Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-2997

Appeal PA09-447-3

Ministry of Health and Long-Term Care

September 28, 2011

Summary:

The appellant sought records in relation to the "Joint Review Panel" convened in 1993-1994. The Ministry of Health and Long-Term Care disclosed a number of records and withheld others under sections 19 and 12(1). Section 12(1) applies only to two paragraphs of one record. Section 19(1) applies to the records for which it was claimed. The ministry was ordered to disclose portions of one record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 12(1), 12(1)(b), 19(a).

Orders and Investigation Reports Considered: Orders PO-2467, PO-2940.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> For the timeframe 1994-2009: any policy analyses, briefing notes, deliberations, correspondence, responses and other documents held by the Ministry in relation to the "Joint Review Panel" convened in 1993-1994 & chaired by [a named individual].

[2] The ministry located responsive records and issued a decision granting partial access to them. The ministry withheld access to certain records in whole or in part, pursuant to the mandatory exemptions in sections 12 (cabinet records) and 21(1) (personal privacy) and the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. The Ministry also noted that some records were non-responsive. The Ministry included two indices with its decision. It also indicated that the fee for the records was $459.00.

[3] The appellant appealed the ministry's fee decision and requested a fee waiver. In turn, this office opened Appeal PA09-447 to deal with the fee issues. The ministry subsequently agreed to waive the fees, which resolved Appeal PA09-447. The appellant later filed a "Failure to Disclose Records Appeal" and this office opened Appeal PA09-447-2 to deal with that matter. The ministry subsequently disclosed the records that were not subject to an exemption claim to the appellant, which resolved Appeal PA09-447-2.

[4] The appellant appealed the ministry's decision to deny access to the remaining records and this office opened the current appeal, PA09-447-3, to deal with this matter.

[5] During mediation, the ministry clarified that the 10-page index listing 114 records is from its Health Services Branch (HSB) and the one-page index listing 11 records is from its Legal Services Branch (LSB).

[6] Also during mediation, the appellant confirmed that he is not taking issue with the severances applied to the records under section 21 of the *Act* or those identified as non-responsive.

[7] Therefore LSB records 2, 5, 6, and 9, and HSB records 46, 47, 72, 73, 97, 105, 106, 110 are no longer at issue in this appeal, as the only severances made to them involved information claimed to be exempt under section 21(1) or to be not responsive.

[8] No further mediation was possible, and the file was forwarded to the adjudication stage of the appeal process. During my inquiry into the appeal, I sought and received representations from the ministry and the appellant, which were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

[9] The following records remain at issue in this appeal, as per the ministry's two indexes.

[10] HSB: records 107 and 108, in their entirety, pursuant to section 19.

[11] LSB: records 3, 7 and 8, in their entirety and record 11 in part pursuant to section 19 and record 10, in its entirety, pursuant to section 12.

ISSUES:

Issue A: Does the mandatory exemption at section 12(1) apply to LSB record 10?

Issue B: Does the discretionary exemption at section 19(a) and/or (b) apply to LSB records 3, 7, 8, 11 and HSB records 107 and 108?

Issue C: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the mandatory exemption at section 12(1) apply to LSB record 10?

[12] The ministry claims that section 12(1)(b) applies. I have also considered whether the record is exempt pursuant to the introductory wording of the section 12 exemption. Section 12(1)(b) states:

> 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 record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

Section 12(1): introductory wording

[13] 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)[1].

[14] 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[2] .

[15] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations[3] .

Section 12(1)(b)

[16] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made[4].

Representations

[17] The ministry's initial representations on the application of section 12(1)(b) were very brief:

> The Ministry submits that LSB record 10 falls squarely within s. 12(1)(b) of the Act, as it clearly consists of a Cabinet submission.

[18] After reviewing the ministry's representations, the appellant submits that "there is an insufficient factual record for the ministry to invoke the s. 12(1)(b) exemption." The appellant points out that the ministry bears the burden of proof in establishing the application of the exemption. He submits that the ministry must provide evidence that the record contains policy options or recommendations submitted or prepared for submission to the Executive Council or its committees, and an assertion by the ministry's counsel is no substitute for evidence. Noting that the Executive Council for which the record was prepared no longer exists due to the change in government, the appellant submits that the ministry should have "filed an affidavit containing its 'institutional memory'…" The appellant submits that the ministry failed to meet its burden under section 53 of the *Act*.

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[1] Orders P-22, P-1570, PO-2320
[2] Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707, PO-2725
[3] Order PO-2320
[4] Order PO-2320, PO-2554, PO-2677 and PO-2725

[19] In reply, the ministry indicates that LSB record 10 is "in fact a cabinet document." The ministry states:

> [P]ortions of the record, in particular page 4, were not only prepared for, but were actually submitted to a Cabinet committee. They formed part of the package that was provided to the committee for its deliberation on the issue described in the record.
>
> …
>
> The ministry acknowledges that the appellant cannot see the record at issue, and therefore cannot comment accurately on its contents. However, the Adjudicator does have a copy of it and, in the Ministry's view, has sufficient evidence based on the actual contents of the record to conclude that it is indeed a cabinet record.
>
> The 'evidentiary proof' that the record was prepared for and submitted to a Cabinet committee is reflected not only in the 'appearance' of the record, but its contents as well. In particular, page 3 of the record is evidence that the contents of the record were considered by a Cabinet committee.

[20] The ministry notes that pages 1 to 3 were not actually submitted to Cabinet, but refers to Order PO-2725, which the ministry submits, held that a record may qualify for exemption under the introductory wording of section 12(1) where its disclosure would reveal the substance of Cabinet's deliberations. The ministry concludes:

> [T]he disclosure of the responsive portions of this record would reveal Cabinet's deliberations, and the basis of those deliberations, regarding the issue described in the record. As such, the Ministry submits that record 10 is also exempt under the introductory words of s.12(1).

Analysis and findings

[21] After reviewing the submissions made by both parties and LSB record 10, I find that pages 1, 2 and 3 of the record are not exempt under the introductory wording of section 12(1) or section 12(1)(b). However, I am satisfied that disclosure of the two paragraphs withheld on page 4 would reveal the substance of the deliberations of the Executive Council or one of its committees.

[22] As the ministry notes in its submissions, the record itself forms part of the evidence on which I will base my decision. It is clear from the record that it was prepared for submission to the Executive Council or one of its committees. I am satisfied that the record demonstrates a clear intention that it go before Cabinet. It is

not sufficient that the record simply be a "Cabinet document"; there must be some evidence that its disclosure would reveal the substance of the deliberations of Cabinet or would otherwise be exempt under sections 12(1)(a) through (f). I am satisfied that the two paragraphs on page four of the record, while brief, would reveal the substance of deliberations of the Executive Council or its committees, and they are, therefore, exempt under the introductory wording of section 12(1).

[23] The first two pages of the record are simply signed submission review/approval forms. In Order PO-2467, after reviewing the ministry's submissions on the application of section 12(1) to submission review/approval forms in that appeal, Adjudicator Bernard Morrow stated:

> I do not find the Submission Review/Approval forms exempt under section 12(1). In my view, these four pages merely confirm the names of senior Ministry staff who appear to have reviewed the Business Case and CMAR documents at some point during the review and approval process. They do not reveal the substance of any deliberations of the Executive Council or its committees and they do not contain policy options or recommendations. Accordingly, I do not find the Submission/Review Approval forms exempt under either the introductory wording in section 12(1) or under section 12(1)(b).

[24] In accordance with Adjudicator Morrow's conclusions in Order PO-2467, I find that neither of these records reveals the substance of the deliberations of the Executive Council or one of its committees, nor would their disclosure permit the drawing of accurate inferences with respect to these deliberations. Nor do these pages contain policy options or recommendations. Accordingly, I find that pages 1 and 2 of LSB record 10 are not exempt under the introductory wording of section 12(1) or under section 12(1)(b).

[25] Page three is a memorandum of an administrative nature. I am not satisfied that the contents of this memorandum would reveal the substance of the deliberations of the Executive Council or one of its committees, or that its disclosure would permit the drawing of accurate inferences with respect to these deliberations. Nor does this page contain policy options or recommendations. It is not possible to say more about this page of the record without revealing its contents. As a result of my review of page 3 of the record, I find that it is not exempt under the introductory wording of section 12(1) or under section 12(1)(b).

[26] In summary, I find that only the two paragraphs on page 4 of LSB record 10 are exempt under the introductory wording of section 12(1).

Issue B: Does the discretionary exemption at section 19(a) and/or (b) apply to LSB records 3, 7, 8, 11 and HSB records 107 and 108?

General principles

[27] Sections 19(a) and (b) 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

[28] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[29] 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[5].

[30] The ministry submits that LSB records 3, 7, 8, 11 and HSB records 107 and 108 are exempt under the Common-law solicitor-client communication privilege [section 19(a)].

Solicitor-client communication privilege

[31] 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[6].

[32] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation[7].

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[5] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) [also reported at [2006] S.C.J. No. 39)]
[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)
[7] Orders PO-2441, MO-2166 and MO-1925

[33] 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[8]

[34] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice[9].

[35] 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[10].

[36] The ministry submits that LSB records 3, 7 and 8 and HSB records 107 and 108, in their entirety comprise "confidential communications to and from legal counsel, counsel's notes, and legal opinions." In particular, the ministry states that LSB record 3 is a legal opinion and thus falls squarely under the section 19(a) exemption.

[37] The ministry states that LSB records 7 and 8 and HSB records 107 and 108 "are all communications to and from counsel in which counsel either provides advice, or requests or receives information for the purpose of providing advice. As such they all fall within the 'continuum of communications' between counsel and instructing clients." The ministry relies on the findings in Order MO-1454 which found that it is "reasonable to assume that internal communications to and from an institution's legal department are confidential." The ministry notes that HSB record 108 is marked as privileged and confidential.

[38] The ministry takes the position that LSB record 11 is partially privileged because it contains counsel's handwritten notes. The ministry states:

> These handwritten notes clearly relate to and were used in providing confidential legal advice on the issues referred to in the notes. As the IPC explained in PO-1742-I, counsel's notes for use and reference in providing legal advice fall within the 'continuum of communications' and can be described as part of a solicitor's 'working papers'."

[39] The appellant does not contest the ministry's claim that the records are subject to solicitor-client privilege. Rather, referring to the decision of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[11]

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[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[11] Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23.

(*Criminal Lawyers' Association*), the appellant takes the position that the ministry failed to consider the public interest in exercising its discretion to withhold records under section 19. I will address the ministry's exercise of discretion below. Before doing so, I must first determine whether section 19 is applicable in the circumstances.

[40] Having reviewed the records at issue in this discussion, I agree that LSB record 3 comprises a legal opinion and accept the ministry's submission that it is a direct communication of a confidential nature between a solicitor and client. LSB records 7 and 8 and HSB records 107 and 108 are all memoranda between counsel and a client. I find that they either provide or request advice from legal counsel and thus contain direct communications of a confidential nature between the solicitor and the client. I further find in the alternative that these records fall within the continuum of communications between legal counsel and her clients aimed at keeping both informed so that advice may be sought and given as required. Finally, I find that LSB record 11 reflects legal counsel's review of the contents of the letter and contains counsel's legal advice regarding certain aspects of it. Accordingly, I find that, if not a direct communication of a confidential nature between a solicitor and client, this record forms part of the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

[41] Accordingly, I find that LSB records 3, 7, 8, 11 and HSB records 107 and 108 all qualify for exemption under the common-law solicitor-client communication privilege of section 19(a) of the *Act*.

Issue C: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[42] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[43] In addition, I may find that the institution erred in exercising its 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.

[44] In either case I may send the matter back to the institution for an exercise of discretion based on proper considerations[12]. I may not, however, substitute its own discretion for that of the institution [section 54(2)].

Representations

[45] Referring to the Supreme Court's decision in *Criminal Lawyers' Association* and Order PO-2940, the appellant submits that the ministry must consider the public interest when exercising its discretion under section 19.

[46] The appellant submits that the ministry has failed to establish that it considered the "facts and circumstances of this particular case" in exercising its discretion to withhold the records under section 19. The appellant states that the ministry took into account only "generalized" considerations, which fall short of the Supreme Court's requirements. The appellant notes that the ministry did not contact him to determine whether there were facts that would possibly require disclosure. He submits that in failing to do so, the ministry "avoided its legal duty to consider such submissions."

[47] The appellant submits that there are "very great public interest considerations" that he believes would override the section 19 claim. The appellant notes that the request relates to the recommendations of a "joint Review Panel", which made recommendations in 1993-1994 regarding the funding of in vitro fertilization (IVF). According to the appellant, the ministry adopted the recommendations, which over the last 20 years have resulted in the "waste of a very large amount of money and infants' lives."

[48] The appellant indicates further that in July 2008, the Government of Ontario appointed an Expert Panel on Infertility and Adoption, which provided its findings and recommendations to the ministry "behind closed doors" in June 2009. The appellant notes that the panel published these findings and recommendations two months later. The appellant refers to the findings of this panel, which essentially recommend that the ministry reverse its earlier decision regarding funding of IVF. The appellant quotes from the panel's conclusions, which are critical of the ministry's earlier funding decision and explain why this panel's recommendations should be accepted. The appellant then states:

> [T]hose quotes are from the Ministry's own medical experts. They consider that a meaningful barrier to Ontario reaping the benefits of a better IVF policy – entailing hundreds of millions of dollars of savings, and thousands of newborns free of the extremely serious illnesses that affect IVF children today – is the Ministry's outdated insistence to cling to an

[12] Order MO-1573

> incorrect policy decision from 1993-1994, and to avoid critique by shielding every aspect of that decision in secrecy.

[49] The appellant submits that the ministry failed to consider this report when exercising its discretion under section 19. He takes the position that the public interest aspects of this case outweigh the section 19 interests and argues that "the injury that would be occasioned to the present government by opening that legal advice to view after so long a time is speculative at best."

[50] In response to these arguments, the ministry disagrees with the appellant that *Criminal Lawyers' Association* suggests that it has a "positive obligation to particularize and explain the 'relevant interests and considerations' that were taken into account in weighing the public interest in disclosure."

[51] The ministry submits that although the court returned the matter to this office to determine whether discretion was properly exercised under section 14 of the *Act*, it took a different approach to the solicitor-client exemption. The ministry states:

> …The Court, citing from its earlier decision in *R. v. McClure,* 2001 SCC 14 ("McClure"), then stressed the categorical nature of solicitor-client privilege:
>
> > …solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
> > [Emphasis added; para. 35]

[52] The ministry submits further that "the obligation to take into account all relevant interests and considerations does not translate into an obligation to provide a detailed explanation of how such interests and considerations were weighed." The ministry notes that the Supreme Court specifically recognized a "long line of case authorities which establish that the purpose of the s. 19 exemption 'is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship'." [Emphasis in the original]

[53] With respect to the public interest arguments made by the appellant, the ministry submits that "the limited amount of information that was withheld would not contribute meaningfully to the public debate … " The ministry notes that there is no time limit placed on the privilege, and even though the records were created in 1993-1994, the issues that they discuss are still current today.

[54] Referring to its initial representations, the ministry states:

> The Ministry reiterates its original submission on this issue. Specifically, the Ministry took into account the principle of the public's right of access to government information and the principle that exemptions from this right should be limited and specific. In this regard, the Ministry disclosed as much information and as many records in this request as it reasonably could at both the request and the appeal stages. The Ministry exercised its discretion under section 19 not to disclose the records because of the importance of maintaining the integrity of the solicitor-client privilege.

Analysis and findings

[55] In Order PO-2940, Senior Adjudicator John Higgins considered similar arguments made by the appellant and institution relating to the institution's exercise of discretion in that case. He found:

> It is evident from WSIB's submissions that, although its primary focus in deciding to apply section 19(a) was the preservation of privilege, WSIB has considered the public interest. In fact, WSIB disclosed other records to the appellant, as already noted. WSIB also argues that there is enough information in the public domain, including the policy itself, to permit informed discussion. I agree with these submissions.
>
> I also note that, in *Criminal Lawyers' Association*, the Supreme Court remitted the appeal back to the Commissioner to examine the exercise of discretion by the Ministry of Public Safety and Correctional Services under the section 14 law enforcement exemption, but did not remit the Ministry's exercise of discretion under section 19. The Court explained its different approach to section 19 as follows:
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> > We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:
> >
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

> In my view, WSIB properly considered all relevant factors, including the public interest, as articulated by the Supreme Court in *Criminal Lawyers' Association*, in exercising its discretion. Similar to the approach taken by the Court, WSIB gave significant weight to the nature of solicitor-client privilege. There is no evidence before me that WSIB exercised its discretion in bad faith. Similarly, there is no evidence that WSIB considered irrelevant factors in exercising its discretion.
>
> Accordingly, I find that WSIB has not erred in exercising its discretion to deny access to the record.

[56] I agree with the findings of the senior adjudicator insofar as they pertain to his approach to this issue resulting from the Supreme Court's decision in *Criminal Lawyers' Association*. With respect to the ministry's exercise of discretion in the circumstances of the case before me, I also find that the focus of its decision to apply section 19 was the preservation of the solicitor-client privilege. However, I note that of the 114 items identified from the Health Services Branch, the vast majority were disclosed to the appellant. Following mediation and the removal of personal information from the records, only two records from this group of records remained outstanding. Of the eleven records located in the Legal Services Branch, two records were disclosed in full and five records were disclosed in part. Once personal information was removed from the records, only four records were withheld in full and one record was withheld in part.

[57] The ministry takes the position that the small amounts of information remaining undisclosed would not contribute meaningfully to the public debate. In my view, similar to the findings made by the senior adjudicator in Order PO-2940, given the amount of information in the public domain, including that disclosed in response to this request and appeal and information cited by the appellant in his representations, the Ministry's approach to this issue reflects a consideration of the public interest in disclosure, and the corresponding public interest in non-disclosure of the records at issue.

[58] Accordingly, I find that the ministry properly considered all relevant factors, including the public interest, in exercising its discretion, and chose to give significant weight to the nature of solicitor-client privilege. I am not persuaded that in doing so, the ministry exercised its discretion in bad faith. In addition, there is no evidence that the ministry considered irrelevant factors in exercising its discretion.

[59] As a result, I find that LSB records 3, 7, 8, 11 and HSB records 107 and 108 are exempt under the common-law solicitor-client communication privilege of section 19(a) of the *Act*.

ORDER:

1. I uphold the ministry's decision to withhold two paragraphs on page 4 of LSB record 10, LSB records 3, 7, 8, 11 and HSB records 107 and 108.

2. I order the ministry to disclose the remaining portions of LSB record 10 to the appellant by providing him with a copy of this record on or before October 20, 2011.

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

Original signed by: September 28, 2011
Laurel Cropley
Adjudicator