be released. This, the appellant argues, would defeat the transparency purposes of the *Act*.

[24] The appellant further submits that the ministry fails to address the application of section 13 to the specific parts of the records that were withheld. The appellant states:

> The HIA (heritage impact assessment) process for [the specified project] concerns a large body of information and facts (property lines, heritage attributes, visualizations, etc.) which, while they may be part of a larger consideration of the adequacy of what [the affected party] did, do not render these particular elements of the document an inseparable part of the deliberative process, as [the ministry claims]. Part of a document may be redacted and the rest disclosed.

[25] Finally, the appellant appears to argue that the application of the advice or recommendation exemption should only apply to the information that flowed from the ministry to MOECC after the MOECC formally requested the ministry's advice or recommendations. The appellant provided two letters as exhibits with her submissions. The first letter is dated December 16, 2014 where MOECC seeks further advice from the ministry with respect to the cultural impacts of the specified wind project. The second letter is dated December 23, 2014 and provides the ministry's response to MOECC.

Analysis and finding

[26] In my determination of the application of section 13(1), I have considered the ministry's role in conducting a review of the heritage impact report and its role within the REA process. I have further taken into consideration the appellant's representations that any application of section 13(1) should be limited and specific. Finally, I have decided that given the ministry's role with the REA process, the appellant's arguments about the timing of the records and the formal request and response of the ministry should not be given any weight.

[27] The information withheld in Records 193a and 203 consists of Questions and Answers regarding the wind project. The ministry submits the draft questions and answers were prepared by MOECC staff in consultation with ministry staff, in advance of a final decision being made by the Director based on a possible decision outcome of the Director. The ministry submits that some of the content of the questions and answers were based on advice and recommendations given by the ministry to the MOECC and reflect part of the deliberative process of the MOECC.

[28] The appellant questions whether Records 193a and 203 are similar to her Exhibit 8 which is the Director's disclosure for the project proponent's Environmental Review Tribunal (ERT) appeal. The appellant submits that if these records are the same then there is no reason to withhold Records 193a and 203.

[29] Based on my review of these records, I find that disclosure of portions of the withheld information could disclose advice or recommendations given by ministry staff to the MOECC. These portions of the records clearly relate to proposed questions and answers about heritage issues regarding the wind project and I accept that disclosure of this information would disclose advice or recommendations by ministry staff. I further confirm that Records 193a and 203 are not the same as the record provided by the appellant in her representations (Exhibit 8). However, the ministry's representations do not establish how the other information in the Questions and Answers relating to other matters could disclose its advice or recommendations to MOECC. This is information that, on my review, does not relate to the ministry's mandate. Accordingly, I find that this information is not exempt under section 13(1).

[30] The ministry describes Records 196, 196a, 198, 199, and 204d as draft proposed culture heritage conditions to be applied to the proposed wind project. The ministry submits that disclosure of these records would reveal draft cultural heritage conditions that ministry staff were considering at the time the records were created. The ministry further submits that the draft conditions, along with the analysis and discussion of them by ministry staff would ultimately become the advice and recommendations that ministry staff provided to the MOECC and the Director for the REA. The ministry states:

> Many of these particular records contain an evaluative component of the draft conditions which can be seen in the tracked changes and comment boxes of the drafts, as well as in email discussions of ministry staff. All of these types of records formed part of the deliberative process of ministry staff in arriving at the final advice and recommendations provided to MOECC and the Director.

[31] The appellant submits that Records 196, 196a, 198, 199 and 204d most likely address the removal of the turbines; present a list of properties with conditions to protect them from vibration damage during construction; and define conditions to protect trees and landscaping along the Interconnection Line. The appellant submits that all of this information has already been disclosed in either the Director's disclosure for the project proponent's ERT appeal or through the appellant's earlier FOI request.

[32] Records 196, 196a, 198, 199 and 204d all relate to the draft heritage conditions recommended by ministry staff. I accept that the withheld comments and changes to the draft conditions consist of advice and recommendations made by ministry staff to the MOECC for the purposes of REA process. I confirm that the information withheld in these records does not relate to the removal of the turbines. Furthermore, I do not accept the appellant's argument that because information was disclosed to her in other processes, that information in the records cannot be exempt under section 13(1). The information in these records consists of information that is in draft form and represents the advice and recommendations of ministry staff. I find them exempt under section 13(1) subject to my finding on the ministry's exercise of discretion.

[33] The ministry describes Records 207a, 208, 208a, 208b, 208c, and 212 as records relating to a draft ministry letter to be sent to the Environmental Approvals Branch of

the MOECC. The ministry notes that MOECC requested the ministry's advice and recommendations on December 16, 2014 as part of the technical review of the cultural heritage component of the proposed project. The group of records responds to that request for advice or recommendations and relates to the ministry's position as to whether the proposed measures to "mitigate impacts to identified cultural resources and protected properties were sufficient and appropriate." The ministry states:

> Record 207a is a copy of a draft response letter to MOECC containing the ministry's advice to MOECC regarding the decision to be made on the REA. As a draft, it forms part of the ministry's deliberative process. The s. 13 exemption was applied to the discussion in the email and the attachments (Records 208, 208a, 208b, 208c) because they constitute the ministry's advice to MOECC on the draft conditions of the REA document and form part of the deliberative process. It is submitted that the disclosure of even the broad discussion in the email would permit the reader to draw accurate inferences about the nature of the ministry's advice and recommendations to MOECC.

[34] Based on my review of this group of records, I find that disclosure of the records would disclose the advice or recommendations given by ministry staff about the cultural and heritage impacts of the proposed project. I find that the advice or recommendations between the ministry staff in the records comprise the actual advice and recommendations to be given to MOECC regarding whether the proposed measures would mitigate the impacts of the proposed project. I find that section 13(1) also applies to this information.

[35] The ministry describes Records 95, 96 and 98 as advice to the Assistant Deputy Minister of the Culture Division. The ministry submits that these emails were a request from the ministry's ADM to his staff (as well as the Legal branch) regarding whether to accept a meeting with an organization related to the project proponent. The ministry states that disclosure of these emails would disclose the advice given regarding this decision. I find that these records are as described by the ministry. The ADM for the Culture Division requested input from staff and legal counsel about how to respond to a meeting request and the email chain details the recommendations of staff and legal counsel. I find these records are exempt under section 13(1).

[36] The ministry describes Records 210a and 210b as duplicate records that comprise a heritage assessment report prepared by a Heritage Planner of the ministry. The Heritage Planner conducted an evaluation of the visual impacts of the three wind turbines at issue and prepared the report as internal advice within the ministry that eventually formed part of the ministry's advice to MOECC regarding the REA application. I find that these records contain the findings and recommendations of the Heritage Planner to the ministry regarding the visual impacts of the three wind turbines. I further accept that these findings and recommendations formed part of the ministry's advice to MOECC. Lastly, based on my review of the record, I find that the reports do not contain factual information such that the exception in section 13(2)(a) applies to any of the

contents of the reports.

[37] In conclusion, I have found that the information in Records 95, 96, 98, 193a (in part), 196, 196a, 198, 199, 203 (in part), 204d, 207a, 208, 208b, 208c, 210a, 210b, and 212 are all exempt under section 13(1), subject to my finding on the ministry's exercise of discretion. Furthermore, I have reviewed these records and considered whether any of the exceptions in section 13(2) are relevant and I find that none apply.

Issue B: Does the discretionary exemption at section 19 apply to the records?

[38] The ministry submits that the records at issue are subject to the solicitor-client privilege in section 19 which states:

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

[39] Section 19 contains two branches. Branch 1 (*subject to solicitor-client privilege*)is based on the common law. Branch 2 (*prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital*) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Solicitor-client communication privilege

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

[41] 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.[7] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[8] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[9]

[42] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

[43] Confidentiality is an essential component of the privilege. Therefore, the

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[7] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

institution must demonstrate that the communication was made in confidence, either expressly or by implication.[11] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[12]

Litigation privilege

[44] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a *zone or privacy* in which to investigate and prepare a case for trial.[13] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[14] It does not apply to records created outside of the zone of privacy intended to be protected by the litigation privilege, such as communications between opposing counsel.[15] The litigation must be ongoing or reasonably contemplated.[16]

Statutory solicitor-client communication and litigation privilege

[45] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[46] The statutory litigation privilege also applies to records prepared by or for Crown counsel in contemplation of or for use in litigation. It does not apply to records created outside of the zone of privacy intended to be protected by the litigation privilege, such as communications between opposing counsel.[17] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[18]

Parties' representations

[47] The ministry submits that the records are exempt under both Branch 1 and 2 of section 19 as the records were created by for Crown counsel in giving legal advice and in contemplation of litigation that arose from the REA decision. The ministry identified the various lawyers involved and stated the following:

> There were/are a number of government lawyers in different legal branches of the government (which are all part of the Ministry of the

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[11] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[12] *Kitchener (City)* v. *Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. C.t).
[13] *Blank* v. *Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[14] *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[15] *Ontario (Ministry of Correctional Service)* v. *Goodis*, 2008 CanLII 2603 (ON SCDC).
[16] *S.&K. Processors Ltd*. v. *Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[17] See *Ontario (Attorney General)* v. *Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service)* v. *Goodis*, cited above.
[18] Ontario (Attorney General)

> Attorney General's Civil Law Division) advising the government clients on the REA file and the associated litigation files…
>
> Some of the records contain direct communications between the government lawyers and the government clients. Other records contain communications between various government lawyers who were advising on the files. There are also a number of records between lawyers regarding the litigation arising from the REA decision. It is submitted that the records containing communications between lawyers are also subject to solicitor-client privilege, as they contain legal advice and input that was ultimately intended for the client.

[48] The ministry further submits that a number of the records contain information that was passed between lawyer and client for the purpose of keeping both informed so that advice could be sought and given. The ministry states:

> For example, a number of records between lawyer and client contain updates on various aspects of the REA application file and the litigation files. Similarly, a number of records containing such updates were also exchanged between various government lawyers. It is submitted that these kinds of records are also subject to solicitor-client privilege as they form part of the continuum of communications aimed at keeping the lawyers informed so that legal advice could be sought and given as required.

[49] The ministry provided more specific submissions relating to each record which I will address below.

[50] Finally, the ministry notes that Records 1 through 156, including all the corresponding attachments, were located in the files of one of the ministry's lawyers.

[51] The appellant notes the ministry has claimed the application of the section 19 exemption to a large number of records and submits it is the substance of the communication that is important when determining whether a record should be protected on the ground of privilege. The appellant states:

> Merely because a lawyer was involved in some way, or because the parties intended the documents to be confidential, does not mean that the document is automatically privileged.

[52] The appellant also submits that it is questionable whether the records referred to by the ministry in paragraph 47 above are actually privileged. The appellant notes that updates exchanged between the government lawyers or between the government lawyer and its clients would often be straightforward reports of what happened including facts arranged in chronological order without analysis or evaluation. The appellant submits that these updates would tend to have been shared widely within the relevant ministries, including with counsel for general information purposes.

Accordingly, the updates would have been strictly factual and not for the purposes of seeking or providing legal advice.

[53] The appellant also submitted specific representations on certain records and she notes that the fact that all of Records 1 through 156 were in a ministry lawyer's files does not mean that all the records are privileged. The appellant submits that some of these records may be copies of unprivileged records originating elsewhere and shared widely.

Analysis and finding

[54] I have reviewed all the records for which section 19 was claimed keeping in mind the appellant's concerns that the records may contain information that ministry staff distributed widely throughout the ministry or outside the ministry. I have also carefully reviewed the emails with a view to determining whether the lawyer who was either the recipient or the sender was actually acting in his role as counsel or whether he was just copied on the emails.

[55] Based on my review of Records 1 – 156, I find that these records are either solicitor-client communication privileged or litigation privileged and exempt under Branch 1 and/or Branch 2 of section 19. As the ministry states in its representations, these records contain the following types of information:

- Email communications seeking or providing legal opinion regarding the REA application.
- Emails and attachments relating to updates about the project and requesting a legal review or input on draft conditions to the REA application.
- Email discussions between the ministry lawyer and the ministry legal director and discussions between the lawyer and the litigators at the Crown Law Office-Civil regarding the judicial review application.
- Emails between government clients that contain discussions of the legal advice received from the lawyers and form part of the continuum of communications between lawyer and client.

[56] The ministry also notes that a number of records (Records 11 – 21, 23 – 26, 131, and seven versions of the briefing note set out in Record 156, 164, 165b, 172, 173a, 216, 217, 221) relate to the legal advice that the ministry lawyers provided to their clients regarding a draft ministry briefing note prepared by the ministry clients. The ministry explains that the purpose of the briefing note was to provide information to ministry senior management about how concerns related to the impact of the proposed turbine project were being addressed as part of the MOECC's technical review of the proponent's application. The ministry states:

> In particular, this draft briefing note includes a section called "Legal Considerations" which contains legal advice regarding the possible legal implications arising from the MOECC Director's possible decision on the REA application. Ministry lawyers were asked by the clients to provide legal review and input regarding the entire briefing note. Some copies of the draft briefing note attached to the covering emails contain tracked changes and comment boxes in the record, which constitute the advice of the ministry lawyers.

[57] The appellant questions whether the emails containing the draft briefing notes were properly exempt under section 19. The appellant states:

> It is not clear how this briefing note differs from those listed in [the ministry's] paragraph 39 (Records 164, 165b, 172, 173a, 216, 217, 221), which are also signed off by the Legal Director, or whether the extent of the difference justifies its complete exemption.
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> [The ministry's] release of several of these briefing notes, albeit with "Legal Considerations" redacted, establishes these records as factual, chronological updates on the unfolding REA process, which are shared widely.

[58] I have compared all the records attaching, relating or discussing the briefing note. Many of these email discussions contain portions of the briefing note in the body of the email with questions or advice exchanged between the email author and recipients. The information which is the subject of these emails is the legal advice sought or provided in regard to issues relating to the subject-matter of the briefing note. The copy of the briefing note that was disclosed to the appellant with the "Legal Considerations" portion severed is not the same as the records at issue. As stated above, the briefing notes found in the records are draft versions of the document which include comment boxes and tracked changes. I accept that the records containing various versions of the briefing note are exempt under section 19.

[59] Regarding records 33 – 45, 54, 58 – 60, 62 – 66, 71 – 85, 90, 93, 94, 99 – 102, 207, 207a, 212, the ministry submits that these email chains contain legal advice and review from various government lawyers that were sought on the letter that was to be prepared by the ministry clients in response to the Environmental Approvals Branch of MOECC. This letter would include the ministry's advice and recommendations to MOECC and the Director regarding the technical review of the cultural heritage component of the proposed project. Based on my review of these emails, I accept that disclosure of the records would reveal legal advice sought or provided regarding the ministry's response letter to the MOECC. Accordingly, these emails are exempt under section 19.

[60] The ministry describes Records 9, 162, 180, 186, 191, and 192 as emails that are part of the continuum of communications between various ministry clients. The ministry explains that these records clearly address the subject matter for which the lawyers had been consulted and refer to the need for further communications with the lawyers and

to the advice provided by the lawyers. Again, based on my review, I accept that the disclosure of these records would disclose legal advice sought and received by a client from its lawyer. I note that the information in these email chains is duplicated extensively and the particular portion referencing the specific advice is prefaced with a note that the information was received from legal counsel. I find these emails to be exempt under section 19.

[61] The ministry further submits that there are a number of emails (Records 164, 165b, 172, 173a, 216, 217 and 221) where the "Legal Considerations" portion of the briefing note was discussed and these emails should also be exempt under section 19. I find that these records and the records described above in paragraph 61 are both exempt under Branch 1 of section 19 as solicitor-client communication privileged.

[62] Records 48 – 53, 55 – 57 consist of email chains between ministry lawyers and litigation lawyers at the Crown Law Office – Civil. The ministry submits that in these records, the litigation lawyers sought legal review and input from ministry lawyers regarding the draft response letter that the litigation lawyers intended to send to the applicant that filed for a judicial review of the Director's decision. Based on my review of these records, I find they are exempt as litigation privileged information under section 19.

[63] Records 61, 105 – 115, 132, 139 – 145, 150, 209, 209a, 209b, 210, 210a, 210b comprise emails about a legal opinion provided to the ministry client regarding legal questions posed by MOECC Legal Branch to the ministry regarding the cultural heritage component of the proposed project. The ministry submits that the questions arose in the context of the newly received application for judicial review at that time. The ministry submits that these emails and the related attachments interpret facts and legislation to assess the questions and provide legal advice to the ministry client. I have reviewed these records and find that disclosure would reveal legal advice sought or provided and are exempt under section 19.

[64] Records 87 – 89 and 214 relate to the request and provision of legal advice from the ministry lawyers to the ministry client regarding the legal descriptions of parcels of land related to the proposed project. I find that these records are also exempt as solicitor-client privileged under section 19.

[65] Records 178 and 179 are email chains between the MOECC deputy minister and the ministry deputy minister which include legal discussions from the MOECC deputy legal director regarding the application for judicial review and preparing a defence/response to the application. Record 154 is also a related email communication between the MOECC deputy legal director and the ministry's legal director regarding the judicial review. Furthermore, there are a group of records containing initial communications between litigation counsel and the ministry's lawyers regarding the judicial review application, as well as communications between the ministry lawyers and the ministry's legal director regarding the judicial review application (Records 119, 122, 124 – 126, 128 – 130, 147 – 149, 151 and 152). Finally, Records 134 – 136 are email chains relating to legal advice provided by the ministry lawyer to the ministry's senior

management about possible public comments that could be made by the ministry about the judicial review application. I find all of these records to be exempt as litigation privileged or solicitor-client communication privileged under section 19.

[66] The ministry submits that Record 92 relates to legal advice sought from the ministry lawyer regarding how the ministry client should respond to the consultant who prepared the archaeological and heritage assessment report on behalf of the project proponent. I find that disclosure of this email chain would reveal legal advice sought and provided between a solicitor and client and is exempt under section 19.

[67] Finally, the ministry describes Record 156, comprised of 238 pages, as a hard copy of the physical file relating to the proposed project for one of the ministry's lawyers. The ministry submits that the contents of Record 156 constitute the lawyer's working papers directly related to the seeking, formulating and giving of legal advice on the proposed project. The ministry submits:

> Disclosure of these types of documents would reveal the thought process of [the named lawyer] in formulating his legal advice to his clients. Note that many of the records contained in Record 156 are duplicates of electronic records discussed earlier in these representations.

[68] The ministry further elaborates on the contents of Record 156 as the following types of information:

- Counsel's written notes of telephone and in-person legal advice given to clients, as well as his written notes of file conversations with other government lawyers. (Pages 1, 8, 9, 24, 75, 76, 89-91, 94, 95, 106, 107, 123, 125-129, 175-180)

- Counsel's handwritten notes containing his legal analysis, comments and review of the client's draft briefing note, as well as notes of his discussions with the other ministry lawyer regarding their legal review of the briefing note.

- Print-outs of emails containing legal advice or requests for legal advice.

- Counsel's handwritten notes containing his legal analysis, comments and review of the client's draft letter to the Environmental Review Branch at MOECC.

- Counsel's handwritten notes containing his legal analysis, comments and review of the client's draft cultural heritage conditions.

- Counsel's handwritten notes of a meeting he had regarding the file with the Legal Director. These notes contain discussions of legal advice, discussions regarding the judicial review application, and next steps for the Legal Branch to take on the file. (Pages 197-214)

[69] Based on my review of Record 156, I find that it contains printouts of email chains, documents, draft documents and handwritten notes. I find that disclosure of Record 156 would reveal information as described above by the ministry and

furthermore information relating to legal advice sought by the lawyer's client. I find Record 156 to be exempt under section 19 as solicitor-client and litigation privileged.

[70] Moreover, based on my review of the records and the circumstances in the appeal, I find that the ministry has not disclosed these records or waived its privilege in the records. Accordingly, subject to my finding on the ministry's exercise of discretion, I find that the records are exempt under section 19.

Issue C: Was the ministry's exercise of discretion under sections 13 and 19 proper in the circumstances?

[71] The section 13 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.

[72] 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
- it fails to take into account relevant considerations.

[73] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] This office may not, however, substitute its own discretion for that of the institution (section 54(2)).

Parties' representations

[74] The ministry submits that it considered the interests to be protected by both the section 13 and 19 exemptions. Regarding the section 19 exemption claim, the ministry submits that it gave this factor significant weight as voluntary disclosure of the information at issue would have resulted in waiver of its privilege. The ministry submits that the appellant/requester is and was engaged in various litigation with the government about the proposed project. The ministry states:

> At the time that the ministry made its original access decision, more than one REA appeal had been filed with the Environmental Review Tribunal. In the case of the appeal filed by the project proponent, the requester had received party status in this appeal to the Tribunal. The ministry was also appearing on behalf of the Director as a witness in this same appeal. While the rules of procedure of the Tribunal would have provided for a disclosure of records relating to the proposed project, records protected

[19] Order MO-1573.

> by solicitor-client privilege would not have been disclosed to the parties to the Tribunal hearing.
>
> Also at the time that the ministry made its access decision, the requester had filed an application for judicial review of the Director's decision and the role of the ministry in the heritage assessment process conducted for the proposed project. The requester named the ministry as one of the respondents to the application and this litigation with the requester is currently ongoing at the time of writing these representations. The requester would not be able to gain access to the government's solicitor-client privileged records as part of the judicial review process.

[75] The ministry submits that exercising its discretion to disclose the records at issue would have resulted in disclosing privileged records to the appellant that she would not be otherwise entitled to in either the judicial review application or the Tribunal appeal. The ministry notes that given the ongoing judicial review, the appellant and the government are in adversarial positions. As such, the government should be able to prepare its position in private without fear of disclosure of privileged information that would challenge the "efficacy of the adversarial process".

[76] The ministry further submits that it also considered whether disclosing the records would increase public confidence in the institution, either the MOECC or the ministry. The ministry submits that it would not as there is a public avenue for the appellant to challenge the Director's decision, to challenge the government's heritage assessment process, and to shine a public light on the heritage issues surrounding the proposed project. Furthermore, the ministry notes that the appellant has already invoked this public avenue and has obtained party status for one of the appeals to the Tribunal and by filing two applications for judicial review.

[77] The ministry also considered the purpose of the section 13 exemption in choosing to exercise its discretion to withhold records. The ministry states:

> The exemption provides a private space for the development of policy and the analysis and debate of issues. It is submitted that in order to provide useful advice, public servants need a private sphere to explore issues candidly and comprehensively without having to be concerned about public disclosure. The email chains and the various draft letters and documents reveal an evolution of thinking and analysis by ministry staff that ultimately led to the ministry's final advice and recommendations to MOECC and the Director regarding the cultural heritage aspects of the proposed project.

[78] Similarly, in its exercise of discretion to claim section 19, the ministry also considered that it was engaged in litigation with the requester and determined that the subject matter of the records for which section 13 has been claimed is directly relevant to the issues on appeal in the requester's judicial review.

[79] The appellant submits that the ministry alleges that her requests were made in bad faith in the arguments supporting their exercise of discretion. The appellant submits that these allegations are without basis and states that:

> The chronology and status of our judicial review set out at [in the appellant's representations] shows that there was no litigation at the time of my FOI request and that our stated purpose for delivering the Notice of Application and material was to have our concerns taken seriously by the government with the hope of resolving the issues through the REA process.

[80] The appellant submits that its attempts to link her request through the access process and her engagement in litigation demonstrates that the ministry relied on irrelevant considerations when it exercised its discretion. The appellant also disputes the ministry's argument that disclosure of the withheld records would not increase public confidence in the institution. The appellant submits that the best way to ensure public confidence in the workings of government is to make government transparent, which is the purpose of her requests for information. The appellant states:

> Effectively, [the ministry] is claiming that it is better for the public to rely on costly litigation and written court decisions than an open and transparent government, with a FOI regime to back up the public's right to access of information. The best way to ensure public confidence in the workings of government is to make government transparent, which is the purpose and partial result of my FOI requests. Withholding disclosure has (obviously) the opposite effect. Transparency is crucial in the case of [the wind project] – a precedent-setting project with respect to cultural heritage. It is only through transparency that the public heritage professionals can have confidence that [the ministry], the ministry responsible for the administration of the OHA has acted appropriately to uphold the intent and spirt of the OHA.

[81] Finally, the appellant submits that the ministry failed to consider the principle under the *Act* that individuals should have a right of access to their own information. The appellant notes that if the records at issue contain information about the impacts of the turbines abutting her protected property, then the ministry failed to consider this principle when it withheld the information at issue from her.

[82] The ministry was given an opportunity to reply to the appellant's allegations that it improperly considered the fact that she was currently in litigation with the government and that it failed to consider the principle under the *Act* that individuals should have access to their information. The ministry submits that in exercising its discretion to withhold information under sections 13 and 19, it primarily considered the purpose of the exemptions and the interests the exemptions are intended to protect. The ministry states:

> With respect to the application of the section 19 exemption, particularly given the volume of section 19 records at issue in this appeal, the ministry's decision to maintain solicitor-client privilege over the relevant records was consistent with the very reason that solicitor-client communication privilege exists at common law.

[83] The ministry cites the rationale for the solicitor-client privilege set out in the decision of the Supreme Court of Canada in *Blank* v. *Canada (Minister of Justice)*[20] in support of their position that their claim of the section 19 exemption was to protect the "zone of privacy between government counsel and clients".

Finding

[84] Based on my review of the parties' submissions and the records that I have found exempt under sections 13 and 19, I find that the ministry properly exercised its discretion to withhold the records. The ministry properly considered the interests to be protected by the section 13 and 19 exemptions. While the appellant argues that the ministry improperly considered the fact that she was involved in litigation against the government, I accept the ministry's position that this was an appropriate consideration for the application of the section 19 exemption.

[85] I also accept the ministry's consideration of its advisory role to MOECC in the REA process to be a valid consideration for the purposes of the application of the section 13 exemption to the records for which it was claimed. I accept that many of the records at issue would relate to consultation and formation of the advice in the comment letter to the MOECC in the REA application process. I further find that the ministry did not apply the exemption in an overly broad manner.

[86] Regarding the appellant's submission that the ministry should have considered the principle under the *Act* that an individual is entitled to information about themselves in government record holdings, I agree with the ministry's submission that any information regarding the appellant's property that may be in the records at issue is not personal information to which this principle applies.

[87] Finally, the appellant submits that the ministry should have considered the community's need for transparency and accountability for its review of the heritage impact of the specified wind project. While public interest is a valid consideration for an institution in the exercise of its discretion to withhold or disclose records, I accept that the institution considered this factor and gave it little weight. As the ministry submits in its representations on the application of the public interest override in section 23 to the records claimed exempt under section 13:

> The ministry's position is that the appellant's interest in this matter is essentially a private one, as she has objected to the proposed location of certain wind turbines and to the heritage impact assessment for the

[20] 2006, 270 D.L.R. (4th) 257.

> [specified project] due to personal interests. As the appellant indicated in paras. 3 and 4 of her representations, she is a directly affected stakeholder because the project proponent proposed three wind turbines in a location that abuts her property.

[88] I uphold the ministry's exercise of discretion under sections 13 and 19. I find that the ministry did not exercise its discretion in bad faith and it did not take into account irrelevant considerations. Nor do I find that the ministry failed to consider relevant considerations.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

[89] During the inquiry, the appellant appeared to raise the possibility of the application of the public interest override in section 23 of the *Act* to the records. Accordingly, this issue was added to the scope of the appeal and the parties were given an opportunity to provide representations on it. The adjudicator noted to the parties that section 23 does not apply to records found to be exempt under section 19 of the *Act*. 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.

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

[91] 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]

Compelling public interest

[92] 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

[21] Order P-244.
[22] Orders P-984 and PO-2607.

the information the public has to make effective use of the means of expressing public opinion or to make political choices.[23]

[93] A compelling public interest has been found to exist where, for example: the records relate to the economic impact of Quebec separation;[24] the integrity of the criminal justice system has been called into question;[25] public safety issues relating to the operation of nuclear facilities have been raised;[26] disclosure would shed light on the safe operation of petrochemical facilities[27] or the province's ability to prepare for a nuclear emergency;[28] or the records contain information about contributions to municipal election campaigns.[29]

[94] A compelling public interest has been found not to exist where, for example: another public process or forum has been established to address public interest considerations;[30] a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[31] a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[32] there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[33] or the records do not respond to the applicable public interest raised by the appellant.[34]

Parties' representations

[95] The appellant submits that *cultural* heritage, in contrast to natural heritage, concerns people and community values and is recognized in provincial policy and guidelines. She cites a number of documents in support of this position and notes that considerations about cultural heritage necessarily concern the public interest. The appellant states:

> There is a public interest with respect to all the Protected Properties potentially impacted by the [specified project] …. An underlying principle of the OHA is that a private owner of a Protected Property acts as steward of the cultural heritage resource in the public interest until he or she

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[23] Orders P-984 and PO-2556.
[24] 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.).
[25] Order PO-1779.
[26] 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.
[27] Order P-1175.
[28] Order P-901.
[29] *Gombu* v. *Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[30] Orders P-123/124, P-391 and M-539.
[31] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[32] Orders M-249 and M-317.
[33] Order P-613.
[34] Orders MO-1994 and PO-2607.

> passes stewardship onto the next owner. My personal interest in the disclosure of records that concern [specified turbines and location] is therefore also a matter of public interest.

[96] The appellant submits that normally the protection of public heritage is carried out at the municipal level in order to have community engagement in the process. The appellant explains that normally a heritage advisory committee provides advice and aid in the drafting of by-laws to protect properties and make recommendation about proposed development that may impact protected properties. This committee's work is carried out transparently through consultations with the public and in public meetings. The municipal council then debates and decides heritage designations and recommendations with respect to development impacts in the public forum of council meetings.

[97] The appellant submits that the ministry, with regard to the wind farm project, stood in the municipality's shoes in the above described process. She states:

> However, whereas the long-tested municipal process for administering the protection of cultural heritage under the OHA is open and transparent as described above…this is not the case for the [ministry] with respect to the regime for Renewable Energy Approvals. Under the proponent-driven REA regime and following the new process set out in the MOECC's Technical Guide to Renewable Energy Approvals, the [ministry] administered the municipality's by-laws and considered impacts to the municipality's other cultural heritage resources behind closed doors. This underscores the importance of disclosing information about the Project's cultural heritage impact process and how [the ministry] arrived at its recommendations to MOECC.

[98] The appellant notes that the ministry's application of the heritage legislative framework and recommended mitigations differed from the municipality's consideration of the matter. While the ministry did not recommend revision to the heritage impact assessment (HIA), it recommended removal of only two of the intended three turbines that were identified as causing impacts. The municipality had asserted that all three turbines should be removed and the HIA should be revised.

[99] The appellant submits that disclosure of the records would aid the municipality, the heritage community and the public at large to have a better understanding of the *heritage* rationale behind the ministry's position. The appellant states:

> Without such disclosure, the citizenry will not have the information it needs to express an opinion with respect to necessary changes in government policy or the law, especially at this time when the electricity system is under increasingly close public scrutiny.

[100] The appellant submits that the potential impacts of the proposed project have roused strong interest and attention, locally, provincially and nationally for two reasons:

- Ontario's new REA regime does not align well with the existing provincial heritage legislative framework.

- It is challenging to site a new kind of energy infrastructure – 45 storey high industrial wind turbines – in rural landscapes with a special heritage context.

[101] The appellant submits that the records relate to two colliding public interests that have not yet been reconciled including the necessity for renewable energy resources and the interest in conserving an area of early cultural heritage. Disclosure of the records would "[reconcile] these two colliding interests, which can only be achieved by an open and thorough examination of the issue." The appellant further sets out examples of the local and national interest in the proposed project.

[102] The appellant then reviews the examples where a compelling public interest was found not to exist and argues that these examples are not applicable in the circumstances of this appeal. While I do not set out all of the appellant's representations on this point, I have reviewed and considered them for the purposes of this appeal.

[103] Finally, the appellant submits that the compelling public interest that she has established in her representations outweighs the purpose of the section 13 exemption. The appellant states:

> Despite [the ministry's] leadership role with respect to the conservation of cultural heritage, it has provided insufficient commentary about its [specified project] recommendations for the public to understand its position on the issues for the purpose of informed public discussion. This informed discussion within the heritage community and the public at large is necessary for the ongoing formulation and improvement of cultural heritage policy.

[104] As stated above, the ministry disputes the appellant's characterization of her interest in the records as a public one. Instead, the ministry submits that due to the proximity of the proposed wind turbines, the appellant's interest is private. The ministry states:

> As the appellant indicated in paras. 3 and 4 of her [dated] representations, she is a directly affected stakeholder because the project proponent proposed three wind turbines in a location that abuts her property. The appellant expressly acknowledged her personal interest in the matter at paras. 3, 28 and 31 of her [dated] representations.
>
> The appellant's personal interest in this matter is further demonstrated by the fact that she filed a judicial review application involving both the ministry and the MOECC regarding the [specified project] and the ministry's role in the heritage impact assessment aspect of the project.

[105] The ministry submits that the appellant's interest and the subject matter of the records relates to a private interest and not the province's population generally.

[106] The ministry argues that I should consider Order PO-2677 where the adjudicator found that the appellant's private interest in the matter did not raise issues of more general application such that a public interest was established for the purpose of section 23.

[107] Further, the ministry submits that disclosure of the records for which the section 13 exemption has been claimed would not be particularly illuminating about the ministry's responsibilities or actions in this regard "given that the information that is already available through the Renewable Energy Approval process and the previous access requests of the appellant." The ministry submits that the following information is available:

- The Renewable Energy Approval process provides the public with access to heritage assessments, which are the key documents that the ministry used when advising MOECC as part of the ministry's review of the [specified project].

- The ministry provided the appellant with two letters that clearly outline the decision-making process and the ministry's advice to MOECC during the technical review.[35]

- The MOECC's letter to the ministry dated December 16, 2014 summarized the status of the review including the review of public concerns regarding cultural heritage, and requested the ministry's advice on the cultural heritage impacts of the project and the proposed mitigation measures.

- The ministry's letter (December 23, 2014) responded to these questions by commenting on the acceptability of the proposed mitigation measures and identifying which impacts remained unaddressed. The letter provided a rationale for the removal of turbines T07 and T011, and the ministry's rationale for why mitigation recommendations for turbine T09 were considered to be out of scope.

[108] The ministry also responded to the appellant's submission that the municipality's processes for administering the cultural heritage protection under the *OHA* was more open and transparent than that of the Renewable Energy Approval process. It is the ministry's position that the two process are not comparable. The ministry states:

> Municipal designation under the OHA is an exercise in local decision-making. In contrast, the heritage assessment under the Renewable Energy Approval process under the Environmental Protection Act is different in that it is a project-proponent driven process in which community input is sought via consultation, and the impact of a proposed

[35] These were attached to the appellant's representations as Exhibits 4 and 5.

project on cultural heritage resources is only one matter under consideration.

Analysis and finding

[109] As stated above, the public interest override can only apply to the information which I have found to be exempt under section 13 of the *Act*, specifically Records 95, 96, 98, 193a, 196, 196a, 198, 199, 203, 204d, 207a, 208, 208b, 208c, 210a, 210b, and 212. While I accept the appellant's submission that the protection of cultural heritage is a matter that concerns the public generally, I find that disclosure of the records that I have found exempt under section 13 would not serve to illuminate the ministry's recommendations regarding the project.

[110] The information I have found exempt under section 13 consists of the following:

- Draft questions and answers
- Draft conditions and emails attaching the draft conditions
- Draft letters and emails attaching the draft letters
- Emails discussing possible responses to a request by the project proponent
- Draft heritage assessment report

Based on my review of this information, I find that disclosure would not address the public interest the appellant has identified, specifically the reason why the ministry did not recommend the removal of Turbine 09. Instead, disclosure of these records would disclose the advice and/or recommendations given by and between ministry staff and legal counsel regarding the ministry's response to MOECC or in providing its recommendations to the Director within the context of the REA framework.

[111] I have compared the information that has been submitted by the parties including the information that has already been disclosed to the appellant and set out in paragraph 105 above, with the information that I have found to be exempt under section 13. Based on this review, I agree with the ministry that the disclosure of the information I have found to be exempt under section 13 would not serve the purpose of illuminating the ministry's responsibilities and actions under the *OHA* for the proposed project. Accordingly, I find that section 23 of the *Act* does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the ministry's decision that section 19 applies to the records for which it is claimed.

2. I uphold the ministry's decision to withhold information under section 13 for Records 95, 96, 98, 193a (in part), 196, 196a, 198, 199, 203 (in part), 204d, 207a, 208, 208b, 208c, 210a, 210b and 212.

3. I order the ministry to disclose the parts of Records 193a and 203 which I have found not to be exempt under section 13 by **March 2, 2018**, which I have identified in the highlighted copies of those records attached to the ministry's copy of the order. To be clear, the highlighted information should be disclosed to the appellant.

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

Original signed by
Stephanie Haly
Adjudicator

January 30, 2018