



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2624**

## **Appeal PA06-316**

### **Ministry of Training, Colleges & Universities**



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## **NATURE OF THE APPEAL:**

The Ministry of Training, Colleges & Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information held within the Ontario Government from May 1, 2005 to January 19, 2006 concerning a named private college (the College) and/or the requester. In formulating his request, the requester indicated that he was particularly interested in seeking any and all communications from the Ministry's employees, namely, communications between a named Superintendent and four other named employees.

The Ministry located responsive records and granted partial access to them, with severances made pursuant to the discretionary exemptions in sections 13 (advice to government), 19 (solicitor-client privilege) and the mandatory exemptions in sections 17 (third party information) and 21 (personal privacy) of the *Act* as follows:

- Tab 1 – 56 documents (107 pages) withheld in full pursuant to section 19;
- Tab 2 – 9 documents (13 pages) withheld in full pursuant to section 13;
- Tab 3 – 13 documents (26 pages) withheld in full pursuant to sections 17 and 21;
- Tab 4 – 2 documents (4 pages) granted in full;
- Tab 5 – 12 documents (17 pages) granted in full; and
- Tab 6 – handwritten notes withheld in part pursuant to section 19.

The Ministry also indicated that no records were located that responded to communications between the Superintendent and one of the named employees.

The requester (now the appellant) appealed the Ministry's decision.

In discussions with the mediator, the appellant explained that he was currently involved in an ongoing hearing before the Licence Appeal Tribunal (LAT) concerning the registration of the College. The appellant indicated that he had received approximately five boxes of material through the LAT disclosure process; however, upon review of the materials the appellant indicated that there appeared to be documents missing, particularly those items identified by the Ministry as being responsive to his access request. The appellant was unable to obtain these records through the legal processes in which he was involved, and accordingly, he wishes to pursue access to records in this appeal.

Extensive mediation was undertaken in an attempt to resolve the issues on appeal, with the following results:

- The mediator notified one affected person for whom contact information was available. The affected person objected to the release of his/her information to the appellant in this appeal.
- The appellant indicated that he does not wish to pursue access to records withheld under Tab 6, and these were accordingly removed from the scope of the appeal. In addition, records that had already been provided during the LAT disclosure process were also removed from the scope of the appeal (specifically Tab 2 – records 1 and 6, and Tab 3 – records 1, 2, 3, 5, 6, 7, 8, 10 and 11).

- The Ministry agreed to reconsider its decision with respect to some of the records remaining at issue (specifically Tab 2 – records 2, 3, 4 and 5 and Tab 3 – records 4, 9 and 13). The Ministry subsequently issued a revised decision, providing the appellant access to a complete copy of Tab 2 – records 2, 3, 4 and 5. These four records are accordingly no longer at issue in this appeal. In this revised decision, the Ministry also granted partial access to Tab 3 – records 4, 9 and 13, with severances made pursuant to section 21. The appellant indicated that he wishes to pursue access to the severed portions of these records, and accordingly, Tab 3 – records 4, 9 and 13 remain at issue in this appeal.
- With respect to Tab 3, the Ministry advised that the last page of Record 13 should be a separate document which is now labeled as 13A. The Ministry confirmed its decision to deny access to Records 12 and 13A pursuant to section 21.
- The appellant advised the mediator that he wishes to pursue access to all the records remaining at issue, and accordingly, sections 13 (advice to government), 19 (solicitor-client privilege) and 21(1) (invasion of privacy) remain at issue in this appeal. Although section 17 was originally raised in relation to records contained under Tab 3, the Ministry confirmed, and I agree, that there is no information contained in the records remaining at issue that would fall under this exemption, and accordingly, section 17 is not an issue in this appeal.

Further mediation was not successful and the file was forwarded to the adjudication stage of the process. I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal.

Although the appellant has requested information which appears to pertain to him in his professional capacity as President/CEO of the College, I decided to include, as an issue, whether any of the records pertain to him in his personal capacity. Accordingly, in the Notice of Inquiry I raised the possible application of sections 49(a) and (b) (discretion to refuse requester's own information/personal privacy).

In addition, following receipt of the Mediator's Report, the appellant notified the mediator that he believes additional responsive records should exist. The mediator contacted the Ministry, who confirmed that all responsive records had been identified. The appellant explained to the mediator that he believed additional records exist as he is aware of at least two meetings that took place between the Ministry and other government departments. For example, he indicated that the college arranged for a meeting between the Superintendent and a representative from Nigeria's Commission for Economic Development. He indicated further that he is aware of meetings that took place between the Ministry and various Canadian departments at the federal level. The appellant pointed out that his request was very broad and that he asked for all information held within the Ontario Government from May 1, 2005 to January 19, 2006 concerning the college and/or himself, and that his request should not be limited only to the specified individuals referred to in the request. Rather than return this matter to the mediation

stage of the appeal, I included the reasonableness of the Ministry's search for records as an issue in the Notice of Inquiry.

The Ministry submitted representations in response. In its representations, the Ministry clarified that it has considered the personal information in the records under sections 49 (a) and/or (b).

Shortly after submitting its representations, the Ministry issued a second supplementary decision to the appellant and sent a copy to this office. In that decision, the Ministry indicated that it intended to disclose Records 4, 9 and 13 from Tab 3 of the records at issue. The Ministry also indicated that following a further extensive search for responsive records, a large number of additional records were located. Out of the newly located records, the Ministry indicated that it was prepared to disclose five records.

On receipt of the supplementary decision, I asked a staff member with this office to contact the appellant to determine whether he was interested in pursuing the current appeal in light of the Ministry's supplementary decision. The appellant confirmed that he wished to continue the current appeal. He also indicated that he was appealing the supplementary decision and that he wished to attempt mediation with respect to the issues arising from it.

As a result, a new appeal file was opened (PA06-316-2) to address the issues arising from the Ministry's supplementary decision and was referred to mediation. In view of the number of records located as a result of the Ministry's additional search, which was conducted after it was advised that reasonableness of search would be raised as an issue in the current appeal, I decided to transfer the search issue to appeal file PA06-316-2, as it seemed to be more appropriately connected to the issues in that file. Accordingly, I removed this issue from the current appeal. The issues raised in Appeal PA06-316-2 will be dealt with in a separate order.

I subsequently sent a revised Notice of Inquiry regarding the current appeal to the appellant, along with the non-confidential portions of the Ministry's submissions.

It should be noted that in its representations the Ministry raised additional discretionary exemptions for Records 12 and 13A of Tab 3. In doing so, the Ministry asked that I not share large portions of its representations relating to these issues with the appellant, due to confidentiality concerns. I decided to defer the issues pertaining to the late raising of discretionary exemptions and the additional exemptions pending my review of the other exemptions claimed for these two records. Accordingly, I withheld the portion of the Ministry's representations that address these newly claimed exemptions and its reasons for raising them at this late stage in the proceedings.

I determined that some of the withheld portions of the Ministry's representations relating to the issues that I decided to defer were relevant to the possible application of section 49(b) to the information in Tab 3. I agreed with the Ministry's confidentiality request insofar as it pertained to those relevant portions of the representations. The Ministry also asked that I withhold certain other portions of its representations pertaining to section 49(b), due to confidentiality concerns. I

agreed with the Ministry's additional confidentiality requests. However, in order to provide the appellant with as much information as possible, I briefly summarized the basis for the Ministry's confidential submissions as they pertained to section 49(b), indicating that the Ministry relied on the factors in sections 21(2)(f) and (h) of the *Act*. I noted that in its representations, the Ministry explained why the information is highly sensitive and how and why the information was provided in confidence.

The appellant submitted extensive representations in response. After reviewing them, I decided that it was not necessary to deal with the additional discretionary exemptions raised by the Ministry late in the process. Nor was it necessary to return to the Ministry for reply representations.

The Ministry recently sent supplementary representations into this office in respect of the additional discretionary exemptions that it first raised in its representations, and asked that I consider them along with its original representations. As I have decided that I do not need to address that issue, I will not consider these submissions in this order.

## **RECORDS:**

Of the records identified as being responsive to this request, the following remain at issue in the current appeal:

TAB 1: Records 1-56 (withheld pursuant to section 19)

TAB 2: Records 7, 8 and 9 (withheld pursuant to section 13)

TAB 3: Records 12 and 13A (withheld pursuant to section 49(b))

The records all comprise e-mails, often in e-mail chains. There are a number of duplicate e-mails within these e-mail chains. Two of the e-mails have attachments.

## **DISCUSSION:**

### **BACKGROUND:**

In order to better understand the issues in this appeal and the dynamics between the parties, it is helpful to set out some of the background regarding the College, the Ministry's responsibilities and the dispute between the appellant and the Ministry.

According to the Ministry, the Private Institutions Branch (PIB) of the Ministry is responsible for administering the *Private Career Colleges Act* (the *PCCA*) and regulations, and for monitoring compliance by private career colleges (pcc) with the legislative framework. A Superintendent and Director of the PIB are appointed under the *PCCA*.

Referring to sections 5(1) and 6(2) of the *PCCA*, which set out the provisions relating to registration and renewal of registration of a pcc, the Ministry notes that the College is a

corporation that has been registered as a pcc. The Ministry indicates further that students of the College notified the PIB in September 2005 that the College had been locked out of its premises due to the non-payment of rent. At about the same time the PIB began receiving complaints from students of the College who claimed that they were owed tuition refunds.

The Ministry indicates that the PIB commenced inspections and over the next few months correspondence and meetings took place between the Superintendent, her counsel, the appellant (as owner of the College) and his counsel. On January 19, 2006, the Superintendent gave the College notice of her proposal to refuse to re-register the College as a pcc and to immediately suspend its operations. On February 3, 2006, pursuant to the procedures established under the *PCCA*, the appellant requested a hearing before the LAT, for which over 25 days of hearings have been held.

The Ministry states that several boxes of documentary disclosure have been produced to the appellant through the LAT disclosure process, with the exception of documents over which privilege has been asserted, some of which form the subject matter of this appeal.

The appellant also provided considerable background information pertaining to the College, founded in 1996, and his involvement in a federal initiative designed to develop “a policy for sustainable development of Africa” in 2002 (the PPL Program). The appellant claims that after he presented his proposal for the PPL Program to the former Minister of Training, Colleges and Universities and the Superintendent, he was subjected to extraordinary scrutiny by the Ministry, which resulted in his ability to accept students who rely on Ontario Student Assistance Program (OSAP) funding to be terminated in November 2002. The appellant asserts that this action by the Ministry caused him significant financial hardship. As a result of this, the appellant commenced a civil action against the Ministry in 2003. The appellant did not indicate the status of this civil matter.

## **PERSONAL INFORMATION**

### **General principles**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term, as defined in section 2(1), means recorded information about an identifiable individual, and includes a list of the types of information that would qualify as “personal information” in paragraphs (a) to (h). However, that list is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) of the definition of personal information in section 2(1) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an

individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Moreover, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

### ***The representations***

The Ministry takes the position that the records in Tabs 1 and 2 do not contain any personal information about an identifiable individual. Moreover, the Ministry submits that there is nothing in these records that might reveal something of a personal nature regarding the appellant.

The Ministry concedes that certain portions of the records in Tab 3 contain information that might reveal something of a personal nature about the appellant. The Ministry submits, however, that the records also contain information about other identifiable individuals that reveals something of a personal nature about them.

The appellant does not address this issue in his representations.

### ***Analysis***

All of the records pertain to the Ministry's dealing with the College, which as I noted above is a corporate entity. The appellant is the owner of the College. Although the decisions of the PIB may impact him personally through the interruption of his business activities, I find that the vast majority of the references to the appellant are in his official business capacity. The references in most of the records are not about the appellant personally. Rather, they pertain to the matters arising from or otherwise connected to the PIB's involvement with the College, including the civil matter brought by the appellant in his capacity as owner of the corporate entity, the status of the College and the Superintendent's decision not to renew the College's registration. I find, therefore, that the majority of the records (specifically, those in Tabs 1 and 2, with the exception of Record 36 of Tab 1) do not contain the appellant's personal information.

Record 36 of Tab 1 refers to matters regarding the appellant's actions that go beyond his professional or business identity and pertain to him personally.

The records in Tabs 1 and 2 also refer to identifiable Ministry staff. The Ministry does not suggest that these individuals are acting in anything other than their official capacities. I find that any information about Ministry staff relates to them in their official capacity, and therefore, does not qualify as personal information.

I find further that the records in Tabs 1 and 2 do not refer to any other identifiable individual. Nor would it be reasonable to expect that an individual may be identified if the information is disclosed.

Accordingly, with the exception of Record 36 of Tab 1, sections 49(a) and/or (b) do not apply to the information in the records contained in Tabs 1 and 2.

The Ministry has claimed the application of section 19 to Record 36 of Tab 1 and I will consider this exemption claim in conjunction with the discretionary exemption in section 49(a).

With respect to the records in Tab 3, I find that although the records generally pertain to the appellant in his official business capacity, there are numerous references in them that extend beyond his business activities. I find that these references pertain to the appellant personally and thus qualify as recorded information about him. The records in Tab 3 also contain information about a number of other identifiable individuals who have been in contact with the PIB regarding the College. I find that this information pertains to them personally. I find further that the information about the appellant is so intertwined with that of the other identifiable individuals that it is not severable. Accordingly, I will consider the records, in their entirety, under the discretionary exemption in section 49(b).

## **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE**

### **Introduction**

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In the event that the records are found to contain the appellant's personal information, section 19 must be read in conjunction with section 49(a). As I indicated above, only Record 36 of Tab 1 contains the appellant's personal information. Accordingly, I will consider the application of section 49(a) in conjunction with section 19 for this record only.

The Ministry claims that all of the records in Tab 1 fall within the solicitor-client exemption in section 19. I will consider the application of section 19 only for the remaining records in Tab 1.



## Section 19

### *General principles*

Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;  
or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

In this case, the Ministry states that the records should be protected under solicitor-client communication privilege. Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

#### ***Branch 1: common law privilege***

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

#### *Solicitor-client communication privilege*

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

#### *Waiver*

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

#### ***Branch 2: statutory privileges***

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

#### *Statutory solicitor-client communication privilege*

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

### *Loss of Privilege*

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

### *The representations*

The Ministry provides some background information relating to the circumstances under which the records were created:

In 2002, due to serious deficiencies alleged by the Ministry to have occurred in [the College’s] administration of the [OSAP], the Ministry terminated the approval of [the College] as an educational institution whose students are eligible to apply for student loan and related assistance. Due to this revocation, in 2003 [the College] sued the then Minister of Training, Colleges and Universities, among others, for over \$21,000,000. Crown Law Office, Civil, is acting on behalf of the defendants, and has filed a Defence and a Counterclaim for over \$1,600,000. These proceedings did not relate to [the College’s] registration as a pcc under the [PCCA], and it continued thereafter to offer vocational training.

Upon learning on September 20, 2005, that [the College] had been locked out of its premises, and upon receiving increased student complaints about [the College] concerning unpaid tuition deposit refunds, the Superintendent became concerned about [the College’s] ongoing viability and its compliance with the [PCCA]. Due to these concerns and aware of the outstanding proceedings relating to OSAP, the Superintendent requested the assistance of the Ministry’s Legal Services Branch from the outset of, and throughout, the ensuing investigation.

The Ministry indicates that the records in Tab 1 fall into four general categories:

1. E-mails or other communications between counsel of the Ministry’s Legal Services Branch and the PIB (the client), for the purpose of seeking, formulating and/or providing legal advice (Records 1, 2, 4, 7, 8, 15-18, 20, 21, 22, 23, 25, 26-29, 32, 34, 35, 37, 38, 39, 41, 42, 47, 52);

2. E-mails or other communications between counsel of the Ministry's Legal Services Branch, PIB and other Ministry clients such as "Issues Management" or the Minister's office (Records 5, 6, 9-13, 43-46, 48-51, 53-56);
3. Drafts and related records drafted by counsel of the Ministry's Legal Services Branch for one or more clients (usually PIB) (Records 19, 24, 25, 30, 33, 36, 40);
4. E-mails or other communications including drafts prepared by a client, with regard to which legal advice is sought from counsel of the Ministry's Legal Services Branch (Records 3, 24, 31).

The Ministry notes that virtually all of the records comprise communications in which one party is legal counsel, acting on behalf of the Ministry. The Ministry identifies six individuals referred to in the records as lawyers connected to the Ministry's Legal Services Branch or to the Crown Law Office, Civil. The Ministry submits that each of these individuals was acting as a legal adviser to the Ministry in the context of the communications in which they were involved.

With respect to the nature of the involvement of Legal Services, the Ministry notes:

...The [PIB] is responsible for registering [pccs] and monitoring their compliance with the [PCCA] and the Regulations made thereunder, which are, in essence, consumer protection legislation. In carrying out its regulatory functions, PIB is at all times guided by this legislative framework. As PIB began reviewing serious issues as to [the College's] compliance or non-compliance with the legislation, it arranged for the continuing involvement of counsel in order for legal advice to be communicated on a timely and ongoing basis.

...The investigation undertaken by PIB to determine whether or not [the College] was in compliance with the applicable legislation, and the consequent decisions made by the Superintendent, could best be described as "protracted dealings", where legal advice was sought on "matters great or small at various stages." Whereas the communication of legal advice will be clear from the face of many of the records, some of the records served to pass information between counsel and the clients for the purpose of "keeping both informed so that advice may be sought and given as required." In this context, there was the expectation at all times that "whether asked specifically or not," counsel would provide the required and appropriate legal advice.

The records show that the client and counsel worked closely together throughout the investigation. Accordingly, it is the Ministry's view that all the records from which an exemption under s. 19 is being sought ought to be considered by the Adjudicator as a whole, as it will then be clear that the records do comprise a "continuum of communications" between counsel and the clients...

As indicated above, the records relate to legal assistance that was given in the context of an investigation into issues relating to possible or actual breaches by [the College] of various provisions of the [PCCA] and Regulations. Legal advice was sought on a broad range of legal issues, which all tie in with the regulatory framework administered by PIB... written communications of a confidential nature took place between the client and counsel, for the purpose of seeking, formulating or providing legal advice, or, in the alternative, for use in giving legal advice.

Referring to previous orders of this office (Orders PO-2509 and MO-1847, for example), the Ministry also submits that draft briefing notes and legal advice relating to media coverage are properly exempt under section 19 in the circumstances of this case.

In his representations, the appellant outlines his history with the Ministry and expresses his opinion regarding the various actions or decisions made against him and the College. Essentially, he believes that the Ministry is acting in bad faith against him and the College and that its actions in refusing to re-register the College were motivated by a desire to gain a tactical advantage with respect to his civil action.

In responding to the issues under section 19, the appellant focuses primarily on the litigation or anticipated litigation aspect of the solicitor-client privilege exemption in respect of the Superintendent's decision. However, as I indicated above, the Ministry does not rely on that aspect of the exemption, but rather focuses on communication privilege. Accordingly, I do not find this line of the appellant's submissions to be useful in deciding the issue.

The appellant notes further that many of the e-mails identified in an index that was provided to him at the request stage were created by the Ministry's administrative staff and submits that they contain merely factual information as a result.

### *Analysis*

Having reviewed the records at issue in Tab 1 and the representation provided by the parties, I am satisfied that they all fall within solicitor-client communication privilege under Branch 1 of section 19. I note that most of the e-mails are either directly to or from legal counsel employed in the Ministry's Legal Services Branch or Crown Law Office, Civil, or legal counsel were copied on the e-mails that were sent among administrative staff of the Ministry. Moreover, I am satisfied that all of the communications pertain to the seeking or giving of legal advice on the issues that the Ministry was dealing with in regards to the College, or that they form part of the "continuum of communications" for the purpose of keeping both administrative staff and legal counsel informed so that advice may be sought or given as required as described in *Balabel*.

It is also clear on the face of the records that any draft document that was included in the e-mails was provided to legal counsel for review and comment, including advice as to content.

References on the drafts themselves or in the covering e-mails reflect the advice provided by legal counsel as part of the review.

The appellant has asserted that e-mails exchanged between Ministry staff cannot be protected under section 19. Previous orders of this office (Orders PO-2087, 2223 and 2370) have found that e-mail communications passing between non-legal Ministry staff that refer directly to legal advice originally provided by legal counsel to other Ministry staff would reveal privileged communications and were, therefore, exempt from disclosure under section 19. That is precisely the case in the current appeal. As I noted above, the records consist of e-mail chains. While some of the e-mails in the chains were not directly sent to legal counsel, they clearly address the subject matter for which legal counsel had been consulted, often refer to the need for the communications to be sent to legal and/or reveal the legal advice provided by counsel. In the end, these e-mails form part of the chain that was ultimately sent to legal counsel. In this context, these e-mails form part of the “continuum of communications” recognized in *Balabel* as falling within the solicitor-client communication privilege.

In its submissions, the Ministry submits that the information contained in the records was clearly intended to be kept confidential and that there is no evidence to support a finding that privilege has been waived. Given the subject matter and the context in which the records were created, it is reasonable to assume that both the direct and indirect communications between Ministry staff and legal counsel was intended to be treated confidentially. As I noted above, a large number of records have been disclosed to the appellant through the LAT disclosure process, but for those records for which privilege has been claimed. I have no evidence before me that the Ministry has waived privilege in these documents.

Accordingly, subject to my discussion below under Exercise of Discretion, I find that the records in Tab 1 all qualify for exemption under the solicitor-client communications aspect of Branch 1 of section 19.

Having found that Branch 1 of section 19 is applicable to these records, I do not need to consider the applicability of Branch 2.

## **ADVICE TO GOVERNMENT**

### **General principles**

Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of

government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, cited above]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, cited above; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above]

### *The representations*

The Ministry submits that Records 7, 8 and 9 of Tab 2 are e-mails between Ministry staff in which advice is specifically being sought from a person with knowledge and experience about the matters in issue.

It submits further that Records 7 and 8 of Tab 2 form a continuum of e-mail correspondence that on its face deals specifically with advice or recommendations within the meaning of section 13(1). The Ministry notes that Record 7 and the originating e-mail in the e-mail chain in Record 8 (which is a duplicate of Record 7) specifically requested the advice of the addressee about a course of action to be taken about two separate but related issues. The Ministry indicates that the addressee of the e-mail, an individual within the Ministry who had knowledge and experience about how to handle these issues, responded by recommending a course of action and backing up the advice with an explanation that is inextricably tied to the advice.

The Ministry submits that Record 9 of Tab 2 is also e-mail correspondence that on its face consists of advice and recommendations within the meaning of section 13(1). The Ministry notes that the originating e-mail in the chain that forms this record specifically requested the advice of the addressee of a course of action proposed to be taken by staff or which the addressee had responsibility. In the response contained within the e-mail chain, the addressee recommended a course of action.

It is the Ministry's position that none of the exceptions in section 13(2) apply to the information contained in the records.

The appellant takes the position that the e-mails contain merely factual information of an administrative nature and do not suggest a course of action, which will ultimately be accepted or rejected by the recipient during the deliberative process.

### *Analysis*

Having reviewed the three records at issue under Tab 2, I agree that disclosure would reveal the advice or recommendations of a public servant within the meaning of section 13(1). In this case, some of the information in the e-mail chains consists of advice or recommendations and the rest of the information, if disclosed, would permit one to accurately infer the advice or recommendations given. I agree with the Ministry that none of the exceptions in section 13(2) apply to the information contained in the records.

Accordingly, subject to my discussion below under the heading "Exercise of Discretion", I find that Records 7, 8 and 9 of Tab 2 are exempt under section 13(1).

I note that these three e-mails were also copied to legal counsel and pertain to the matters discussed by legal counsel in the context of the solicitor-client relationship as confidential communications. Had the Ministry claimed the application of section 19 for these three records,



I would also have found it to apply as these records clearly form part of the “continuum of communications” for the purpose of keeping both administrative staff and legal counsel informed so that advice may be sought or given as required as described in *Balabel*.

## **PERSONAL PRIVACY**

In this case, I have determined that Records 12 and 13A of Tab 3 contain the personal information of the appellant and other identifiable individuals.

### **General principles**

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access. Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual’s personal privacy (see Order M-1146).

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption. (See Order PO-1764)

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

### *The representations*

The Ministry submits that Records 12 and 13A of Tab 3 contain the names of other individuals along with information that was provided by them in confidence (section 21(2)(h)). During the adjudication stage of the process, the Ministry raised a number of confidentiality concerns relating to these two records. The Ministry's primary concern is that discussion of any information in or about the records pertaining to this issue would reveal the identities of the individuals referred to in them. In light of these concerns, it is not possible to discuss the nature of the information or the impact of disclosure in any detail, other than to indicate that the Ministry's submissions suggest that the information in the records is highly sensitive (section 21(2)(f)).

The appellant's representations do not address this issue with any specificity.

### *Analysis*

Based on my review of the contents of the two records at issue in Tab 3, which contain serious concerns raised by the individuals referred to in them, I am satisfied that these individuals supplied the information to the Ministry in confidence and with an expectation that it would be maintained in confidence (section 21(2)(h)). Consequently, I find that the factor favouring non-disclosure in section 21(2)(h) applies to the information in Records 12 and 13A.

In order for personal information to be regarded as "highly sensitive" (section 21(2)(f)), it must be established that its release would cause excessive personal distress to the individuals involved. It is not sufficient that release might cause some level of embarrassment to those affected (Order P-434). I am persuaded by the Ministry's representations, by the objections to disclosure made by an affected person during the mediation stage of the process, and the contents of the records themselves, that disclosure of any information in these records would cause extreme personal distress to the individuals referred to in them. Accordingly, I find that the factor weighing against disclosure in section 21(2)(f) also applies in the circumstances.

In the overall context of the issues that have arisen between the Ministry and the appellant as discussed throughout this order, I find that the factors in sections 21(2)(f) and (h) carry significant weight in favour of non-disclosure.

Although the appellant generally feels aggrieved by the Ministry's treatment of him and the College, he has provided no evidence to support disclosure of this particular information. In the circumstances, I find that none of the factors favouring disclosure apply to the information contained in Records 12 and 13 of Tab 3.

Accordingly, I find that disclosure of the information in Records 12 and 13A of Tab 3 would constitute an "unjustified invasion" of the other individuals' personal privacy. I therefore find that the Ministry may refuse to disclose this information under section 49(b). Having come to this conclusion, I will consider whether the Ministry has properly exercised its discretion pursuant to section 49(b) under the heading "Exercise of Discretion" below.

### **EXERCISE OF DISCRETION**

As I noted above, the section 13 and 19 exemptions are discretionary. In addition, the discretionary exemption in section 49(a) must be considered for Record 36 of Tab 1 and section 49(b) for Records 12 and 13A of Tab 3. I found above that all of the records at issue qualify for exemption under one or more of these discretionary exemptions.

In these cases, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Accordingly, I must also review the Ministry's exercise of discretion in deciding to deny access to the information that I have found to be exempt. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

The appellant does not specifically address the Ministry's exercise of discretion in refusing access to the records at issue. As I indicated above, the appellant believes that the Ministry is acting in bad faith against him and the College and that its actions in refusing to re-register the College were motivated by a desire to gain a tactical advantage with respect to his civil action. While these comments refer to the legal matters that have arisen between the Ministry and the

College, it is arguable that he believes that the Ministry is continuing to act in bad faith by withholding the information he seeks.

The Ministry notes that at the request stage it carefully examined the records to determine what could be disclosed to the appellant. It notes further that during the mediation stage of the appeal, it exercised its discretion and released a number of the records originally at issue to the appellant and again as it was preparing its representations during the adjudication stage of the process. The Ministry submits that these decisions reflect its willingness to disclose records in the interest of public access to information.

However, with respect to section 49(b), the Ministry submits that in this case the appellant's interests in disclosure must be balanced against the interests of other individuals identified in the records. As well, the Ministry contends that in the context in which this request has been made, the importance of protecting solicitor-client privilege and internal communications pertaining to the situation outweighs the appellant's interests in access.

The Ministry did not specifically refer to section 49(a) in its submissions, and its general submissions on the exercise of discretion were somewhat brief. However, throughout its submissions, the basis for the Ministry's exercise of discretion not to disclose the records at issue was abundantly clear and I have considered this issue in light of the submissions as a whole.

In particular, I have taken into account the Ministry's explanations regarding the nature of the information contained in the records, and the context, as revealed through the submissions made by both parties, where there is an outstanding action and counterclaim between the Ministry and the appellant as well as on-going proceedings before the LAT. I have taken into consideration the Ministry's concerns as they pertain to the individuals identified in the records. I have also noted the Ministry's consideration of the fact that the appellant has already received a great deal of information through the LAT process and as a result of the Ministry's decisions to disclose additional information throughout the appeal process. I find that the Ministry's submissions as a whole take into account the appellant's interest in disclosure of the information contained in the records and balances that interest against the purpose of the exemptions and the interests to be protected.

In the circumstances, I find that the Ministry has exercised its discretion under sections 13, 19, 49(a) and (b) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. I have insufficient evidence before me to establish that the Ministry is acting in bad faith or that it is withholding the records at issue for an improper purpose. On the contrary, the history of this appeal indicates that the Ministry has actively worked to assist the appellant and has provided him with a significant amount of information.

Having determined that the Ministry's exercise of discretion was appropriate, I find that the records at issue are exempt as follows:

- Records 1-35 and 37 – 56 of Tab 1 are exempt under section 19;

- Record 36 of Tab 1 is exempt under section 19 and 49(a);
- Records 7, 8 and 9 of Tab 2 are exempt under section 13(1); and
- Records 12 and 13A of Tab 3 are exempt under section 49(b).

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_

Laurel Cropley

Adjudicator

\_\_\_\_\_  
November 26, 2007