Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3896

Appeals PA15-285 and PA15-383

Ministry of the Environment, Conservation and Parks

November 2, 2018

Summary: The records at issue in these appeals relate to the possible presence of the *Baudoinia compniacensis* fungus within a five kilometer radius of a named distillery. The access request was made to the Ministry of the Environment, Conservation and Parks (the ministry). The ministry issued a decision letter, granting access in part to the responsive records. The requester appealed the ministry's decision to this office and Appeal PA15-383 was opened. It deals with duplication of records, the responsiveness of the records, the ministry's denial of a fee waiver, as well as the possible application of the mandatory exemption in section 21(1) (personal privacy), the discretionary exemption in section 19 (solicitor-client privilege) and the public interest override in section 23. A third party also appealed the ministry's decision to this office and Appeal PA15-285 was opened, which deals with the possible application of the mandatory exemption in section 17(1) (third party information) to the records.

In this order, disposing of both appeals, the adjudicator finds: several records are exact duplicates of others and were removed from the scope of the appeal; some records are not responsive to the request and were removed from the scope of the appeal; some of the records contain the personal information of the requester; other records contain the personal information of other individuals; the personal information of the requester is to be disclosed to him under section 47(1); the personal information of other individuals is exempt from disclosure under section 21(1); the records are not exempt from disclosure under section 17(1), meaning that the third party's appeal (PA15-285) is dismissed; some records are exempt from disclosure, either in whole or in part under section 19; the ministry's exercise of discretion is upheld; the public interest override in section 23 does not apply to the personal information found to be exempt under section 21(1); and the ministry's decision to deny the requester's request for a fee waiver is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 17(1), 19, 21(1), 23, 24, 47(1) and 57(4)(c).

Orders Considered: Orders PO-2490 and PO-2629.

OVERVIEW:

[1] This order disposes of the issues raised as a result of two appeals filed with this office. An individual submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Environment and Climate Change (now the Ministry the Environment, Conservation and Parks or the ministry), seeking access to "any and all information available" regarding the *Baudoinia compniacensis* fungus (the fungus) within a five kilometer radius of a named distillery/storage facility. Although no specific time frame was identified in the request, the request mentions studies that had been conducted over the 30 year period leading up to the request.

[2] In response, the ministry located records and issued an interim access decision, granting partial access to them. The ministry advised the requester that certain information would be withheld, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The ministry also provided the requester with a fee estimate.

[3] The requester subsequently emailed the ministry, requesting a fee waiver. The ministry denied the fee waiver, advising the requester that he had not provided sufficient evidence of financial hardship for a fee waiver. The requester then paid the fee, in full and the ministry proceeded to retrieve the records.

[4] The ministry then notified the third party whose facility was the subject of the request, under section 28(1)(a) of the *Act*, to provide the third party with an opportunity to submit its views on the disclosure of records that the ministry identified as possibly affecting its interests.

[5] After receiving the third party's submissions, the ministry issued a decision letter to the third party and to the requester, advising that it was granting partial access to the responsive records. The ministry denied access to certain records, or parts of them, claiming the discretionary exemptions in sections 13(1) (advice or recommendations), 19(a) and (b) (solicitor-client privilege), as well as the mandatory exemption in section 21(1) (personal privacy) of the *Act*. The ministry also advised that records unrelated to the request were removed from the scope of the request, as well as any duplicate records marked as "Duplicates."

[6] The third party appealed the ministry's decision to this office, which opened Appeal PA15-285 to address the issues. The requester also appealed the ministry's

decision to this office and Appeal PA15-383 was opened. For ease of reference, the requester appellant will be referred to as the requester and the third party appellant will be referred to as the third party in this order.

[7] During the mediation of the appeals, the ministry issued a revised decision letter of its decision in Appeal PA15-285 to the third party. In this letter, the ministry noted that it had provided records to the third party in accordance with section 28(1)(a) of the *Act* initially, and additional records for consultation at a later date. This revised decision advised the third party that after reviewing its submissions (which were confirmed to apply to both sets of records provided), the ministry's final decision was to provide the requester with partial access to the records. The ministry reiterated that it was still relying on sections 13(1), 19(a) and (b) and 21(1) to deny access, but was also adding the exemption in section 22(a) (publicly available) to deny access to newspaper articles. The ministry repeated its position on the non-responsiveness and duplication of certain records.

[8] Subsequently, the ministry sent two letters to the third party advising of corrections to the final records package and providing revised indices of records. In response, the third party objected to the disclosure of all of the records identified by the ministry as responsive to the request, including any records that it was not notified about at the request stage *and* the information identified by the ministry as non-responsive. The third party relies on the mandatory exemption in sections 17(1)(a), (b) and (c) (third party information) of the *Act*. Finally, the third party objected to the disclosure of the ministry's index of records to the requester.

[9] Also during the mediation of the appeals, the ministry adjusted the fee estimate down, based on the actual cost of processing the request, and appears to have refunded the requester the difference, at least in part. The requester requested another fee waiver under section 57(4)(c), which the ministry denied. The requester continues to pursue access to all of the records identified by the ministry in response to the request, including any that the ministry identified as "Not Relevant" (or non-responsive), and any records removed by the ministry on the basis that they are "Duplicates." In addition, the requester believes that there is a public interest in the disclosure of all of the records, which raises the possible application of the public interest override in section 23 of the *Act*. Lastly, the requester continues to appeal the ministry's fee estimate, as well as its decision to deny his request for a fee waiver.

[10] The appeals were then transferred to the adjudication stage, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeals started the inquiry by seeking representations from the third party, including notifying the third party of her preliminary decision to provide the requester with a copy of the ministry's non-confidential index of records.

[11] The adjudicator received the third party's representations. Subsequently, there were discussions between staff from this office and the third party regarding the

sharing of the index. Once the sharing issue was resolved, the adjudicator sought and received representations from the ministry and the requester. Both the ministry and the requester provided representations. Portions of the representations were withheld, as they met this office's confidentiality criteria, but they have been taken into consideration in this decision.

[12] In the ministry's representations, it advised that it was no longer relying on the discretionary exemptions in sections 13(1) (to pages 273 and 274)[1] and 22(a) (to page 411). As a result, those exemptions are no longer at issue in appeal PA15-383. In addition, in its representations, the third party provided its consent to disclose three newspaper articles to the requester. The ministry did not claim any exemptions with respect to two of the articles, and had withdrawn its section 22(a) claim to the third article. Therefore, these articles are no longer at issue. I will order the ministry to disclose the articles to the requester, if it has not done so already. These newspaper articles are located at pages 278, 396 and 411.

[13] In the requester's representations, he submits that the revised fee estimate was fair. Consequently, the amount of the fee is no longer at issue in Appeal PA15-383.

[14] In sum, the issues in Appeal PA15-383 (the requester's appeal) are:

- Duplication of records;
- The responsiveness of the records;
- The possible application of the mandatory exemption in section 21(1) and the discretionary exemption in section 19;
- The ministry's exercise of discretion under section 19;
- The possible application of the public interest override in section 23; and
- The ministry's decision to deny the fee waiver.

[15] The issues in Appeal PA15-285 (the third party's appeal) are:

- The possible application of the mandatory exemption in section 17(1); and
- The possible application of the public interest override in section 23.

[16] The appeals were then transferred to me to continue the inquiry. I sought reply representations from the third party in response to the ministry's representations on the possible application of sections 17(1) and 23. I received representations from the third party. Portions of the representations meet this office's confidentiality criteria and will

[1] The third party continues to claim the application of section 17(1) to these pages.

not be referred to in this order, but were taken into consideration.

[17] I have decided to issue one order, disposing of both appeals. For the reasons that follow, I make the following findings:

- several records are exact duplicates of others and are removed from the scope of the appeal;
- some records are not responsive to the request and are removed from the scope of the appeal;
- some of the records contain the personal information of the requester. Other records contain the personal information of other individuals;
- the personal information of the requester is to be disclosed to him under section 47(1);
- the personal information of other individuals is exempt from disclosure under section 21(1);
- the records are not exempt from disclosure under section 17(1), meaning that the third party's appeal (PA15-285) is dismissed;
- some records are exempt from disclosure, either in whole or in part under section 19;
- the ministry's exercise of discretion is upheld;
- the public interest override in section 23 does not apply to the personal information found to be exempt under section 21(1); and
- the ministry's decision to deny the requester's request for a fee waiver is upheld.

RECORDS:

[18] The records at issue consist of reports, memos, a slide deck, a technical memorandum, employee notes, briefing notes, meeting agendas, newspaper articles, and correspondence. There are approximately 400 responsive, non-duplicated pages at issue. To be clear, the records are contained on the CD entitled "Final Pkg_IPC," dated April 5, 2016.[2]

[2] Subtitled "Final Package IPC."

ISSUES:

A. Are there duplicate records that can be removed from the scope of the appeal?

B. What records are responsive to the request?

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

D. Does the mandatory exemption in section 21(1) apply to the information at issue?

E. Does the mandatory exemption at section 17 apply to the records?

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

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

H. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Issue A: Are there duplicate records that can be removed from the scope of the appeal?

Representations

[19] The ministry submits that a total of 205 pages of records were removed as duplicate records. It provided a table listing the page numbers of the records that were removed as duplicates, as well as listing the pages of the records that these pages duplicate. The ministry states that in evaluating a record for duplication, it was considered to be a duplicate only if nothing was added, changed or deleted.

[20] The requester submits that he does not object to duplicate records being removed from the scope of the appeal, provided this office verifies that they are, indeed, duplicates. However, he believes that the pages contained at 31-35, 373-375, 452-483 and 509-514 do not appear to have corresponding non-duplicate copies within the records. The requester submits that his conclusion regarding these records is based on his review of the Index of Records that the ministry provided to him.

Analysis and findings

[21] I have reviewed all of the records contained in the table the ministry provided, comparing the records that were removed as duplicates with the ones that were not

removed. I confirm that all of the pages that were removed as duplicates are, indeed, duplicates of other pages, as set out in the ministry's representations. I also verify that the specific pages the requester is concerned about are duplicated in the following pages:

- Pages 31-35 are duplicates of pages 20-22, 523 and 567;
- Pages 373-375 are duplicates of pages 20-22;
- Pages 452-483 are duplicates of pages 116-128, 377-388 and 389-395; and
- Pages 509-514 are duplicates of pages 17-19 and 20-22.

[22] As the requester has submitted that he does not object to duplicate records being removed from the scope of the appeal, provided I verify that they are true duplicates, which I have done, I find that the 205 pages that were removed as duplicates are no longer at issue in these appeals.

Issue B: What records are responsive to the request?

[23] The ministry withheld some records on the basis that they are not responsive to the access request, and the requester objects to this.

[24] 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).

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

Representations

[26] The ministry submits that it took a liberal interpretation of the request, and that the request was sufficiently detailed to permit it to identify records responsive to it. The ministry lists the following records as not responsive to the requester's request:

- Page 13 is the requester's access request. The ministry argues that it relates to access to information under the *Act*;
- Pages 27-37, 41-47 and 84-85 have multiple partial severances. The severed portions are from an employee's notebook and relate to another site, investigation or other matter;
- Page 83 is blank;
- Pages 354-359 relate to another distillery in another location;
- Pages 427-439 are related to the distillery but are not related to the fungus or its relationship to the distillery/facility; and
- Page 428 is blank.

[27] The requester submits that he is unable to determine if there are records that have been incorrectly deemed to be not responsive to the request, but he is of the view that there is a real possibility that the ministry made some errors, resulting in his confidence in the ministry being "weakened." As an example, the requester argues that page 13 appears to be his access request, and that this letter is relevant to the request.

Analysis and findings

[28] I have reviewed the above-referenced pages, and I make the following findings regarding those pages:

- Page 13 is the requester's access request, which I find does not relate to information regarding the fungus, but rather to access under the *Act*.
- Pages 27-30 were partially withheld. I find that the withheld portions identified as not responsive by the ministry are not related to the request because they relate to other matters being dealt with by ministry staff.

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

- Pages 31-35 I have already removed from the scope of the request because they are duplicates.

- Pages 36-37 were partially withheld. I find that the withheld portions identified as not responsive by the ministry are not related to the request because they relate to other matters being dealt with by ministry staff.

- Pages 41-47 were partially withheld. I find that the withheld portions identified as not responsive by the ministry are not related to the request because they relate to other matters being dealt with by ministry staff.

- Pages 84-85 I have already removed from the scope of the request because they are duplicates.

- Page 83 is a blank page.

- Pages 354-359 relate to a different distillery than the one that is the subject matter of this access request.

- Pages 427-439 (except page 428) relate to the distillery, but do not relate to the fungus or its relationship to the distillery.

- Page 428 is blank.

[29] In sum, I find that the records the ministry has claimed are not responsive to the request, are in fact, not responsive, as detailed above and will, therefore, not be disclosed to the requester.

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[30] In order to determine if the personal privacy exemption in section 21 and/or section 49(b) of the *Act* may apply, it is necessary to decide whether the records contains "personal information" and, if so, to whom it relates. Sections 21 and 49(b) can only apply to *personal* information as that term is defined in section 2(1) of the *Act,* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the

> individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[31] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[5]

[32] Section (3) also relates to the definition of personal information and states:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[33] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[6]

[34] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something

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[5] Order 11.
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

of a personal nature about the individual.[7]

[35] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

Representations

[36] The ministry submits that several pages contain the type of personal information defined in paragraph (b) of the definition of personal information in section 2(1). In particular, the ministry argues that: pages 27, 287 and 288 contain financial information about identifiable individuals; pages 28, 29, 30, 273, 274, 276, 400, 401, 408, 412, 413 and 414 contain medical information about identifiable individuals; and pages 344, 400, 401, 408, 412, 413, 414, 417, 567, 583, 584 and 585 contain information about identifiable individuals' employment histories.

[37] The ministry also argues that pages 279, 280, 281, 282, 419, 420, 421, 422, 423, 424, 425 and 426, qualify as personal information under paragraph (c) of the definition of personal information in section 2(1).

[38] The ministry further submits that pages 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 273, 274, 276, 360, 361, 362, 363, 372, 400, 401, 408, 412, 413, 414, 515, 518, 523, 556, 583, 584 and 585 contain personal information as defined in paragraph (d) of the definition of personal information in section 2(1), namely the name, address and telephone numbers of identifiable individuals.

[39] The ministry goes on to argue that pages 28, 29, 30, 344, 515, 518, 523 and 567 contain the views or opinions of one individual about another identifiable individual, falling within paragraph (g) of the definition of personal information in section 2(1).

[40] Turning to paragraph (h) of the definition of personal information in section 2(1), the ministry submits that pages 283, 285, 286, 299, 300 and 529 contain the names of identifiable individuals, along with other personal information about them.

[41] Lastly, the ministry submits that pages 45, 46 and 47 contain the requester's personal information, including the name, telephone number, employment information and other personal information about the requester, falling within paragraphs (b), (d) and (h) of the definition of personal information in section 2(1).

[42] The requester acknowledges that there is a likelihood that personal information is contained in the records, but he is unable to ascertain to whom it relates without reviewing the records.

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[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Analysis and findings

[43] I have reviewed the records and I agree with the ministry and find that the records contain the personal information of identifiable individuals. In particular, I find that pages 27, 287 and 288 contain financial information about identifiable individuals and that pages 28, 29, 30, 273, 274, 276, 400, 401, 408, 412, 413 and 414 contain medical information about identifiable individuals, which qualifies as their personal information under paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[44] I also find that pages 279, 280, 281, 282, 419, 420, 421, 422, 423, 424, 425 and 426 contain information that qualifies as personal information under paragraph (c) of the definition, and that pages 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 273, 274, 276, 356, 357, 358, 359, 360, 361, 362, 363, 372, 400, 401, 408, 412, 413, 414, 515, 518, 523, 556, 583, 584 and 585 contain personal information as defined in paragraph (d) of the definition of personal information in section 2(1), namely the name, address and telephone numbers of identifiable individuals.

[45] I further find that pages 28, 29, 30, 344, 515, 518, 523 and 567 contain the views or opinions of one individual about another identifiable individual, falling within paragraph (g) of the definition, and that pages 283, 285, 286, 299, 300, 400, 401, 412, 413, 414, 529, 567, 583, 584 and 585 contain the names of identifiable individuals along with other personal information about them, which qualifies as personal information under paragraph (h) of the definition.

[46] In addition, I find that pages 344, 408, 417 and 567 contain information about identifiable individuals in their professional capacity, but that the information would reveal something of a personal nature about them, which qualifies as their personal information.

[47] Lastly, I find that pages 45, 46 and 47 contain only the requester's personal information, including his name, telephone number, employment information and other personal information about him, falling within paragraphs (b), (d) and (h) of the definition of personal information in section 2(1).

[48] I will now determine whether the personal information referred to above is exempt from disclosure under section 21(1) of the *Act*.

Issue D: Does the mandatory exemption in section 21(1) apply to the information at issue?

[49] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. As previously stated, I have found that pages 45, 46 and 47 contain only the personal information of the requester, and that other information within these pages is not responsive to the request (see Issue B). As a result, under section 47(1) the requester has a right to access his own personal

information, and I will order the ministry to disclose the requester's personal information, on pages 45, 46 and 47, to him.

[50] As stated above, I also found that other records contain the personal information of identifiable individuals other than the requester. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[51] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[52] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 14(4) or the "public interest override" in section 23 applies.[9]

[53] The ministry is relying on the presumptions in sections 21(3)(b) (compiled as part of an investigation), (d) (employment or educational history) and (f) (financial transactions) to withhold the personal information under section 21(1) from the requester.

Representations

[54] The ministry is claiming the application of section 21(1) to pages 279, 280, 281, 282, 419, 420, 421, 422, 423, 424, 425 and 426 in their entirety. With respect to the remaining records detailed above under Issue C, the ministry is claiming that only portions of those records are exempt under section 21(1).

[55] The ministry submits that the personal information at issue does not fit within any of the exceptions in section 21(1)(a) through (e), and that the disclosure of the personal information at issue would constitute an unjustified invasion of identifiable individuals' personal privacy.

[56] The ministry submits that it considered both the presumptions in section 21(3) and the factors in section 21(2) in determining that the disclosure of the personal information would constitute an unjustified invasion of personal privacy.

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[9] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

[57] With regard to the presumptions in section 21(3), the ministry submits that the following presumptions apply:

- section 21(3)(b) applies to some of the personal information, which was provided by identifiable individuals to a provincial officer as part of an investigation into a possible violation of the *Environmental Protection Act*;
- section 21(3)(d) applies to some personal information, because it relates to individuals' employment histories; and
- section 21(3)(f) applies to other personal information, as it details financial transactions of the individuals to whom the information relates.

[58] The ministry goes on to argue that it considered the factor in section 21(2)(f), which is that the personal information at issue is highly sensitive.

[59] Lastly, the ministry submits that it disclosed as much information as possible to the requester, withholding only the names and identities of individuals, their contact information, employment and medical histories, as well as financial transactions relating to identifiable individuals. The ministry goes on to state that it disclosed the comments made by identifiable individuals, without identifying them.

[60] The requester submits that the disclosure of the personal information in the records would not constitute an unjustified invasion of the personal privacy of the individuals to whom the information relates. He also submits that the exception in section 21(1)(e) applies, which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably be accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations.

[61] The requester submits that he made the access request for a research purpose, with the intent of gaining a better understanding of the fungus that is the subject

matter of the request. In particular, the requester argues that he is trying to determine the impact of the fungus on the environment, including the properties of individuals who live near the distillery.

[62] In addition, the requester argues that the factors in sections 21(2)(a) to (d) that favour disclosure apply, and the factors that weighing against disclosure in sections 21(2)(e) to (i) do not apply, for the following reasons:

- the disclosure of the personal information will subject the activities of the ministry to scrutiny by allowing the public to consider the adequacy of information currently available, whether further research is required, and whether redress measures were adequate;

- the disclosure of the personal information will likely promote public health and safety as it could lead to further studies of the health and safety concerns;

- the disclosure of the personal information will promote informed choice in the purchase of goods and services, as it will allow individuals to consider whether to purchase a product that causes fungus from a particular company;

- the personal information sought is relevant to a fair determination of rights affecting the requester, so that he can evaluate whether proceedings should be commenced;

- the disclosure of the personal information will not unfairly expose the individuals to whom it relates to pecuniary or other harm;

- the personal information is not highly sensitive, as it has been previously disclosed to other parties by the third party

- the personal information is likely to be reliable and accurate;

- the personal information was not supplied in complete confidence; and

- the disclosure of the personal information will not unfairly damage the reputation of any person referred to in the records, as the information relates to a fungus and not individuals personally.

[63] The requester submits that he also believes that additional unlisted factors exist, namely inherent fairness issues and ensuring public confidence in an institution. With respect to the presumptions in section 21(3), the requester argues that they do not apply to any of the personal information at issue.

[64] Lastly, the requester provided a number of affidavits from individuals who are concerned about, and wish to have more information about, the fungus and its effects. In these affidavits, the individuals support the requester's access request and advise

that all of the information should be disclosed in its entirety. However, the affiants also state that they prefer that their personal information and involvement in this matter remain confidential, although, if necessary, they provide their consent to disclose their own affidavit.

Analysis and findings

The consent exception in section 21(1)(a)

[65] Although the requester provided affidavits sworn by a number of individuals in support, generally, of his access request, I am unable to conclude, based on the language in the affidavits, that these individuals provided their express consent to the disclosure of their own personal information to the requester. I conclude, therefore, that section 21(1)(a) does not apply in these circumstances.

The research exception in section 21(1)(e)

[66] The requester submits that the research exception in section 21(1)(e) applies, as he made the access request for a research purpose. Section 21(1)(e) and Regulation 460 set out the requirements for this exception to apply. For example, section 10 of Regulation 460 requires that prior to the disclosure of personal information by the head to the researcher, the institution and the researcher must enter into a written agreement relating to the security and confidentiality of personal information.

[67] Based on my review of the requester's and the ministry's representations, I have no evidence before me that there is an agreement between the ministry and the requester relating to a research study. I find that in the absence of an agreement between the ministry and the requester, the requester has not met the requirements of section 21(1)(e) of the *Act* and section 10 of Regulation 460. While I am satisfied that the purpose of the requester's request is to gain a better understanding of the fungus and its full impact,[10] I am not satisfied that the requester is conducting a research study within the meaning of this term, as contemplated in section 21(1)(e). As a result, I find that this section is not applicable in the circumstances of this appeal.

[68] I will now determine whether any of the presumptions in section 21(3) or factors in section 21(2) apply to the remaining personal information at issue.

The presumptions in section 21(3)

[69] Based on my review of the records, and the ministry's representations, I conclude that the presumptions against disclosure in sections 21(3)(a) (medical information), 21(3)(b) (compiled as part of an investigation) and 21(3)(f) (financial

[10] As set out in the requester's representations.

transactions) apply to some of the personal information contained in the records.[11] As the presumptions apply to this personal information, I find that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the individuals to whom it relates. Consequently, I find that this personal information is exempt from disclosure under section 21(1) of the *Act*.

The factors in section 21(2)

[70] Turning to the remaining personal information at issue, and the factors in section 21(2), I find that none of the factors that weigh in favour of disclosure of personal information apply and I do not afford them any weight. In particular, I find that the disclosure of the limited amount of personal information that was withheld would not assist in subjecting the ministry's activities to public scrutiny, promote public health and safety, promote informed choice in the purchase of goods, or be relevant to a fair determination of the requester's rights.

[71] I find that only one factor which does not favour disclosure, applies to some of the personal information. In particular, I find that some of the personal information at issue is highly sensitive (section 21(2)(f)), and I afford this factor considerable weight in favour of the non-disclosure of the personal information.

[72] Having found that none of the factors in section 21(2) that favour disclosure apply, the factor in section 21(2)(f) (which does not favour disclosure) applies to some of the personal information, and given that section 21(1) is a mandatory exemption, I find that the disclosure of the remaining personal information at issue would constitute an unjustified invasion of individuals' personal privacy. Consequently, this personal information is exempt from disclosure under section 21(1).

Section 21(4)

[73] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. Neither party raised the possible application of section 21(4) to the records and I find, on my review of the personal information contained in the records that none of the section 21(4) exceptions are applicable.

[74] In sum, I find that all of the personal information of individuals other than the appellant is exempt from disclosure under section 21(1). In particular, pages 279, 280, 281, 282, 419, 420, 421, 422, 423, 424, 425 and 426, which the ministry withheld in full, are exempt from disclosure under section 21(1). In addition, the portions of pages

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[11] I do not agree with the ministry that the presumption in section 21(3)(d) applies to any of the personal information contained in the records. On my review of the records, they do not contain personal information that would qualify as employment history-related for the purposes of section 21(3)(d).

27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 273, 274, 276, 283, 285, 286, 287, 288, 299, 300, 344, 356, 357-358, 359, 360, 361, 362, 363, 372, 400, 401, 408, 412, 413, 414, 417, 515, 518, 523, 556, 567, 583, 584 and 585 which the ministry withheld, are also exempt from disclosure under section 21(1).

Issue E: Does the mandatory exemption at section 17(1) apply to the records?

[75] The third party is claiming the application of the mandatory exemption in section 17(1) to all of the records at issue, with the exception of the three newspaper articles it consented to disclose, as well as the records that are not responsive to the request.

[76] I have already found some records to be exact duplicates of others, or not responsive to the request, and I have removed them from the scope of the appeal. In addition, I have found certain records to be exempt from disclosure, in full, under section 21(1). Therefore, it is not necessary to consider whether those records are exempt under section 17(1).

[77] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or …

[78] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[12] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[13]

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[12] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[79] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[80] The types of information listed in section 17(1) have been discussed in prior orders:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[14]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[15]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[16] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[17]

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[14] Order PO-2010.
[15] Order PO-2010.
[16] Order PO-2010.
[17] Order P-1621.

Representations

[81] The third party submits that the records contain technical, scientific and/or commercial information. In particular, the third party submits that the records: summarize technical memoranda and analyses relating to superficial fungal staining at the facility; contain monitoring results relating to the facility; set out technical considerations driving operation and maintenance decisions at the facility; and include technical guidelines being considered or proposed for the facility and the surrounding area.

[82] Other records, the third party submits, contain scientific information, summarizing scientific assessments of the staining, including studies commissioned by the third party from independent scientific consultants.

[83] In addition, the third party submits that many records contain commercial information relating to the anticipated capital and operating costs of possible voluntary mitigation measures being considered by it.

[84] The ministry submits that the records contain technical, scientific and commercial information. The requester agrees that at least some of the records are scientific or technical in nature.

Analysis and findings

[85] Having reviewed the records, I am satisfied that some of them contain scientific information for the purposes of section 17(1). In particular, they contain information about the biological nature of the fungus, including research studies conducted about the fungus. I also conclude that other records contain technical information for the purposes of section 17(1), namely information on how to physically minimize or eliminate the effects of the fungus. Finally, I also find that other records contain commercial information, as they relate to the buying or selling of services. As a result of the records containing either scientific, technical or commercial information, I find that part one of the three-part test in section 17(1) has been met for all of the records remaining at issue.

Part 2: supplied in confidence

[86] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[18]

[87] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate

[18] Order MO-1706.

inferences with respect to information supplied by a third party.[19]

[88] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[20]

[89] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[21]

Representations

[90] The third party submits that the information contained in the records was supplied by it to the ministry in confidence. The information, it argues, was sufficiently sensitive that it was only provided to the ministry on the understanding that the information would be used solely for discussions between it and the ministry. In addition, the third party submits that it has consistently treated the records in a confidential manner; the records are not widely disclosed within the company and are only available to employees with a "need to know," and who are bound by a duty of confidentiality.

[91] The ministry submits that while not all of the records were expressly marked "private and confidential," the information in the records was supplied to it with a reasonable expectation of confidentiality.

[92] The requester submits that the records were not supplied in confidence. He goes on to argue that the nature of the ministry's inquiry into the fungus was to gain a better understanding of the fungus, partially due to concerns that were being raised by the public, as well as the lack of information available. The requester further submits that given the fact-finding nature of the ministry's inquiry, it was not reasonable for the third

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[19] Orders PO-2020 and PO-2043.
[20] Order PO-2020.
[21] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

party to assume that the records would remain confidential.

Analysis and findings

[93] Having regard to the parties' representations, and on my review of the records, I am satisfied that the following pages of records were supplied in confidence to the ministry by the third party:

> 1-12, 48, 49-52, 69-70, 71-79, 86, 90-93, 94, 139-267, 284, 286, 287, 288, 289-291, 292, 294-295, 297, 302, 314-315, 316-318, 321-322, 324, 327, 328, 330, 331, 332, 333, 334, 336, 337, 338-339, 340, 343, 345, 346-347, 348-350, 351, 363, 404-405, 530-541, 553-555 and 614.

[94] I will explain these records in more detail, below. Having found that the above-listed pages were supplied in confidence by the third party to the ministry or would reveal information that was supplied in confidence to the ministry by the third party, I find that the second part of the three-part test has been met with respect to these records.

[95] Conversely, I find on my review of the records that the following pages were not supplied by the third party to the ministry in confidence, nor would disclosure of these records reveal information that was supplied to the ministry by the third party. These records contain information that was created by the ministry itself or provided to the ministry by other individuals or, in some cases, consists of information provided by the third party to residents or individuals, but not the ministry. In all cases, below, the information contained in the records was not supplied in confidence by the third party to the ministry.

Page numbers	**Nature of the records**
14-16	Ministry memorandum, describing actions taken by the ministry and discussion at a public meeting
17-19	Ministry memorandum, describing actions taken by the ministry and discussion at a public meeting
20-22	Air quality test conducted by the ministry
27-30	Handwritten notes taken by ministry staff dealing with individual complaints
36-38	Handwritten notes taken by ministry staff dealing with individual complaints

39-40	Internal ministry email
41-47	Handwritten notes taken by ministry staff dealing with individual complaints
95-96	Fax cover and letter from the ministry to an individual, answering a question
101	Ministry memorandum
115	Ministry memorandum
116-128	Results of an investigation conducted by the ministry
131	Agenda for a public meeting
134-137	Fax cover from an MPP to the ministry, letter from a company (not the third party) to the MPP
268-272	Report from the ministry to its air resources branch containing information compiled by ministry staff
273-274	Notes of an investigation conducted by the ministry
275	Letter from the Ministry of Labour to the ministry
276-277	Memorandum between two ministries
283	Agenda for a public meeting with notes
285	Agenda for a public meeting with notes
296	Ministry fax cover sheet
298	Agenda for a public meeting with notes
299	Handwritten notes
300	List of task force members
301	Handwritten notes

303	Handwritten notes
304	Agenda for a public meeting
305	Ministry fax cover sheet
306-307	Ministry report
308	Ministry order
309	Ministry fax cover sheet
310-311	Ministry report
312	Internal ministry document
313	Internal ministry document
319	Ministry fax cover sheet
320	Internal ministry document
323	Ministry fax cover sheet
325	Letter from the ministry to the third party
329	Ministry fax cover sheet to the third party
335	Ministry fax cover sheet to the third party
341	Letter from the ministry to the third party
342	Ministry fax cover sheet
353	Ministry fax cover sheet
356	Letter from the ministry to an individual
357-358	Letter from the ministry to another third party
359	Letter from another third party to the ministry
360	Letter from an individual to the third party, copied to the ministry

361-362	Letter from the third party to an individual
364-366	Ministry background paper
367	Internal ministry email
368	Internal ministry email
369	Internal ministry email
370	Internal ministry email
371	Letter from the third party to residents
372	Email from the ministry to an individual
376-388	Ministry technical memorandum regarding the ministry's investigation
389-395	Ministry report of surveys it conducted
397-398	Ministry background paper
399	Letter from the ministry to the public health unit
400	Ministry occurrence report in response to a complaint
401	Ministry occurrence report in response to a complaint
402	Ministry memorandum
403	Ministry fax cover sheet
406	Letter from the ministry to the third party
408	Ministry occurrence report in response to a complaint
409	Internal ministry email
410	Internal ministry note
412	Ministry occurrence report in response to a

	complaint
413	Ministry occurrence report in response to a complaint
414	Ministry occurrence report in response to a complaint
415-416	Ministry memorandum regarding an examination of an issue
417	Internal ministry email
418	Continuation of memorandum at 415-416
440	Cover page of a report authored by the ministry
446-451	Ministry's evaluation report
506-508	Ministry background paper
515	Internal ministry email
516-517	Email between the ministry and another third party with attachment
518	Internal ministry email
523	Internal ministry email
529	Ministry notes of a meeting with several attendees
556-557	Internal ministry email
567	Internal ministry email
578	Internal ministry email
583-585	Email between the ministry and an individual
607	Ministry fax cover sheet
608	Ministry request for an investigation

609	Fax cover sheet from an MPP to the ministry
610	Letter from another third party to an MPP
611	Letter from another third party to the third party
612	Letter from the third party to another third party
630	Letter from another third party to the ministry
631	Letter from the ministry to another third party
632	Letter from the ministry to the third party

[96] As I have found that the above-listed records were not supplied in confidence to the ministry by the third party, I find that the second part of the three-part test in section 17(1) has not been met with respect to these records, and that they are not exempt from disclosure under section 17(1). The ministry has also claimed the application of the discretionary exemption in section 19 to pages 309-313, 367, 368, 369, 370, 397, 402, 409, 410 and 417, and I consider the application of section 19 to those records, below. However, as no other exemptions have been claimed with respect to the remaining records listed above, I will order the ministry to disclose them to the requester.

Part 3: harms

[97] The remaining records at issue are located at pages 1-12, 48, 49-52, 69-70, 71-79, 86, 90-93, 94, 139-267, 284, 286, 287, 288, 289-291, 292, 294-295, 297, 302, 314-315, 316-318, 321-322, 324, 327, 328, 330, 331, 332, 333, 334, 336, 337, 338-339, 340, 343, 345, 346-347, 348-350, 351, 363, 404-405, 530-541, 553-555 and 614.

[98] Before I determine whether the disclosure of these records could reasonably be expected to cause the harms set out in sections 17(1)(a), (b) or (c), I will provide a general description of them.

Page Numbers	**Nature of the records**
1-12	Report from the third party describing steps taken to deal with the fungus

48	Letter from the third party to the ministry
49-52	Letter from the third party to the ministry setting out efforts undertaken, research findings and next steps
69-70	Research update from the third party
71-79	Research presentation from the third party regarding the fungus
86	Letter from the third party to the ministry with a proposal regarding the fungus
90-93	Letter from the third party to the ministry setting out efforts undertaken, research findings and next steps
94	Letter from the third party to the ministry re: next steps
139-267	Report prepared by the third party re: engineering analysis of the fungus
284	List of quotes for proposed services
286	Summary of quotes for proposed services
287	Adjusted quote for proposed services
288	Invoice for services rendered
289-291	Quote for proposed services
292	Letter from the third party to the ministry
294-295	Third party's request for quotes
297	Letter from the third party to the ministry
302	Letter from the third party to the ministry
314-315	Third party's fax cover sheet with draft document
316-318	Third party's Q and A

321-322	Letter to ministry from the third party re: plan
324	Third party's fax cover sheet
327	Draft letter from the third party to the ministry
328	Letter from the third party to the ministry
330	Letter from the third party to the ministry
331	Internal ministry email but contains information supplied to the ministry from the third party
332	Fax from the third party to the ministry
333	Letter from the third party to the ministry
334	Letter from the third party to the ministry
336	Letter from the third party to the ministry
337	Letter from the third party to the ministry
338-339	Letter from the third party to the ministry
340	Letter from the third party to the ministry
343	Letter from the third party to the ministry
345	Letter from the third party to the ministry
346-347	Letter from the third party to the ministry
348-350	Research update from the third party
351	Draft letter to residents
363	Letter from the third party to the ministry
404-405	Letter from the third party to the ministry
530-541	Draft scholarly paper

553-555	Report prepared for the third party
614	Letter from the third party to the ministry

[99] The party resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[22]

[100] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[23]

Representations

The third party

[101] The third party submits that the harms enumerated in sections 17(1)(a), (b) and (c) apply to the records. Turning to section 17(1)(a), the third party argues that very significant harm would occur if the ministry disclosed the records relating to the facility's air emissions. These records, it submits, contain information regarding its technical operating parameters, and competitors could use this non-public information to gain a better understanding of the third party's operations, including with respect to confidential distillery processes. This information could unfairly advantage other third parties in the competitive marketplace for distillery operations in the province.

[102] Similarly, with respect to the application of section 17(1)(c), the third party submits that the disclosure of the records could result in an undue loss to it, or an undue gain to potential litigants. The third party goes on to state that it does not know who has requested the records or for what purpose, but it is concerned that the records are being sought for use in litigation, and that potential litigants could easily obtain the records once disclosed. The third party further submits that if the records are to be disclosed to a current or potential litigant, such disclosure should occur through the litigation process, with judicial oversight.

[103] Regarding the application of section 17(1)(b), the third party submits that the disclosure of the records could "foster an environment" where similar information may no longer be voluntarily supplied to the ministry, which is clearly not in the public

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[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[23] Order PO-2435.

interest. The records, the third party argues, were provided to the ministry in good faith as part of its ongoing efforts to cooperate with the ministry and to facilitate a strategy to address the fungal staining issue, including assisting with relieving the effects of the fungal growth on neighbouring homes.

[104] The third party goes on to argue that the disclosure of the records could damage the current candid and open relationship with the ministry and between the ministry and other facilities in similar situations. The third party states:

> The consequence of disclosure could be an environment where scientific and technical studies of possible solutions would no longer be commissioned or shared with the [ministry]. If non-government parties must assume that all information and records provided to the [ministry] (whether confidential or not) will become public, they will naturally be much more sensitive to the contents of those documents and the potential impacts of their disclosure. This would delay and add to the cost of document preparation, and would also discourage the disclosure of certain categories of information and dampen the willingness of private parties to conduct the studies or assessments that form the basis of such documents. This chilling effect would not be in the public interest. . .

[105] Lastly, the third party submits that previous orders of this office have found that section 17(1)(b) applied where a government agency with limited investigative resources benefitted from voluntary cooperation by third parties.[24]

The ministry

[106] The ministry submits that the third party has not met the third part of the three-part test, as it has not established the harms set out in section 17(1)(a), (b) or (c); therefore, the records (other than records subject to section 21(1) and 19) should be disclosed to the requester. Rebutting the third party's position on the application of section 17(1)(c), the ministry submits that past orders of this office have found that the possibility of litigation is not sufficient by itself to reasonably be expected to cause undue loss.

[107] With respect to the possible application of section 17(1)(b), the ministry states:

> The records at issue in this appeal relate specifically to air contaminants, emissions into the environment and air monitoring which relate to "contaminants released to the environment," which are regulated under the *Environmental Protection Act* (*EPA*) by the Ministry. The Ministry acknowledges that as it would prefer to work co-operatively with the

[24] See Order P-1003.

> industry, it submits that the *EPA* provides the authority for it to obtain this type of record in any event.

The requester

[108] The requester submits that the third party has not met part three of the three-part test. First, the requester argues that the ministry has the statutory authority to compel the production of the records. Second, the requester submits that litigation is not sufficient to trigger the undue loss or gain provision, and that a finding in a court of law cannot be considered an undue loss or gain under section 17.[25]

[109] The requester also submits that the third party may have already consented to the disclosure of the records, raising the possible application of section 17(3), which states:

> A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[110] The requester goes on to argue that the third party acknowledges that they have worked with stakeholders to relieve the effects of the fungus, that they have a desire to control the growth, and that they have been willing to communicate with local residents. This, the requester submits, would indicate that the third party has already consented to the disclosure of the information in the records.

The third party's reply

[111] In reply to the requester's claim that the third party has already consented to the disclosure of the information in the records, the third party submits that communicating with certain community members generally does not, and should not, give rise to an implied waiver of confidentiality with regard to the information contained in the records.

[112] Concerning section 17(1)(a), the third party submits that the ministry's representations did not appear to specifically address the third party's submissions regarding the likelihood of prejudice to its competitive position, which must not be ignored for the purposes of section 17, and which were set out in its original representations.

[113] With respect to section 17(1)(b), the third party submits that the orders the requester relies on involve records relating to events like spills or discharges of contaminants for which there are specific statutory obligations under the *EPA* to provide such records to the ministry. Conversely, the third party argues, the records in this instance were provided to the ministry purely on a voluntary basis as part of its efforts to cultivate a candid relationship with the ministry. In response to the ministry, the third

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[25] See Orders PO-3088 and PO-2490.

party submits that if a regulator has to resort in each instance to compelled disclosure, the public would lose the benefits associated with an open and voluntary dialogue between the regulator and industry to collaborate on issues and potential technical approaches before the proposed approach is determined and released. It further submits that the expected drain on the government's already limited investigative resources would clearly not be in the public interest, and that environmental protection would not be served well if the ministry has to compel disclosure in every situation.

[114] The third party argues that, with respect to section 17(1)(c), the facts indicate that the likelihood of litigation and the associated expectation of harm are by no means speculative. The third party submits that even if the requester does not consider him or herself a potential litigant, the records may become easily accessible to a potential litigant. In response to the ministry's position that "a finding by a court of law cannot be considered an undue loss for the purpose of section 17," the third party states:

> That IPC decision in turn cites PO-2490, which held that it is a "unsustainable argument to suggest that the outcome of a lawsuit before the civil courts could produce an "undue loss or gain" (emphasis added).[26] It is important to note that [the third party] never attempted to characterize the "outcome" of a lawsuit as the undue loss in question. Rather, as stated in our representations to the IPC dated [date], the concern was that the disclosure of the Confidential Records to a potential litigant would amount to an end-run around the normal, court supervised, documentary discovery process. In other words, such disclosure would deprive [the third party] of certain legal rights and protections that it would otherwise be entitled to in the normal course of documentary discovery, and allow the litigant to gain important strategic advantages. If the Confidential Records are to be disclosed to a current or potential litigant, such disclosure should occur through the litigation process with the judicial oversight it affords.

Analysis and findings

[115] I find that the third party has not provided me with sufficient evidence to establish that disclosure of the records at issue could reasonably be expected to result in the harms contemplated in sections 17(1)(a), (b) or (c).

Section 17(1)(a)

[116] The third party argues that significant harm would occur if the records relating to the facility's air emissions were disclosed. It further argues that the records contain information relating to its technical operating parameters and competitors could use this information to gain a better understanding of its operations, including with respect to

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[26] IPC Order PO-2490 (July 27, 2006), page 9.

confidential distillery processes. This information could unfairly advantage other third parties in the competitive marketplace for distillery operations in the province.

[117] I reject the third party's argument that the harms set out in section 17(1)(a) could reasonably be expected to occur should the records be disclosed. The records at issue relate to the nature of the fungus and how the possible effects of the fungus on the area surrounding the distillery were addressed. In other words, the records relate to a particular issue that arose, and how it was remedied. The records do not relate to the operations of the distillery vis-a-vis how a product is developed, made, aged and stored, which is the type of information a competitor could reasonably be expected to use to its advantage.

[118] Further, I find that the third party has not provided sufficient evidence to establish how a competitor could use the information about the fungus to prejudice significantly the competitive position of the third party, or interfere significantly with the third party's contractual or other negotiations. I find that the third party's representations are speculative and vague and do not establish the nature of the anticipated harms contemplated in section 17(1)(a). Therefore, the third part of the three-part test has not been met and I find that section 17(1)(a) does not apply.

Section 17(1)(b)

[119] The third party's position is that the disclosure of the records could "foster an environment" where similar information may no longer be voluntarily supplied to the ministry, which is clearly not in the public interest. The records, the third party argues, were provided to the ministry in good faith as part of its ongoing efforts to cooperate with the ministry and to facilitate a strategy to address the fungal staining issue, including assisting to help relieve the effects of the fungal growth on neighbouring homes. The third party's position is that if a regulator has to resort in each instance to compelled disclosure of information, the public would lose the benefits associated with an open and voluntary dialogue between the regulator and industry in problem-solving.

[120] The ministry's position is that the records at issue in this appeal relate specifically to air contaminants, emissions into the environment and air monitoring which relate to "contaminants released to the environment," which are regulated under the *Environmental Protection Act* (*EPA*), and while it would prefer to work co-operatively with the industry, the *EPA* provides the authority for it to obtain the records.

[121] Based on my review of the representations of the parties and on my review of the records themselves, I accept the ministry's argument that it had the authority under the *EPA* to obtain the records at issue from the third party.

[122] In Order PO-2629, former Adjudicator Laurel Cropley addressed this office's approach to the application of section 17(1)(b) in the context of records relating to environmental issues and clean-ups. She stated:

With respect to the third party's submission regarding the application of section 17(1)(b), a number of previous orders of this office have addressed similar arguments made with respect to reports concerning environmental contamination and clean-up efforts provided to the Ministry in the context of its administration of the *EPA*. These orders have found records similar to the record at issue in the current appeal not to qualify for exemption under section 17(1)(b) of the *Act* (Orders P-1595, M-1143, PO-1707, PO-1732-F, PO-1666 and PO-1803).

I summarized the rationale for these decisions in Order PO-1666:

> With respect to section 17(1)(b) ..., the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the EPA provides the authority for it to obtain this type of record in any event.
>
> …Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of information to the Ministry. The EPA clearly requires specific types of information and establishes the legal authority to obtain it. Although, as the Ministry indicates, it would prefer to have this information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the EPA, if necessary. Consequently, I find that section 17(1)(b) does not apply.

Expanding on this rationale, former Assistant Commissioner Tom Mitchinson noted in Order PO-1803 that there is a public interest in making the maximum amount of information in the area of environmental contamination and clean-up efforts available. He noted further that this view is reflected in the provisions of the *EPA*, which provide the necessary authority to the Ministry to ensure that the public is fully informed of issues impacting the environment.

Assistant Commissioner Mitchinson found that the public interest signified by the wording of section 17(1)(b) must have some connection to the policy mandate of the institution with custody or control of the record at issue. In the case of the Ministry of the Environment, its policy mandate relates to the protection of the environment.

Assistant Commissioner Mitchinson observed that it is significant that the Ministry, which has the mandate to protect the public interest in matters

relating to the environment, does not express any concern that similar information will not be supplied in future, nor that the continued supply of similar information is in the public interest. He concluded:

> Because section 17(1) is a mandatory exemption, in my view, it is fair to infer from the Ministry's position that it has determined that disclosure of the record would not interfere with the kinds of public interests that the Ministry's mandate seeks to protect. Given the Ministry's experience with issues of this nature, in particular the types of information it requires to protect the natural environment on an ongoing basis, the Ministry's position that section 17(1)(b) does not apply is a significant consideration.

The record at issue in the current appeal relates to "contaminants released to the environment", and according to the Ministry, falls under the *EPA*. In my view, the reasoning enunciated in the previous orders referred to above is relevant to the facts of this case and I adopt it for the purpose of this decision.

In providing the third party with an explanation for its decision to release the record at issue, the Ministry set out the legislative basis for its decision as well as the previous decisions of this office pertaining to similar types of information. It is significant to note that the Ministry does not express any concern about similar information not being supplied in the future or that the continued supply of similar information is in the public interest. The third party's submissions make no effort to distinguish this clear line of reasoning in previous orders of this office. I find, therefore, that the third party has failed to establish that disclosure of the record at issue could reasonably be expected to result in similar information no longer being supplied, where it is in the public interest that similar information continue to be supplied.

[123] Adopting and applying the approach of former Adjudicator Cropley, I find that even if the third party provided the information to the ministry voluntarily, the ministry had the authority to require the information from the third party under the *EPA*.

[124] I am not persuaded by the third party that the disclosure of the records at issue could reasonably be expected to result in similar information no longer being supplied to the ministry by the third party or others where it is the public interest that similar information continues to be supplied, because had it not supplied the information to the ministry voluntarily, it would have had to supply it under the authority granted to the ministry by legislation. In my view, the ministry could equally compel the provision of similar information in the future.

[125] As a result, I find that the third part of the three-part test has not been met and

that the exemption in section 17(1)(b) does not apply.

Section 17(1)(c)

[126] The third party's position is that the disclosure of the records could result in undue loss to it, or an undue gain to potential litigants, as it is concerned that the records are being sought for use in litigation, and that the likelihood of litigation and the associated expectation of harm is not speculative. The third party also argues that the disclosure of the records to a potential litigant would amount to an end-run around the normal court-supervised documentary discovery process, allowing a litigant to gain important strategic advantages.

[127] The ministry argues that past orders of this office have found that the possibility of litigation is not sufficient in and of itself to reasonably be expected to cause the third party undue loss.

[128] Past orders of this office have analysed the relationship between the harms intended to be protected against under section 17(1) and civil litigation, and have found that section 17(1) is intended to protect the "informational assets" of businesses and others in the context of the marketplace.[27]

[129] The third party cites Order PO-2490 and submits that the order held that the outcome of litigation cannot produce an undue loss or gain. In Order PO-2490, former Adjudicator John Higgins indeed rejected the argument that the results of litigation could result in an undue loss or gain, stating:

> In addition, it is in my view a curious and unsustainable argument to suggest that the outcome of a lawsuit before the civil courts could produce an "undue" loss or gain. The whole purpose of litigation, and the unswerving ambition of the Canadian judiciary, is to produce results that are fair and just. In my view, this argument cannot be upheld. Section 17(1)(c) cannot possibly include "undue gain or loss" in the context of litigation.

[130] Adjudicator Higgins also set out this office's position with respect to the relationship between the discovery process in civil litigation and the freedom of information access process. In Order PO-2490, the third party and the requester were engaged in civil litigation. The third party argued that the requester was attempting to get through the back door what the court had declined to permit through the front door, in an attempt to gain an edge in that civil action, thus depriving the third party of its right to a fair trial and impartial adjudication.

[131] Although Adjudicator Higgins was determining whether section 17(1)(a) of the

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[27] See for example, PO-2490.

Act applied to the records at issue, he also canvassed the relationship between civil litigation, section 17(1) generally, and the *Act* as a whole. He stated that section 17(1) was not intended to include a litigant's competitive position in civil litigation. He noted that previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and that the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[28] Adjudicator Higgins stated:

> The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:
>
> > This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:
>
> > The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
> >
> > > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
> >
> > …

[28] [2005] O.J. No. 2851 (Div. Ct.).

> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:
>
> > The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[132] In Order PO-2490, the third party also argued that the reference in section 17(1)(c) to "undue loss or gain" was not limited to undue loss or gain in the marketplace, and that disclosure of the records at issue would give the requester an advantage in the lawsuit.

[133] Adjudicator Higgins stated that he had analysed the relationship between the harms intended to be protected against under section 17(1)(a) and civil litigation, and that his reasoning under section 17(1)(a) stemmed from the view that section 17(1) was intended to protect the "informational assets" of businesses and others in the context of the marketplace. He then found that this reasoning applied with equal force in the context of section 17(1)(c).

[134] Applying the approach taken by Adjudicator Higgins in PO-2490, I find that the harm contemplated in section 17(1)(c) has not been established in the context of actual or potential civil litigation between the third party and other parties, including the discovery process. As a result, I find that the third part of the test in section 17(1)(c) has not been met as the third party has not provided sufficient evidence that the disclosure of the records could reasonably be expected to cause undue loss or gain to any person, group, committee or financial group or agency.

Summary

[135] In sum, based on my review of the records and the third party's representations, I find that the third party, as the party bearing the onus of proof, has failed to provide sufficient evidence to establish a reasonable expectation of harm under sections 17(1)(a), (b) or (c). I also find that no reasonable expectation of such harms with disclosure can be inferred from the content of the records themselves. As a result, part three of the test for exemption under section 17(1) has not been established.

[136] As all three parts of the three-part test must be established for the exemption at section 17(1) to apply, I find that the records at issue do not qualify for exemption under that section. As no other exemptions were claimed with respect to these records, I uphold the ministry's decision to disclose them to the requester.

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

[137] The ministry is claiming the application of section 19 to pages 309, 310, 311, 312, 313, 367, 368, 369, 370, 397, 402, 409, 410 and 417.

[138] Section 19 of the *Act* states, in part:

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

[139] 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) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The ministry submits that the records for which it claims section 19 fall squarely within both sections 19(a) and 19(b).

Section 19(a) – Branch 1 ("subject to solicitor-client privilege")

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

[141] 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.[29] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal

[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

matter.[30] 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.[31]

[142] 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.[32]

[143] 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 of privacy" in which to investigate and prepare a case for trial.[33] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[34] The litigation must be ongoing or reasonably contemplated.[35]

[144] 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.[36] 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.[37]

Section 19(b) – Branch 2 ("prepared by or for Crown counsel")

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

[146] In contrast to the common law litigation privilege, termination of litigation does

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[30] Orders PO-2441, MO-2166 and MO-1925.
[31] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[32] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[33] *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).
[34] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[35] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[36] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[37] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

not end the statutory litigation privilege in section 19.[38]

Representations

[147] As previously stated, the ministry is claiming the application of section 19 to pages 309, 310, 311, 312, 313, 367, 368, 369, 370, 397, 402, 409, 410 and 417.

[148] In particular, the ministry provides the following submissions regarding the records:

- pages 309 to 313 consist of correspondence from the ministry's legal counsel to a ministry Environmental Officer, setting out the seeking and giving of legal advice;

- pages 367 and 370 consist of email correspondence from the ministry's legal counsel to a ministry Environmental Officer containing "substantive" legal advice;

- page 369 consists of email correspondence from the ministry's legal counsel to the ministry's Ecological Standards and Toxicology Section Manager, which includes legal advice;

- page 397 consists of a briefing note discussing what the ministry's legal advice was;

- pages 409 and 410 consist of email correspondence from the ministry's legal counsel to the District Manager of the Sarnia District Office, as well as emails with the Director of the London Regional Office. These emails contain legal advice; and

- pages 368 and 417 consist of email correspondence between ministry staff discussing a strategy for conducting anticipated litigation. The email was created for the dominant purpose of strategizing on reasonably contemplated litigation and is subject to the exemption in section 19(b).

[149] The requester submits that without the benefit of seeing the records, he is unable to determine which records are subject to section 19.

Analysis and findings

[150] I have reviewed the records the ministry claims are exempt from disclosure under section 19, and I agree with the ministry's decision in this regard. Under branch 1 of section 19, I find that all of the records except two are exempt, as they are subject to solicitor-client communication privilege. In particular, I make the following findings

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[38] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

regarding these records:

- pages 309-313 is a draft document provided to legal counsel by staff for the purpose of obtaining legal advice;
- pages 367 and 370 comprise a two-page email from legal counsel to staff, providing legal advice;
- page 369 is an email from legal counsel to staff and forms part of the continuum of communication between legal counsel and their client;
- page 397 was partially withheld and the withheld portion sets out legal advice that had been provided to staff by legal counsel;
- page 402 is a memorandum to legal counsel from staff, in which the staff member is seeking legal advice;
- page 409 is an email from legal counsel to staff, providing legal advice; and
- page 410 is a memorandum from staff to legal counsel, seeking advice.

[151] I find all but one of the above-listed records consist of privileged communications between a lawyer and their client. Most of the records are communications between the ministry's legal counsel and ministry staff, in which legal advice is sought and given, including legal advice on the drafting of a certain document. Further, information is provided to legal counsel to assist them in formulating the legal advice, including the information gathered by staff. In my view, this information amounts to either direct communications of a confidential nature exchanged in the course of giving and receiving legal advice, or falls within the type of information that can be characterized as part of a continuum of communications between lawyer and client, necessary in order to permit advice to be sought and received. I find that these records fall within the common law solicitor-client communication privilege and are therefore exempt from disclosure.

[152] Page 397 is a communication amongst ministry staff, of which the ministry withheld a portion under section 19. While I acknowledge that this record does not consist of direct communications between ministry staff and legal counsel, I note that this office has previously applied section 19 where disclosure would reveal the content of the communications between a solicitor and client, which is applicable in this case. I find, therefore, that this portion is exempt from disclosure under section 19(a).

[153] Turning to branch 2 of section 19, the remaining pages are pages 368 and 417, which were partially withheld. These records are emails between ministry staff and it is clear on my review of them that the withheld portions were created for Crown Counsel for the dominant purpose of reasonably contemplated litigation. I therefore find that this information is exempt from disclosure under the statutory litigation privilege in

section 19(b).

[154] Lastly, I find that the ministry has not waived its privilege under either section 19(a) or 19(b), either explicitly or implicitly. Therefore, I uphold the ministry's decision under section 19, subject to my findings regarding the ministry's exercise of discretion.

Issue G: Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[155] Sections 19 is a discretionary exemption, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[156] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[157] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[39] This office may not, however, substitute its own discretion for that of the institution.[40]

[158] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[41]

- the purposes of the *Act*, including the principles that; information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;

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[39] Order MO-1573.
[40] See section 54(2).
[41] Orders P-344 and MO-1573.

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

Representations

[159] The ministry submits that it properly exercised its discretion in withholding information under section 19, taking into consideration the high public interest in maintaining the confidentiality of the solicitor-client relationship. In addition, the ministry submits that it disclosed as much information to the requester as possible, withholding only the portions of records that it found to be exempt from disclosure.

[160] The requester submits that he acknowledges the importance of maintaining solicitor-client communications as confidential. However, he argues that the "balance of convenience test" favours a finding that the ministry did not exercise its discretion to withhold the exempt information, and he argues that the following factors should be taken into consideration:

- the purpose of the *Act*, including the principle that information should be available to the public;
- severing only parts of records;
- the disclosure of the records will increase public confidence in the ministry;
- the age of the records; and
- the ministry's operational decision regarding the subject matter of the records has already been made.

[161] The requester further submits that environmental impacts and the potential health and safety issues related to the fungus are also relevant considerations regarding the ministry's exercise of discretion and favour disclosure of the records.

[162] Lastly, the requester argues that there are varying degrees of the solicitor-client relationship, in which there may be a reduced need for maintaining the confidentiality of the solicitor-client relationship. For example, the requester submits, in this instance the advice appears to have been provided by in-house legal counsel who are employed by the ministry. He goes on to state:

> Being that these individuals are public employees and the advice or recommendations were provided in the normal course of their public duties, the Requester believes that the need to maintain the confidential nature of the solicitor-client relationship is lessened. As such, the Requester believes that this consideration also favours a disclosure of the records.

Analysis and findings

[163] On my review of the parties' representations and the records themselves, I am satisfied that the ministry properly exercised its discretion, taking into consideration the importance of solicitor-client privilege, while balancing the requester's right of access. I note that in many instances, the ministry only withheld portions of records, and disclosed as much information as possible to the requester. Consequently, I uphold the ministry's exercise of discretion.

[164] As an aside, I note that the confidentiality of the solicitor-client relationship is not diminished when both legal counsel and the client are employed by a public institution.

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[165] Given that I have found that none of the information at issue is exempt under section 17(1),[42] and given that section 23 cannot apply to information found to be exempt under section 19, the possible application of the public interest override in section 23 may apply only to the personal information of individuals that I have found to be exempt under section 21(1).

[166] 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.

[167] 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.

[168] 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 requester 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 a requester. 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.[43]

[169] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s

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[42] The third party did provide representations on the possible application of the public interest override as it relates to section 17(1). As I have found that the records are not exempt under section 17(1), this order will not include the third party's representations on section 23.
[43] Order P-244.

central purpose of shedding light on the operations of government.[44] 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.[45] A public interest does not exist where the interests being advanced are essentially private in nature.[46] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[47]

[170] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[48]

[171] Any public interest in *non*-disclosure that may exist also must be considered.[49] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[50] A compelling public interest has been found *not* to exist where, for example the records do not respond to the applicable public interest raised by requester[51]

Representations

[172] The requester submits that there is a relationship between the records and the central purpose of the *Act*, which is to shed light on the operations of government. The disclosure of the records, the requester argues, will allow the public to better understand the ministry's actions with respect to the fungus and why a chosen course of action or inaction was selected in response to the fungus. The requester further submits that there is a strong public interest in obtaining further information about the fungus, and that there is a compelling public interest in the disclosure of the records that clearly outweighs the exemption in section 21(1). The requester then goes on to reiterate his arguments with respect to whether the exemption in section 21(1) applies to the personal information contained in the records.

[173] The ministry's position is that the disclosure of the personal information in the records would not inform the citizenry about the ministry's activities or add to the information the public has in order to express public opinion or make political choices. The ministry further submits that while the personal information in the records may be of importance to the requester, it has not been demonstrated that the disclosure of the

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[44] Orders P-984 and PO-2607.
[45] Orders P-984 and PO-2556.
[46] Orders P-12, P-347 and P-1439.
[47] Order MO-1564.
[48] Order P-984.
[49] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[50] Orders PO-2072-F, PO-2098-R and PO-3197.
[51] Orders MO-1994 and PO-2607.

personal information would raise issues of general application that could be said to create a compelling public interest.

[174] Furthermore, the ministry argues, the purpose of section 21(1) is the protection of personal privacy and the purpose of this exemption outweighs any public interest in the disclosure of the personal information contained in the records. Lastly, the ministry argues that the majority of the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, and that past order of this office have found that there is no public interest in revealing the identities of persons who have made complaints.[52]

Analysis and findings

[175] In considering whether there is a "public interest" in disclosure of the record, with respect to the first question set out above, I am not persuaded that there is a relationship between the specific information at issue and the *Act*'s central purpose of shedding light on the operations of government.[53] I am not satisfied that disclosure of individuals' names, addresses or medical or financial information will "serve the purpose of informing or enlightening the citizenry about the activities of [the ministry]" or "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."[54]

[176] I also note that, although the requester is clearly interested in the personal information contained in the records, I have not been provided with sufficient evidence to satisfy me that there is a public interest in this personal information, and certainly not to the extent of "rousing strong interest or attention."[55]

[177] Moreover, even if I were to accept that a compelling public interest in disclosure of the information at issue exists, in order for me to find that section 23 applies to override the exemption at section 21(1), I would have to also be satisfied that the compelling public interest clearly outweighs the purpose of the exemption. The personal privacy exemption in section 21(1) protects the personal information of individuals held by public institutions, which is one of the two central purposes of the *Act.* The records at issue contain names, addresses, medical information, and financial information. I found that the disclosure of this information is presumed to result in an unjustified invasion of personal privacy. The requester has not provided any evidence to demonstrate how or why any compelling public interest clearly outweighs the purpose of the mandatory personal privacy exemption in section 21(1), other than arguing that he is conducting "research," which requires the personal information. As noted previously, I rejected that argument when considering whether the personal privacy

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[52] Orders P-1320 and P-1394.
[53] Orders P-984, PO-2607.
[54] Orders P-984 and PO-2556.
[55] Order P-984.

exemption in section 21(1) applied.

[178] Accordingly, I find that the public interest override provision in section 23 does not apply to override the exemption of the personal information remaining at issue, and I uphold the ministry's decision to deny access to it.

Issue I: Should the fee be waived?

[179] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state, in part:

> 57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) whether dissemination of the record will benefit public health or safety;
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[180] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[56]

[181] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's

[56] Order PO-2726.

decision.[57]

[182] The institution or this office may decide that only a portion of the fee should be waived.[58]

[183] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    a. disclosing a public health or safety concern, or
    b. contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record[59]

[184] The focus of section 57(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue.[60]

[185] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. In deciding whether it would be "fair and equitable" to waive the fee, the institution must consider the factors listed in section 57(4) and Regulation 460.[61] Other relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;

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[57] Orders M-914, P-474, P-1393 and PO-1953-F.
[58] Order MO-1243.
[59] Orders P-2, P-474, PO-1953-F and PO-1962.
[60] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[61] See section 8 of Regulation 460.

- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.[62]

Representations

[186] The ministry submits that the requester's request for a fee waiver was not made under sections 57(4)(a), (b) or (d), but rather under section 57(4)(c). According to the ministry, the requester advised it that the identified fungus may pose a health risk to the residents and to past and current employees of the third party. The requester also advised the ministry that there is limited data available to the general public regarding the cause and effect of the fungus, and limited data to ascertain why the fungus is occurring in a particular area. The requester also advised the ministry that access to the records would advance the understanding of the health and safety concerns related to the fungus.

[187] The ministry denied the requester's request for a fee waiver. The ministry submits that it agrees with the requester that the subject matter of the records is of a public, rather than private, interest. However, the ministry also submits that the requester did not provide any evidence in his submission that there is an actual interest from the public in this matter.

[188] Concerning whether the subject matter of the record relates directly to a public health or safety issue, the ministry argues that the actual content of the majority of the records does not address health and safety issues. The ministry states:

> There are a small number of records that do relate to health and safety and of these documents only one has health and safety as its primary focus.

[189] The ministry further submits that there is considerable information in the public domain about this fungus, and that the records at issue do not disclose information about a public health or safety issue that is not otherwise available.

[190] With respect to whether the dissemination of the record would yield a public benefit, the ministry states:

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[62] Orders M-166, M-408 and PO-1953-F.

> . . . [T]he Ministry was of the opinion that the dissemination of the records will not yield a public benefit by either disclosing a health and safety concern or contributing meaningfully to the development of understanding of an important public health or safety issue, as the records do not contain detailed and substantive technical information that is not otherwise available.

[191] The ministry also submits that the requester provided no evidence nor did he specify in any detail how he would disseminate the records or make them available to those communities that could be affected by the fungus. Therefore, the ministry concludes that only one of the four necessary factors was met in determining whether dissemination of the records would benefit public health or safety under section 57(4)(c).

[192] Turning to whether it would be fair and equitable to waive the fees, the ministry submits that after receiving the fee waiver request, on more than one occasion it attempted to work with the requester to minimize the processing costs of the request by providing recommendations and suggestions for narrowing the scope of the request. According to the ministry, the requester did not advance any compromise solutions to reduce the fees.

[193] The ministry further argues that it has already reduced the fees and it would be unreasonable and not fair and equitable in the circumstances to now waive the remaining fee, thereby transferring the cost of processing the request from the requester to the ministry. The ministry submits that waiving the fees would contravene the user pay principle upheld by this office, and contemplated by the principles of the *Act*.

[194] The requester submits that it is fair and equitable to waive the fee, as the dissemination of the records will benefit public health and safety. Concerning the four factors that may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c), the requester submits:

- the subject matter of the records is a matter of public interest, as the fungus impacts the public and their property and is not specific to any private entity nor does it only cause a private consequence;

- the subject matter of the records relates directly to a public health and safety issue, which is the impact of the fungus on the public and their property, especially those who live nearby or who are exposed to it on a continuous basis;

- the dissemination of the records would yield a public benefit by contributing meaningfully to the development of understanding of the fungus itself, an important public health and safety issue for those individuals who live nearby or

are exposed to it on a continuous basis, as the information is not readily available as indicated by the other parties; and

- the probability that the requester will disseminate the contents of the records is certain, as he has been working with residents for years to find out further information regarding the fungus.

[195] In addition, the requester submits that the request deals with an environmental issue, and that the fungus itself seems to be airborne and/or able to be transplanted from one geographic area to another through environmental conditions.

[196] The requester also argues that it would be fair and equitable to waive the fee, which has already been paid some time ago, based on the following factors:

- the manner in which the ministry responded to the request, including incurring significant delays and a failure to comply with established time limits for reply;

- the ministry did not assist the requester in narrowing the request, for example, by providing an index at an earlier date;

- the ministry has not disclosed any records to the requester to date;

- the requester did not have the benefit of the index and was not able to narrow the scope of the request without knowing what the records were;

- the requester advanced a compromise solution early on, by paying for the records in full without delay and agreeing to accept the records electronically; and

- the fee waiver will not shift an unreasonable burden of the cost to the ministry as the majority of the cost has already been incurred and any hard costs have essentially been negated through the requester agreeing to accept the records electronically.

Analysis and findings

[197] I have reviewed the parties' representations, reviewed the records, and considered the factors enumerated above in determining whether the dissemination of the records will benefit public health or safety under section 57(4)(c). I find that the subject matter of the records is a matter of public interest and relates directly to a public health or safety issue in which the public has an interest, namely the possible consequences and effects of the fungus in a specific community. I do not agree with the ministry's argument that because there is information already in the public domain regarding the fungus, that is the end of the matter with respect to whether the dissemination of the records will benefit public health or safety.

[198] I also find that dissemination of the records would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue in that community, and I accept the requester's statements that he would disseminate the contents of the records, particularly to the community most likely to be affected by the presence of the fungus.

[199] However, the analysis as to whether a fee waiver should be granted does not end at this point. The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request, unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 8 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.

[200] In my determination of whether it would be "fair and equitable" to waive the fee in this appeal, I reviewed the considerations outlined above. In the circumstances of this request, I find that it would not be fair and equitable to grant a fee waiver. I find that the ministry has already reduced the fee, and the requester does not dispute the amount of the fee. I also note that some of the issues the requester raised, namely the reason the requester has not received any records to date, as well as the delay in receiving the index of records is not due to any action taken by the ministry, but is due to the fact that there is a third party appeal relating to the records at issue.

[201] Consequently, I uphold the ministry's decision to deny the requester's request for a fee waiver.

[202] Lastly, as an aside, I reviewed the ministry's representations on the issue of the amount of the fee, which the requester does not dispute. It is not clear from the ministry's representations whether the outstanding refund due to the requester[63] has been paid out to him. If the ministry has not done so already, it should do so upon receipt of this order.

Summary of findings

[203] In sum, I make the following findings:

- several records are exact duplicates of others and are removed from the scope of the appeal;
- some records are not responsive to the request and are removed from the scope of the appeal;

[63] At paragraph 55, the ministry refers to an "additional refund due" in the amount of $60.60.

- some of the records contain the personal information of the requester. Other records contain the personal information of other individuals;
- the personal information of the requester is to be disclosed to him under section 47(1);
- the personal information of other individuals is exempt from disclosure under section 21(1);
- the records are not exempt from disclosure under section 17(1), meaning that the third party's appeal (PA15-285) is dismissed;
- some records are exempt from disclosure, either in whole or in part under section 19;
- the ministry's exercise of discretion is upheld;
- the public interest override in section 23 does not apply to the personal information found to be exempt under section 21(1); and
- the ministry's decision to deny the requester's request for a fee waiver is upheld.

ORDER:

1. I order the ministry to disclose pages 1-12, 14-16, 17-19, 20-22, 48, 49-52, 69-70, 71-79, 86, 90-93, 94, 95-96, 101, 115, 116-128, 131, 134-137, 139-267, 268-272, 275, 277, 278, 284, 289-291, 292, 293, 294-295, 296, 297, 298, 301, 302, 303, 304, 305, 306-307, 308, 314-315, 316-318, 319, 320, 321-322, 323, 324, 325, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338-339, 340, 341, 342, 343, 345, 346-347, 348-350, 351, 353, 364-366, 371, 376-388, 395, 396, 398, 399, 403, 404-405, 406, 411, 415, 416, 418, 440, 446-451, 506-508, 516-517, 530-541, 553-555, 557, 578, 607, 608, 609, 610, 611, 612, 614, 630, 631 and 632 in their entirety to the requester by **December 10, 2018** but not before **December 3, 2018**. To be clear, these records are located in the ministry's CD of records entitled "Final Pkg_IPC" dated 2016-04-05.
2. I order the ministry to disclose pages 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 273, 274, 276, 283, 285, 286, 287, 288, 299, 300, 344, 360, 361, 362, 363, 368, 372, 397, 400, 401, 408, 412, 413, 414, 417, 515, 518, 523, 529, 556, 567, 583, 584 and 585, in part to the requester by **December 10, 2018** but not before **December 3, 2018**. To be clear, the ministry is to withhold the portions of these records that are not responsive to the request, exempt under section 21(1), or exempt under section 19, as indicated on the records located in the ministry's CD of records entitled "Final Pkg_IPC" dated

2016-04-05. The requester's own personal information located at pages 45, 46 and 47 is to be disclosed to him.

Original Signed by: November 2, 2018

Cathy Hamilton
Adjudicator