Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2084

Appeal PA-010130-3

Ministry of Northern Development and Mines

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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

1. All reports, briefing papers, discussion papers and evaluations, of the proposal to create the Canadian Ecology Centre [the CEC] from initial concept discussions to the announcement of its launch in Feb. 1998.

2. All approvals and authorizations for Northern Ontario Heritage Fund grants totaling $3 million to date, including all assessments and audit reports - including the CEC's most recent annual audit.

3. The CEC's most recent application to the Northern Ontario Heritage Fund, reported in the press, for an additional, approximate, $1 million in funding, together with all reports, briefing notes, briefing papers memos, letters, faxes and e-mails discussing, reacting to, or evaluating that application/request.

4. All reports from Jan. 1, 2000 to Feb. 9, 2001 evaluating the performance of the CEC and/or its prospects for the future.

The Ministry initially issued an interim decision advising the requester that all records responsive to part 3 and certain records responsive to parts 1, 2 and 4 of the request would be exempt under sections 13(1), 17(1)(a) and(c), and 21 of the *Act*. The decision also included a fee estimate for processing parts 1, 2 and 4 of the request, which the requester appealed. The fee appeal was settled in mediation, and the requester paid the required 50% deposit ($1,300).

The Ministry then ascertained that it had not notified certain affected parties, and advised the requester that there would be a delay in issuing the final decision. The requester appealed this delay, and that matter was resolved by the issuance of Order PO-1918.

The Ministry then issued its final access and fee decision, disclosing 66 pages of records responsive to parts 1, 2 and 4 of the request, and denying access to the rest of the records responsive to those parts, and all of the records responsive to part 3 of the request, under one or more of the following exemptions in the *Act*:

-	section 13(1)	-	advice or recommendations
-	sections 17(1)(a), (b) and (c)	-	third party commercial information
-	section 18(1)(c)	-	economic or other interests of the Ministry
-	section 19	-	solicitor-client privilege
-	section 21(1)	-	invasion of privacy

The requester (now the appellant) appealed the decision to deny access as well as the revised fee. The fee issue was resolved during the mediation stage of the appeal.

The following other activities took place during mediation:

- the Ministry disclosed additional records, in whole or in part, and the

relevant exemption claims were clarified to exclude section 18 and include sections 13(1), 17(1)(a) and (c), 19 and 21 of the *Act*;

- the Ministry raised the section 15(b) exemption claim (relations with other governments) for the first time;

- the appellant removed specific salaries, home telephone numbers and bank account or credit card numbers of certain identified individuals from the scope of the appeal;

- the Ministry took the position that certain identified records were not responsive to the request, and the appellant maintained that these records were responsive;

- the appellant removed any newspaper articles or media releases relating to the CEC from the scope of the appeal; and

- the remaining issues concerning part 3 of the request were removed from the scope of this appeal.

Mediation did not resolve the remaining issues, and the file was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry and 12 affected parties, initially, setting out the facts and issues in the appeal and inviting representations. I received representations from the Ministry and three affected parties.

In its representations, the Ministry:

- withdrew the section 13(1) exemption claim for some records or portions of records, and identified that factual information in certain records could be severed and disclosed;

- withdrew the section 15(b) exemption claim.

I then sent the Notice of Inquiry to the appellant, along with a copy of the non-confidential portion of the representations of the Ministry and one affected party, and a summary of the positions taken by the other two affected parties. The appellant did not provide representations in response.

After all documentation had been received, a total of 136 records remain at issue in this appeal. Many of them have been disclosed to the appellant, subject only to small severances. These records are all described in an index prepared by the Ministry and provided to the appellant during the course of this appeal.

DISCUSSION:

RESPONSIVENESS

The Ministry takes the position that the following records or portions of records contain information that is not responsive to the appellant's request and should not be disclosed for that reason: Records 130, 131, 132, 135, 137, 155, 156, 157, 158, 159, 174, 176, 186, 201, 207, 213, 302, 315, 321, 333, 334, 335, 362 and 365.

The Ministry submits:

> It is the Ministry's position that the appellant's request was detailed and specific and adequately described the records sought. The Ministry located a large volume of records relating to the [CEC]. During review of the records … some records found in the original search were determined by the Ministry to be not responsive to the appellant's request.

The Ministry goes on to make representations with respect to specific records and identifies why they are unrelated to the request. The Ministry submits that these records contain information not related to the CEC or information that does not fall within any parts of the request.

Previous orders of the Commissioner have established that to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request. (See also Order P-1051)

Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

The appellant's request in this case is very clear and specific. It identifies the particular type of information he is seeking and the specific periods of time covered by the request.

In order to be responsive, records must be "reasonably related to the request", and institutions should adopt a "liberal interpretation" in deciding whether a particular record is responsive. The records identified by the Ministry as non-responsive in this case all relate in some way to the CEC and its work and, on a general level, it could be argued that they are "reasonably related to the request" for that reason. However, I find that in the circumstances of this appeal, the Ministry has properly identified certain records that are not responsive. In making this finding I have taken into account the clear and specific wording of the request, and the level of understanding the appellant appeared to have about the kind of information he was requesting. The request in this case, on its face, reflects a sophisticated understanding of the business activity of the Northern Ontario Heritage Fund, as well as a clear description of the sought-after information over a specific time period. The Ministry conducted extensive searches and located numerous responsive records, and the appellant paid substantial fees. In deciding that certain records were not responsive, the Ministry linked its reasons to the specifics of the request, and provided a detailed rationale in each instance. It is also relevant to note that the Ministry's position with respect to the issue of responsiveness was provided to the appellant during the course of this inquiry and, although given an opportunity to dispute the Ministry's position, he declined to do so.

Having reviewed the records and considered the Ministry's representations, I make the following specific findings:

- Portions of Records 207 and 213 are newspaper articles and media releases unrelated to the CEC, and I find that they are not responsive to the request.

- The other portions of Record 207 that remain at issue consist of a report by a corporate third party that is not related to the CEC. I find that this report is not responsive to the appellant's request.

- The other portions of Record 213 that remain at issue consist of newspaper articles and media releases that are directly related to the CEC. The appellant removed this type of information from the scope of his appeal during mediation, so I find that it is no longer responsive to his request.

- The Ministry identifies that portions of Records 130, 155, 156, 157, 174, 186, 302, 321, 333, 334, 335, 362 and 365 contain information on two specific projects, and maintains that although managed by the CEC and another party, they were assigned separate project numbers and did not involve the provision of any funding to the CEC. The Ministry's position is substantiated on my review of these records, and I find that the portions that relate to the other two identified projects are not responsive to the appellant's request.

- The Ministry submits that all of Records 131, 132 and 135 and portions of Records 130, 201, 207 and 315 consist of minutes of Mattawa and Area Forestry

Committee (MAFC) meetings, MAFC business plans, lists of MAFC expenditures, MAFC balance sheets and a list of MAFC members. The Ministry states that the MAFC is a non-governmental organization separate and distinct from the CEC, and that it has received no funding from the Northern Ontario Heritage Fund. Having reviewed these records, I agree that they deal primarily with matters unrelated to the CEC. Small portions of some of the MAFC minutes address CEC-related matters, however, these minutes fall outside the timeframe of the appellant's request and do not deal with the specific topic of the request. For these reasons, I find that the records identified by the Ministry are not responsive to the appellant's request.

- The Ministry identifies that all of Records 158, 159, 355 and portions of Records 157, 176 and 201 are minutes of CEC Board of Directors or Executive Committee meetings, a memorandum to the Board of Directors, and information relating to the business of the Board. The Ministry submits that these records are not related to the approval and authorization to fund the CEC, and that the CEC minutes are post-1998 and do not relate to the proposal to create or fund the CEC. I concur, and find that the records identified by the Ministry are not responsive to the appellant's request.

Accordingly, I find that all of Records 131, 132, 135, 158 and 159 and the identified portions of Records 130, 137, 155, 156, 157, 174, 176, 186, 201, 207, 213, 302, 315, 321, 333, 334, 335, 362 and 365 are not responsive to the request.

Because the non-responsive portions of Records 131, 132, 135, 137, 157, 158, 159, 176, 207 213, 302, 321, 333, 334, 355, 362 and 365 are the only portions that remain at issue in this appeal, I will not consider them further in this order.

ADVICE OR RECOMMENDATIONS

In its representations, the Ministry withdrew the section 13(1) claim for Records or remaining portions of Records 14, 28, 98, 105, 119, 120, 126, 127, 130, 139, 178, 179, 180 and 186, and for identified portions of Records 25, 129, 130, 138, 140, 143, 147, 150, 162, 166 and 169. The Ministry also identified that Records 30, 49, 96, 129, 161, 124, 155, 156, 184, 187 and 193 contain factual information that can be severed and disclosed to the appellant. As a result, the records that continue to be subject to exemption under section 13(1), in whole or in part, are Records 25, 37, 42, 51, 96, 124, 129, 149, 150, 151, 155, 156, 160, 161, 162, 165, 170, 171, 173, 184, 186 and 187.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the section 13(1) exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take

> actions and make decisions without unfair pressure (Orders 24, P-1363 and P-1690).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In Order P-434, I made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants that relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (see, for example, Orders P-1147 and P-1299).

I recently reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order P0-2028. In that order (which involved the same parties as the present appeal), the Ministry took the same position as it is taking in this appeal, that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". I did not agree, and stated:

> … [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.
>
> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit

> the free flow of expertise and professional assistance within the deliberative process of government.

I will apply this same approach to the analysis of the records at issue in this appeal.

Having reviewed the relevant records, I find that portions of Records 51, 96, 124, 129, 138, 160, 161, 165, 184, and 187 contain some information that qualifies as "advice or recommendations". Specifically:

- the severed portion of Record 51 contains a specific recommendation;

- the severed portion of Record 96 respecting the eligible costs "provides advice related to a suggested course of action and makes implicit recommendations about specific costs that should be considered eligible or ineligible in the opinion of the authors", as claimed by the Ministry;

- the second-to-last paragraph of the e-mail comprising Record 124 contains specific recommendations regarding certain conditions for funding;

- the reference to the specific decision and the last paragraph of Record 129 contain specific recommendations regarding certain conditions for funding;

- the first paragraph of Record 160 contains a specific recommendation;

- disclosing portions of Record 161 would reveal the advice and recommendations referred to in another record, specifically Record 160;

- the first severed line in Record 165 identifies a specific recommendation;

- the second-to-last paragraph of the e-mail comprising Record 184 contains specific recommendations regarding certain conditions for funding;

- both copies of the second-to-last paragraph of an e-mail contained in Record 187 (which is duplicated) contain specific recommendations regarding certain conditions for funding.

On the other hand, I find that the requirements of section 13(1) are not present or established for the relevant portions of Records 25, 149, 150, 151, 155, 156, 161, 162, 170, 171, 173 and 186, as well as other severed portions of Records 124, 129, 160, 165, 184 and 187 not identified in my previous discussion. The information in these records or portions of records consists largely of information, views, comments and options; indeed, that is precisely how the Ministry describes these records in its representations. As such, I find that these records or portions of records do no qualify for exemption under section 13(1).

As far as Records 37 and 42 are concerned, the Ministry takes the position that portions of them qualify for exemption. These two records are copies of a "Project Evaluation Report" prepared by staff of the Ministry's Regional Economic Development Branch for the NOHFC. The

Ministry identifies that the evaluation is provided to assist the Board of Directors of the NOHFC in rendering a decision on funding. The Ministry also provides details concerning the process of making applications for funding, and the role of the parties in making a final determination.

In Order PO-2028, referred to above, I had to determine whether the section 13(1) exemption applied to a similar record. Most of the record in that appeal had already been disclosed to the requester. The remaining portions consisted of two paragraphs under the heading "Potential Issues", and a number of listed "Funding Options", together with pros and cons for each option. In this appeal the Ministry submits that the potential issues listed in Records 37 and 42 qualify for exemption for the same reasons that were argued and rejected in Order PO-2028.

In Order PO-2028, I made the following findings:

> The severances on pages 4 and 5 each consist of a paragraph listed under the heading "Potential Issues". The Ministry submits that they contain advice, and states:
>
> > With respect to the severed "Potential Issues", there is certainly an implied suggestion that these are matters which the decision-makers should take into consideration in reaching a decision on whether or not to approve the project for funding. The suggested course of action in this section is that the decision-makers should take the issues into account during the deliberative process.
>
> I do not accept the Ministry's position on these two severances. In my view, these paragraphs simply draw matters of potential relevance to the attention of the decision-maker. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given.

Similarly, in this appeal, I find that the portions of Records 37 and 42 that refer to "potential issues" do not advise or recommend anything, and, for that reason, do not qualify for exemption under section 13(1).

In Order PO-2028, I also reviewed in some detail the approach this office has taken to the application of section 13(1) to "options". After reviewing a number of orders, I stated:

> What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions

of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

Applying this approach to the severed portions of pages 9 and 10, I find they do not contain "recommendations" or "advice". The Ministry acknowledges in its representations that the role of Ministry staff in providing support to NOHFC does not extend to "recommending a particular course of action to be followed". In my view, the description of each option itself is "mere information". The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to "advise" the NOHFC in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The "pros and cons" description that accompanies each option also do not contain any explicit advice. There is no statement recommending that NOHFC chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

The next question is whether disclosure of these portions would allow one to accurately infer any advice given. When considered as a whole and in the context of the roles played by Ministry staff in providing support to the NOHFC and the Board of that organization as a decision-making body for Northern Ontario project funding, I find that disclosure of the "pros and cons" for the various options would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record. In my view, in comparing the various "pros and cons" it would not be reasonable to infer a suggested course of action by Ministry staff, which will ultimately be accepted or rejected by the Board during the deliberative process. Accordingly, I find that the "pros and cons" portions of pages 9 and 10 do not consist of or allow one to accurately infer any advice or recommendations. Therefore, section 13(1) of the *Act* does not apply.

I take the same approach to the portions of Records 37 and 42 that identify options. I find that these options, including the pros and cons associated which each, do not constitute "advice or recommendations", nor would their disclosure allow one to accurately infer any such advice or recommendations. However, unlike the record at issue in Order PO-2028, Record 37 in this appeal includes a page that consists of a clearly stated recommendation, including conditions and processes. I am satisfied that this page of Record 37 contains a recommendation for the purpose of section 13, and qualifies for exemption under section 13(1).

In summary, I find that the following records or portions of records qualify for exemption under section 13(1) of the *Act*:

Record 37	-	one page
Records 51	-	a specific recommendation
Record 96	-	the portions containing the specifics of eligible costs
Record 124	-	the second-to-last paragraph of the e-mail
Record 129	-	reference to a specific decision, and the last paragraph

Record 160	-	first paragraph
Record 161	-	the portions that would reveal the exempt information in Record 160
Record 165	-	first severed line
Record 184	-	second-to-last paragraph of the e-mail
Record 187	-	second-to-last paragraph of the e-mail (twice)

THIRD PARTY INFORMATION

The Ministry claims that the following records or portions of records qualify for exemption under section 17 of the *Act*: Records 21, 28, 32, 57, 93, 111, 117, 118, 120, 124, 139, 140, 141, 143, 147, 155, 156, 163, 165, 168, 174, 181, 184, 186, 187, 188, 189, 190, 191, 192, 197, 198, 199, 200, 201, 212, 214, 229, 235, 243, 245, 253, 267, 270, 273, 288, 289, 290, 291, 294, 298, 300, 301, 304, 306, 307, 309, 312, 313, 314, 315, 327, 336, 341, 342, 344, 346, 347, 359, 360, 361, 364, 367, 371, 372, 375, 377, 378, 381, and 390.

General

For a record to qualify for exemption under section 17(1), the parties resisting disclosure must satisfy each part of the following three-part test:

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

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

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

(Orders 36, P-373, M-29 and M-37)

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** does not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the

> onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

(*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.))

The Ministry did not provide representations on section 17. As noted earlier, two affected parties responded to the Notice of Inquiry on the section 17 issue. One of them consented to the disclosure of information as long as all affected parties were consulted. The other affected party (the HRDC) objected to disclosure, maintaining that the requirements of section 17 were present.

Although the CEC was identified as an affected party and invited to participate in the inquiry, it did not respond to the Notice. However, in its earlier submissions to the Ministry, the CEC took the position that disclosing the identity and amounts contributed by private sector parties would prejudice CEC's competitive position and its ability to raise funds from that sector in the future.

Type of information

Previous orders have defined "commercial" and "financial" information as follows:

> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. (Order P-493)

> The term "financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

The section 17 records in this appeal, for the most part, identify contributions or proposed contributions by various corporate entities to the CEC project. In some cases the specific contributions are identified, and in others the information is more general in nature. With one exception, I am satisfied that the records at issue all contain "commercial information" and that some of them also contain "financial information" for the purpose of section 17.

Record 32 is different. It consists of a statement regarding an identified industry representative's involvement on a board, and I find that this record does not contain any of the types of information listed in section 17, and does not qualify for exemption for that reason.

Supplied in confidence

In order to satisfy Part 2 of the test, the affected parties and/or the Ministry must show that the information was supplied to the Ministry in confidence, either implicitly or explicitly.

Supplied

The "supplied" requirement of the Part 2 test reflects the purpose in this exemption, that being the protection of the informational assets of a third party. The authors of the William Commission report (*Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980)) made the following comments about this purpose:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself.* The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (pp. 312-315) [my emphasis]

In confidence

The "in confidence" component of the test requires a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the supplier had an expectation of confidentiality with respect to the information; this expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may be either explicit or implicit. (Order M-169)

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, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

Many of the section 17 records contain information relating to corporate sponsors of the CEC project. Most of them were contacted by the Ministry in the context of responding to the appellant's request, and also by me during the course of this inquiry. However, none of these corporate sponsors responded to the Notice of Inquiry or otherwise participated in this appeal.

On my review of the records, it is clear that none of the corporate sponsors supplied information directly to the Ministry. The information was supplied to the CEC, who in turn provided it to the Ministry in the context of its discussions regarding project funding. As far as the sponsors are concerned, in the absence of representations, I conclude that they did not have a reasonable expectation that their information would be treated confidentially. Indeed, given that the information relates to sponsorship, it would seem more likely to me that the corporate sponsors intended that the information be publicized.

As far as the CEC is concerned, it is clear that the commercial and financial information about the corporate sponsors was "supplied" to the Ministry by the CEC in the context of its funding discussions. Although I accept that discussions of this nature are often conducted with an expectation of confidentiality, in the circumstances of this appeal, I have not been provided with evidence from the parties sufficient to establish that the information about corporate sponsors was supplied to the Ministry in confidence. As noted earlier, neither the Ministry nor the CEC provided representations in this appeal, so any evidence of confidentiality can only be ascertained by a review of the records themselves. There is no explicit notation on any record to indicate that it was submitted in confidence and, in the absence of any evidence or argument from the parties, it is not reasonable to conclude that there was an implicit expectation of confidentiality on the part of the CEC when it provided the information, or the Ministry when it received it. Accordingly, I find that the information of the corporate sponsors contained in the various records was not supplied to the Ministry in confidence for the purposes of section 17 of the *Act*.

One of the public sponsors, the HRDC, submits that information relating to it qualifies for exemption under section 17. However, this affected party does not address the issue of confidentiality in its representations. There is no explicit indication on the face of the relevant records that they were supplied in confidence and, in the absence of any evidence or argument on this issue, I am not persuaded that sponsorship funding provided by a public body to the CEC would have been supplied to the CEC and in turn to the Ministry with a reasonably held implicit expectation of confidentiality in the circumstances.

Record 336 contains a reference to an RFP process, and brief comments about identified bidders. Again, in the absence of evidence or argument from any of the parties linking the contents of this record to the confidentiality requirement of section 17, I find that it was not "supplied in confidence" for the purpose of this exemption claim.

Therefore, I find that the second requirement of section 17 has not been established for any of Records 21, 28, 32, 57, 93, 111, 117, 118, 120, 124, 139, 140, 141, 143, 147, 155, 156, 163, 165, 168, 174, 181, 184, 186, 187, 188, 189, 190, 191, 192, 197, 198, 199, 200, 201, 212, 214, 229, 235, 243, 245, 253, 267, 270, 273, 288, 289, 290, 291, 294, 298, 300, 301, 304, 306, 307, 309, 312, 313, 314, 315, 327, 336, 341, 342, 344, 346, 347, 359, 360, 361, 364, 367, 371, 372, 375, 377, 378, 381, and 390. Because all three requirements of the exemption claim must be established, I find that none of these records qualify for exemption under section 17(1) of the *Act*.

As far as the harms requirement is concerned, I would simply state that none of the parties in this appeal have discharged the burden of providing sufficient "detailed and convincing" evidence necessary to establish any of the harms identified in sections 17(1)(a), (b) or (c) of the *Act*, as outlined above.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims section 19 of the *Act* as the basis for denying access to Records 60, 61, 62, 71 and 74. This section reads:

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

Previous orders of this office have identified that solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The Supreme Court of Canada has described this privilege as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or

> small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409).

Record 61 consists of a memorandum sent by Ministry program staff to the NOHFC. The Ministry submits that this record was prepared by the client's agent (i.e. Ministry staff supporting the NOHFC) and sent to the NOHFC for the purpose of providing instructions and obtaining legal advice from legal counsel in drafting a legal agreement for the CEC project. The Ministry submits that the handwritten notes of Ministry staff are part of the process of instructing and obtaining legal advice, and that these portions of Record 61 fall within the "continuum of communications" between a lawyer and client and therefore qualify for exemption under section 19.

Record 62 is a memorandum from the NOHFC to Ministry legal counsel providing instructions and seeking advice on the drafting of the legal agreement. Record 62 also encloses Record 61 for additional information in this regard. The Ministry submits that Record 62 qualifies as solicitor-client communications privilege.

Record 71 is a memorandum from the NOHFC to Ministry legal counsel with additional instructions, and attaching a draft agreement marked with notes and comments. In the Ministry's view, this record forms part of the "continuum of communications" between a lawyer and client, because it relates to the process of drafting the agreement, and qualifies for solicitor-client communication privilege on that basis.

Record 74 is a memorandum from the NOHFC to Ministry legal counsel with additional instructions on the draft agreement. The Ministry submits that this record qualifies for exemption under section 19 for the same reasons as Record 71.

The Ministry also submits that solicitor-client communication privilege has not been waived for any of these records, and that they cannot be severed without disclosing information that qualifies for exemption.

Having reviewed these records, I accept the Ministry's position. I find that all five records relate directly to ongoing discussions between a client (the NOHFC) and its solicitor (Ministry legal counsel) concerning the drafting of an agreement. The communications are either internal to the client for the purpose of preparing documentation which was provided to counsel (i.e. Records 60, 61 and attachments to Record 62), or communications directly to the solicitors in order to obtain legal advice or give instructions (Records 71 and 74). I am satisfied that Records 60, 61,

62, 71 and 74 constitute "a continuum of communications" between solicitor and client as described in *Balabal v. Air India*, and that they all qualify for exemption under the solicitor-client communication privilege component of section 19.

PERSONAL INFORMATION/INVASION OF PRIVACY

Personal Information

The Ministry divides the records containing "personal information" into a number of broad categories. I will use these categories (slightly modified) for the purpose of my sections 2(1)/21 discussion. These categories are:

1) Records containing home telephone number of identifiable individuals: Records 188 and 189.

2) a) Income statements, general ledger reports and other financial records containing payroll amounts listed with either named CEC staff or specific job titles: Records 93, 139, 174, 282, 290, 291, 301, 304, 307, 327, 344, 347, 353, 359, 364, 367, 372 and 378.

   b) Prospective financial records containing payroll amounts listed with CEC job titles: Records 57, 202, 212, 214, 219, 267, 270, and 381.

   c) Expense accounts that identify expenses incurred by identified staff, or amounts paid to identified corporation(s): Records 93, 282, 290, 291, 301, 307, 349, 353, 359, 367, 372 and 378.

3) Financial contributions made by identifiable individuals to the CEC: Records 124, 139, 181, 184, 189, 290, 291, 304, 307, 346, 347, 359, 367 and 372.

4) Information about an affected party that is unrelated to his involvement with the CEC project: parts of Records 140 and 143.

5) Information about the affected party that is unlikely to be accurate or reliable: parts of records 140 and 143.

6) Information about the affected party's personal vacation or travel plans: parts of records 140 and 143.

7) Other information contained in certain records that would reveal information about the affected party: parts of Records 139, 140, 143 and 162.

Section 2(1) of the *Act* defines "personal information" as recorded information about an identifiable individual, and goes on to list a number of examples, including:

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or

> information relating to financial transactions in which the individual has been involved,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Having reviewed all of the relevant records, I find that those described in categories 1, 2(a), 3 and 6 contain the personal information of certain identifiable individuals as defined by section 2(1) of the *Act*. Specifically, I find that category 1 records contain the home telephone numbers of identifiable individuals and fall within the scope of paragraph (d) of the definition. I also find that all of the records in categories 2(a), 3 and 6 fall within the scope of paragraph (h) in that they contain an individual's name in association with other personal information about that individual. This other information consists of personal vacation plans (category 6), information about personal contributions (category 3) and specific salary information (category 2(a)). As far as the category 2(a) is concerned, in some cases the salary amounts paid are referable to an identified position on staff. Where records that do not identify an individual by name are concerned, I am satisfied that this salary information identifying salary amounts paid, when associated with a specific position, is sufficient to render this information identifiable to the individual holding the position, thereby bringing this information within the scope of paragraph (h).

Previous decisions of this office have drawn a distinction between an individual's personal information, and information relating to a person's professional or official capacity. Generally speaking, these orders have found that information associated with a person in his or her professional or official government capacity is not "about the individual", and therefore falls outside the scope of the definition of "personal information" in section 2(1) of the *Act* (e.g. Orders P-257, P-427, P-1412, P-1621-I). In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking this approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385. In applying the principles described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations

> whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original.

I find that this reasoning is relevant to most of the information contained in the category 2(b), 2(c), 4, 5 and 7 records at issue in this appeal.

Category 2(b) records are financial records containing projected payroll amounts listed with CEC job titles, but no names or other identifying information. The records in this category are Records 57, 202, 212, 214, 219, 267, 270, and 381.

It has been established in a number of previous orders that information provided by, or relating to, an individual in a professional capacity or in the execution of employment responsibilities, including expenses, is not "personal information" (Orders P-257, P-427, P-1412, P-1621, M-262). Similarly, in this appeal, I find that these types are records, comprising category 2(c), do not contain the identified individual's personal information. Furthermore, amounts paid to identified corporation(s) are not personal information for the purpose of section 2 of the *Act*.

The information in the categories 4, 5 and 7 relates to an identifiable individual who was notified and provided representations in response to the Notice of Inquiry. This affected party is a former staff member at the CEC, and he submits that certain information contained in the records qualifies as his "personal information", that it is "highly sensitive" in nature, and that disclosing it could unfairly damage his reputation.

In my view, with the exception of information relating to the affected party's personal vacation plans contained in category 6, none of the other information about him in the category 4, 5 and 7 records qualifies as his "personal information", as defined in the *Act* and interpreted in past orders of this office. The information all relates to various aspects of discharging his professional responsibilities as an employee of the CEC, including business travel plans and various operational issues. None of this information relates to the affected party in a personal sense, including information identifying that rumours may have been circulating in the CEC

about certain job functions being handled by the affected party. All of this information is "appropriately described as being related to the employment or professional responsibilities" of the affected party, as described by Adjudicator Hale in Reconsideration Order R-980015, and does not qualify as "personal information" within the meaning of the opening words of the definition.

Unjustified invasion of personal privacy

Section 21(1) of the *Act* is a mandatory exemption claim, which requires the Ministry to deny access to personal information unless certain circumstances listed in section 21(1) are present. The only circumstance with potential application in the circumstances of this appeal is section 21(1)(f), which provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the Ministry to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Having carefully reviewed the records that qualify as "personal information", and in the absence of any evidence or argument from the appellant to establish that disclosure of any of this "personal information" would **not** be an unjustified invasion of the personal privacy of the various identifiable individuals, I find that it would. Therefore all information that meets the requirements of the definition of "personal information" qualifies for exemption under section 21 of the *Act*.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 60, 61, 62, 71 and 74, and to the following portions of records that qualify for exemption under section 13 or 21 of the *Act*:

   Section 13:

   Record 37 – one page
   Records 51 – a specific recommendation
   Record 96 – the portions containing the specifics of eligible costs
   Record 124 – the second-to-last paragraph of the e-mail
   Record 129 – reference to a specific decision, and the last paragraph
   Record 138 – the second paragraph
   Record 160 – first paragraph

Record 161 – the portions that would reveal the exempt information in Record 160
Record 165 – first severed line
Record 184 – second-to-last paragraph of the e-mail
Record 187 – second-to-last paragraph of the e-mail (twice)

Section 21:

Records containing home telephone number of identifiable individuals: Records 188 and 189.

Records in Category 2(a), which include income statements, general ledger reports and other financial records containing payroll amounts listed with either named CEC staff or specific job titles: Records 93, 139, 174, 212, 214, 219, 267, 270, 282, 290, 291, 301, 304, 307, 327, 344, 347, 353, 359, 364, 367, 372 and 378.

Financial contributions made by identifiable individuals to the CEC: Records 124, 139, 181, 184, 187, 189, 290, 291, 304, 307, 346, 347, 359, 367 and 372.

Information about the affected party's personal vacation or travel plans: parts of records 140 and 143.

2. I order the Ministry to disclose the following records or portions of records to the appellant by **January 15, 2003** but not before **January 10, 2003**: Records 14, 21, 25, 28, 30, 32, 37, 42, 49, 57, 93, 96, 98, 105, 111, 117, 118, 119, 120, 124, 126, 127, 129, 130, 138, 139, 140, 141, 143, 147, 149, 150, 151, 155, 156, 160, 161, 162, 163, 165, 166, 168, 169, 170, 171, 173, 174, 178, 179, 180, 181, 184, 186, 187, 188, 189, 190, 191, 192, 193, 197, 198, 199, 200, 201, 202, 212, 214, 219, 229, 235, 243, 245, 253, 267, 270, 273, 282, 288, 289, 290, 291, 294, 298, 300, 301, 304, 306, 307, 309, 312, 313, 314, 315, 327, 336, 341, 342, 344, 346, 347, 349, 353, 359, 360, 361, 362, 364, 367, 371, 372, 375, 377, 378, 381, and 390.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: December 11, 2002
Tom Mitchinson
Assistant Commissioner