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

July 27, 2018

PERSONAL AND CONFIDENTIAL

Mr. Mitchell Shnier
25 Lower Links Road
Toronto, ON M2P 1H5

Dear Mr. Shnier:

Re: Notice of Reconsideration Order PO-3870-R
Appeal Number PA16-128
Ministry of Natural Resources and Forestry

My review of the above-noted reconsideration request has been completed.

Enclosed is the order which disposes of the issues raised by reconsideration request. Please note that the order requires the Ministry of Natural Resources and Forestry to **send** you the records ordered disclosed by **August 31, 2018**. It does not require that you **receive** the records by that date. If you have not received the records within a reasonable time after **August 31, 2018**, taking into account the normal delivery times, you may contact the Freedom of Information and Privacy Coordinator for the Ministry of Natural Resources and Forestry, or this office.

Thank you for your cooperation in this matter.

Yours truly,

Diane Smith
Adjudicator

Enclosure

cc: Ms. Laura Lee May
Freedom of Information & Privacy Co-ordinator
Ministry of Natural Resources and Forestry

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel/Tél: (416) 326-3333
1 (800) 387-0073
Fax/Téléc: (416) 325-9188
TTY/ATS: (416) 325-7539
Web: www.ipc.on.ca

Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3870-R

Appeal PA16-128

Order PO-3841

Ministry of Natural Resources and Forestry

July 27, 2018

Summary: The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a proposed Hydro-electric Generating Station. The ministry decided to disclose all of the responsive records in full.

The third party appealed this decision and relied on the mandatory third party information exemption in section 17(1) and the mandatory personal privacy exemption in section 21(1). It also sought to raise the application of the discretionary exemptions in sections 16 (prejudice defence of Canada), 18(1) (economic and other interests), 19 (solicitor-client privilege), and 20 (danger to safety or health). In response, the requester raised the application of the public interest override in section 23 of the *Act*.

In Order PO-3841, the adjudicator ordered disclosure of all of the records at issue. In particular, she did not find that section 21(1) applied, as the records do not contain personal information. She also did not allow the appellant to raise the application of the discretionary exemptions. She found that the mandatory exemption in section 17(1) applied to five records and applied the public interest override in section 23 to order these records disclosed.

The appellant then filed a reconsideration request of Order PO-3841. This order denies the appellant's reconsideration request and upholds Order PO-3841.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 16, 17, 18(1)(c) and (e), 19, 20 and 23.

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the MNRF or the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for:

> All records relating to the proposed Hydro-electric Generating Station at the [name] Falls.

[2] The ministry identified responsive records relating to the request. Before releasing the records to the requester, the ministry notified a third party to obtain its view regarding disclosure of the records.

[3] The third party provided the ministry with submissions stating that its position is that the information should not be disclosed.

[4] After considering the representations from the third party, the ministry issued a decision granting full access to the records.

[5] The third party, now the appellant, appealed the decision of the ministry.

[6] During mediation, the ministry notified the appellant of additional records responsive to the request and solicited its views on the release of the records. After reviewing the appellant's submissions, the ministry issued a decision to disclose those records in full. The appellant appealed the ministry's decision, and those records were added to the records at issue in the appeal.

[7] The appellant claimed that the mandatory exemptions at sections 17(1) (third party information), and 21(1) (personal privacy) and the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* apply to the remaining records at issue.

[8] The requester also raised the possible application of the public interest override in section 23 to the records at issue.

[9] No further issues were resolved at mediation, and this appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[10] I sought the representations of the parties in accordance with the IPC's *Practice Direction 7* and section 7 of the *Code of Procedure*.

[11] The appellant in its representations raised the application of additional discretionary exemptions in sections 16 (prejudice defence of Canada), 18 (economic interests of Ontario), and 20 (danger to safety or health). I sought representations on these additional exemptions, along with the discretionary exemption in section 19. I also asked the parties to provide representations on whether this case qualifies as a rare exception to the general presumption that affected parties are not entitled to raise the possible application of discretionary exemptions to the records.

[12] Representations were received from all parties and were exchanged between them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.[1]

[13] I then issued Order PO-3841, where I found that the personal privacy exemption in section 21(1) did not apply as the records do not contain personal information. I did not allow the appellant to raise the application of the discretionary exemptions. With respect to the section 19 solicitor-client exemption, I found that even if the appellant could raise it, it did not apply.[2]

[14] In Order PO-3841, I also found that the mandatory exemption in section 17(1) applies to five records, Records 1, 3 to 5, and 19, and I applied the public interest override in section 23 to order these records disclosed. Accordingly, all of the records at issue were ordered disclosed.

[15] The appellant then filed a reconsideration request of Order PO-3841, which is the subject of this order.

[16] In this order, I deny the appellant's reconsideration request and maintain my findings in Order PO-3841.

RECORDS:

[17] The records relate to the proposed development by the appellant of a hydro-electric generating station (the project) on Crown land that is adjacent to a ministry-owned dam and consist of emails, drawings, letters and maps.

[18] At issue in Order PO-3841 was the information contained in the following records:

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[1] The parties provided representations that contain both confidential and non-confidential portions.

[2] I considered the application of section 19 to each individual record for which the appellant claimed the application of section 19, except for the records I determined were subject to the mandatory section 17(1) exemption, namely, Records 1, 4 to 5, and 19.

RECORD	TIFF#[3]	PAGES	Exemptions claimed by the appellant	Part/ entire
1	A0262985	10693	21(1)	part
		10694-10695	17(1), 18(1), 19, 21(1)	entire
2	A0262985	10700	16, 17(1), 18(1), 20	entire
3	A0262985	10701-10706	16, 17(1), 18(1), 20, 21(1)	entire
4	A0262988	10709-10710	21(1)	part
	A0263076	10737-10740	17(1), 18(1), 19, 21(1)	entire
5	A0263074	10741-10744	17(1), 18(1), 19, 21(1)	entire
6	A0261047	8834	16, 17(1), 20, 21(1)	entire
		8845, 8847-8848	16, 18(1), 20	part
		8868	21(1)	part
7	A0261902	9826	16, 17(1), 20, 21(1)	entire
8	A0261905	9827	16, 17(1), 20, 21(1)	entire
9	A0261938	9893	16, 17(1), 20, 21(1)	entire
10	A0263676	1897	16, 17(1), 20, 21(1)	entire
11	A0261269	0461	16, 17(1), 20, 21(1)	entire
12	A0263576	5917	21(1)	part
		5918	16, 17(1), 20, 21(1)	entire
14	A0263850	6965	21(1)	part
		6966	16, 17(1), 20	entire
15	A0263852	6967	21(1)	part
		6968	16, 17(1), 20	entire
16	A0264118	7406	21(1)	part
		7407	16, 17(1), 20	entire
19	A0261196	8952-8955	16, 17(1), 18(1), 19, 20, 21(1)	part
20	A0261240	0436-0437	17(1), 21(1)	entire
21	A0262193	10474-10475	16, 18(1), 20	part

[3] Tagged Image File Format number.

		10476-10489	16, 17(1), 18(1), 19, 20, 21(1)	part
		104790	21(1)	part
		10491-10497	16, 17(1), 18(1), 19, 20	entire
22	A0263574	5909-5911	17(1), 18(1), 21(1)	part
23	A0263582	11815-11816	17(1), 21(1)	part
28	A0264429	11844-11846	17(1), 21(1)	part
29	A0263643	6145	21(1)	part
		6146-6147	17(1)	part
30	A0263767	11987	17(1), 19, 21(1)	part
32	A0263858	6970	17(1), 18(1), 19, 21(1)	entire
33	A0263860	6971	17(1), 18(1), 19, 21(1)	entire
36	A0263907	12126	17(1), 19, 21(1)	part
37	A0263908	12129-12130	17(1), 19, 21(1)	entire
40	A0263980	7161	17(1), 19, 21(1)	entire
41	A0264282	12313	17(1), 21(1)	part
		12314	21(1)	part
43	A0264344	12351-12352	17(1), 21(1)	part
45	A0264373	8061-8062	17(1), 21(1)	part
47	A0263670	6636	17(1), 21(1)	part
		6637	21(1)	part
50	A0264429	8125-8126	17(1), 21(1)	entire
52	A0264436	8144-8146	17(1), 18(1), 21(1)	part
53	A0264436	8147-8148	17(1), 21(1)	part

DISCUSSION:

[19] In Order PO-3841, issued on May 16, 2018, I ordered the ministry to disclose all of the records at issue by June 20, 2018, but not before June 15, 2018.

[20] On May 29, 2018, the appellant's lawyer contacted this office's Adjudication Review Officer (the ARO) by telephone and indicated that the appellant was considering whether to submit a reconsideration request of the order. She wanted to clarify the process for making this request.

[21] The appellant's lawyer advised the ARO that she had been looking over section 18 of the IPC's *Code of Procedure* (the *Code*), which applies to appeals under the *Freedom of Information and Protection of Privacy Act* (the *Act*) and contains provisions governing the process and grounds for reconsideration of decisions. They discussed section 18.04 of the Code, which reads:

> 18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:
>
> > (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed. [Emphasis added by me].

[22] On May 29, 2018, the ARO followed up his conversation with the appellant's lawyer with the following email:

> Thank you for your call a short while ago seeking clarification on IPC's reconsideration policy.
>
> Section 18.05 of IPC's *Code of Procedure* provides that a reconsideration request should set out "all relevant information". Therefore, a reconsideration request should include everything the party intends to rely on (including any representations), so the adjudicator may proceed to decide on the reconsideration request without further notice. Section 18.05 states:
>
> > A reconsideration request should include all relevant information in support of the request, including:
> >
> > (a) the relevant order and/or appeal number;

> (b) the reasons why the party is making the reconsideration request;
>
> (c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;
>
> (d) the desired outcome; and
>
> (e) a request for a stay, if necessary.
>
> A reconsideration request should specify which records it pertains to. After the adjudicator receives the reconsideration request, she will decide on it and any stay requested.
>
> Section 18.09 allows the adjudicator to seek representations from other parties if the adjudicator so desires. Therefore, the party making the request should address any sharing issues in its reconsideration request.
>
> If you have further questions, feel free to contact me again.
> [Emphasis added by me].

[23] By reason of the provisions of section 18.04 of the *Code*, the reconsideration request had to have been made before June 15, 2018, the first specified date in Order PO-3841. The reconsideration request was not received before June 15, 2018. Instead it was received by this office at 4:20 p.m. on Friday, June 15, 2018.[4]

[24] I find that the appellant's reconsideration request was late and for that reason, in accordance with section 18.04(a), I am denying its reconsideration request.

[25] Nevertheless, even if I were to accept the reconsideration request late, I would not reconsider my decision under section 18.01 of the *Code*. This section reads:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> a) a fundamental defect in the adjudication process;

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[4] Despite seeking a reconsideration of all of the records at issue in Order PO-3841, the only records specifically addressed in detail in the reconsideration request letter were Records 1, 4 and 5. As well, this request did not address the issue of whether the reconsideration request letter could be shared with the other parties to the appeal. The appellant ultimately agreed on June 28, 2018 to the sharing of its reconsideration request with the other parties.

b) some other jurisdictional defect in the decision; or

c) a clerical error, accidental error or omission or other similar error in the decision.

[26] The appellant relies on section 18.01(a) as the basis for its reconsideration request, namely that there was a fundamental defect in the adjudication process.

[27] Generally, the appellant submits that that I misapplied the section 19 exemption to the records and also that I erred in my section 23 findings. It specifically submits that I failed to consider the application of sections 18(1) and 19 to Records 1, 4 and 5, therefore, my section 23 analysis was flawed.

[28] The appellant provided eight grounds in support of its reconsideration request. I will consider each ground separately.

> **<u>Ground 1</u>. The adjudicator failed to consider the evidence tendered by the appellant[5] with respect to the application of section 19 in the *Act* to all records which it had claimed section 19 for: Records 1 (pages 10694-10695), 4 (pages 10737-10740), 5, 19, 21 (pages 10476-10489 and 10491-10497), 30, 32, 33, 36, 37 and 40 (collectively, the "Section 19 Records"), but specifically, Records 1, 4, and 5, and as a result, the adjudicator failed to consider the application of section 19 to Records 1, 4, and 5.**

[29] Concerning the first ground, the appellant submits in particular that I did not address whether section 19 could be raised for Records 1, 4, and 5 and I did not make a finding that the discretionary exemption in section 19 cannot be raised by the appellant. The appellant acknowledges that this may have been a result of having found these three records were already exempted from disclosure pursuant to the mandatory exemption in section 17(1) of the *Act*, which I subsequently found was overridden by the section 23 public interest override. The appellant states:

> ...that although the same records had already been found to have qualified for the section 17 third party information exemption, it is not proper for the adjudicator to not review the remaining exemptions claimed. In so doing, the adjudicator erroneously implied in the decision that the applicability of exemptions were mutually exclusive, and that by finding one exemption to apply to certain records, either no other exemptions could be found to apply to the same records, or it was no

[5] When quoting from the appellant's submission, the name of the appellant has been replaced with the words "the appellant."

> longer required to determine if any other exemptions might apply. This is an error of law as well.
>
> Further, the adjudicator failed to review the position of the appellant that this case represents a rare circumstance in which the appellant should be permitted to raise the section 19 exemption...

[30] Concerning the latter point, I found that there was no need for me to consider whether this was one of the rare circumstances that the appellant as an affected party, was able to raise the application of the discretionary exemption in section 19. Instead, I considered the application of section 19 to each individual record for which the appellant claimed the application of section 19, except for the records I determined were subject to the mandatory section 17(1) exemption, namely, Records 1, 4 to 5, and 19.[6]

[31] At paragraphs 208 and 209 of Order PO-3841 concerning the application of section 19 to Records 21, 30, 32, 33, 36, 37, and 40, I stated:

> ...it is only in "rare circumstances" that a third party can raise the application of discretionary exemptions. Even if I were to accept that the appellant is able to claim the application of the section 19 exemption instead of the ministry in this case, I would not find that it applies. I find that the records at issue were either not prepared in contemplation of litigation or for settlement discussions or that if any privilege attached to the record, such privilege was waived by the appellant.
>
> In particular, I find that I do not have sufficient information to determine that the records at issue are subject to section 19 as claimed by the appellant. I cannot ascertain what litigation existed or was reasonably contemplated from the emails at issue in Records 30, 32, 33, 36, 37, and 40, nor can I find that they contain confidential privileged solicitor-client communications. As well, if there had been any privilege in Record 21 (pages 10476 to 10489), any such privilege has been waived.

[32] As explained in detail below, I adopt these findings for Records 1, 4 and 5. Namely, assuming that I should have considered the application of section 19 to Records 1, 4 and 5, I would not have found that these three records are subject to this exemption. Section 19 reads:

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[6] The appellant did not address in its reconsideration request the application of section 19 to Record 19, which is an email chain dated between 2011 and 2012. As well, the appellant did not claim the application of section 19 to Record 3, which I had found subject to section 17. Record 3 is a letter to the appellant from its engineers.

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

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

[33] The following chart, which is reproduced from Order PO-3841, provides details of Records 1, 4 and 5:

Record	**Description of Record**	**Date**
1	Letter to MNRF counsel from from appellant's counsel	March 2015
4	Letter to MNRF counsel from appellant's counsel	January 2015
5	Letter to appellant from appellant's counsel	November 2014

[34] Concerning Records 1, 4 and 5, the appellant provided the same submissions in its initial representations for all three of these records, as follows:

> [This record] is subject to litigation privilege under both the common law and statutory privileges pursuant to the Act, and further, would be in keeping with the historic practice of the MNRF to have denied access to this specific record and all similar records. It clearly meets the common law and statutory definitions of litigation privilege because the legal advice contained in this record was sought in contemplation of litigation (which encompasses actual or contemplated actions as well as mediation and settlement), and continues to be privileged under the statutory litigation privilege, which does not end where the litigation or contemplation of litigation ends.

[35] These are the same representations on the application of section 19 that the appellant provided for Records 32, 33, and 37. The appellant also referred to Records 1, 4 and 5 in its representations on section 19 about Records 30 and 40.

[36] In its reply representations the appellant provided additional information about Records 1, 4 and 5, specifically that these three records:

> ...were all legal opinion letters that were aimed at resolving a legal dispute that could reasonably have led to litigation. There is no basis for the MNRF's claim that such legal opinion letters were provided in the normal course of the regulatory process for obtaining approvals, and the Crown Counsel to whom those legal opinions were addressed would be in a position to attest to this as well. In his affidavit [attached to the appellant's reply representations, the appellant's Vice-President][7] has also attested to the fact that litigation was contemplated at the time the legal opinion letters were provided.

[37] In the affidavit of the Vice-President of the appellant, he describes Records 1, 4 and 5 as legal opinion letters by counsel to the appellant which were aimed at clarifying legal issues in the hopes of avoiding litigation. He states that the remaining records for which section 19 was claimed:

> ...similarly dealt with issues that had been identified as legal issues, which raised the spectre of litigation such that they were created or provided in order to resolve or settle any legal disputes which were being contemplated.

[38] In Order PO-3841, I considered the application of section 19 to the information at issue in Records 21, 30, 32, 33, 36, 37 and 40. With respect to these records, I determined that:[8]

> In particular, I find that I do not have sufficient information to determine that the records at issue are subject to section 19 as claimed by the appellant. I cannot ascertain what litigation existed or was reasonably contemplated from the emails at issue in Records 30, 32, 33, 36, 37, and 40, nor can I find that they contain confidential privileged solicitor-client communications. As well, if there had been any privilege in Record 21 (pages 10476 to 10489), any such privilege has been waived.[9]

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[7] The appellant is a corporation.

[8] Paragraph 209 of Order PO-3841.

[9] For Record 21, I found at paragraph 212 of Order PO-3841 that:

> Record 21 (pages 10476 to 10489) is a letter with attachments. I find that this record was not made in confidence as claimed by the appellant. As well, I find that any privilege attached to this record was waived by the appellant. The appellant sent this letter to the MOE [Ministry of Energy], and copied it to the township. Within days it was sent by the MOE to the MNRF. As well, the letter indicates that the appellant was going to post the letter and attachments on its website and announce its existence on its social media accounts.

[39] I adopt this reasoning for Records 1, 4 and 5 and find, based on my review of records and the appellant's initial and reply representations that I cannot ascertain what litigation existed or was reasonably contemplated from these three records, nor can I find that they contain confidential privileged solicitor-client communications.

[40] Records 1 and 4 were addressed to the ministry. Record 4 refers to the letter in Record 5 being provided to the ministry. Record 4 is a follow-up letter to Record 5. These letters are dated between November 2014 and March 2015.

[41] The initiating letter, Record 5, was written to the appellant by the appellant's lawyer in response to a question the appellant had about an interpretation of legislative provisions. Records 1 and 4 are follow up letters about this and were written directly to the MNRF by this lawyer. All three letters are interrelated and all three were provided directly to the ministry.

[42] Record 4, which is addressed to the ministry, discusses Record 5 and specifically refers to Record 5 being provided to the ministry. Record 4 was sent to the ministry as a follow up to a discussion between the ministry and the appellant's lawyer. Record 1 was written in response to a letter written by the ministry to the appellant's lawyer and refers specifically to the appellant's application to construct the project.

[43] Nowhere in these three letters is there a reference to contemplated litigation, nor do the appellant's representations of 2017, including its reply representations, which were written over two years after these three records were written, provide details as the relationship between these letters and any contemplated or actual litigation.

[44] Based on my review of the records, I agree with the ministry that the letters in Records 1, 4 and 5 were "provided in the normal course of the regulatory process for obtaining approvals" for the appellant's application to construct the project. I disagree that they were prepared in contemplation of litigation. Therefore, I disagree with the appellant that the claimed statutory litigation privilege in section 19 applies to Records 1, 4 and 5.

[45] To the extent that the appellant appears to also raise solicitor-client communication privilege for these records (the appellant describes Records 1, 4 and 5 as "legal opinion letters"), I find that this privilege does not apply as the ministry and the appellant were not in a solicitor-client relationship. As well, I find that any privilege in Record 5, the letter addressed to the appellant from its lawyer, was waived when this record was provided by the appellant to the ministry.

[46] Therefore, if it was a defect for me not to consider the application of section 19 to Records 1, and 4 to 5, I find based on my review the records and the parties' representations that section 19 does not apply to these records.

[47] With respect to the appellant's argument that I failed to consider its evidence on the application of section 19 to all of the records for which it was claimed, I find that the appellant's arguments were fully considered as outlined in Order PO-3841 and above.

[48] Accordingly, I dismiss Ground 1 as a ground for reconsideration of Order PO-3841.

> **Ground 2. Similarly, the adjudicator failed to consider the evidence tendered by the appellant with respect to the application of section 18(1) in the *Act* to Records 1, 4, and 5, and as a result, the adjudicator failed to consider the application of section 18 to Records 1, 4, and 5.**

[49] In Order PO-3841, I considered whether the appellant should be allowed to raise the application of the discretionary exemption in section 18(1) to Records 2, 6, 21 (pages 10474 to 10497), 22, 32, and 33 and 52. I found in paragraphs 179 and 180 that:

> ...the position taken by the appellant with respect to section 18(1) is one that is fundamentally concerned with protecting its own interests. I also find that any perceived overlap with the interests of the province arises from arguments that the appellant's interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the province.
>
> Relying on the findings in Orders PO-3032 and PO-3601, I find that this appeal is not a rare exception to the general presumption and that the appellant is not entitled to raise the application of the discretionary exemption in section 18(1).

[50] As explained in detail below, I adopt these findings for Records 1, 4 and 5. Assuming that I should have considered whether the appellant could raise section 18(1) for these records, I find that this is not a rare exception to the general presumption and that the appellant is not entitled to raise the application of the discretionary exemption in section 18(1) for these records.

[51] In its initial representations on the application of section 18 to Records 1, 4 and 5, the appellant stated:

> This record qualifies for the section 18 exemption pursuant to the *Act* because the content of the letter reveals information [subject matter of the record] that could reasonably be expected to prejudice the economic interests and/or competitive position of the MNRF if disclosed under s.

18(1)(c), and it reveals positions, plans and criteria applied in the course of negotiations carried on by the MNRF with [the appellant], under s. 18(1)(e).

[52] The appellant also provided representations on sections 18(1)(c) and (e) for all the records the appellant claim these exemptions for and submitted that disclosing:

- the records the appellant has applied section 18(1)(c) to may jeopardize or unduly delay the construction of the project and severely inhibit the fulfillment of the MNRF's mandate.

- the records the appellant has applied section 18(1)(e) to would severely hinder the MNRF's ability to continue negotiations on the project and/or other similar renewable energy projects in the future.

[53] Sections 18(1)(c) and (e) read:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[54] The ministry's position was that it considered whether it should claim the application of section 18(1) in this appeal and had determined that this exemption did not apply.

[55] Based on my review of Records 1, 4 and 5, and taking into account the parties' representations, and for the same reasons articulated with respect to the appellant's section 18(1) claim for the other records, I find that the appellant, as a third party, is not allowed to claim the application of sections 18(1)(c) or (e) to Records 1, 4 and 5.

[56] Accordingly, I dismiss Ground 2 as a ground for reconsideration of Order PO-3841.

Ground 3. Because the adjudicator failed to consider the application of both sections 18(1) and 19 to Records 1, 4, and 5,

the adjudicator failed to consider both sections 18(1) and 19 in the analysis with respect to the section 23 public interest override.

[57] Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[58] The appellant correctly points out that section 23 does not apply to section 19. However, I have found above that section 19 does not apply to Records 1, 4 and 5.

[59] In addition, as I have found that the appellant cannot raise section 18(1) for Records 1, 4 and 5, and as the ministry did not raise this exemption, there would have been no need for me to consider whether section 23 applied to override the section 18(1) exemption.

[60] Accordingly, I dismiss Ground 3 as a ground for reconsideration of Order PO-3841.

Ground 4. The adjudicator factually erred in summarizing our argument, and misinterpreted both our argument and the applicable law as determined by the courts with respect to section 19 and solicitor-client privilege, and as a result, misapplied the exemption to the Section 19 Records.

[61] The appellant submits that at paragraphs 198 and 203 of Order PO-3841, I factually erred in relying solely on the branch 2 statutory litigation privilege, and not on solicitor-client communication privilege, when considering the applicability of section 19 to the records at issue.

[62] At paragraph 198, I was referring to the appellant's reply submission. At paragraph 203, I reiterated the appellant's reliance on the statutory litigation privilege in branch 2 of section 19.

[63] In Order PO-3841, I reviewed the records at issue for which the appellant claimed the application of section 19.[10] In each case where the appellant claimed the application of solicitor-client communication privilege, I considered its applicability. I

[10] As noted above, with the exception of Records 1, 4 to 5, and 19. In its reconsideration request, the appellant did not provide specific representations on the application of section 19 to Record 19, an email chain between the appellant and the ministry dated between February 2011 and June 2012. From my review of Record 19, I do not find that section 19 applies to it.

considered the possible application of the section 19 solicitor-client communication privilege in paragraphs 209 to 228 of Order PO-3841.[11]

[64] The appellant also indicates that I did not consider whether the records were prepared in the course of settlement discussions with the intent of trying to resolve a litigious dispute. However, I found above for Records 1, 4 and 5, and found in Order PO-3841 for the rest of the records for which the appellant claims the application of section 19, that "I cannot ascertain what litigation existed or was reasonably contemplated from my review of the records."

[65] The appellant submits further that I misinterpreted the law as it stands surrounding settlement or common interest privilege. In the Notice of Inquiry, I stated:

> Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[12] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[13] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[14] The litigation must be ongoing or reasonably contemplated.[15]

[66] The appellant was asked in the Notice of Inquiry:

> Are the records subject to common law litigation privilege? Please explain.

[67] Concerning loss of privilege, the Notice of Inquiry stated:

> Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[16] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[17]

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[11] See paragraphs 221 and 223 of Order PO-3841.
[12] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[13] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[14] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[15] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[16] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[17] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

[68] The appellant were then asked:

> Has privilege been lost through waiver? Does the common interest principle arise here? Please explain.

[69] Despite these questions, and as noted in Order PO-3841, the appellant did not provide sufficient evidence to demonstrate how the records for which section 19 has been claimed were prepared in contemplation of or for use in litigation. Nor did the appellant provide details as to how the common interest principle arises in this appeal.

[70] At paragraph 209 of Order PO-3841, I found:

> ...I cannot ascertain what litigation existed or was reasonably contemplated from the [records].

[71] This is supported by the ministry's representations, to which the appellant provided reply submissions. The ministry's representations were referred to in Order PO-3841. In its representations, the ministry stated:

> ...the ministry's position is that there was no solicitor-client privilege between the ministry and the appellant. The appellant was represented at all times by its own counsel and not by the Crown. Further there was no common interest or enterprise between that parties that could give rise to solicitor-client privilege. Furthermore, the ministry does not agree that the appellant provided these records as part of any settlement process or that these records were created in preparation for litigation. It is the ministry's position that the appellant's dominant purpose in providing these records to the ministry was as part of the regulatory process for obtaining approval to construct a hydro-electric generating station. The appellant sought ministry approval for its plans and specifications for this proposed facility as required under applicable legislation such as at the *Lakes and Rivers Improvement Act R.S.O. 1990* and the *Public Lands Act R.S.O. 1990, R.S.O. 1990.*
>
> There was no adversarial case or controversy to settle between the ministry and the appellant at the time that these records were created or provided. In paragraphs 1-5 of the supplementary representations, the appellant relies on the *Magnotta* decision to assert that above listed records[18] are subject to settlement privilege; however, *Magnotta* is clearly distinguishable from these circumstances because the parties in that case were involved in formal a mediation process aimed at averting litigation.[19]

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[18] Records 1, 4, 5, 19, 21, 27, 30, 31, 32, 33, 34, 36, 37, 38, 39 and 40.

[19] *Liquor Control Board of Ontario v. Magnotta Winery Corporation,* 2010 ONCA 681 (CanLII) at paras 2-7.

> Since the ministry and the appellant were not engaged in settlement negotiations at the time the records were created, settlement privilege cannot attach to these records.
>
> Furthermore, these records were not prepared in anticipation of litigation. For litigation privilege to attach to documents there must be more than a mere possibility of litigation, instead there must be a "reasonable prospect of litigation".[20] The appellant provides no evidence that litigation was contemplated at the time these records were created or provided, it provides no evidence there was a reasonable prospect of litigation at that time, and to date, and no party has commenced any such litigation proceedings relevant to the Records.

[72] In reply, the appellant stated:

> Records 1, 4, and 5 ...were all legal opinion letters that were aimed at resolving a legal dispute that could reasonably have led to litigation. There is no basis for the MNRF's claim that such legal opinion letters were provided in the normal course of the regulatory process for obtaining approvals, and the Crown Counsel to whom those legal opinions were addressed would be in a position to attest to this as well. In his affidavit, [appellant's Vice-President] has also attested to the fact that litigation was contemplated at the time the legal opinion letters were provided.

[73] In his affidavit appended to the appellant's reply representations, concerning section 19, the appellant's Vice-President states:

> All of the Section 19 Records were created or provided in the course of settlement negotiations because they were made in confidence with the intent of trying to resolve a litigious dispute. Although litigation was not ultimately commenced, it was contemplated, and legal advice respecting same was obtained by [the appellant].
>
> Specifically, Records #1, 4, and 5 were legal opinion letters provided by counsel to [the appellant], which were aimed at clarifying legal issues in the hopes of avoiding litigation.
>
> The remainder of the Section 19 Records similarly dealt with issues that had been identified as legal issues, and which raised the spectre of litigation such that they were created or provided in order to resolve or settle any legal disputes which were being contemplated.

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[20] Order MO-1798.

[74] At paragraph 209 of Order PO-3841, I found:

> ...that I do not have sufficient information to determine that the records at issue are subject to section 19 as claimed by the appellant. I cannot ascertain what litigation existed or was reasonably contemplated from the emails at issue in Records 30, 32, 33, 36, 37, and 40, nor can I find that they contain confidential privileged solicitor-client communications. As well, if there had been any privilege in Record 21 (pages 10476 to 10489), any such privilege has been waived.

[75] In making this finding in paragraph 209, I considered the application of mediation and settlement privilege. I took into account the following findings in the Court of Appeal decision in the *Magnotta* case:[21]

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. [Emphasis added by me in Order PO-3841].[22]

[76] I disagree that in Order PO-3841 I misinterpreted the law as it stands surrounding settlement or common interest privilege when I found that mediation or settlement privilege did not apply for the records for which section 19 had been claimed. The appellant appears to take issue with paragraph 203 of Order PO-3841, but does not refer to paragraph 204 where I state that the statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.

[77] Accordingly, I dismiss Ground 4 as a ground for reconsideration of Order PO-3841.

> **Ground 5. In determining that the section 23 public interest override was sufficient to outweigh the application of the section**

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[21] I disagree with the appellant that in Order PO-3841 I implied that Order PO-2112 post-dated *Magnotta*. In paragraph 196 of Order PO-3841, I referred to the issuance of Order PO-2112 in 2003, which predates the 2010 decision in *Magnotta*.

[22] Paragraph 210 of Order PO-3841.

17 third party information exemption, the adjudicator failed to adequately state or provide reasons.

[78] The appellant states:

> After canvassing the case law in paragraphs 273 and 274, without any further analysis or reasoning, the adjudicator concludes in paragraph 275 that the public interest in the project clearly outweighed the purpose of the section 17 third party information exemption

[79] At paragraph 275, I stated:

> I found above that disclosure could reasonably be expected to interfere significantly with the contractual or other negotiations of the appellant under section 17(1)(a). I do not find that disclosure of the information at issue could be exploited by competitors. I find that the public interest in the project as, outlined above, clearly outweighs the purpose of the section 17(1) exemption in this case. [Emphasis added by me].

[80] Both the appellant and the requester provided extensive representations on the application of section 23.[23] At paragraphs 261 to 263 of Order PO-3841, I determined that there was a public interest in the disclosure of the records I had found subject to section 17(1), Records 1, 3, 4, 5, and 19, as follows:

> It is clear from the requester's representations that there is a public interest in disclosure of the records. The project is a high profile and controversial undertaking on a public and navigable waterway entered into between the appellant, a private developer, and the MNRF.
>
> The requester's group is active in bringing to light problems with the project and its impact on the local environment. Some of the concerns about the project raised by this group include the following:
>
> - Risk of damage to public infrastructure (the Highway Bridge and the north dam), and possible contamination of the river (due to the treatment or leaks from the piping for groundwater pumped out of the proposed excavation).
>
> - Proposed construction sequence risks flooding the lake and the thousands of private properties on it, due to an unacceptable cofferdam lowering plan.

[23] See paragraph 230 of Order PO-3841.

- Proposed operation would risk injuring the public (as the fast and dangerous water would extend far outside and downstream of the proposed downstream safety boom, contrary to the Canadian Dam Association's guidelines).

- Proposed operation would often begin at about noon on summer days, but not provide warning to the recreating public about increased flow to the river, contrary to the MNRF's public safety measures requirements.

I find that although disclosure may jeopardize or delay the completion of the project, it is in the public's interest that any public safety or public property damage concerns about the construction of the hydro-electric generating station be brought to light.

[81] I find that in determining that the section 23 public interest override applied to the records subject to the section 17 third party information exemption, I did adequately state or provide reasons.

[82] Accordingly, I dismiss Ground 5 as a ground for reconsideration of Order PO-3841.

<u>Ground 6</u>. At paragraph 266 of the Decision, the adjudicator failed to state or provide reasons for concluding that disclosure of the records at issue would not reveal any information that could reasonably be expected to jeopardize and/or endanger the security of the project or any surrounding building, individual or entity.

[83] The appellant submits that similar to Ground 5, in paragraph 266 of the order, I come to the conclusion that disclosure of Records 1, 3 to 5, and 19 would not reveal any information that could reasonably be expected to jeopardize and/or endanger the security of the project or any surrounding building, individual or entity without providing any further analysis or reasoning, and furthermore while also conceding in the same paragraph that hydroelectric generating stations or any utility structure could be at risk for vandalism or intentional damage.

[84] Paragraph 266 of Order PO-3841 reads:

Although hydro-electric generating stations or any utility structure could be at risk for vandalism or intentional damage, I disagree that disclosure

> of the contents of the specific records at issue would reveal any information that could reasonably be expected to jeopardize and/or endanger the security of the project or any surrounding building, individual or entity.

[85] This paragraph is included in the analysis of the public interest override in the order, where I considered whether there was a public interest in the non-disclosure of the records. This analysis concerns Records 1, 3 to 5, and 19. In Order PO-3841, I determined that the appellant should not be allowed to raise the application of the discretionary exemptions in sections 16 and 20 to Records 2, 6 to 12, 14 to 16, and 21. These sections read:

> 16. A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.
>
> 20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[86] In my analysis of whether to allow the appellant to raise the application of sections 16 and 20,[24] I found:

> Based on my review of the information disclosed from the records and the parties' representations, it is apparent to me that the location of the project is well known. As well, despite the information at issue in Records 6 and 21 being widely circulated or publicly available by 2014 or 2015, I have not been provided with evidence of any harm that has arisen because of the circulation of these two records.
>
> I have carefully reviewed the appellant's representations and the records at issue, and have considered the interests that sections 16 and 20 are designed to protect, as well as the public disclosure of similar information in Records 6 and 21. I am not satisfied that this is one of those rare cases where the appellant should be allowed to raise the application of the discretionary exemptions in sections 16 and 20. This is not a case where release of the records at issue would seriously jeopardize the rights of a third party.[25]

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[24] Paragraphs 160 and 161 of Order PO-3841.
[25] See order P-777.

[87] Of Records 1, 3 to 5, and 19, the records for which I considered the application of section 23, the only record that the appellant provided representations on with respect to either sections 16 or 20, was Record 19.

[88] Record 19 is an email chain between the ministry and the appellant dated between February 2011 and June 2012. The specific representations on the sections 16 and 20 exemptions for Record 19 are that this record:

> ...qualifies for the section 16 and section 20 exemption pursuant to the Act where the information in the record reveals the location of the building structures...

[89] As stated in Order PO-3841, Record 21, which was to be posted on the appellant's website, contains drawings showing the locations of the project's building structures.[26] As well, the letter at Record 6, which was widely circulated, contains the location of buildings.[27]

[90] Of Records 1, 3 to 5, and 19, Record 19 is the only record of these records for which the appellant claimed sections 16 or 20. Concerning these records, taking into account:

- the findings in Order PO-3841 sections 16 and 20, and
- the information in the other records at issue in this order some of which is publicly available,

I maintain my finding in paragraph 266 that:

> ...disclosure of the records at issue [Records 1, 3 to 5, and 19] would not reveal any information that could reasonably be expected to jeopardize and/or endanger the security of the project or any surrounding building, individual or entity.

[91] Accordingly, I dismiss Ground 6 as a ground for reconsideration of Order PO-3841.

> **<u>Ground 7</u>. At paragraph 269 of the Decision, the adjudicator factually erred in concluding that there is or was no other public process or forum to address public interest considerations.**

[92] The appellant submits that that this finding constitutes a factual error because I failed to take into account the process and mechanisms in place that allow for public

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[26] See paragraphs 71 to 74 of Order PO-3841.
[27] See paragraphs 155 to 160 of Order PO-3841.

scrutiny of the project, concerning environmental reviews or assessments. The appellant states:

> Under the provincial process, the Director of the Environmental Assessment and Approvals Branch within the Ministry of the Environment received 66 requests asking that [the appellant] be required to prepare an Environmental Review or an individual environmental assessment (EA) for the proposed [project]. After reviewing the requests, the Director issued a statement informing the public that after careful consideration, it was determined that no further Environmental Review or individual EA was required for Swift River. We also understand that the Minister for the Environment subsequently confirmed this decision. It is through this process that environmental and safety concerns are addressed through the proper authorities with the requisite expertise.

[93] The appellant did not provide details as to when a decision was made that it did not need to prepare an environmental review or assessment.

[94] The appellant further submits that the proper process is not a freedom of information request seeking the disclosure of, among other things, communications between counsel for the MNRF and it, related to the subject matter addressed in Records 1, 4, and 5 and that these records do not provide assistance in assessing the public interest identified in the order.

[95] The appellant in its reconsideration request appears to be providing new evidence on environmental reviews or assessments. As noted above, section 18.02 of the *Code* provides that the IPC will not reconsider a decision simply on the basis that new evidence is provided.[28] Therefore, I will not reconsider my findings on section 23 based on this new evidence.

[96] Even if I were to take into account the new evidence provided by the appellant about environmental reviews or assessments, I would still maintain my finding in paragraph 269 of Order PO-3841 on the issue of the compelling public interest in Records 1, 3 to 5, and 19, that there is not another public process or forum to address public interest considerations.

[97] In coming to the conclusion in paragraph 269 about the lack of a public process or forum to address the public interest considerations,[29] I summarized the requester's submissions about the public interest in the project. At paragraphs 240 and 241, I stated:

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[28] Section 18.02 of the *Code* reads:

> The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[29] See paragraphs 235 to 241 of Order PO-3841.

> The requester submits that there are too many unaddressed questions of public safety and risk to public infrastructure to allow the project to proceed without public scrutiny of government decisions. He states that this requires the public having access to the appellant's input to the government.
>
> The requester states that, some time ago, the appellant removed most of the information from their website and has not issued or posted any project updates, press releases, or other news in over a year. As well, the requester states that the appellant has not answered any of the emails he or others have sent to it over the past years. [Emphasis added by me].

[98] The appellant's reply submissions did not respond, in particular, to the requester's submission that the appellant removed most of the information from its website and has not issued or posted any project updates, press releases, or other news in over a year, nor answered any of the emails sent to it over the past years by the requester and others.

[99] Although there may have been an environmental review of the project at some time, based on my review of the evidence, I would have still maintained my finding in paragraph 271 of Order PO-3841 that there is a compelling public interest in the disclosure of the records at issue, including Records 1, 4 and 5. I also disagree with the appellant, and find no basis for, the appellant's submission that the requester should not be able to make an access request for records exchanged between the appellant's counsel and MNRF's counsel.

[100] Accordingly, I dismiss Ground 7 as a ground for reconsideration of Order PO-3841.

> **Ground 8. The adjudicator acted *ultra vires* its jurisdiction in ordering the disclosure of Records 1, 4, and 5, which the appellant maintains are protected by solicitor-client privilege, settlement privilege, and/or litigation privilege.**

[101] The appellant submits:

> The adjudicator, in ordering the disclosure of the Section 19 Records, and specifically Records 1, 4 and 5, acted *ultra vires* its jurisdiction because the adjudicator was effectively directing the MNRF to violate the fundamental common law principles of solicitor-client privilege, litigation privilege, and/or settlement privilege.
>
> As already clarified in *Magnotta,* above, fundamental common law privileges such as solicitor-client privilege, litigation privilege, and

settlement privilege cannot be taken as having been abrogated absent clear and explicit statutory language, which does not exist in the Act.

In *Sable Offshore Energy Inc. v Ameron International Corp*,[30] a Supreme Court of Canada decision referred to in [the appellant's initial] representations dated February 16, 2017, the SCC confirmed that there is a *prima facie* assumption of inadmissibility of evidence that meets the criteria unless one of the narrow exceptions to the privilege applies. As long as a communication is shown to have been made with a view to negotiating a resolution of a litigious dispute, as Records 1, 4 and 5 clearly demonstrate, settlement privilege protects the communication against disclosure.

The following three points from the decision are also relevant in this case:

> a. Substance takes priority over form. It is not necessary that parties state their communications are "without prejudice" - the test is whether the communications were made in confidence with the intent of trying to resolve a litigious dispute.
>
> b. Settlement agreements themselves are privileged, as are any settlement negotiations made in that respect, whether successful or unsuccessful.
>
> c. Limited exceptions to the privilege exist. A court's determination of whether to recognize an exception depends on a balancing exercise of whether the public interest in recognizing an exception outweighs the strong public interest in promoting settlement by protecting the confidentiality of settlement negotiations.

IPC Order No. PO-3059-R involved a request for reconsideration in respect of minutes of settlement that had been ordered to be disclosed by the Ministry of Community Safety and Correctional Services in a prior IPC order. In that decision, Adjudicator Corban found that based on the *Magnotta* decision, it was clear that section 19 of the Act included records prepared for use in the mediation or settlement of actual or contemplated litigation, and rescinded the previous IPC order, and ordered that the minutes of settlement were exempt from disclosure.

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[30] *Sable Offshore Energy Inc. v Ameron International Corp,* 2013 SCC 37.

> The adjudicator's order for the MNRF to disclose Records 1, 4, and 5 which are clearly protected by the section 19 exemption is thus *ultra vires* the jurisdiction of the IPC, as the Act does not trump the fundamental common law protections surrounding solicitor-client,[31] litigation privilege, and settlement privilege. In so ordering, the IPC would be requiring that the MNRF disclose documents that the MNRF would otherwise be required not to disclose by operation of solicitor-client privilege, litigation privilege, and/or settlement privilege; the IPC does not have the requisite jurisdiction to do so.

[102] As explained in more detail above under Grounds 1 and 4, I do not agree that the information in Records 1, 4 and 5 was made with a view to negotiating a resolution of a litigious dispute; therefore, I have found that settlement privilege does not protect these three records from disclosure. I do not find that these records were prepared for use in the mediation or settlement of actual or contemplated litigation.

[103] Therefore, I find that there is no basis for the appellant's submission that I acted *ultra vires* my jurisdiction in ordering disclosure of Records 1, 4 and 5. I agree with the ministry that these three records were "provided in the normal course of the regulatory process for obtaining approvals" for the appellant's application to construct the project.

[104] Accordingly, I dismiss Ground 8 as a ground for reconsideration of Order PO-3841.

Conclusion

[105] In conclusion, I deny the appellant's reconsideration request of Order PO-3841. I hereby revoke the stay of Order PO-3841 granted in my letter of June 19, 2018. However, since the time for compliance identified in the original order has now passed, I will set new dates for the ministry to disclose the records previously ordered disclosed in Order PO-3841.

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[31] The appellant did not specifically submit in its representations that Records 1, 4 and 5 were subject to solicitor-client communication privilege, nor any details in its reconsideration request about this. I find that I do not have sufficient evidence to find that these three records, which were provided to the ministry by the appellant, are subject to solicitor-client communication privilege.

ORDER:

I order the ministry to disclose the records previously ordered disclosed in Order PO-3841 to the requester by **August 31, 2018** but not before **August 27, 2018.**

July 27, 2018

Diane Smith
Adjudicator