Representations of Mitchell Shnier

Information and Privacy Commissioner of Ontario Appeal PA16-128

Concerning

Freedom of Information Request A-2015-00061 to the Ontario Ministry of Natural Resources and Forestry

March 7, 2017

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Representations of Mitchell Shnier

Facts

1) For more than six years, through Freedom of Information (FoI) requests and other opportunities I have been requesting and receiving records including detailed technical drawings from; the Ministry of Natural Resources and Forestry ("MNRF", named MNR at the time), the Ministry of the Environment and Climate Change ("MOECC", named MOE at the time), and Transport Canada, for the proposed project to build a hydro-electric generating station at the Bala falls (the Proposed Project).

2) The proponent for this Proposed Project is Swift River Energy Limited, who is also the Appellant in this matter.

3) In my representations below I will refer to the proponent's representations dated January 31, 2017 as the Appellant's Representations.

4) As the Appellant states in paragraph 3 of their Appellant's Representations, they were established for the sole purpose of pursing this opportunity. Therefore, all of their communications with the MNRF concern the Proposed Project.

5) I will refer to the Freedom of Information and Privacy Protection Act as the Act.

6) I will refer to the Office of the Information and Privacy Commissioner of Ontario as the IPC.

7) I will refer to the Notice of Inquiry, with date of notice February 24, 2017, which was sent to me, as the NoI.

8) As part of pursing the opportunity to develop the Proposed Project the Appellant was required to provide an Environmental Screening/Review report (the ESR) to both the public and the MOECC. The ESR informs the public of the negative environmental impacts of the Proposed Project, and the mitigation of these.

Background

9) The *Lakes and Rivers Improvement Act* (the LRIA) is administered by the MNRF, who therefore have responsibility for issuing approvals such as the *Location* approval and *Plans and Specifications* approval which the Appellant requires before they may construct their Proposed Project.

   Due to the complexity of the Proposed Project, its *Plans and Specifications* approval was split into two Phases. The MNRF has not yet provided *Phase 2, Permanent Works, Plans and Specifications* approval under the LRIA for the Proposed Project.

   The MNRF considers hydro-electric generating stations to be dams, as they hold back water and therefore have similar public safety requirements.

   As stated in the MNRF's publication: *Technical Bulletin, Location Approval for Dams, July 2015*: *"The Lakes and Rivers Improvement Act (LRIA) provides the Minister of Natural Resources and Forestry with the legislative authority to govern the design, construction, operation, maintenance and safety of dams in Ontario."*

Therefore, the MNRF's authority and responsibility includes the safe design and operation of Ontario's hydro-electric generating stations, regardless of the entity that actually owns and operates them.

10) As the Proposed Project would be on a public and navigable waterway, the broad public has a direct interest in whether the Proposed Project could and would be operated safely, especially for those using and recreating on, in, and under the water upstream and downstream of the Proposed Project.

11) A purpose of the Act is to enable public scrutiny of government decision making.

To do this, the public needs access to the records the Appellant supplies to the MNRF as background to, and in application for, the MNRF's decision making. For example, for the MNRF's assessment of the Appellant's Plans and Specifications in determining whether to issue approvals for construction.

Issue A, sharing of these representations

12) I confirm that my representations may be shared with the Appellant.

Issue B, "personal information"

13) The Appellant is well aware of the FoI process, through both:

a) Ministries contacting them in the past to inquire whether they object to the release of documents I have requested.

b) Through their own requesting of documents, as shown in Appendix A.

14) The Appellant is also aware that they can ensure Ministries know information they supply is confidential and not to be released through the FoI process by explicitly so indicating. For example, Appendix B is an e-mail sent by the proponent to both Transport Canada and the MOECC in which the proponent states:

> *"Please note that this email is not to be released under the Freedom of Information Act, as per section 20.(1) it contains confidential information being provided to the government and is treated consistently in a confidential material, and per section 20 (1) c) disclosure could reasonably be expected to interfere with contractual obligations of a third party."*

This shows the Appellant has known for many years prior to this FoI request that if records they supply are confidential and therefore not to be released through the FoI process, they must explicitly so indicate when these are first supplied.

15) Prior to this FoI request, the Appellant did not claim privacy or object to records being released through the FoI process for records containing the names of the five individuals named in paragraph 22 of the Appellant's Representations. Examples of such released records are in Appendices C, D, and E. I have many more such example records.

This shows that in the past the Appellant has accepted that records will be released without their names being redacted.

16) The cited PO-1880 which the Appellant provides as justification for not releasing the names of these individuals is not applicable in this situation as these individuals' identities and roles are already widely known, for example:

a) As an Ontario Land Surveyor, Paul Forth's name must appear on his land surveys. Indeed such records have previously been received through FoI requests to the MNRF, as shown in Appendix F.

b) The proponent's project manager Karen McGhee and president Anthony Zwig are already well-known to the public due to published articles in the local media, as shown in Appendices G and H. As shown in Appendix H, Karen McGhee even provided a photograph of herself for publication.

c) As the vice-president of Swift River Energy, Frank Belerique; has hosted a recent public meeting held by the Appellant, has been interviewed by the local media and identified himself as a representative of the Appellant, and his photograph has also been published by the local media, as shown in Appendix I.

As these individuals and their roles associated with the Appellant are already widely known by the public, their privacy would not be impacted by their unredacted business correspondence being released.

17) The definitions in the Act are very clear:

Section 2(3): *"Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity."*

Section 2(4): *"For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling."*

If there is any personal information further than the above in the records (such as concerning vacation time, social events, or personal issues), I agree these individual words may be redacted. However, the remainder of the record should be fully released.

18) Further, R-980015 reinforces that the exemption in Section 2(1)(h) of the Act referring to "other information" is to be interpreted that it does not include communications for business purposes, as it states: *"If the 'other' information is not 'personal' in the sense that it is 'about' the identifiable individual, it does not qualify as that individual's personal information."*

I therefore submit there is no justification for these individuals' names being redacted.

Issue C, mandatory exemption at Section 21(1)

19) Section 2(3) of the Act states that the name of individuals as used in a business or professional capacity is not personal information.
- As noted above, the individuals named in paragraph 22 of the Appellant's Representations are already known to the public, so the concern cited in PO-1880 does not apply.
- If it is found that the contested records concern only business and professional communications of these individuals, then the concern in MO-1409 does not apply (I assume the Appellant intended to cite MO-1409 as the cited P-1409 does not seem to exist).

20) The Appellant has not shown that there is any "personal information" in the contested records. Therefore Section 21(1) of the Act is irrelevant. This is reinforced by PO-2225 which found that:

    a) A person is a landlord even if their business is so small that they only rent out their basement.

    b) Information as it relates to this person's landlord activities is not personal information, so the exemption in Section 21 of the Act does not apply and the information must be disclosed.

21) In paragraph 29 of the Appellant's Representations they refer to the personal information as: *"names, e-mail addresses, and personal contact information"*.

    a) From my past experience reading records received through the FoI process from all five of these individuals, the e-mail addresses and personal contact information provided was for business use.

    b) For example, their e-mail addresses provided were their "work" e-mail addresses of paul.forth@tulloch.ca and kmcghee@m-k-e.ca, and "Tulloch" and "m-k-e" are these individuals' business names.

    Therefore, this is actually the business and not these individuals' personal contact information, which is further confirmation that the exemption in Section 21(2)(h) is not applicable for these five individuals in this situation.

22) In paragraph 30 of the Appellant's Representations they seem to claim that all the information they have submitted to the MNRF was "supplied in confidence".

    a) As noted above for Appendix B, the Appellant knew that information they submit to government Ministries is subject to release through the FoI process, so if supplied information is confidential, it should be so marked. Yet the Appellant chose to not do this.

    b) In paragraph 17 of the Appellant's Representations it is noted that the Appellant agrees to disclose the: "vast majority of the content" of the responsive records, which the indices shows is hundreds of pages.

    There would be no way for the MNRF to implicitly know which of these hundreds of pages the Appellant now claims are confidential, and the Appellant did not explicitly mark these contested records as confidential.

    As stated in P-561, it is the Appellant's responsibility to consistently treat confidential information as confidential. Clearly, the Appellant has not done this, as they chose to not explicitly so identify the few records they now claim are confidential amongst the hundreds of pages they sent to the MNRF.

    The Appellant has therefore not fulfilled the test required for the exemption in Section 21(1) of the Act.

23) In paragraph 31 of the Appellant's Representations they claim that *"ensuring public confidence in an institution"* requires that institution not releasing information, apparently by that institution somehow determining which of the communications they receive are confidential.

    a) Given the large number of records the Appellant has provided to the MNRF, and the relatively small number which the Appellant now claims are confidential, it is clearly the Appellant's responsibility to explicitly identify the few confidential records they provide. Confidential information is only

confidential if so handled consistently. As the Appellant has not done this and has shared the records, it is too late now to claim they are confidential.

b) As noted in MO-2513 and M-278, a purpose of the Act is to ensure public confidence in the integrity of government institutions by facilitating scrutiny. In contrast, what the proponent suggests would facilitate secretive dealings with private developers and therefore not fulfill the purposes of the Act.

Issue D, mandatory exemption in Section 17

24) The Appellant has never developed a hydro-electric generating station before, and does not have the design or engineering expertise to do this, so contracts with others for all of the design work.

For example, I understand that some detailed design work has been done by WSP Global Inc., that does have the required expertise and that do this type of work for any other client that hires them.

Therefore, concerning the exemption in Section 17(1) of the Act, the Appellant doesn't have any trade secrets, so there are none to be disclosed or protected.

25) PO-2010 provides definitions to aid in the application of Section 17 of the Act. This requires a three-part test, the first part of which is addressed in paragraphs 34 and 35 of the Appellant's Representations.

The Appellant does not provide any detail as to what information they sent to the MNRF that they would consider to meet this first test of Section 17(1), and not knowing the topics addressed in the contested records prevents me from addressing these issues fully.

However, I do not see how any of the provided information could have "Scientific information", which PO-2010 notes: *"must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field."*

a) As the Appellant is currently doing detailed design of their proposed hydro-electric generating station, this would be applying engineering knowledge and principles, not testing and hypothesis.

b) The Appellant does not have any scientists on staff, and the companies they have contracts with such as Tulloch Engineering and WSP Global Inc. are engineering companies, not scientific companies.

So it appears there is no evidence of any third-party scientific information.

26) In paragraphs 34 and 35 of the Appellant's Representations they claim the contested records may contain technical drawings:

a) The Appellant has already released directly to the public many detailed technical drawings, such as those in Appendices J and K, therefore, the Appellant has the burden of proof to show why they would be harmed by the release of the contested records.

For example, the Appellant has not, but must show what additional detail is there in these contested records and why would it cause any more harm than what the Appellant has already directly released themselves.

b) The Appellant does not refer to any explicit indications on their drawings requiring they be kept confidential, so presumably there are no such explicit indications.

c) Companies doing business with the government know their information may be subject to FoI requests and so may be disclosed to the public.

As such companies nonetheless willingly pursue such work, and in this case the Appellant did not include explicit notices of confidentiality, demonstrates these exemptions do not apply, so the contested records should be released.

27) The lengthy, vague, unjustified, and unspecific list of claimed reasons to withhold information provided in paragraph 34 of the Appellant's Representations leave it to the Adjudicator to determine which contested records contain which – or any – information meeting the test. It would not seem to be the Adjudicator's role to make such a determination.

a) In fact, concerning the Burden of Proof in Section 53 of the Act, P-203 states that: *"Third parties who rely on the exemption provided by section 17 of the Act, share with the institution the onus of proving that this exemption applies to the record or parts of the record."*

b) I do not see any such effort by or information from the Appellant to fulfill this burden of proof.

It therefore appears the Appellant has not met the first part of the three-part test required by Section 17 of the Act.

28) For the second part of the test required to fulfill Section 17 of the Act, as stated above, it appears the Appellant did not take any action to indicate the information being provided was confidential.

a) If the situation was that all of the information supplied by the Appellant was confidential, perhaps it could be justified that there was an implicit understanding of confidentiality and the Appellant would be seen as consistently treating their supplied information as confidential.

b) But over the years the Appellant has supplied both confidential and non-confidential records to the MNRF, the vast majority being non-confidential. Yet the Appellant has not treated records they now claim are confidential any differently.

Therefore, there has been no implicit or explicit understanding of confidentiality, so the second part of the test for applying the Section 17(1) exemption of the Act also fails.

29) PO-3186 presents several requirements for supplied records to be considered confidential, including:

a) A clear statement when the information was supplied that it was to be treated as confidential, such as: *"each page of its proposal is marked 'Confidential'"*.

b) A clear statement in their representation to the IPC of why they claim the particular information is confidential.

The Appellant has not met either of these requirements.

Instead of the Appellant fulfilling their burden of proof, paragraph 38 of the Appellant's Representations simply makes the unjustified claim: *"the information was communicated to the institution on the basis that it was confidential"* – with no indication of how the MNRF was to know which records of the hundreds provided over the years were to be considered confidential.

30) This situation was addressed in PO-2142, which found that:

"Apart from the appellant's hindsight on this issue, there is nothing in the records, taken as a whole, or the appellant's submissions which suggests that

- *the appellant communicated that the records were submitted in confidence*
- *the appellant had an expectation that the records were being submitted in confidence*
- *the appellant prepared and submitted the records for a purpose that would not entail disclosure"*

This further reinforces that the second part of the test for applying the Section 17(1) exemption of the Act is not met.

31) In paragraph 42 of the Appellant's Representations, rather than any evidence of harm they only state that disclosure: *"could reasonably be expected to significantly prejudice Swift River's competitive position …"*.

a) Such an unsubstantiated statement appears to be exactly the concern noted in PO-3186, which states: *"Evidence amounting to speculation of possible harm is not sufficient"*. Rather PO-3186 notes: *"the appellant must provide 'detailed and convincing' evidence"* to establish this.

b) The Appellant has not provided any examples of why such disclosure could cause such prejudice or harm. For example, perhaps the release of this information could enhance the Appellant's reputation in the industry through showing innovative thinking.

32) This issue is also addressed in PO-2020, which states this burden of proof of harm: *"must describe a set of facts and circumstances"*.

Instead paragraph 42 of the Appellant's Representations only states such disclosure: *"could significantly prejudice Swift River's competitive position"*, to which I note:

a) As stated in paragraph 3 of the Appellant's Representations: *"Swift River was established solely to develop the North Bala Falls Small Hydro project"*. That is, the Appellant has no operations, income, or employees, it has never developed a hydro-electric generating station, and according to all available information such as its web site, it is not looking for any other work or projects to develop.

b) In 2005, the MNRF awarded the Appellant the exclusive opportunity to pursue developing the Proposed Project, which the Appellant has been working on for over 11 years.

That is, the Appellant has no market competitors. Therefore the Appellant's stated concern for its "competitive position" is meaningless and unjustified. Competition and marketplace forces have no impact on the Appellant's opportunity or ability to develop and operate the Proposed Project, which is their only business and purpose.

In summary, the Appellant's Representations do not provide any evidence, facts, or circumstances by which the release of the contested records would cause it any harm.

33) Paragraph 42 of the Appellant's Representations states such disclosure could: *"delay the building of the Bala Falls Project"*.

If properly planning and safely executing the Proposed Project requires additional time, then that is certainly in the public interest rather than facilitating a development which would create unaddressed risks to the public and to public infrastructure.

34) As noted in PO-3186, for the third part of the test required to justify the exemption in Section 17 of the Act the appellant must provide: *"detailed and convincing"* evidence to establish a: *"reasonable expectation of harm"*.

Further, the NoI states the Appellant: *"must demonstrate a risk of harm that is well beyond the merely possible or speculative"*.

The Appellant has only provided speculation of harm, which is not sufficient.

Issue E, compelling public interest

35) Paragraph 43 of the Appellant's Representations states their claim that there is no compelling public interest that clearly outweighs the exemptions claimed.

However as they neglect to mention several relevant facts, I appreciate the opportunity to present these below.

36) Over the more than six years I have been requesting to view all the records from both the MNRF and MOECC concerning the Proposed Project, what has been learned is that:

a) Of the thousands of records viewed, many are of little interest as they concern routine matters such as requesting information and reporting status.

b) However, many of the records have been extremely beneficial to the public, as we have been able to learn of self-serving decisions the Appellant has made, such as:

- Risking; damage public infrastructure, flooding Lake Muskoka, and contaminating the environment to speed-up their proposed construction.
- Not following the MNRF's and the Canadian Dam Association's public safety procedures and guidelines.
- Not honouring commitments made to other Ministries and other levels of government.

Many of these are detailed in my Responses to Appellant's Supplemental Representations accompanying this document.

c) As this is a "proponent-driven process", the community's only opportunity to learn about changes the Appellant has made to their plans since issuing their ESR is to request and view records through the FoI process, as:

- The MNRF; is very secretive, will not allow us to communicate with their staff, provides extremely evasive responses to our letters, and has only allowed us a single meeting with their technical staff.
- The proponent does not respond to our letters asking questions. For example, we e-mailed and even hand-delivered letters to their offices on:
  - April 15 and 21, 2015
  - October 20, 2015
  - April 26, 2016
  - May 10, 2016
  - June 16, 2016

- June 22, 2016
- June 30, 2016
- July 5, 2016
- July 21, 2016
- February 1, 2017

Other than a single e-mailed reply to one of these confirming receipt and that they would later respond (and they did not), we have not received any response to these e-mails.

As an example, the most recent e-mail I've sent to the Appellant was on February 1, 2017 and a copy is in Appendix L. The Appellant has not sent any response to this.

- In the more than 11 years the Appellant has been pursuing the Proposed Project they have hosted only three public meetings, all at extremely inconvenient times for the many seasonal residents.

  These three meetings have been the only opportunities for the public to ask questions of the proponent. For example, while the proponent has made presentations to the Council of the Township of Muskoka Lakes (the "Township"), there is no opportunity for the public to ask questions at these meetings.

d) It appears that many, if not most, of the IPC's decisions concern requests for particular records, where the requester knows of their existence, but not their content. For the Proposed Project, the situation is different as I typically do not know in advance of making FoI requests of the existence of particular records, it is only through viewing all records that are available that the most useful records are found.

e) Also, I initiated this FoI request on June 5, 2015, which is now 21 months ago. Having to wait this long to receive records does not fulfill the purposes of the Act, is most frustrating, and is an example of the difficulty the public encounters trying to learn of the negative impacts of the Proposed Project.

As the FoI records are the public's main source of information, and it is not known which records will provide updates to current concerns or inform the public of new issues, it is important that all records concerning the Proposed Project continue to be released through the FoI process, not just those records which the Appellant agrees we can view.

37) In past years, government Ministries would have significant engineering and technical staff in-house.

However, most technical work for government Ministries is now done by private developers (such as the Appellant) or outside contractors. For this Proposed Project, this creates a problem as according to the LRIA, MNRF in-house engineers must review and approve the Appellant's detailed Plans and Specifications, but the MNRF has extremely limited resources for this.

As a result, it appears that the MNRF:

a) Did not realize that the Appellant's change to an upstream cofferdam design that would fully obstruct the Bala north channel was a design that:

- Created an unacceptably high probability of flooding Lake Muskoka during the proposed construction.

- Could not be lowered and later raised as required by the MNRF's cofferdam lowering plan.

b) Did not realize that the excavations required by the soldier pile cofferdam subsequently proposed by the Appellant would risk damaging the MNRF's Bala north dam.

We do not know if this issue has been addressed.

Clearly, there is compelling public interest in identifying and resolving such issues before any further approvals are issued, but the MNRF does not permit me to communicate with their technical staff. This is another example of the importance of all requested records being made available to me, with less delay.

38) For such projects, the expectation is that the public would learn about negative impacts such as the above, and the mitigation of these, would be through the environmental assessment process.

However, for the Proposed Project, the Appellant has made significant changes from what they presented in their ESR and for too many of these changes the Appellant is not informing the public, and in many cases, they are also not informing other Ministries and other levels of government.

Some examples of the public benefit from information that we were only able to receive through previous FoI requests include:

a) Appellant changed their construction plans so they would not conform to their ESR and later that their proposed construction would create a high risk of flooding Lake Muskoka, which would directly and negatively affect the thousands of property owners on Lake Muskoka.

b) Fast and dangerous water created by the Proposed Project would extend far outside of the Appellant's proposed downstream safety boom. This is therefore a safety concern to all that use this very popular in-water recreational area.

c) Appellant's ESA showed groundwater contamination, and that their plan to deal with this provided conflicting information to different government agencies, so could not be implemented as would have been approved.

d) Appellant changed their upstream cofferdam design to one that risked damage to crucial public infrastructure, both the:

- District's Muskoka Road 169 bridge over the Bala north channel (the Highway Bridge).
  - Damaging the Highway Bridge would prevent emergency response vehicles from being able to reach people on the other side of the Highway Bridge.
- The MNRF's Bala north dam.
  - As Lake Muskoka is 90 km², and is 18' higher than the Moon River, damaging the Bala north dam would be disastrous.

e) Appellant would not warn the recreating public before their Proposed Project would start operation – which would often be at about noon on summer days – even though MNRF procedures requires such warning.

This continues to be an unaddressed public safety issue of broad interest to the community.

Detailed examples showing all of the above are in my accompanying document entitled: *"Public interest examples from previous FoI requests"*.

Without me learning about the issues, incorrect government decisions would likely have resulted, such as accepting a construction plan that could not be implemented, or risking flooding Lake Muskoka.

In summary, there is a demonstrated broad community interest in these records continuing to be available to the public through the FoI process.

39) In most of the above situations, the existence of particular technical drawings, and key reports was not known in advance. For example, I did not know the Appellant changed their upstream cofferdam design to fully obstruct the Bala north channel until I received a technical drawing showing this.

That is, specific drawings or documents cannot be requested as the public does not know before viewing them which are available and which may show threats to public safety or other concerns to the broad public. Therefore, to be able to determine if issues previously identified have been adequately addressed or if there are new serious issues, the public needs to be able to receive all documents that concern the Proposed Project.

This issue was considered in P-1398, in which:

a) It states a requester had: *"not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies"*.

b) That Adjudicator subsequently wrote he: *"does not agree"* with the Ministry that: *"members of the public must have identified and expressed a specific interest in a record or records at issue before section 23 can apply"*.

40) Concerning paragraph 46 of the Appellant's Representations:

a) While the Appellant is certainly a private developer, as noted above, the:
   - Proposed Project would be on public land (as it is owned by the MNRF).
   - Proposed construction would risk damage to public infrastructure (the Highway Bridge and Bala north dam), and could contaminate the Moon River (due to the treatment or leaks from the piping for groundwater pumped out of the proposed excavation).
   - Proposed construction sequence risks flooding Lake Muskoka and the thousands of private properties on it, as the most recent information we have does not have an acceptable cofferdam lowering plan.
   - 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, contrary to the MNRF's public safety measures requirements.

   Clearly these issues directly impact the broad public, showing compelling public interest that clearly outweighs the Appellant's private concerns.

b) Ontario Power Generation (OPG) owns and operates many hydro-electric generating stations in Ontario, such as the Ragged Rapids and Big Eddy generating stations that are a few km downstream from Bala on the Moon

River. OPG receives approximately 4 ¢/kW•h for the power produced by these generating stations.

As a result of the Feed-In Tariff contract the Appellant signed with the Ontario Power Authority (OPA, now the Independent Electricity System Operator, IESO), they would be paid either 17.685 ¢/kW•h or 11.79 ¢/kW•h (depending on the time-of-day) for power generated. The sources of the subsidy for the above-market price that would be paid to this private developer is split between:

- The Global Adjustment charge on electricity bills (which may include the "Debt Retirement Charge").
- Provincial income tax revenues.

So while the Appellant notes they have *"not received any public subsidies to date"*, they are only pursing this Proposed Project due to the expectation of receiving this public subsidy for power produced.

The split of the sources of this subsidy is a political decision by the Ontario government, and some portion is from provincial tax dollars. As found in MO-1184: *"All government institutions are obliged to ensure that tax dollars are being spent wisely. Therefore, public confidence in the integrity of the institution is also a relevant consideration favouring disclosure."*

Therefore, as this private development would be built only due to the expected public funds subsidy, there is a valid and compelling public interest in the contested records being released.

41) Concerning paragraph 47 of the Appellant's Representations:

If the Appellant would demonstrate:

a) That they would build according to the public safety and environmental commitments they made in their ESR,

b) How they would operate their Proposed Project safely,

c) That they are providing the same information to all government agencies,

We would not need to request records through the FoI process. But as noted above, the Appellant:

a) Is making changes to the plans presented in their ESR without informing the public.

b) Has changed their construction plans and now risks damage to the Highway Bridge, without informing the District.

c) Has stated they would not operate their Proposed Project according to the MNRF's public safety requirements.

d) Is providing conflicting information to different government agencies.

e) Presents plans that would not meet the MNRF's cofferdam lowering plan, and therefore risks flooding Lake Muskoka.

Therefore, there remains a compelling public interest which clearly outweighs the purpose of the Section 17, 19, and 21 exemptions in the Act.

It would certainly make the hydro-electric development industry more trusted and respected if the Appellant was seen to be honouring their public safety commitments and building projects that could be operated safely.

42) Concerning paragraph 48 of the Appellant's Representations:

a) The Appellant claims the Proposed Project would be in the *"economic interests of the MNRF"*.

- As the MNRF is a government agency which would not earn any income from the Proposed Project, it is not clear what this statement means.

b) As noted above, what is clear is that the Appellant would receive a large subsidy in operating the Proposed Project.

- As has been in the news constantly for many months, it is not clear that renewable energy projects benefit Ontario's economy as the Appellant claims in this paragraph.

c) A more specific example that the Proposed Project would have negative economic impacts is that it would require diverting 94% of the water from the Bala falls, and tourists won't come to Bala to see the dry rocks where the falls used to be.

43) Concerning paragraph 49 of the Appellant's Representations:

a) It is certainly not for the Appellant to judge which records would benefit the public interest, as the Appellant's only interest is reducing their costs and proceeding with this Proposed Project as quickly as possible.

- But as noted above, there are too many unaddressed questions of public safety and risk to public infrastructure to allow this to proceed without public scrutiny of government decisions concerning this Proposed Project. This requires the public having access to the Appellant's input to the government for these decisions.

b) As noted above, the Appellant has no *"competitive position in the marketplace"*. In 2005 the Ontario government awarded the Appellant a monopoly on pursuing the development of this Proposed Project, and the Appellant has no other business, no operations, no employees, and no income. There is nothing competitive in what they do.

c) The Appellant claims there is a: *"large amount of information published on the Bala Falls Project website"*. This is incorrect, for example:

- The Appellant actually removed most of the information from their web site 16 months ago.
- Since then, the Appellant has made only three minor changes to their web site, such as announcing their hosting a public meeting, this being only the third public meeting they've hosted in over 11 years.

  The Appellant has not issued or posted any project updates, press releases, or other news in over a year.

As detailed above, the Appellant has does not answered any of the e-mails I or others have sent to them over the past years.

This is certainly does not demonstrate: *"a willingness to engage the public"* as claimed by the Appellant.

44) Concerning paragraph 50 of the Appellant's Representations:

a) My accompanying document entitled: *"Public interest examples from previous FoI requests"* provides many examples of the broad public benefit which has resulted from records received through past FoI requests. I

submit this certainly demonstrates compelling public interest, as there continue to be serious unaddressed issues.

b) Both the Appellant and MNRF have refused to communicate with us, so we do not know in advance which records will include information about risks to public safety, risks to public infrastructure, and other issues of broad public concern. We therefore need to see all records concerning the Proposed Project.

c) I submit the exemptions in Sections 17, 19, and 21 of the Act should not apply, as:
   - The Appellant has not provided: *"detailed and convincing evidence"* of harm they would incur through the release of the contested records.
   - Yet I have shown specific examples of the compelling public interest in and benefit from records received through previous FoI requests.

Issue F, Solicitor-client privilege

45) The Appellant seems to be confused into thinking they qualify as the "client" for solicitor-client privilege when the solicitor is Crown Counsel. There is no such privilege, as I detail below.

46) Concerning paragraph 57 of the Appellant's Representations:

a) Despite the Appellant's claims, letters sent to opposing Counsel are not protected by any privilege. For example:
   - In PO-2749 it was determined that: *"At common law, communications between opposing parties are not considered privileged"*, and that such letters were: *"outside any reasonable zone of privacy"*.
   - Quoting MO-2396: *"The fact that a record was either created by or sent to opposing counsel provides a clear indication that it was not intended to be confidential as between solicitor and client, and therefore such records cannot normally be subject to solicitor-client communication privilege. Accordingly, even where a copy of a letter to opposing counsel is sent by fax from solicitor to client, or where correspondence to opposing counsel is copied to the client by the solicitor, I find that in the absence of any added confidential communication, such records cannot be found to be privileged, even as part of the 'continuum of communications'"*.

b) Therefore (quoting from paragraph 57 of the Appellant's Representations):
   - Letters the Appellant *"explicitly addressed to Crown Counsel"* are not privileged as that is communications with opposing counsel.
   - Letters the Appellant sent to the MNRF or Crown Counsel which contained: *"communications from Swift River to its solicitors"* regardless of whether it was: *"conveying information with the explicit intention of seeking advice at some future point in time"* shows that the communication is not subject to the Appellant's solicitor-client privilege, so does not qualify for the Section 19 exemption in the Act.

47) Concerning paragraph 58 of the Appellant's Representations:

Despite the Appellant's claims, these contested records cannot be protected by Litigation Privilege as they were not kept confidential. The fact that they were shared with the opposing side even more disqualifies them from being subject to such privilege. As justification, I cite and quote relevant IPC decisions, as follows:

a) In PO-1710:
   - *"Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation."*
   - *"The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation"*.
   - In explaining why Litigation Privilege exists and what it is, this Order states: *"Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel."*

b) In PO-2116:
   - *"litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose 'the fruits of his work' (i.e., research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a 'zone of privacy' around the party."*

c) In PO-2112:
   - *". . . [The origin of litigation privilege] had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court"*.
   - *"…litigation privilege aims to facilitate a process (namely, the adversary process) …"*.
   - *"litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose 'the fruits of his work' (i.e., research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a 'zone of privacy' around the party."*
   - *"However, Records 4, 5, 9, 10, 11 and 12 are communications between the opposing parties in the contemplated litigation. Therefore, they cannot qualify for litigation privilege since the 'zone of privacy' rationale cannot exist."*

All of the above show that Litigation Privilege by definition is control of when – or if – this information will be presented in court. For this to be possible, it must be kept confidential before trial, and certainly would not be disclosed to the opposing party or its Counsel.

Therefore, by sending records to Crown Counsel, who are opposing Counsel, or to the MNRF, the Appellant did not keep the records confidential. As a result, these records cannot be subject to Litigation Privilege for the purposes of the exemptions allowed by Section 19 of the Act.

48) Concerning paragraphs 59 and 60 of the Appellant's Representations:

a) The Appellant seems to be claiming that P-1342 determined that if the parties share a common interest, records exchanged will therefore be subject to privilege. This is incorrect.

- The situation in P-1342 would only apply if the records were initially subject to solicitor-client privilege, which is certainly not the case between the Appellant and the MNRF.

b) Also, MO-2396 states: *"Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication"*.

In summary, I submit that by disclosing this information to the MNRF, the Appellant waived any rights to the exemptions of Section 19 of the Act.

49) Concerning paragraph 62 of the Appellant's Representations:

The Appellant continues their mistaken belief that somehow because they sent records to opposing counsel these records become magically subject to privilege as if the Appellant was sending records to their own legal counsel.

50) Concerning paragraphs 63 to 66 of the Appellant's Representations:

A solicitor-client relationship is a mutual and reciprocal relationship.

It is therefore very significant that the MNRF and their Crown Counsel do not claim these records are subject to any type of privilege, and that the MNRF does not contest the release of any of these records or consider them subject to any exemptions in the Act.

As Crown Counsel (who would be a direct party to the claimed privilege) has therefore confirmed the contested records are not subject to privilege is authoritative and definitive that the exemptions in Section 19 of the Act do not apply to the contested records.

Additional exemptions, Sections 16, 18 and 20

51) Concerning paragraphs 68 to 70 of the Appellant's Representations, relative to Section 16 of the Act:

In their claim that the contested records should not be released due to Section 16 of the Act, the Appellant states this release: *"could reasonably be expected to jeopardize and/or endanger the security of the Bala Falls Project and any other surrounding building, which could also reasonably be expected to prejudice the defence of Canada".*

Under Issue H, concerning Section 16 of the Act, the NoI states:

a) *"It is evident from the context of this exemption that it is intended to protect vital public security interests"*.

b) *"In order for section 16 to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative"*.

The facts are:

a) The Proposed Project would generate 1/10,000 of the power generation capacity of Ontario, so it cannot be considered "vital" as a security or any other interest of Canada or Ontario.

b) The only other surrounding buildings are a small bait shop and a building that used to be a Church and a small tourist shop. Jeopardizing the security of these buildings would not *"prejudice the defence of Canada"*.

c) The Appellant has not provided any evidence that a hydro-electric generating station has ever been the subject of *"espionage, sabotage or terrorism"*, nor why the Proposed Project would or could be.

The Appellant's statements therefore do not: *"demonstrate a risk of harm that is well beyond the merely possible or speculative"*, so there is no justification for an exemption due to Section 16 of the Act.

52) Also concerning paragraph 70 of the Appellant's Representations, but relative to Section 20 of the Act:

In their claim that the contested records should not be released due to Section 20 of the Act, the Appellant states this: *"could reasonably be expected to seriously threaten the safety or health of individuals responsible for securing the building, any individuals inside or outside of the building either before, during, or after construction and once the building is fully operational, through an act of terrorism or sabotage."*

a) Firstly, during operation, there would be no: *"individuals responsible for securing the building"*. Hydro-electric generating stations of this size do not have guards, in fact they do not usually even have personnel inside as they are remotely operated. Other than occasional maintenance visits, the Proposed Project would be unattended.

b) The rest of the Appellant's paragraph is mere speculation, with no demonstration or evidence of actual risk.

c) In contrast, there is real evidence that the operation of hydro-electric generating station can and have directly harmed the public, as follows.
   - Appendix P contains pages from a 2010 industry presentation by Bracebridge Generation Ltd., the owner and operator of the Wilson's Falls generating station which is less than 50 km from the Proposed Project.
   - Their presentation states that in 2008 a 16-year-old boy drowned when he attempted to swim past the water flowing from their generating station.
   - This is evidence that the operation of hydro-electric generating stations can and have harmed the public. As the Proposed Project; would have more than ten times the flow of the Wilson's Falls generating station, would be started without warning on summer days, and would be in an area far more popular for in-water recreation, the likelihood of harm would be even greater.

d) Even worse is that the Appellant's safety plans are inadequate:
   - I learned from a previous FoI request to the MNRF that the MNRF's Public Safety Measures Plan for the Bala Dams requires the public be warned before flow is increased to the Moon River.
   - Yet the Appellant has stated they would not provide warning to the public before starting operation of the Proposed Project even though operation would often be at about noon on summer days.

In summary, there is compelling public interest that the contested records, including detailed technical drawings, be released so that:

a) The public can learn directly from these records both:
   - What is being done to address the known unaddressed public concerns such as those in the accompanying document entitled: *"Public interest examples from previous FoI requests"*.

- Whether there are other public safety concerns not currently known to the public.

b) This would further the purposes of the Act as such records would be input to government decision making, so their being known to the public would therefore facilitate public scrutiny.

53) Paragraph 72 of the Appellant's Representations repeats points they made earlier, such as in their paragraphs 47 and 48, where the Appellant confuses their own self-interest and profits for the economy of Ontario. These were addressed above.

54) Concerning paragraph 73 of the Appellant's Representations:

a) The term "negotiation" typically includes a financial component. Other than relatively minor fees for permits or approvals sought, I am not aware of any such negotiations required as part of the Proposed Project.

I therefore question the Appellant's use of the term "negotiation" in justifying an exemption based on Section 18(e) of the Act. If this can be justified, then the Appellant's burden of proof requires they identify which records are subject to this exemption and why, but they have not done so.

b) Negotiations are between parties. If there are: *"negotiations respecting the Bala Falls Project and the leasing of certain crown lands to Swift River"* then being party to the negotiation, the MNRF would also have claimed this exemption. As the MNRF has not contested the release of these records it would appear the Appellant's claim is unjustified.

55) Concerning paragraph 74 of the Appellant's Representations:

The Appellant states the contested records: *"contains and/or reveals plans, policies and projects … of the MNRF where the disclosure could be reasonably expected to result in premature disclosure of a pending policy decision by the MNRF …"*.

If the MNRF has disclosed such internal information to the Appellant, who is a private developer and could benefit from this advance information, this could be inappropriate and all the more reason why the contested records should be released. Facilitating public scrutiny is a purpose of the Act, so the exemptions in the Act should not be used to keep such favouritism secretive.

Issue G, discretionary use of Section 19

56) The Appellant's Representations for this issue appear to claim settlement privilege.

Concerning paragraphs 75 through 81 of the Appellant's Representations, for settlement privilege, PO-2112 found:

a) The harms due to disclosing records claimed to be subject to settlement privilege are: *"too speculative and remote to meet the burden of proof"*.

b) *"The courts have not recognized any generalized 'chilling effect' of disclosure of settlement material"*.

c) *"Where settlement material contains information that is otherwise harmful to the interests of the government or a third party, or personal information whose disclosure would be an unjustified invasion of privacy, that information would be protected under the appropriate exemptions"*.

That is, either the Appellant has not adequately demonstrated the harms that would be caused by the release of the contested records, or if releasing the

material would cause harm then the material would be protected by other sections of the Act.

57) Concerning paragraphs 82 through 86 of the Appellant's Representations, the fact that the MNRF is not objecting to the release of the contested records shows there is no validity to the Appellant's claim of the following exemptions in the Act:

a) Section 16. As the MNRF's Bala north dam would be directly adjacent to, and even attached to, the Proposed Project, the MNRF has clearly found no basis for a national defence concern.

b) Section 18. As the MNRF would have far more – and credible – concern for the economic interests of Ontario than the Appellant, the fact that the MNRF has not contested the release of these records shows there is no such valid concern.

c) Section 19. As the MNRF would be the other party in any claims of solicitor-client privilege, and the MNRF has not opposed the release of these contested records, this shows there is no such valid concern.

d) Section 21. This has been addressed above.

58) Concerning paragraphs 87 through 91 of the Appellant's Representations:

a) As shown for Issue E above, the Appellant is not providing any useful information directly to the public; they do not respond to questions sent by e-mail, and their web site does not provide any information concerning the serious and unaddressed issues of public safety, environmental contamination, risking damage to public infrastructure, or risking flooding Lake Muskoka.

- Clearly these are all issues of compelling public interest.

As a result, the only method by which the public can determine if these serious issues are being addressed is through FoI requests.

b) As found in PO-2435: *"transparency and government accountability are key purposes of access-to-information legislation"*. The public is already concerned about these issues, therefore:

- If through the release of the contested records the public can see that the MNRF makes the right decision to withhold any further approvals until the issues of safe design and safe operation of the Proposed Project have been adequately addressed, then the public's confidence in the MNRF would be improved.
- However, if the MNRF is allowed to make secretive deals with this private developer and these serious issues of concern to the public are not addressed, then it *"would undoubtedly decrease the public confidence in the operation of the MNRF, and other similar departments in the Government of Ontario"* – and deservedly so.

The MNRF has already taken the right first step by allowing these records to be released, it is only the Appellant's self-interest, showing no regard for the public's valid concerns, which are preventing the release of these records.

59) Concerning the Appellant's *"Supplementary Representations of Swift River Energy Limited"*, these are addressed in my accompanying document entitled: *"Responding to Appellant's Supplementary Representations accompanying their Representations dated January 31, 2017"*.

Conclusion

60) I have provided evidence that as a result of records previously received through FoI requests, there has been broad public benefit as the public has been able to learn that the Appellant has not adequately addressed serious public concerns, such as risks to public safety, risks to public infrastructure, and risks of causing flooding.

61) It is not possible for me to know in advance which particular contested records are needed to determine whether these issues have been addressed, or whether there are other unaddressed serious issues not yet known to the public.

62) Therefore, due to the:

a) Appellant not providing any information directly to the public concerning these issues,

b) Need to have access to the information the Appellant is providing to the MNRF, who would be using this information to make important government decisions and issue approvals,

c) Demonstrated, broad, and compelling public interest that these issues be addressed before any further approvals are issued,

d) Appellant not justifying that the exemptions in the Act are applicable,

e) Appellant not meeting the test demonstrating harm if these contested records were released,

I submit that the contested records, including technical drawings, should all be released, as has already been determined appropriate by the MNRF.

63) I accept that as necessary, there may need to be minor word-by-word redactions of personal information, such as references to vacation time, social events, or personal issues.

64) I would look forward to providing additional detail or documents, and answering any questions.

65) If the Appellant submits a reply Representation, I would look forward to the opportunity to provide a sur-reply Representation to it.

66) All of which is respectfully submitted.