Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4068

Appeal PA17-568-2

Ministry of Natural Resources and Forestry

September 23, 2020

Summary: The Ministry of Natural Resources and Forestry received a request under the *Act* for a named staff member's emails regarding wolves in Slate Islands Provincial Park. The ministry issued a decision granting full access to a number of records and partial access to others, with portions withheld pursuant to the exemptions at sections 14 (law enforcement), 18 (economic and other interests), 19 (solicitor-client privilege), 21 (personal privacy) and 21.1 (species at risk) of the *Act*. During the inquiry, the ministry withdrew its claim of section 21.1, and significantly narrowed the number of records for which it was relying on sections 14 and 18, resulting in the disclosure of additional information. The appellant advised that he was not interested in obtaining access to the type of personal information that was withheld under section 21(1). In this order, the adjudicator upholds the ministry's application of the exemptions in sections 14(1)(l), 18(1)(b), and 19, and dismisses the appeal.

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"), 21(1), 14(1)(l), 18(1)(b), and 19.

Orders Considered: Order PO-2433.

OVERVIEW:

[1] This appeal is about access to records under the Freedom of Information and Protection of Privacy Act (the Act) relating to wolves in a provincial park. Specifically, the Ministry of Natural Resources and Forestry (the ministry) received a request from an individual for access to the following:

> As found in any email accounts under his control fully or partially, please provide all emails sent or received by [named individual] … which are related to wolves in Slate Islands Provincial Park. The time frame for the search will extend from 2013/01/01 to present.

[2] The ministry issued a decision granting full access to some of the records and partial access to other records. The ministry withheld information pursuant to the exemptions at sections 14 (law enforcement), 18 (economic and other interests), 19 (solicitor-client privilege), 21 (personal privacy) and 21.1 (species at risk) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision to this office.

[4] A mediator was assigned to explore the possibility of achieving a mediated resolution to the issues raised by the appeal. During mediation, the ministry clarified that it is relying on section 14(1)(l) and sections 18(1)(c) and 18(1)(d), in particular. The ministry also clarified that it was relying on section 21.1, and not section 21(1) for certain pages.

[5] The appellant advised that he would like to pursue access to the information withheld pursuant to sections 19 and 21.1. The appellant also advised that he would like to pursue access to the information withheld pursuant to sections 14 and 18, except for the information severed from pages 44, 72, 73, 151, and 203. As a result of discussions with the mediator, the appellant determined that he would like to pursue access to the portion of page 227 that was withheld pursuant to section 21(1), but that he was not seeking access to the additional severances made under the personal privacy exemption.[1]

[6] A mediated resolution was not achieved and the appeal was transferred to the adjudication stage, I began an inquiry under the *Act* by inviting and receiving representations from the ministry. In its representations, the ministry amended its position by withdrawing its claim to section 14(1)(l), except for a small portion of pages 178 and 179. The ministry also withdrew its claim to section 18(1), except for portions of pages 230 and 231, for which it now relied on section 18(1)(b). The ministry withdrew its reliance on section 21.1 entirely.[2] The ministry maintained its decision to deny access to some information in the records under sections 19 and 21(1) of the *Act*. A revised decision letter was sent to the appellant disclosing the previously withheld portions of the records in accordance with the ministry's amended position.[3]

[7] I also invited, but did not receive, representations from an affected party.

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[1] As a result of mediation, pages 44, 72, 73, 151, and 203, and the section 21(1) severances on pages 24, 25, 26, 40, 104, 105, 129, 135, 136, 139, 156, 172, 173, 177, and 201, 220 and 230 are no longer at issue in this appeal.

[2] The ministry had previously relied on section 21.1 to withhold portions of pages 29, 148, 150, 155, 178, 179, 180, 183, 219, 220, 222, and 230.

[3] Note: The ministry's revised decision letter and additional disclosures were not sent to the appellant until after the parties submitted reply and sur-reply representations.

[8] I then invited the appellant to provide representations. The non-confidential portions of the ministry's representations were shared with the appellant, in accordance with *Practice Direction Number 7* and the *IPC's Code of Procedure*. The appellant provided representations in response. Reply and sur-reply representations were sought and received from both the ministry and appellant.[4]

[9] For the reasons that follow, I uphold the ministry's decision to deny access to the remaining information at issue based on sections 14, 18, and 19 of the *Act*, and I dismiss this appeal.

RECORDS:

[10] The portions of the records that remain at issue in this appeal, are as follows:[5]

Page	Date	To	From	Subject	Disclosure	Exemptions claimed
81	10/26/2017	AB	CD[6]	LSCR [Lake Superior Coastal Range] Caribou Deck Review; Draft Caribou (Boreal Population) Lake Superior Costal Range Michipicoten Island and Slate Islands Management Options	Partial	19
178	06/06/2016	EF	GH	Trip to Slate Islands – wolf research	Partial	14(1)(l)
179	06/06/2016	EF	GH	Trip to Slate Islands – wolf research	Partial	14(1)(l)
227	06/09/2015	IJ	KL	Research application for the project titled "Wolf Status and Trophic Interactions on the Slate Islands"	Partial	21(1)

[4] I have considered the parties' representations and supporting documentation in their entirety, but in the interest of brevity, only summarize the most pertinent points in this order.
[5] As described in the ministry's index of records, although the exemptions have been updated to reflect the ministry's representations.
[6] I have replaced the names in the ministry's index of records with random initials. "CD" is the individual named in the appellant's request.

230	06/16/2017	CD	IJ	Update from the Slates	Partial	18(1)(b)
231	06/16/2017	CD	IJ	Update from the Slates	Withheld	18(1)(b)

ISSUES:

A. Does the withheld portion of page 227 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary law enforcement exemption at section 14(1)(l) apply to the withheld portions of pages 178 and 179?

C. Does the discretionary economic and other interests exemption at section 18(1)(d) apply to the withheld portions of pages 230 and 231?

D. Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld portion of page 81?

E. Did the ministry exercise its discretion under sections 14, 18, and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the withheld portion of page 227 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] The ministry relies on the mandatory personal privacy exemption at section 21(1) of the *Act* to withhold a portion of page 227, which forms part of a research funding application.

[12] In order to determine whether the personal privacy exemption at section 21(1) of the *Act* applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as "recorded information about an identifiable individual" that fits within the list of examples provided in paragraphs (a) to (h). The list of examples under section 2(1) is not exhaustive; information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[7]

[13] Exceptions to the definition of personal information exist for information about individuals that have been deceased for more than 30 years,[8] and for information that

[7] Order 11.
[8] Section 2(2) of the *Act*.

would identify an individual in a business, professional, or official capacity.[9] However, even when information relates to an individual in a business, professional, or official capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual.[10]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[11]

Representations

[15] According to the ministry, the withheld portion of page 227 contains the name, home address, and biography of a volunteer (the affected party) who was expected to assist with the proposed research. The ministry maintains that this information constitutes the affected party's "personal information," because the definition of that term in section 2(1) of the *Act* refers both to an individual's address and to their name where it appears with other personal information.

[16] The ministry maintains that the exceptions to the definition of personal information are not applicable, as the affected party's proposed involvement in the research was in a personal capacity, and not in a business, professional, or official capacity.

[17] The appellant says that he is not generally interested in obtaining personal information of "non-Ontario Public Service [OPS] individuals" or volunteers. However, he describes some specific instances in which he would be interested in obtaining access to individuals' names. His reason for seeking access to individuals' names in certain circumstances is that he would like to know if "the Crown is subsidizing [American] students when it should instead be devoting resources to protecting Ontario's species at risk of extinction." The appellant also maintains that the lines between a professional and personal capacity may become blurred when "relationships are as close as they can be in academia."

[18] In response, the ministry submits that the affected party is not one of the individuals described in the appellant's representations. The ministry explains that the affected party was a volunteer member of the public without any of the responsibilities of an OPS employee.

[19] In his sur-reply submissions, the appellant says that if the withheld information is personal information as described by the ministry, then he "has no further desire to seek"

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[9] Sections 2(3) and 2(4) of the *Act*. 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. See, for example, Orders MO-1550-F and PO-2225.
[10] Orders P-1409, R-980015, PO-2225 and MO-2344.
[11] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

access to those portions of the record.

Analysis and findings

[20] Personal information is defined as including the address, telephone number, fingerprints or blood type of an individual, as well as an 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.[12]

[21] Having reviewed the record, I am satisfied that the withheld portions contain the affected party's name and address, a few sentences describing their relevant experience and hobbies, and a summary of how they will assist with the proposed research. Accordingly, I find that the withheld information is the affected party's personal information within the meaning of paragraphs (d) and (h) of the definition in section 2(1) of the *Act*. I also accept the ministry's submission that this information relates to the affected party in a personal, rather than professional, capacity, such that the exceptions to the definition of personal information in sections 2(3) and 2(4) do not apply.

[22] In his sur-reply submissions, the appellant requested that I verify the accuracy of the ministry's description of the personal information contained in page 227, because if the information is what the ministry claims, then he does not seek access to it. Based on my review of the record, I am satisfied that the appellant is not interested in obtaining access to the information withheld on page 227, and it is no longer at issue in this appeal. Therefore, it is not necessary for me to consider whether the disclosure of the affected party's personal information would be an unjustified invasion of personal privacy under section 21(1) of the *Act*.

Issue B: Does the discretionary law enforcement exemption at section 14(1)(l) apply to the withheld portions of pages 178 and 179?

[23] In its representations, the ministry withdrew its claim to section 14(1)(l) to all records except for a small portion of pages 178 and 179.[13] Section 14(1)(l) states:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[24] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement

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[12] Paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*, respectively.
[13] Previously, the ministry had relied on section 14(1)(l) to deny access to portions of the following pages of records: 29, 147, 148, 150, 155, 178, 179, 180, 183, 184, 219, 220, 222, 230 and 231.

context.[14] It is not enough, however, for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[15] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [16]

Representations

The ministry's representations

[25] The ministry submits that disclosing the withheld portions of pages 178 and 179 could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of a crime, as contemplated by section 14(1)(l). The ministry acknowledges that section 14(1)(l) is typically raised by institutions involved in law enforcement; however, it maintains that the exemption can also be used in other contexts where there is a "clear link established between disclosure of the information and the likelihood of an unlawful act."[17]

[26] The ministry explains that the withheld portions of pages 178 and 179 are codes required to access wildlife monitoring cameras in Slate Islands Provincial Park. According to the ministry, the cameras are locked inside code-activated lockboxes to protect them from unlawful acts such as theft and vandalism.[18] The ministry submits that disclosing the codes could reasonably be expected to facilitate the commission of an unlawful act, as it would undermine the security protections that it has put in place to protect the cameras. Given that the only purpose for which the codes are required is to access the lockboxes, the ministry maintains that access to the withheld information does not further the purposes of the *Act* or freedom of information legislation generally.

The appellant's representations

[27] The appellant acknowledges that he has "no explicit reason to obtain the camera lockbox codes," but notes that the *Act* indicates that information ought to be public but for limited and specific exemptions. In the appellant's view, postulating that a crime could be committed as a result of disclosure is an insufficient reason for denying access to the withheld codes under section 14(1)(l).

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[14] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[15] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[17] The ministry references Orders P-885, PO-3852, and PO-3653.
[18] The ministry notes the theft and vandalism of wildlife monitoring cameras is an unlawful act under both the *Criminal Code*, RSC 1985, c C-46, and under section 2(1)(a) of O.Reg 347/07 under the *Provincial Parks and Conservation Reserves Act, 2006*.

[28] The appellant maintains that the codes must be changed frequently in order to minimize the risk of them being "leaked." With this in mind, the appellant submits that the codes at issue will be out of date, such that their disclosure would no longer pose a risk of harm as contemplated by the ministry. He also distinguishes the codes at issue from police codes, which are frequently withheld under section 14(1)(l), on the basis that police codes remain the same for long periods of time. The appellant maintains that changing the lockbox codes is "trivial in nature" as compared with changing the entire police code structures.

[29] According to the appellant, if someone were suitably motivated to steal the wildlife monitoring cameras, the codes would not be a meaningful obstacle to them doing so. He also points to Orders PO-3653 and PO-3852, in which the GPS coordinates for similar cameras on Michipicoten Island were ordered disclosed, and he claims that those cameras have not been subject to any malevolent activity as a result.

The ministry's reply

[30] The ministry maintains that it is not merely concerned with the value of the cameras themselves, but also with the value of the information stored on the cameras. The ministry says that because it has disclosed the location of the cameras,[19] disclosing the lockbox codes would increase the risk that an individual could obtain access to the cameras or the recorded information through unlawful means.

[31] The ministry submits that the fact that lockbox codes are changed periodically does not mean that section 14(1)(l) is inapplicable. The ministry explains that there is no policy in place dictating how frequently the codes need to be changed; however, it notes that because the cameras in question are positioned in remote locations, changing the codes regularly is difficult.

[32] In the ministry's view, the importance of protecting the cameras and the recorded information far outweighs any potential benefit that may arise from releasing the lockbox codes. Therefore, the ministry maintains that its reliance on section 14(1)(l) is an appropriate "limited and specific" application of the exemption to the records.

The appellant's sur-reply

[33] In response to the ministry's reply, the appellant reiterates that he does not intend to use the codes to access the cameras; rather, he would like to "surmise exactly how often the [ministry] does or does not change its codes." He submits that the ministry's representations reveal that there is no policy on how frequently the lockbox codes are changed, which he claims is in conflict with its submission that it takes all reasonable measures to protect the cameras from interference. The appellant suggests that if the

[19] Although the ministry initially withheld information regarding the location of wildlife management cameras in Slate Islands Provincial Park, I note that this information was subsequently disclosed to the appellant as a result of the ministry's revised decision.

ministry knows that codes may be released as a result of freedom of information requests, then it may be more motivated to change the codes on a regular basis.

Analysis and findings

[34] As mentioned above, in order to rely on the exemption in section 14(1)(l), the ministry must provide detailed evidence about the potential for the harm contemplated by the exemption. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, but it need not prove that disclosure of the withheld information will in fact result in such harm.

[35] Having considered the parties' submissions and the nature of the information at issue, I am satisfied that the exemption in section 14(1)(l) applies to the withheld wildlife management camera lockbox codes on pages 178 and 179 of the records.

[36] I accept that the ministry's wildlife management cameras are protected by lockboxes that can only be opened with a particular code, and I am satisfied that maintaining the confidentiality of the lockbox codes is important for protecting both the ministry's hardware, as well as the information captured by the cameras. I also accept that disclosing the withheld information could reasonably be expected to undermine the ministry's security protections, thereby facilitating the commission of an unlawful act, such as vandalism of the cameras, or theft of the cameras or the information they contain.

[37] In my view, the potential risk of harm resulting from the disclosure of lockbox codes is greater than simply disclosing the location of the wildlife management cameras, as was the case in Orders PO-3653 and PO-3852, cited by the appellant. And, although the appellant claims to have no interest in uisng the codes to access the cameras himself, disclosure of this information must be viewed as disclosure to the world. On this basis, I am satisfied that the risk of the harms described in section 14(1)(l) occurring as a result of this information being disclosed is beyond the merely speculative or possible, such that the exemption applies.

Issue C: Does the discretionary economic and other interests exemption at section 18 apply to the withheld portions of pages 230 and 231?

[38] The purpose of the exemption at section 18 of the *Act* is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[20]

[39] As with the law enforcement exemption discussed above, for section 18 to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it

[20] Toronto: Queen's Printer, 1980.

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.[21]

[40] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[22]

[41] In its representations, the ministry withdrew its claim to section 18 for all records except for the withheld portions of pages 230 and 231.[23] Although the ministry initially relied on the exemptions in sections 18(1)(c) and (d) to withhold this information, the ministry explains that it took this position in error, and it now relies on section 18(1)(b). The ministry submits that the appellant is not prejudiced by the change in its position during my inquiry, as no new portions of records are claimed to be exempt, and the appellant would be provided an opportunity to respond to the ministry's arguments regarding section 18(1)(b). The appellant did not object to this change in the ministry's position in his submissions.

[42] Section 18(1)(b) states:

> A head may refuse to disclose a record that contains,
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> > (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication.

[43] For section 18(1)(b) to apply, the ministry must show that:

i. the record contains information obtained through research of an employee of the institution, and

ii. its disclosure could reasonably be expected to deprive the employee of priority of publication.[24]

Representations

The ministry's representations

[44] The ministry asserts that section 18(1)(b) applies to the withheld portions of pages

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[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[22] Order MO-2363.
[23] Previously, the ministry had relied on sections 18(1) to deny access to information from the following pages of the records at issue: 29, 147, 148, 150, 155, 178, 179, 180, 183, 184, 219, 220, 222, 230 and 231.
[24] Order P-811.

230 and 231 because those portions contain information obtained through research by ministry employees, and disclosing that information could reasonably be expected to deprive the employees of priority of publication. According to the ministry, the employees in question are Field Research Scientists employed at the Science and Research Branch of the ministry, whose duties include conducting field research to obtain data in support of the development of provincial natural resource policies. The ministry explains that it prefers (and sometimes requires) its scientists to publish their work in peer-reviewed literature, as it ensures a high level of rigour and promotes the credibility of both the ministry's research and the policies that the research informs.

[45] The ministry submits that its collaborative research program on wolves and caribou in the Lake Superior Coastal Range (LSCR) aims to better understand the predator-prey dynamics in closed systems, and to improve monitoring and methodologies for LSCR caribou. Although the primary intent of the work is to inform policy, publication in academic journals also serves the goal of furthering the understanding of predator-prey interactions among the international scientific community.

[46] In support of its reliance on section 18(1)(b), the ministry provided an affidavit from one of the employees whose scientific work is at issue. The employee attests that page 231, which was withheld in its entirety, depicts a map showing all of the locations that were monitored from a radio-collared wolf between June 2016 and May 2017. The employee maintains that this is novel information that is intended for peer-reviewed publication. The employee says that disclosing this information could reasonably be expected to deprive him and his colleague of priority of publication. As evidence of this, the employee notes that his raw research data was posted online and on Twitter following disclosure of the non-exempt portions of the requested records. He also maintains that photographs and other data obtained through requests under the *Act* were used in two public presentations delivered by the appellant and two other individuals.

[47] The ministry maintains that the map at page 231 was attached to the email found at page 230 of the records at issue. According to the ministry, the redaction on page 230 reveals novel information displayed on the map. Again, the ministry submits that this information was obtained through research and is intended for peer-reviewed publication.

[48] The ministry argues that, if the withheld portions are disclosed to the appellant, there is reason to believe that he would post the information online or include it in a public presentation, as has occurred in the past. The effect of this would be to deprive its employees of priority of publication.

The appellant's representations

[49] The appellant argues that research involving "real, irreplaceable species which belong to the people of Ontario and treaty rights holders" should be released to the public as soon as it is available. He maintains that public awareness and scrutiny of research practices and outcomes is necessary to ensure that the research is ethical. In particular, he says that when "research shows a catastrophe is unfolding, it needs to be stopped and

opened up to public scrutiny immediately." In this regard, the appellant claims that the ministry has conflated its wildlife management and wildlife research priorities.

[50] The appellant submits that the exemption in section 18(1)(b) should not be allowed to "terminally bury" and/or forget information. He says that accountability regarding research cannot occur unless extremely limited timeframes are applied to the exemption from the release of information relating to publishable research. He maintains that in order to credibly rely on section 18(1)(b), researchers should be required to show that active, verifiable steps have been taken to effect publication within 90 days of obtaining information believed worthy of publication. He says that, as a researcher himself, he knows that when research findings are "revolutionary," a researcher can "easily" submit them to a journal within 30 days, and "certainly" within 90 days. The appellant maintains that a peer reviewed journal will include a "received" date near the abstract, so that authors can be sure who was first to report the research findings, regardless of how long the peer review process takes.

[51] With regard to the records at issue, the appellant notes that the email on page 230 of the records is dated June 16, 2017, and that the map on page 231 shows wolf locations from 2016 to 2017. He maintains that the ministry has been in possession of the information at issue for many years, and questions when the ministry intends to submit the research for publication in a peer-reviewed journal. According to the appellant, any "revolutionary" results would have been published promptly as a standalone article. The fact that these results were not immediately published suggests that they are not revolutionary, and that the harm to the researchers from disclosure would therefore be small or negligible.

[52] The appellant submits that the ministry's interest in invoking section 18(1)(b) could be rooted in keeping the results (and the time of their realization) out of the public eye, rather than trying to protect priority of publication. He suggests that the ministry may be interested in doing so to protect the results, as well as the researchers' names and reputations, from public scrutiny. The appellant argues that the ministry's priority should be stewarding the commons of all of the people of Ontario, and not protecting the careers of a few individuals and their "right" to advance those careers.

[53] Finally, the appellant acknowledges that he and his colleagues have published information they received through their freedom of information requests under the *Act*, as described by the ministry. He maintains that it was only through the *Act* that they were able to publish and distribute information required to generate a public outcry regarding the destruction of the LSCR caribou. However, he states that he and his colleagues have no formal or informal associations with academic institutions and they promise not to publish any of the research findings in peer-reviewed publications as their own work.

The ministry's reply

[54] In response, the ministry submits that there is no endpoint for the application of the section 18(1)(b) exemption, and disclosure must therefore be assessed on a case-by- case

basis. The ministry maintains that academic research often requires observations to be made over a number of years, particularly when it is intended to determine patterns of behaviour and migratory patterns of animals.

[55] The ministry claims that its initial submissions provide sufficiently detailed evidence to support its reliance on section 18(1)(b), including identifying the employees who could reasonably be expected to be deprived of the priority of publication. The ministry notes that the only information that it seeks to withhold under section 18(1)(b) is conclusions pertaining to the collection of data that is integral to the impending publication of the scientists' research.

[56] The ministry provided additional affidavit evidence from one of the employees whose research is at issue. The employee attests that there is no standard expectation that results be published within 90 days of collection, much less 30 days, as the appellant has suggested. He maintains that such rapid dissemination of results is unprecedented in ecology or conservation biology, particularly for ongoing studies like the one he is involved with. The employee submits that he and his colleagues have shared their data and findings with the appropriate managers and authorities as soon as they have become available. He also attests to presenting his research and preliminary findings at meetings and conferences "at least annually" since their work began in 2015.

[57] Regarding the anticipated publication of his research, the employee claims to be actively working on a manuscript, which he anticipates submitting for peer-reviewed publication.[25] He also advises that most of the data that has been collected on wolves, caribou, and beavers will be included in his colleague's PhD dissertation, which will be published over the course of the "next several years."

[58] The employee notes that the appellant said that neither he, nor two of his colleagues, have an interest in publishing the data in peer-reviewed literature. However, he submits that the appellant failed to mention two of his other colleagues who have "strong research interests related to [the scientist's] work on Michipicoten and Slate Islands."

The appellant's sur-reply

[59] In response, the appellant says that regardless of what is stated in the affidavit, the ministry is using section 18(1)(b) to effect an embargo on the release of the withheld information. The appellant objects to the ministry's classification of rapid dissemination of results as "unprecedented in ecology or conservation biology," and he discusses at length one method of doing so: namely, preprints.[26] He says that while preprinting is not

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[25] Note: The employee's affidavit was dated July 26, 2019, at which time he anticipated submitting the manuscript to a peer-reviewed journal in September 2019.

[26] The appellant cites a definition of "preprints" from the Public Library of Sciences website (https://wi,w.plos.org/preprints), which states:

necessarily standard practice among researchers, it is certainly not "unprecedented" as suggested by the ministry's affiant.

[60] The appellant proposes that if research that is less than 30 days old is captured by an access to information request, then the institution should be able to rely on the section 18(1)(b) exemption; however, for information that is older than 30 days, the researcher should "promptly slip a manuscript into publication via preprint to assert primacy." The appellant says that this method would allow researchers their priority of publication while also ensuring the dissemination of important information as quickly as possible.

[61] The appellant also maintains that too much weight is placed on intention and anticipation. He cites a number of instances in which the ministry employees' plans to publish the results could be interrupted, such that publication is further delayed or even prevented. In the appellant's view, there is nothing guaranteeing the release of the information at any future time. He argues that a "fixed and clear time line of submission needs to be given to [ministry] researchers for the publication of their data."

[62] Finally, the appellant reiterates that his colleagues are individuals with the "highest degree of ethics," and it "goes without saying" that none of them would publish research or information as if it were theirs, if, in fact, it was not.

Analysis and findings

[63] To withhold information under the section 18(1)(b) exemption, the ministry must demonstrate that (i) the record contains information obtained through the research of one of its employees, and (ii) that disclosure of that information could reasonably be expected to deprive the employee of priority of publication.[27] The ministry must demonstrate that the risk of this harm occurring is well beyond the merely possible or speculative.

[64] Based on my review of the records, I find that pages 230 and 231 contain both raw research data and findings based on scientific research. I accept, based on the ministry's representations and affidaivt evidence, that this information was obtained through the research of ministry employees who are responsible for conducting field research to gather data in support of the development of provincial natural resource policies. Therefore, I find that the first requirement for establishing the exemption in section 18(1)(b) is satisfied. The question that remains is whether disclosure of the information could reasonably be expected to deprive the ministry employees of their priority of publication.

[65] I acknowledge the appellant's concerns regarding the ministry employees' delay in

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> A preprint is a version of a scientific manuscript posted on a public server prior to formal peer review. As soon as it's posted, your preprint becomes a permanent part of the scientific record, citable with its own unique DOI [Digital Object Identifier]. By sharing early, you can accelerate the speed at which science moves forward.

[27] Order P-811.

publishing their findings. However, the *Act* does not impose a timeframe during which researchers must intend to publish their work in order for the exemption in section 18(1)(b) to apply, nor does it impose a requirement for researchers to preprint their findings after a certain amount of time. Furthermore, although it may be desirable to publish, or otherwise disseminate, research promptly when it reveals that "a catastrophe is unfolding," there is no exception to the section 18(1)(b) exemption for instances where that is the case.[28]

[66] In Order PO-2433, the adjudicator noted that, "previous orders have upheld the exemption in circumstances where cogent evidence was provided to support the position that an employee intended to publish a specific record."[29] It is clear from the ministry's submissions and affidavit evidence that the ministry employees intend to publish the withheld information in a peer-reviewed publication and have a timeline in mind for doing so. I accept the ministry's submission that research often requires observations to be made over a number of years, and that that fact at least partially explains why data from 2016 and 2017 have not yet been published in a peer-reviewed publication. In my view, the fact that the ministry employees have not elected to preprint their results does not undermine their stated intention to present their findings in a peer-reviewed publication.

[67] Although the appellant submits that he and his colleagues will not publish the information in scientific literature or claim it as their own, an order to disclose the ministry employees' research must be viewed as disclosure to the world. With that in mind, I find that the release of the withheld portions of pages 230 and 231 could reasonably be expected to deprive the ministry employees of priority of publication. I am satisfied that the risk of this harm occurring is well beyond merely possible or speculative. Therefore, I find that the second requirement for relying on the exemption in section 18(1)(b) is satisfied and that the exemption applies.

Issue D: Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld portion of page 81?

[68] The ministry relies on section 19 of the *Act* to withhold a portion of page 81 of the records. Section 19 states as follows:

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

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[28] Note: Section 11 of the *Act*, which is not at issue in this appeal, creates an obligation to disclose a record if the head of an institution "has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public."
[29] See also, Order P-811.

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

[69] 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. An institution must establish that one or the other (or both) branches apply.

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

[71] In this case, the ministry relies on the common law solicitor-client communication privilege, which 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.[30] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[31] 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.[32] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[33]

[72] 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.[34] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[35]

[73] 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]

[74] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[38] However, waiver may not apply where the record is disclosed to another party

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[30] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[31] Orders PO-2441, MO-2166 and MO-1925.
[32] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[33] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[34] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[35] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[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.
[38] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

that has a common interest with the disclosing party.[39]

Representations

[75] The ministry submits that the withheld information on page 81 has been properly withheld based on the solicitor-client communication privilege protected under section 19. The ministry claims that the withheld information relates to confidential communications exchanged in the seeking and giving of legal advice and falls along the "continuum of communications" covered by the exemption. According to the ministry, solicitor-client privilege has not been waived by either client or counsel.

[76] The appellant asks that I examine what has been withheld to determine whether it is genuinely subject to solicitor-client privilege.

Analysis and findings

[77] As stated above, the ministry must demonstrate that the record is covered by either the common law privilege (Branch 1), the statutory privilege (Branch 2), or both. The ministry's representations suggest that it relies on common law solicitor-client communication privilege under Branch 1 (section 19(a)). Based on my review of page 81, and for the following reasons, I find that the exemption in section 19(a) applies to the withheld portions.

[78] Page 81 consists of a PowerPoint slide, which forms part of a slide deck that was attached to an email sent between ministry staff. Past orders of this office have recognized that email exchanges between non-legal staff can form part of the "continuum of communications" covered by solicitor-client privilege.[40] This includes where disclosure would "indirectly reveal information exchanged between the [counsel] and [client] for the purpose of keeping both […] informed so that legal advice may be sought and given as required."[41] It also includes emails between non-legal staff that refer to the need for the communications to be sent to legal counsel.[42]

[79] My review of the record confirms that the withheld information reflects legal advice that was provided to the ministry by legal counsel. I am satisfied that, although the record itself is not a communication between solicitor and client, the withheld information falls along the "continuum of communications" that is protected by solicitor-client communication privilege. I am also satisfied, based on the entirety of the record in which page 81 appears, that the privilege has not been waived. Therefore, I find the withheld portion of page 81 is exempt based on the solicitor-client privilege exemption in section 19(a) of the *Act*.

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[39] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[40] Orders P1409, PO-1663, and PO-2624.
[41] Order MO-2789.
[42] Order PO-2624.

Issue E: Did the ministry exercise its discretion under sections 14, 18, and 19? If so, should this office uphold the exercise of discretion?

[80] The section 14, 18, and 19 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[81] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[43] According to section 54(2), however, this office may not, however, substitute its own discretion for that of the institution.

[82] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[44]

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

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[43] Order MO-1573.
[44] Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[83] The ministry submits that it properly exercised its discretion in relying on the exemptions in sections 14(1)(l), 18(1)(b), and 19, by taking into consideration the circumstances of the request, the purposes of the *Act*, and the nature of the exemptions. The ministry claims to have exercised its discretion in good faith and without relying on irrelevant considerations.

[84] The appellant's representations do not specifically address the ministry's exercise of discretion under sections 14, 18, and 19, although he does maintain that the ministry is relying on some exemptions for improper reasons, such as to bury information and protect reputations.

Analysis and findings

[85] Based on my review of the parties' submissions and the nature and the content of the records at issue, I find that the ministry properly exercised its discretion to withhold information pursuant to the discretionary exemptions at sections 14(1)(l), 18(1)(b), and 19 of the *Act*.

[86] The ministry identified nearly 400 pages of records responsive to the appellant's request. Of those, the ministry withheld discrete portions of only five pages of records under sections 14(1)(l), 18(1)(b) and 19. With this in mind, I am satisfied that the ministry's application of the exemptions was limited and specific, in accordance with the purpose of the *Act* as set out in section 1.

[87] I am also satisfied that the ministry took into account relevant considerations in relying on the three exemptions. I am not persuaded that the ministry has exercised in discretion in bad faith or for an improper purpose. Accordingly, I uphold the ministry's decision to withhold the records, or portions thereof, pursuant to sections 14(1)(l), 18(1)(b), and 19 of the *Act*.

ORDER:

I uphold the ministry's decision to deny access to the remaining information at issue based on sections 14, 18, and 19 of the *Act*, and I dismiss this appeal.

Original Signed by: September 23, 2020
Jaime Cardy

Adjudicator