Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4374

Appeal MA21-00022

Regional Municipality of York

April 28, 2023

Summary: The Regional Municipality of York (the region) received an access request from an environmental organization for correspondence between it and the Ministry of the Environment, Conservation and Parks (the ministry) relating to the Upper York Sewage Solutions or Lake Simcoe Protection Plan. The region issued a decision to grant partial access to the responsive records, citing sections 6(1)(b) (closed meeting), 9(1) (relations with government), 9.1(1)(a) (relations with Aboriginal communities) and 12 (solicitor-client privilege) of the *Act* for the portions it withheld. The region also decided to withhold certain information as not responsive to the request. The appellant raised the issue of the possible application of the public interest override in section 16.

In this order, the adjudicator finds that one portion of a record the region marked as not responsive, is in fact responsive and orders the region to issue an access decision for it. He finds that section 6(1)(b) does not apply, that section 12 applies in part, and that section 9.1(1)(a) does not apply. The adjudicator upholds the region's section 9(1) claim and finds that there is no compelling public interest in disclosure of the information withheld under section 9(1). He orders the region to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, C. M.56, as amended, sections 6(1)(b), 9(1), 9.1(1)(a), 12 and 16.

Orders and Investigation Reports Considered:

Cases Considered: Order MO-2186.

OVERVIEW:

[1] The Regional Municipality of York (the region) received an access request from an environmental organization, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following records:

> All correspondence, emails, letters and meeting notes, agendas or minutes between [the region] and the Ministry of the Environment, Conservation and Parks [the ministry] regarding Upper York Sewage Solutions or Lake Simcoe Protection Plan.

[2] The region granted partial access to the responsive records, citing sections 6(1)(b) (closed meeting), 9(1) (relations with government), 9.1 (relations with Aboriginal communities) and 12 (solicitor-client privilege) of the *Act* to deny access to the remaining portions.

[3] The requester, now the appellant, appealed the region's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] A mediator was assigned to explore resolution. During mediation, the mediator held discussions with the region and the appellant. The appellant raised the possible application of the public interest override in section 16. The region also claimed section 12 to certain records that were also withheld under section 9(1). The late-raising of the discretionary exemption is not an issue in this appeal.[1]

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process.

[6] The adjudicator originally assigned to the appeal decided to conduct an inquiry and invited representations from the region, the Ministry of the Environment, Conservation and Parks (the ministry) and the affected First Nation. Only the region provided representations which were shared with the appellant who provided her own representations.

[7] At this stage, I was assigned carriage of this appeal. I continued with the inquiry and received additional representations from the region and the appellant.

[8] In this order, I find that some of the information marked as non-responsive is responsive to the request, and I order the region to issue an access decision regarding it. I do not uphold the region's claims under sections 6(1)(b) and 9.1(1)(a). I uphold

[1] In the Notice of Inquiry sent to the appellant, the original adjudicator indicated her preliminary view that there is no prejudice sufficient to disentitle the region from relying on section 12 in relation to records 7, 9 and 26. Although she did not invite submissions on "the late raising of a discretionary exemption," she invited the appellant to address her preliminary view in her representations, if she wished. The appellant indicated that she did not object to the late raising of a discretionary exemption, and, therefore, this is not an issue before me.

the region's decision under section 12, in part. I uphold the region's decision under section 9(1) and find that section 16 does not apply to override the application of this exemption.

RECORDS:

[9] There are 392 pages of records at issue that were fully withheld and include emails, correspondence, notes, and a power point presentation and are numbered records 1-22, 24-44, 46. The region provided a final index of records with its representations which was shared with the appellant.

ISSUES:

A. What is the scope of the request for records? Which records are responsive to the request?

B. Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to record 1?

C. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to records 1 - 5, 7, 9 and 26?

D. Does the mandatory exemption at section 9(1) for information received from other governments apply to records 2, 4-7, 9-22, 24-44 and 46?

E. Does the discretionary exemption in section 9.1(1)(a) apply to record 8?

F. Did the institution exercise its discretion under sections 9.1 or 12, as the case may be? If so, should the IPC uphold the exercise of discretion?

G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 9(1) exemption?

DISCUSSION:

Issue A: What is the scope of the request for records? Which records are responsive to the request?

[10] The original adjudicator, having reviewed the records at issue and some of the annotations they contained, also clarified with the region that it claims that certain portions of the records are not responsive to the appellant's request. In her representations, the appellant indicated that she challenged the region's position that this information is not responsive and wished for it to be reviewed.

[11] The region claims that portions of the following records are not responsive to the request: 5 (page 48), 7 (page 76), 13 (page 95), 17 (page 104) and 21 (page 120). It is therefore necessary for me to decide whether these portions are responsive to the request.

[12] To be considered responsive to the request, records must "reasonably relate" to the request.[2] Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.[3]

Representations

[13] The region submits that the appellant's request was sufficiently detailed to allow it to identify records responsive to the request.

[14] It submits that the marked portion on page 76 of record 7 relates to a separate initiative concerning COVID-19 and is designated by a new subject line.

[15] The region submits that the marked portions on page 48 of record 5, page 95 of record 13, page 104 of record 17, and page 120 of record 21 contain comments between York Region staff. It submits that as the request was limited to "correspondence" between the region and the ministry, these portions are not responsive to the request.

[16] The appellant submits that she pursues access to the portions of the records on pages 48 (record 5), 95 (record 13), 104 (record 17), and 120 (record 21) that were labelled as non-responsive and does not seek access to page 76 (record 7). The appellant submits that all four records are described as emails, and are more likely email threads. She requests that I review these portions of the records to make a final determination regarding their responsiveness by examining the list of recipients in the individual emails. She submits that if individual emails within a thread contain recipients from both organizations, that all emails contained within the thread fall within the scope of the request and the record in its entirety is responsive.

[17] The parties provided reply and sur-reply representations which I will address as necessary with respect to each issue below.

Finding

[18] The appellant has provided no evidence supporting her assertion that all emails in a thread of emails fall within the scope of the request even if some of the emails are not responsive to the request. In my view, it is possible that some of the emails in a thread can be responsive even if other emails in that same thread are not.

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

[19] I have reviewed the information that the region submits is not responsive. I find that the portions claimed as not responsive in records 5 (page 48), 13 (page 95), 17 (page 104), and part of the portion of record 21 (at page 120) are not responsive to the request because they do not involve communications between the region and the ministry.

[20] However, I find that part of the information marked as not responsive in record 21 also contains an email that includes the ministry as a recipient. The region has not explained why this information is not responsive and I find that it is responsive.

[21] As I have found that part of the information at page 120 (in record 21) is responsive, the region should issue an access decision for this information.

Issue B: Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to record 1?

[22] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[23] For this exemption to apply, the institution must show that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting,
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[4]

[24] The region has withheld a power point presentation (record 1) under section 6(1)(b) and section 12. Based on my review of the record and representations, I am unable to find that a meeting occurred as required for the application of section 6(1)(b). As a meeting did not occur, record 1 can not be exempt under section 6(1)(b). I will discuss whether record 1 is exempt under section 12 in the next issue.

Issue C: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to records 1 - 5, 7, 9 and 26?

[25] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel

[4] Orders M-64, M-102 and MO-1248.

for an institution. It states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[26] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

[27] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

[28] Here, the region claims that the solicitor-client communication privilege applies.

[29] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[5] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[6] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[7]

[30] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[8]

[31] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[9] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[10]

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[5] Orders PO-2441, MO-2166 and MO-1925.
[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[8] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[10] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)

Representations

[32] The region has claimed that records 1 - 5, 7, 9 and 26 are solicitor-client privileged and are exempt under section 12. In its representations, it submits that all of these records were prepared by counsel for the purpose of giving or seeking legal advice, and therefore are protected by solicitor-client communication privilege.

[33] In her representations, the appellant submits that record 3 is described as containing hand-written notes of the region's legal counsel of a confidential meeting with ministry staff for the purpose of providing legal advice. She submits that by definition, the discussions occurring during a meeting between the region and the ministry cannot be subject to solicitor-client privilege. She submits that any discussion of privileged matters during such a meeting would have waived the privilege as the relationship between the region's legal counsel and ministry staff is not one of solicitor and client. She submits that the region's counsel cannot provide legal advice to the ministry's staff as it would create a clear conflict of interest.

[34] The appellant asks that I review the remaining seven records to make a determination whether they qualify for exemption under section 12.

Analysis and finding

[35] The region has identified the records withheld under this exemption as follows:

> Record 1 is a power point presentation that was produced by its legal counsel to update the Regional Council on the project
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> Record 2 is an email written by its legal counsel to staff providing legal advice
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> Record 3 contains hand-written notes of its legal counsel of a confidential meeting with ministry staff held for the purpose of providing legal advice
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> Record 4 is an email and handwritten notes by its legal counsel for the purpose of providing legal advice
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> Records 5 is a cover Letter and a draft Wastewater Servicing Implementation Agreement
>
> Record 7 is a draft of the non-disclosure agreement (NDA)
>
> Record 9 is another draft of the NDA
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> Record 26 is another draft of the NDA.

[36] The region provided the IPC with all of the records claimed exempt under section 12. After reviewing these records and considering the region's representations, I find

that records 1 - 4 qualify for solicitor-client privilege because they consist of communications of a confidential nature between lawyer and client made for the purpose of obtaining or giving legal advice and/or aimed at keeping both informed so that advice can be sought and given.

[37] With respect to record 3, the notes taken by the region's legal counsel, although the appellant suggests that a discussion occurring between the region and the ministry cannot be subject to solicitor-client privilege, what is at issue are the region's counsel's hand-written notes. After reviewing these notes, it is clear that they consist of counsel recording what transpired in a meeting in order to provide legal advice to his client, the region. I do not agree that simply because the lawyer took his notes during a meeting where the ministry was present means that any solicitor-client privilege has been waived or does not exist, as suggested by the appellant. The appellant has not referred me to any authority that supports this position. Further, after reviewing the notes, I am of the view that they contain information that relates to formulating or giving legal advice.

[38] However, after reviewing records 5, 7, 9 and 26, I do not agree that section 12 applies to the withheld information. In each of these records, it is evident that they are communications between the region's legal counsel and the ministry. As solicitor-client communication privilege does not protect communications between a lawyer and an outside party, I find that these records are not covered by solicitor-client privilege.[11]

[39] Since I have found that records 5, 7, 9 and 26 are not exempt under section 12, I will consider if they are exempt under section 9(1), the exemption claimed in the alternative.

Issue D: Does the mandatory exemption at section 9(1) for information received from other governments apply to records 5-7, 9-22, 24-44 and 46?

[40] The original adjudicator assigned to this appeal clarified with the region that the government whose interest at stake in relation to its section 9(1) claim is the Ministry of the Environment, Conservation and Parks (the ministry) and, in relation to its section 9.1(1)(a) claim, an identified First Nation. The latter is addressed below under Issue E.

[41] Section 9(1) protects certain information that an institution has received from other governments.[12] The purpose of this exemption is to ensure that institutions under the *Act* can continue to receive information that other governments might not be willing

[11] The region did not suggest that there was a common interest between itself and the ministry in its representations.

[12] The IPC has issued several orders on the purpose of a similar exemption under section 15 of the provincial *Freedom of Information and Protection of Privacy Act*: see Orders PO-2247, PO-2369-F, PO-2715, PO-2734. See also Order P-1398, upheld on judicial review in *Ontario* (*Minister of Finance*) *v. Ontario* (*Information and Privacy Commissioner*) (1999), 118 O.A.C. 108 (C.A.); and Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

to provide without some assurance that it will not be disclosed.[13]

[42] The region is claiming that the section 9(1)(b) exemption applies to records 5-7, 9-22, 24-44 and 46 because disclosure of the information in those records would reveal confidential discussions between it and the ministry. That section states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information that institution has received in confidence from,
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> …
>
> The Government of Ontario or the government of a province or territory in Canada[.]

[43] For a record to qualify for this exemption, the region must establish that:

1. information was received by the institution from the ministry in confidence; and
2. disclosure of the record could reasonably be expected to reveal that information.[14]

[44] The region has identified records withheld under this exemption as follows:

> Records 5–7, 9, 11, 13, 16-22, 24-33, 35, 37-42, 44 and 46 are emails between the region and the ministry
>
> Records 8, 10, 12, 15, 36, and 43 are letters between the region and the ministry
>
> Record 14 is a region/ministry meeting agenda

[45] For section 9(1)(b) to apply, there must be detailed evidence about the potential for harm. The risk of harm must be well beyond the merely possible or speculative although it need not be proven 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.[15]

[46] 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 harm under section 9(1)(b) is self-evident or can be proven simply by repeating the description of harms in

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[13] Order M-912.
[14] Orders MO-1581, MO-1896 and MO-2314.
[15] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4.

the *Act*.[16]

Representations

[47] The region submits that in early 2020, the ministry requested confidential discussions with it regarding potential alternatives to the UYSS project that could achieve the required level of servicing. It submits that these discussions have occurred under the terms of a very broad, legally binding non-disclosure agreement (or NDA) signed by the ministry and the region. It submits that the terms of the NDA are not permitted to be disclosed by the region without the express written consent of the ministry.

[48] The region notes that the purpose of section 9(1) exemption is to "ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure".[17] The region submits that the ministry requested that the discussions take place under a broad non-disclosure agreement, and it acceded to the request. The region submits that given that circumstance, it is clear that the ministry was only willing to supply the information contained in those discussions on the basis that it would be protected from future disclosure.

[49] The region submits that the UYSS is a large infrastructure project that has significant implications for provincially approved development in York Region. It submits that premature disclosure of the records and the conversations detailed within the records would prejudice the potential ability to have further negotiations and discussions between the parties.

[50] The appellant submits that the region has also failed to provide detailed evidence of the risk of harm if the records are disclosed. She also submits that the region cannot lawfully contract out of its duties under the *Act* by entering into a non-disclosure agreement with the ministry.

[51] The appellant notes that section 9(1) refers to "information the institution has received in confidence." She refers to Interim Order MO-3614-I where the adjudicator confirmed that the focus of section 9(1) is to "protect the interests of the supplier of information, and not the recipient." She also refers to Order MO-2186 where the adjudicator found the phrase "received in confidence" under section 9(1) is "analogous to the phrase 'supplied in confidence' under section 10(1)." The appellant submits that since the "supplier" of information is the ministry, this exemption does not apply to information sent from, or supplied by, the region to the ministry.

[52] The appellant submits that the NDA between the region and the ministry,

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[16] Order MO-2363.

[17] The region refers to *Ontario* (*Workers' Compensation Board) v. Ontario* (*Assistant Information & Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (Ont. C.A.).

including drafts of the agreement, do not fall within the section 9(1) exemption because it is not "information received" from the ministry as required by the first step of the test. She submits that the NDA is the product of a negotiation between the region and the ministry and is mutually generated, rather than "received" or "supplied." She refers to the Divisional Court decision in *K-Bro Linen Systems Inc. v Ontario (Information and Privacy Commissioner)*, where the Court held that "the content of a negotiated contract will not ordinarily be considered information "supplied" in confidence by a party to the contract … even if there was little negotiation over the contract or where the contract substantially reflects a proposal made by a party to the final contract."[18]

[53] The appellant submits that the relationship between the region and the ministry, in this instance, is one of regulation and compliance as the region requires an environmental compliance approval to operate the UYSS project. She submits that the region should not be able to exclude information related to the project and its relationship with the ministry through a contractual NDA as to do so would shield important information from scrutiny and neutralize the purpose of the *Act* and the oversight role of the IPC.[19]

[54] The appellant submits that as the party resisting disclosure, the region must provide detailed evidence about the risk of harm that would result if the records were disclosed, and submits that the region has failed to do so.

[55] The appellant submits that the region has not provided sufficient evidence to show that the risk of harm is real and not just a possibility nor has it established any causal connection between disclosure and the possibility of such harm. The appellant notes that the region, by its own admission, states that the information it seeks to protect "will eventually become available to the public." She submits that the region fails to provide "detailed and convincing" evidence of tangible harm that would result in disclosing the records now or a rationale as to why disclosure must be delayed.

[56] As noted, the parties provide reply representations in this appeal which will be referred to as needed in the following analysis.

Analysis and finding

[57] In order to deny access to a record under section 9(1), the region must demonstrate that disclosure of the record could reasonably be expected to reveal information that it received from, in this instance, the ministry and that the information was received in confidence.

[58] Section 9(2) sets out that the head shall disclose a record if the ministry consents to disclosure. As noted, the ministry was invited to provide representations in this appeal. Despite it not providing submissions, it is evident based on its

[18] *K-Bro Linen Systems Inc. v Ontario (Information and Privacy Commissioner)*, 2022 ONSC 3572.
[19] The appellant refers to Order PO-2497 to support this statement.

correspondence with the IPC that it does not consent to disclosure of the withheld information.

[59] As stated in Order MO-1288, an expectation of confidentiality must have been reasonable, and must have an objective basis. In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case. It is not sufficient to simply assert an expectation of confidentiality with respect to the information received by the institution.

[60] In this appeal, I find that there was an expectation of confidentiality in the information received from the ministry by the region. This is evidenced by the fact that the parties entered into a non-disclosure agreement relating to this information. Given the existence of this agreement combined with the evidence throughout the records that they were to be treated confidentially, I find that information that was received by the region from the ministry was received in confidence.

[61] After reviewing the records that contain emails and letters between the region and the ministry, I agree that they contain information that if disclosed would reveal information received from the ministry in confidence. This includes emails and letters that originated from the region but that reference information received from the ministry. Although the appellant suggests that correspondence coming from the region cannot be exempt, I disagree. If that correspondence refers to information received in confidence from the ministry that information would be exempt from disclosure under section 9(1).

[62] The appellant argues that the region has not provided sufficient evidence to show that the risk of harm in disclosing the information is real and that the region's submission that disclosure would prejudice further discussions with the ministry is not sufficient. However, section 9(1) sets out that disclosure shall be refused if it "could reasonably be expected to reveal information the institution has received in confidence from" the ministry. In my view, there is no requirement for the region to explain the type of harm that may result by disclosure of the information, beyond showing that disclosure would result in revealing information it received in confidence from the ministry. After reviewing the records, I find that they contain information that the ministry provided to the region in confidence. As a result, I find that the exemption at section 9(1) applies to this information.

[63] The records at issue include a non-disclosure agreement including the draft and final versions of the agreement. The draft and final versions of the agreement were sent between the region and the ministry. Although the appellant argues that draft versions of the agreement are not considered "information received," after reviewing the records, it is clear that the drafts contain information received from the ministry in confidence and qualify for exemption.

[64] The appellant also argues that the final version of the agreement is not

information that was "received" from the ministry because a negotiated agreement is not something that is "supplied" by one party to the other as set out in case law dealing with the "supplied" test under section 10(1) (third party information). As noted, the appellant relies on Order MO-2186 where the adjudicator found the phrase "received in confidence" under section 9(1) is "analogous to the phrase 'supplied in confidence' under section 10(1)." The appellant submits that the region has not established that the information in this record was "received" in confidence because it was "generated in the give and take of negotiations" and therefore section 9(1) does not apply.

[65] In my view, the question of whether the record contains information that was received from the ministry and whether that same information appears in a negotiated contract is irrelevant to the operation of the exemption at section 9(1). I do not agree that "received in confidence" is analogous to "supplied in confidence" as the adjudicator held in Order MO-2186 and relied upon by the appellant in this appeal. First, I find that if the Legislature intended them to have the same meaning, it would have employed the same term in each section. Also, in MO-2186, the adjudicator stated that her approach was consistent with Order MO-1896. In Order MO-1896, the adjudicator does not analyze the meaning of either "supplied" or "received" and does not provide her rationale for treating "received" as the same as "supplied". Instead, the adjudicator focuses on the "in confidence" portion of section 9(1)(b). In my read of order MO-1896, the adjudicator is not suggesting that the terms "received in confidence" and "supplied in confidence" are analogous as stated in MO-2186.

[66] I find the adjudicator's analysis in Order PO-3801, more helpful in this appeal. In PO-3801, the Independent Electricity System Operator (the IESO) denied access to the information under section 20(1) of the *Electricity Act, 1998*, (the *EA*) which deems certain information exempt under section 17(1)(a) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator examined section 20(1) of the *EA* which deems that all requirements of section 17(1)(a) (the third party exemption in *FIPPA*), including "the supplied" requirement are met. The adjudicator set out the two sections which state:

> Section 20(1) of the *EA* states:
>
> > A record that contains information provided to or obtained by the IESO or a predecessor relating to a market participant and that is designated by the head of the IESO as confidential or highly confidential is deemed for the purpose of section 17 of the Freedom of Information and Protection of Privacy Act to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

Section 17(1)(a) of the *Act* 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;

[67] The adjudicator did not agree with the appellant that any difference between "provided to or obtained by" in the first part of section 20(1), and the "supplied" requirement in section 17(1), was a "distinction without a difference." The adjudicator observed that "'supplied' connotes movement in one direction only, from a third party to the IESO, whereas 'provided to or obtained by' connotes more than one possible route by which information could come into the possession of the IESO. In my view, it encompasses a much broader class of information than 'supplied.'"

[68] I agree with the analysis in Order PO-3801 and adopt it in this appeal. In my view "received in confidence" and "supplied in confidence" are not analogous. Similar to the finding in PO-3801, I find that "received in confidence" encompasses a much broader class of information than "supplied." Specifically, information that was originally received (provided to or obtained by the region) that now appears in a signed contract, in my view, still remains "information received from an institution." The fact that the information now appears in a negotiated contract does not mean it is now negotiated information as it would if it was originally supplied. Therefore, similar to my finding that the draft NDA agreement contains information received in confidence from the ministry, the final version of the NDA also contains much of the same information and therefore remains as "information received from the ministry" and is exempt from disclosure.

[69] In its representations, the region refers to the information it claimed exempt under section 9(1) and section 9.1(1) in part of record 24 and submits that it was unaware that the appellant represented the identified First Nation who commissioned the review document that it withheld under these exemptions. Although the region is no longer claiming section 9.1 applies to this information, I must still consider whether section 9(1) applies to any of the information.

[70] I note that the region did not specifically address how section 9(1) applied to the withheld information. However, based on my review of record 24, I find that section 9(1) applies to this portion of the record because it was information provided to the region by the ministry and similar to the other records being claimed under this exemption, given the NDA, is presumed to have been provided in confidence.

[71] As a result, I find that disclosure of the withheld information would reveal

information the region received from the ministry in confidence and I uphold the region's section 9(1)(b) claim, subject to my finding concerning the public interest below.

Issue E: Does the discretionary exemption in section 9.1(1)(a) apply to record 8?

[72] The region relies on section 9.1(1)(a) of the *Act* to withhold information in record 8, which is a letter from a First Nation to the region.

[73] Section 9.1(1)(a) states that:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or

[74] Under the discretionary exemption in section 9.1(1), records created in the course of working relations between an Aboriginal community and the provincial government or its institutions will be offered protection from disclosure if certain conditions are met.[20]

[75] Section 9.1(1)(a) uses the same "reasonably be expected language" used in section 9(1)(b), discussed above. For section 9.1(1) to apply, there must be detailed evidence about the potential for harm. The risk of harm must be well beyond the merely possible or speculative although it need not be proven 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]

[76] 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 9.1 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[22]

[77] The only record withheld under section 9.1(1)(a) is record 8 which the region has identified as a two-page letter from a First Nation which is not publicly available. The region submits that it applied section 9.1(1)(a) to the record to protect communications between the region and the Indigenous community so as not to prejudice the relations between them. Both the region and the appellant indicate that

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[20] Interim Order PO-3817-I.
[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.

they defer to representations received by this First Nation for any objections to disclosure of the record.

[78] The First Nation was invited to provide representations in this appeal but declined to do so.

[79] Unlike the exemption in section 9(1), for section 9.1(1)(a) to apply, a party must show that disclosure of the information would prejudice the conduct of relations between the specified Aboriginal community and the region. After reviewing the record, I find that on its face, disclosure would not prejudice the conduct of relations between these parties. Given that no party has provided me with reason why prejudice would occur if this information was disclosed, I find that the exemption does not apply and will order the region to provide this record (record 8) to the appellant.

Issue F: Did the institution exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

[80] The section 12 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[81] In addition, the IPC 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.

[82] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations. The IPC cannot, however, substitute its own discretion for that of the institution.

Representations

[83] The region submits that it exercised its discretion appropriately and section 12 has been applied sparingly to records produced by its legal counsel in connection with the provision of legal advice. The region submits that the UYSS environmental assessment that it submitted to the ministry is publicly available as an acknowledgement of the public importance of the initiative overall.

[84] The appellant submits that the region exercised its discretion overbroadly and unreasonably in claiming exemptions under section 12 and did not take into account relevant considerations. She submits that the region withheld records in full, even

though not all solicitor-client communications are privileged and, when possible, should be redacted to remove such information.

[85] The appellant submits that the region has not taken into account all the relevant considerations in exercising its discretion. The appellant notes that the project is a public infrastructure sewage treatment project intended to serve the people of Aurora, Newmarket and East Gwillimbury and has been criticized for significant delays, high cost, flawed design, and has garnered opposition from the Chippewas of Georgina Island First Nation and several environmental organizations for its potentially significant environmental impact on Lake Simcoe and the surrounding watershed. She submits that disclosure would also "increase public confidence in the operation of the institution", a relevant consideration in the exercise of discretion.

[86] The appellant suggests that given the statement by the region that the information it seeks to protect "will eventually become available to the public", delaying disclosure will only decrease public confidence in its obligation to serve the public interest. The appellant asks that the matter be sent back to the region for reconsideration of the section 12 exemption based on these considerations.

Analysis and finding

[87] Based on the information I have found exempt under this discretionary exemption and the region's representations, I find that the region has properly exercised its discretion. I am satisfied the region properly considered the interests sought to be protected and the wording of section 12. The region has applied section 12 to a limited set of records that were created by its counsel to either seek or provide legal advice and were found to be privileged within the meaning of section 12. As I find below in Issue G, I accept the evidence that the region has provided information in order to address the public interest. I find that the region has not exercised its discretion in bad faith. The region considered the right factors and balanced them and I uphold its exercise of discretion.

[88] Despite the appellant's suggestion that the records should be severed so that only privileged information be withheld, in this circumstance I find that would not be appropriate as disclosure would result in disclosing meaningless snippets[23] or information that might be misconstrued without appropriate context.

Issue G: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 9(1)?

[89] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

[23] See Order PO-1663 and *Ontario* (*Minister of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1997] OJ No 1465 (Div. Ct.).

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[90] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[91] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

Representations

[92] The region submits that the records that it claims are exempt under section 9(1) consist of confidential discussions between it and the ministry, primarily concerning the approval of the UYSS environmental assessment. It notes that a number of the records concern a draft non-disclosure agreement and submits that there is no compelling public interest in the drafts and contents of the NDA.

[93] The region submits that the environmental assessment has been publicly available for review and public scrutiny and has been since July, 2014. It submits that the extent of public disclosure and communication about this project has been extensive.

[94] The region submits that the records at issue are confidential discussions between the parties regarding the EA approval, undertaken in a good-faith effort to move that process to a conclusion. It submits that disclosure may well prejudice that process and that once approved, the announcement would be made to the public. It submits that the discussions between it and the ministry should remain confidential, in the interim, in accordance with the intent of provisions of section 9(1) to protect the discussions between the parties and to facilitate ongoing communication regarding important public works.

[95] The region submits that a great deal of information has already been disclosed that is adequate to address any public interest considerations. As such, it submits that there is no compelling public interest in disclosure of the records at this time.

[96] The appellant submits that it is in the public interest to protect the only source of drinking water for vulnerable communities that have been impacted from significant pollution. She submits that the records withheld by the region are precisely the kind that achieve the *Act*'s central purpose of shedding light on government operations and serve to inform the tax-paying general public of potential risks of a major public works

project such as the UYSS project. She submits that this is a compelling public interest for disclosure of records relating to the design, planning and implementation of the UYSS project due to its potential adverse environmental impacts on Lake Simcoe. She submits that the records will provide important information to inform the public about the continuing EA approval process. She submits that disclosure of the records would reveal the substance of discussions with the ministry about the measures being taken to protect clean drinking water access for vulnerable communities as well as steps being considered to help mitigate potential adverse environmental impacts, qualify as compelling public interests that clearly outweigh the purpose of the exemption.

[97] The appellant submits that citizens have a right to have access to information at the centre of closed-door discussions between the region and the ministry regarding a public works project that has been the subject of public debate for over a decade. She submits that the use of an NDA to conceal these negotiations inhibits insight into how decisions are being made regarding municipal infrastructure, decreases transparency about public spending, hinders meaningful consultation, and prevents government accountability.

[98] The appellant submits that the organization she represents is a public interest environmental organization and has long advocated for the protection of drinking water through better pollution regulation suggests a broader public interest in disclosure of the records.

[99] The appellant submits that the region has failed to convincingly demonstrate how premature disclosure of the records would negatively affect its ability to have further negotiations and discussions with the ministry, especially since this information will eventually become public.

Analysis and finding

[100] I have considered the representations of the parties and reviewed the records at issue. In my view, and for the following reasons, I find that there is no compelling public interest in the disclosure of the withheld information in the records that would outweigh the purpose of the exemption at section 9(1).

[101] The appellant argues that disclosure of the information about the continuing environmental assessment approval process will provide important information to the public. She submits that the fact that the environmental assessment is publicly available is not relevant in addressing the ongoing behind-the scenes processes. However, the appellant does not address the region's submissions concerning the extent of its disclosure of information concerning the environmental assessment approval process.

[102] In my view, the evidence of the region's public engagement weighs against the assertion that there is a "compelling public interest" in this information received in confidence from the ministry. The region indicates that it has been engaged with the

appellant concerning the approval of the UYSS environmental assessment, and that the extent of disclosure and communication about this project has been significant. In its reply representations, the region reiterates that this is not a case where limited information about a matter of public interest has been disclosed. It suggests that the appellant has been privy to voluminous information about the environmental assessment, including thousands of pages of expert and related material filed as part of the region's environment assessment submission and extensive detailed correspondence between the region and the appellant. The region also notes that the ministry's extensive and thorough review of the submission has been, and remains, available online. This was not disputed by the appellant.

[103] As noted by the parties, the records concern communications concerning an NDA between the region and the ministry as well as information concerning the environmental assessment approval process. The appellant has not shown how information concerning the NDA would respond to a public interest and I find that it does not.

[104] The appellant suggests that there is a compelling public interest in the closed-door discussion between the region and the ministry regarding a public works project that has been the subject of public debate for over a decade. However, a compelling public interest has been found not to exist when a significant amount of information has already been disclosed that adequately addresses any public interest considerations.[24] After reviewing the withheld information and considering the submissions of the parties, especially the submissions concerning information the region has already shared publicly addressing the public interest in the public works project, I find that there is no compelling information in the information in dispute that would clearly outweigh the purpose of the section 9(1) exemption.

[105] Although the appellant suggests that the region is attempting to invoke section 9(1) to prevent public access to relevant information about the approval process, I note that this is a mandatory exemption and disclosure requires consent from the government source. In my view, the region's claim of this exemption does not appear for the purpose of thwarting public access to the records at issue.

ORDER:

1. I order the region to issue another access decision to the appellant for the portion of the information in record 21 (page 120) that I found to be responsive to the appellant's request, treating the date of the order as the date of the request for the purposes of the procedural requirements of the *Act*.

[24] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

2. I do not uphold the region's decision regarding section 6(1)(b) and find that this exemption does not apply to record 1.

3. I do not uphold the region's decision regarding section 9.1(1)(a) and order it to disclose record 8 to the appellant by **June 5, 2023** but not before **May 31, 2023**.

4. I uphold the region's decision regarding section 12, in part, and find that this exemption does not apply to records 5, 7, 9 and 26.

5. I uphold the region's decision regarding section 9(1), in part, and order it to disclose to the appellant the report starting at page 129 (record 24) by **June 5, 2023** but not before **May 31, 2023**.

6. In order to ensure compliance with order provision 3 and 5, I reserve the right to require the region to send me a copy of the pages that I have ordered to be disclosed to the appellant.

Original signed by: April 28, 2023

Alec Fadel
Adjudicator