



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2787**

**Appeal PA07-288-3**

**Ministry of Training, Colleges & Universities**



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## **NATURE OF THE APPEAL:**

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to certain fees charged by publicly funded colleges and universities in Ontario, from June 1, 2007 to the date of the request.

The Ministry issued a fee estimate in the amount of \$650, and on receipt of the 50% deposit, issued a time extension for an additional 30 days. The requester, now the appellant, appealed the decision and Appeal PA07-288 was opened by this office. This appeal was resolved when the appellant agreed to close his appeal on the understanding that the Ministry would issue its access decision in response to the request on or before a specified date. However, the Ministry did not issue the decision by that date, and the appellant filed a “deemed refusal” appeal. This office then opened Appeal PA07-288-2, which was resolved when the Ministry issued a decision respecting access to the responsive records.

In its decision, the Ministry denied access to the records in their entirety, claiming the application of the exemptions listed in sections 12 (Cabinet records), 19 (solicitor-client privilege) and 22 (information published or publically available) of the *Act*. The Ministry also provided the appellant and this office with an Index setting out the responsive records and the exemptions claimed for each. The appellant has appealed this decision, and the Commissioner’s office opened Appeal PA07-288-3.

During mediation, the Ministry reviewed its decision and issued a revised decision, providing access to a number of records, in whole or in part. The revised decision again cited the application of sections 12, 19 and 22 and noted that some records contained information that was not responsive to the request. The appellant indicated his wish to proceed with his appeal of the application of the exemptions in sections 12 and 19 to the records, as well as section 22, as applied to Record 1 only. He withdrew his appeal respecting the application of section 22 to the other responsive records, however. The appellant also continues to seek access to the “non-responsive” sections of Records 57, 60 and 102 in the appeal, but withdrew his request for access to the remaining “non-responsive” severances from the other records at issue.

No other mediation was possible, and the file was moved to the adjudication stage of the appeals process. I sought and received the representations of the Ministry, initially, a copy of which was shared with the appellant, along with a Notice of Inquiry. Portions of the Ministry’s representations were withheld on the basis that they contained information which is confidential. Following the submission of the Ministry’s initial representations, it disclosed to the appellant complete copies of Records 164, 170, 171 and 173. These records are, accordingly, no longer at issue in the appeal.

The appellant also provided me with representations in response to the Notice, which I shared in their entirety with the Ministry. In his representations, the appellant accepts the Ministry’s position that portions of Records 57, 60 and 102 are concerned with issues that are completely unrelated to the subject matter of his request. As a result, the appellant indicates that he is no longer seeking access to this information. I then sought and received further representations from the Ministry by way of reply. In its reply submissions, the Ministry decided to disclose to

the appellant a complete copy of Record 159, and it has been removed from the scope of this appeal, as well.

## **RECORDS:**

The records at issue are described in the Index of Records provided to the appellant by the Ministry during the mediation stage of the appeal.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry takes the position that all of Record 72 is exempt from disclosure under the mandatory exemption in the introductory wording to section 12(1) and each of sections 12(1)(a), (b) and (d). Because section 12(1) is a mandatory exemption, I am also required to consider whether the information in this document falls within the ambit of any of the other subsections of section 12(1).

Sections 12(1)(a), (b) and (d) read:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331].

A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the

drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry submits that the disclosure of the contents of Record 72 would reveal the actual record used to brief the Minister of Training, Colleges and Universities on certain issues relating to the formulation of a new tuition policy framework. The record indicates that the Ministry was required to report back to the Cabinet, as well as the Education Policy Committee (EPC), Management Board of Cabinet (MBC) and, ultimately, the Policy and Priorities Board (PPB). It indicates that the briefing note which forms the attachment to Record 72, and the comments contained in the covering email memorandum thereto, would reveal that Cabinet and its committees had considered and made a determination on the issues addressed in the document. As a result, the subject matter of Record 72 was discussed at meetings of the Cabinet and its committees and the disclosure of this record would reveal the substance of those deliberations.

I have reviewed the contents of the covering email and the briefing note that comprise Record 72 and find that their disclosure would reveal the substance of the deliberations of the Executive Council and its committees, specifically, the EPC, MBC and the PPB. As such I find that Record 72 falls within the ambit of the introductory wording of section 12(1).

### **INFORMATION AVAILABLE TO THE PUBLIC**

The Ministry submits that Record 1 is a publicly available document that can be accessed on the internet from the website maintained by McMaster University. It provided the appellant with the URL for a PDF version of this particular document and the specific page numbers where it exists. The appellant appears to have obtained access to it, albeit not in the format which he desires because the “file is a compilation of scanned images of the pages of various documents” and “the text of the documents within the PDF file is not searchable” using “commonly available Internet search engines.” The appellant continues to seek access to a copy of the version of Record 1 that the Ministry maintains as it may “have handwritten notes on it or that it might have been part of a group of records that is responsive, the remainder of which may not have been disclosed.”

Section 22(a) states:

A head may refuse to disclose a record where,

the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a “regularized system of access” exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a “regularized system of access” include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The appellant submitted that the document was not recoverable through the use of a search engine because it was in the form of a PDF document from a scanned record. The Ministry did not, until the submission of its original representations, assist the appellant in locating the document by proving its specific location on the McMaster university website. It has, however, now done so and the appellant has obtained access to it in its original form. I note that the Ministry copy of the document, which was provided to the Commissioner’s office during the processing of the appeal, is in the same format and does not contain any additions or handwritten notes.

In my view, section 22(a) applies to Record 1 because it is clearly publicly available through access to the McMaster University website. However, owing to the fact that the appellant was unable to locate a copy of the record using a search engine, I find that until such time as the Ministry provided the URL and location of the document, it was not publicly available for the purposes of section 22(a) and would not, at that time, have been exempt under this section. The Ministry is urged to specifically refer to the publicly-available location through the use of a URL or other means when responsive documents exist on an internet website, rather than relying on the availability of a search engine to assist in locating the record.

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry claims the application of the solicitor-client exemption in section 19 to the remaining records. This section reads:

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

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

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>) 257 (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.)].

***Litigation privilege***

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

. . . . .

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

**Branch 2: statutory privileges**

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution 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 legal advice.”

### ***Statutory litigation privilege***

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

### **Representations of the parties**

The Ministry has broken down the records to which it has applied the section 19 exemption into four categories of documents which fall within various aspects of the exemption, depending upon the type of record. These are described as:

1. Communications between various clients and Ministry counsel for the purpose of seeking, formulating and/or providing legal advice – Records 2, 4, 5, 10, 25, 28, 49, 57, 60, 64, 90, 91, 109, 140, 141, 150, 152, 158, 178, 180, 185, 197 and 198;
2. Communications between various clients and Ministry counsel relating to the seeking and provision of legal advice in relation to the preparation of documents, specifically briefing, issue and decision notes, responses and approaches to media requests, option papers, memoranda, a chronology and “question and answers” – Records 9, 11, 16, 21, 22, 23, 24, 40, 41, 42, 44-47, 48, 59, 60, 66, 77, 82, 84, 85, 86, 88, 89, 93, 105, 124, 129, 130, 134, 153(1), 156, 160, 161, 169, 172, 174, 176, 179, 184, 187, 188, 189, 190, 191, 192, 193 and 194;
3. Communications between counsel, either within the Ministry’s own Legal Services Branch or at the Ministry of the Attorney General’s Crown Law Office, Civil (CLOC) – Records 13, 20, 21, 22, 26, 48, 51, 52, 65, 66, 74, 75, 76, 90, 95, 99, 137, 138, 146, 147, 148 and 151; and
4. Records covered by litigation privilege or prepared by or for Crown counsel for use in giving legal advice or in contemplation of litigation in relation to:
  - i) Ancillary Fees - Records 31, 58, 69, 70, 78, 92, 107, 111, 112, 122, 123, 126, 127, 128, 132, 133, 143, 153 and 155;
  - ii) Chronology and Q and As – Records 24, 41, 42, 59 and 179;
  - iii) Letters between Counsel for the Ministry and the Plaintiffs – Records 55, 131 and 133; and
  - iv) Miscellaneous – Records 155, 162, 167, 168, 175, 181, 182 and 183.

The Ministry provided me with detailed representations on the application of section 19 to each of these categories of records. The majority of these submissions cannot be reproduced in this order as they outline and describe confidential information about the nature and subject matter of the records to which the exemption was applied. As a result, I am unable to describe the Ministry’s representations in greater detail.



The appellant has provided me with specific representations on the application of section 19 to Records 28, 57, 60, 155, 159, 164, 169, 170, 171, 173 and 174, despite the fact that Records 159, 164, 170, 171 and 173 were already disclosed to him. He objects to the Ministry's decision to withhold them primarily on the basis that these records often represent communications to and from Ministry staff who are not lawyers. The appellant also questions whether the Ministry properly applied the litigation privilege aspect of the section 19 exemption to the records listed in Category 4 above.

### **Analysis and Findings**

The records responsive to the request in this appeal involve the Ministry's response to a letter dated June 5, 2007 addressed to the Board of Governors of George Brown College from counsel representing students in a class action lawsuit. Attached to the letter was a Statement of Claim indicating that the lawsuit was being initiated against all Ontario community colleges. The covering letter dated June 5, 2007 also stated that the Plaintiffs intended to add the Ministry as a co-defendant in the action. The action was served simultaneously with the issuance of a press release by the organization represented by the appellant. As a result, the Ministry became aware of the existence of the class action proceeding on June 5, 2007 and of the Plaintiff's intention to add the Ministry as a co-defendant only at that time.

The responsive records were created by the Ministry as a result of the issuance of the legal proceeding and involved members of the Ministry's Legal Services Branch from the outset. These records include various draft correspondence, notes of conversations that took place between the Ministry's counsel and Ministry staff, legal opinions about various aspects of the issues identified by Ministry staff, handwritten notes made by counsel and an assortment of internal briefing documents designed to keep the Minister and various staff apprised of the Ministry's positions and the progress of the lawsuit. The Ministry compiled the records in a chronological fashion, by the date of their creation, and as such are numbered consecutively depending on when they were received or prepared by the Ministry.

Many of the records, particularly those prepared by non-legal Ministry staff at the beginning of the time period covered by the request, cannot properly be considered to be communications between a solicitor and his or her client; nor were they prepared by or for Crown counsel for use in litigation. Rather, these records represent the Ministry's initial reaction to the proposed class action lawsuit, prior or parallel to the involvement of legal counsel.

I will proceed to examine each record, in whole or in part, to determine whether the information they contain qualifies for exemption under either Branch 1 or Branch 2 of section 19.

### **Record 2**

The handwritten notes which have been severed from Record 2 were made by legal counsel following her review of the contents of the letter. I find that these notes qualify for exemption

under the litigation privilege aspect of Branch 1 of section 19 as they represent information recorded by the solicitor in contemplation of litigation.

### **Record 3**

Only a small portion of Record 3 has been withheld from disclosure under section 19. I find that this excerpt represents part of the continuum of communications between a solicitor and her client and is, accordingly, exempt under the communication privilege aspect of Branch 1 of section 19.

### **Record 4**

Record 4 is a lengthy email chain involving communications between various Ministry counsel and Ministry staff regarding the position being taken in response to the announcement of the proposed class action lawsuit. I find that it qualifies for exemption under the solicitor-client communication aspect of Branch 1 of section 19.

### **Record 5**

Record 5 is an email chain passing between various Ministry staff, none of whom are counsel. As a result, I find that Record 5 does not qualify for exemption under section 19.

### **Record 9**

Record 9 is an email communication between Ministry staff requesting that a briefing note be drafted prior to a meeting with the Minister the next day. While Ministry counsel received a carbon copy of the email, it was not directed to them and did not seek their legal advice. Accordingly, I find that Record 9 does not qualify for exemption under section 19.

### **Record 10**

Record 10 is an email communication from a Ministry staff person to Ministry counsel to which is attached another email describing the progress of the proposed class action lawsuit. I find that this document qualifies for exemption under the solicitor-client communication privilege aspect of section 19 as the staff person is clearly seeking the advice of the counsel to whom the email is directed.

### **Records 11, 12 and 25**

Record 11 is an email from a Ministry staff person to two Ministry counsel requesting their attendance at a meeting with the Minister. In my view, this represents part of the continuum of communications between a solicitor and a client and qualifies for exemption under the solicitor-client communications aspect of Branch 1 of section 19. The briefing note which is attached to Record 11 does not qualify for exemption under section 19, however.

Record 12 is a brief email regarding the attendance of the Ministry counsel at the meeting with the Minister and also qualifies for exemption under the communication privilege aspect of section 19.

Record 25 is a further communication between client and solicitor regarding arrangements for the meeting referred to above. This record also qualifies for exemption under the same principles as those relating to Records 11 and 12.

### **Record 13**

Record 13 is an email sent between Ministry counsel relating to the conduct of the litigation. I find this record to be exempt under the communication privilege aspect of Branch 1 of section 19.

### **Record 16**

Record 16 is an email chain representing communications between Ministry staff and counsel regarding the composition of an Issue Note. The copy of the Issue Note which is attached to the email chain includes the legal advice provided by counsel and also qualifies for exemption under the solicitor-client communication privilege component of Branch 1 of section 19.

### **Record 20**

Record 20 is an email chain between two Ministry counsel respecting the commencement of the Ministry's involvement in the litigation. This record clearly qualifies for exemption under the litigation privilege aspect of Branch 1 of section 19.

### **Records 21 and 22**

These documents are emails sent to and from Ministry staff and Ministry legal counsel in which counsel is asked to provide (and does so) legal advice respecting the drafting of a memorandum. I find that these records are exempt from disclosure under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Record 23**

Record 23 is an email with a number of attachments sent by Ministry counsel to a Ministry staff person. I find that it represents part of the continuum of communications passing between solicitor and client and is exempt under Branch 1 communication privilege.

**Records 24 and 42 (identical in content)**

This document is an email chain setting out a series of question and answers which has been vetted and commented upon by Ministry counsel. I find that this record qualifies for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19.

**Record 26**

This is an internal memorandum received by Ministry counsel from the Crown Law Office-Civil (CLOC) of the Ministry of the Attorney General relating to the class action litigation. This record also falls within the ambit of litigation privilege under Branch 1 of section 19 as it was prepared specifically for the dominant purpose of litigation.

**Record 28**

Record 28 is an email chain between two Ministry staff who are not legal counsel. The record does not contain legal advice received from counsel and does not qualify for exemption under section 19.

**Record 31**

Similarly, Record 31 is an email received by one Ministry staff person from another in response to a request for some specific information. I find that this does not qualify for exemption under section 19.

**Record 39**

This email message describes certain communication issues within the Ministry but does not relate to the conduct of the litigation or to the solicitor-client relationship. I find that it does not qualify for exemption under section 19.

**Record 40**

Record 40 is a draft version of a memorandum to College Presidents from the Deputy Minister respecting the Ministry's ancillary fees policy. The memorandum is dated June 6, 2007 and does not, on its face, include any legal advice received from Ministry counsel relating to this issue or to the litigation. As such, I find that it does not qualify for exemption under section 19.

**Record 41**

Record 41 is pages 1 and 3 of the questions and answers attached to Records 24 and 42, which include the notation that they were "prepared for legal counsel for use in giving legal advice and/or use in litigation". I find that because this record includes the comments made by counsel, it is exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Record 43**

Record 43 is an email to which is attached the press release issued by the Plaintiffs in the class action lawsuit. The email is sent by a Ministry staff member and is addressed to a number of Ministry employees, including several counsel. I find that it does not represent a confidential communication between a solicitor and her client and does not qualify for exemption under any aspect of either Branch 1 or Branch 2 of section 19.

### **Records 44, 45, 46 and 47**

These documents are various draft versions of an Issue Note dated June 6, 2007. In my view, this record does not contain legal advice nor was it prepared for use in litigation. Its purpose was to brief various Ministry staff and the public of the issue and the Ministry's response to it. I find that it does not qualify for exemption under section 19.

### **Record 48**

Record 48 is an email chain passing between two Ministry counsel regarding the conduct of the defence of the class action lawsuit, at its initial stage. This document clearly qualifies for exemption under the litigation privilege aspect of Branch 1 of section 19 as it was prepared for the dominant purpose of contemplated litigation.

### **Record 49**

Record 49 is a series of emails which are attached to a legal opinion provided by Ministry counsel respecting the merits of the class action lawsuit. Clearly, such a document qualifies as a confidential solicitor-client communication which falls within the ambit of Branch 1 of section 19.

### **Record 51**

Record 51 is a handwritten note of a conversation between two Ministry counsel regarding the class action lawsuit. Again, I find that it qualifies for exemption under the litigation privilege aspect of Branch 1 of section 19 as it was prepared for the dominant purpose of litigation.

### **Record 52**

This email communication between Ministry counsel was also prepared for the dominant purpose of litigation and is, accordingly, exempt under litigation privilege, Branch 1.

### **Record 55**

Record 55 is a covering letter from the solicitors for the Plaintiffs in the class action lawsuit seeking to initiate settlement discussions with the Ministry. Communications between opposing

counsel cannot qualify for either litigation or communication privilege and this document is not exempt under section 19, therefore.

### **Records 57 and 60**

The sole portion of Records 57 and 60 which remains at issue in this appeal does not represent a communication between a solicitor and his or her client, nor does it represent a document that was prepared for use in litigation or whose dominant purpose was litigation. In my view, this information does not qualify for exemption under section 19.

### **Record 58**

Record 58 is an email sent from one Ministry staff person to another requesting that some “fact checks” be undertaken regarding certain information to be included in a document. I do not agree that this record qualifies for exemption under section 19.

### **Record 64**

Record 64 is a confidential communication between a Ministry staff person and one of its counsel. I find that it falls within the ambit of the continuum of communications between solicitor and client and is exempt from disclosure on that basis.

### **Record 65**

Record 65 is a proposed communication which includes certain handwritten notations made by Ministry counsel in which she suggests certain changes to the document. I find that this record is exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Record 66**

Record 66 is an email attached to a lengthy Draft Decision Note which is addressed to a number of individuals, including Ministry legal counsel, seeking their comments on the document. I find that it qualifies as a confidential communication between a client and her counsel requesting the provision of a legal opinion or legal advice. Accordingly, this document qualifies for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Record 69**

Record 69 is an email chain between Ministry staff who are not counsel. This record does not qualify for exemption under section 19.

### **Records 70 and 78**

Similarly, Records 70 and 78 are email chains with an attached table regarding ancillary fees which passed between Ministry staff who are not counsel. Accordingly, Records 70 and 78 do not qualify for exemption under section 19.

### **Records 74, 75 and 76**

These documents are emails passing between Ministry counsel in which they discuss the conduct of the litigation at issue in the appeal. I find that they are exempt from disclosure under the litigation privilege aspect of Branch 2 of section 19.

### **Record 77**

Record 77 is an email attached to a draft Communications Options paper which is addressed to a number of individuals, including Ministry counsel, seeking their comments on the document. I find that it qualifies as a confidential communication between a client and her counsel requesting the provision of a legal opinion or legal advice. Accordingly, this document qualifies for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Record 82**

Record 82 is an email chain attached to the Draft Decision Note described in Record 66 representing the comments made by, among others, legal counsel on the draft note. I find that this record is exempt from disclosure under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Records 84, 85, 86, 87, 88, 89 and 93**

These documents are various draft versions, along with certain email communications about their circulation, of a Communications Options paper. Ministry counsel was among those who were consulted about its contents and asked to provide comments from a legal perspective about the message contained therein. I find that these documents contain legal advice provided by counsel and qualify as solicitor-client communications under Branch 1 of section 19.

### **Records 90, 91 and 96**

These emails are communications between a Ministry solicitor and her client and form part of the continuum of communications arising out of that relationship. They qualify for exemption under the solicitor-client communication aspect of Branch 1 of section 19.

### **Record 92**

This is an email chain and a lengthy selection of emails passing between Ministry staff and individuals employed at various post-secondary education institutions in Ontario. I find that this document does not qualify for exemption under section 19 as none of the parties to the communications are legal counsel.

### **Record 95**

Record 95 is an email communication from one Crown Counsel to two others seeking their input into a proposed draft letter. I find that this document qualifies for exemption under the litigation privilege aspect of Branch 1 of section 19.

### **Record 99**

Record 99 is an email communication between Crown Counsel in which they discuss an issue present in the litigation that was then underway. I find that this document qualifies for exemption under the litigation privilege aspect of Branch 1 of section 19.

### **Record 105**

Record 105 is an email addressed from a Ministry staff person to several others. In addition, a Ministry counsel was carbon copied on the document, along with two other Ministry staff. In my view, the author of the email and the attached document is not seeking legal advice on its contents per se. Rather, he is seeking the input of other non-legal Ministry staff on the contents of the attached draft document. As such, it does not qualify for exemption under section 19.

### **Record 107**

Record 107 is a cover email written by a Ministry staff person to several others seeking their views on an attached briefing note. As none of these individuals are Crown Counsel, I find that section 19 has no application to this record.

### **Record 108**

Record 108 is an email from Crown Counsel to a Ministry staff person to which is attached a draft paper that contains her legal advice on a particular issue. I find that this document represents a confidential communication between a solicitor and her client and that it qualifies for exemption under Branch 1 of section 19.

### **Record 109**

Similarly, Record 109 is an email with a series of attachments sent by Crown Counsel to her clients in the Ministry offering legal advice on an issue pertaining to the litigation. I find that



this document represents a confidential communication between a solicitor and her client and that it qualifies under Branch 1 of section 19.

### **Record 111**

This email was written by one Ministry staff person to another. Neither are legal counsel and the record does not contain legal advice. Accordingly, section 19 has no application to it.

### **Record 112**

Record 112 is a series of emails and memorandum passing between Ministry staff who are not Crown Counsel regarding a draft memorandum on the subject of ancillary fees. I find that these documents do not fall within the ambit of section 19 as they were not prepared for use in litigation and do not represent communications between solicitor and client.

### **Records 122, 123, 124, 126, 127, 128, 132, 133 and 143**

These are records relating to certain research that was conducted by Ministry staff relating to the ancillary fees issue. The documents were prepared by Ministry staff and incorporated information about this issue into a memorandum directed to the Minister, which is represented in draft form in Record 124. None of these records were prepared by or for Crown Counsel for the dominant purpose of litigation; rather, the information was compiled in order to brief the Minister on the details of the issue. These records are not, accordingly, exempt from disclosure under section 19.

### **Record 129**

Record 129 is an email attached to a draft option paper soliciting the comments of a number of Ministry staff, including legal counsel. I find that this record is exempt from disclosure under the solicitor-client communication privilege aspect of Branch 1 of section 19 as it represents a communication between a solicitor and client in which the client is seeking the lawyer's advice on a legal issue.

### **Records 130 and 134**

Records 130 and 134 are the final version of Record 124, along with a covering email from a Ministry staff person who is not a lawyer. In my view, because of the contents of the email, this document does not qualify for exemption under section 19 as it does not represent a confidential communication between a solicitor and a client in which the client is seeking the lawyer's legal advice.

### **Records 131 and 135**

Records 131 and 135 are FAX cover pages and two letters addressed to counsel for the plaintiffs in the lawsuit. I find that these records cannot qualify for exemption under section 19 as any privilege that may have existed in them was waived since they are addressed to counsel who are adverse in interest to that of the Ministry.

### **Records 137 and 138**

These records are emails passing between Crown counsel, the contents of which relate to the conduct of the litigation. As a result, they qualify for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19 as part of the continuum of communications relating to the lawsuit.

### **Records 139, 140 and 141**

These records are a series of emails relating to the Ministry's reaction to a story in the media. The communications involved Crown counsel and request her advice on the response which is to be provided on behalf of the Ministry. Accordingly, Records 139, 140 and 141 are exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19.

### **Records 146, 147, 148, 150, 151, 152 and 153**

Each of these records are emails and memorandum passing between Crown Counsel which relate directly to the conduct of the litigation. As a result, they qualify for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19 as part of the continuum of communications relating to the lawsuit.

### **Records 155, 156, 157, 160, 161 and 162**

These are a series of emails between Ministry staff that followed immediately after the announcement of the lawsuit and the press conference which took place on June 5, 2007. None of the individuals involved in these communications were lawyers and I find that these records do not, accordingly, qualify for exemption under section 19 as they are not communications between a solicitor and a client and were not made in contemplation of litigation.

### **Record 158**

Record 158 is an email chain containing legal advice rendered by the Ministry's Director of Legal Services to various Ministry staff. I find that it represents a confidential communication passing from solicitor to client relating to a legal issue and that it qualifies, therefore, for exemption under section 19.

### **Records 163, 165, 166, 167 and 168**

These records are emails which document the initial response of certain non-legal Ministry staff to the lawsuit. The records describe the Ministry's reaction to the lawsuit from the perspective of its communications staff. These records are not exempt under section 19.

### **Record 169**

Record 169 is an email in which a Ministry staff person describes the legal advice provided by Ministry counsel. I find that the disclosure of this record would reveal a confidential communication between a solicitor and her client and that it qualifies under Branch 1 of section 19 as a privileged communication.

### **Records 172 and 174**

These are email communications between Ministry staff to which are attached a draft memorandum from the Ministry to the presidents of Ontario's community colleges. I find that neither of these records qualifies for exemption under section 19.

### **Records 175 and 176**

These are email communications passing between staff at the Ministry who were involved in developing a communications strategy on its behalf. I find that these records do not qualify for exemption under either branch of section 19.

### **Record 178**

Record 178 is a legal opinion provided by Crown Counsel to Ministry staff. Clearly, this document represents a confidential communication about a legal matter passing between a solicitor and her client. Accordingly, I find that it is exempt from disclosure under the solicitor communication privilege aspect of Branch 1 of section 19.

### **Records 179, 180, 181, 182, 183 and 184**

Each of these documents was prepared by the Ministry in response to the lawsuit initiated against the colleges pertaining to the ancillary fees issue. The Ministry's position with respect to this issue is canvassed in these documents and its "message" in response to the lawsuit is also discussed. Despite the fact that legal counsel was carbon-copied on one of the emails comprising the chain in Record 184, counsel's legal opinion was not sought or given. I find that section 19 has no application to these documents.

### **Records 185, 186 and 187**

These are emails in which Ministry staff specifically request, and receive a response from Crown Counsel to meet and discuss a specific topic related to the litigation. These communications fall within the ambit of solicitor-client communication privilege under Branch 1 of section 19 and are, accordingly, exempt from disclosure under section 19.

### **Records 188, 189, 190, 191, 192, 193 and 194**

These records are a series of emails to which are attached draft versions of a media response. Each of these documents include comments of a legal nature made by Crown Counsel in providing legal advice to the Ministry's communications staff who were drafting the document. In my view, these records contain confidential communications about a legal issue passing between a solicitor and her client and they qualify, accordingly, under Branch 1 of section 19.

### **Record 195**

The undisclosed portion of Record 195 consists of an email communication from Crown Counsel to various Ministry staff in which she comments on a draft document. This record contains confidential communications about a legal issue passing between a solicitor and her client and it qualifies for exemption, accordingly, under Branch 1 of section 19.

### **Records 197 and 198**

These are email communications passing between Crown Counsel and Ministry staff regarding arrangements for a meeting with another Crown Counsel from the Ministry of the Attorney General's Crown Law Office-Civil. These represent part of the continuum of communications between a solicitor and her client and are exempt under the communication privilege aspect of Branch 1 of section 19.

## **ORDER:**

1. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 4, 10, 11 (other than the briefing note attached), 12, 13, 16, 20, 21, 22, 23, 24, 25, 26, 41, 42, 48, 49, 51, 52, 64, 65, 66, 72, 74, 75, 76, 77, 82, 84, 85, 86, 87, 88, 89, 90, 91, 93, 95, 96, 99, 108, 109, 129, 137, 138, 139, 140, 141, 146, 147, 148, 150, 151, 152, 153, 158, 169, 178, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197 and 198.
2. I order the Ministry to disclose to the appellant, by July 9, 2009 but not before July 3, 2009, copies of Records 5, 9, the briefing note attached to Record 11, Records 28, 31, 39, 40, 43, 44, 45, 46, 47, 55, 57, 58, 60, 69, 70, 78, 92, 105, 107, 111, 112, 122, 123, 124, 126, 127, 128, 130, 131, 132, 133, 134, 135, 143, 155, 156, 157, 160, 161, 162, 163, 165, 166, 167, 168, 172, 174, 175, 176, 179, 180, 181, 182, 183, 184 and 189.

3. In order to verify compliance with the terms of Order Provision 2, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

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

Donald Hale  
Adjudicator

June 4, 2009 \_\_\_\_\_