Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3018

Appeal PA09-364

Ministry of the Attorney General

December 7, 2011

Summary: The appellant made a request to the Ministry of the Attorney General for all records held by the Office of the Children's Lawyer concerning her and her daughters. The ministry granted access to a number of records, but denied access to certain records under sections 49(a) (discretion to refuse requester's own information), 19(a) (solicitor-client privilege) and sections 21(1) and 49(b) (personal privacy). The withheld information qualifies for exemption under section 49(a) in conjunction with section 19(a). In addition, small portions of the records qualify for exemption under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 19(a), and 49(a) and (b)

Orders and Investigation Reports Considered: Orders P-1617, PO-2119

Cases Considered: *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)

BACKGROUND:

[1] The Ministry of the Attorney General (the ministry) received a request for information under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records with the Office of the Children's Lawyer (OCL) relating to the appellant and her daughters. The request identified two specific court file numbers, and read:

> I request … access to all records relating to the involvement of the [OCL] and the clinic social worker in a matter concerning my [two named daughters] [for a specified time period]
>
> I request … access to all records on me held by OCL and his social worker assistant [for a specified time period]

[2] The ministry identified approximately 564 pages of responsive records, and granted partial access to them. It denied access to the remaining records or portions of records under sections 49(a) (discretion to refuse requester's own information), 19(a) (solicitor-client privilege) and sections 21(1) and 49(b) (personal privacy). The ministry also indicated that it was claiming section 22(a) with respect to those records currently available to the public (the court file).

[3] The appellant appealed the ministry's decision.

[4] During mediation the ministry issued a supplementary decision letter in which it stated that it was also claiming the exemptions in sections 13(1) (advice or recommendations) and 15(b) (relations with other governments). In addition, the ministry stated that it had conducted a further search and located additional records, and that partial access was being granted to these additional records. The ministry stated that the exemptions in sections 19(a), 21(1), 49(a) and 49(b) were being applied to the withheld portions of the newly-located records. The ministry also provided an index of records with its supplementary decision letter, which contains a brief description of each record and the corresponding exemptions claimed for them.

[5] Also during mediation, the appellant indicated that she was not pursuing access to any records for which section 22(a) was claimed, and this issue and the corresponding records are no longer at issue in this appeal.

[6] Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry, initially.

[7] After receiving the Notice of Inquiry, the ministry issued a revised decision letter to the appellant. In that decision, the ministry indicated that it was granting access to a number of additional records and portions of records, and provided the appellant with copies of those records. The ministry also identified that four additional responsive records had been located, and that access was granted to three of them. The ministry denied access to the fourth under section 19(a) of the *Act*.

[8] The ministry then provided representations to this office addressing the issues relating to the remaining records. The ministry also indicated that it was no longer

relying on the exemption in section 15(b) for any of the records, and that section is no longer at issue in this appeal.

[9] In addition, in its representations the ministry raised a preliminary issue relating to the applicability of the *Act* to OCL case files.

[10] I then sent the appellant a revised Notice of Inquiry (which included reference to the preliminary issue raised by the ministry), along with a copy of the non-confidential representations of the ministry. The appellant provided representations in response, and included a number of attachments.

[11] In the discussion that follows, I reach the following conclusions:

- the records contain the personal information of the appellant and other identified individuals;
- the withheld portions of pages 181, 182 and 377 qualify for exemption under section 49(b); and
- the remaining records qualify for exemption under section 49(a), in conjunction with section 19(a).

RECORDS:

[12] There are approximately 75 pages or portions of pages of records remaining at issue in this appeal, consisting of copies of correspondence, internal notes, forms, notes and email correspondence. The pages or portions of pages remaining at issue are pages 181, 182, 209, 320-363, 368-369, 373, 377-379, 382-387, 410-411, 512-513, 549, 556-564, 570, 573, and 577.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 49(b) apply to the withheld portions of pages 181, 182 and 377?

C. Does the discretionary exemption at section 49(a) in conjunction with section 19(a) apply to the remaining information?

DISCUSSION:

Preliminary issue – Application of the *Act*

[13] As a preliminary issue, the ministry takes the position that the appellant, as a litigant in a custody and/or access dispute, should not be able to obtain disclosure through the *Act*. The ministry refers to three grounds in support of its position, which include 1) that the government is not a party in the identified litigation and that the OCL, when providing services to a child, is acting independently of government; 2) that parties to litigation must utilize other avenues of disclosure; and 3) that if the child client was requesting the information, they should request it through the *Solicitors Act*, rather than through the *Act*, and that allowing another party to access the information through the *Act* would lead to an absurd result. The appellant did not address this issue.

[14] I note that the ministry raised this preliminary issue for the first time in its representations, and that this issue was not identified in the Notice of Inquiry sent to it. Some of the ministry's representations on this issue raise unique questions concerning the records of a lawyer representing a child client, and may merit further analysis in the appropriate case. However, because of my findings below that the records qualify for exemption under the identified sections of the *Act*, there is no useful purpose served in reviewing this issue in the circumstances of this appeal, and I decline to do so.

A. Do the records contain "personal information" as defined in section 2(1)?

[15] Under section 2(1) of the *Act*, "personal information" is defined as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[16] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[17] 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].

[18] The ministry takes the position that the records for which the section 21(1) exemption is claimed contain "personal information" as defined in section 2(1). In particular, the ministry submits that the records or portions of them contain the personal information of the appellant, the children, the father of the children, the appellant's family and others. It also states that certain brief, handwritten notations refer to the personal information of counsel for the child. Furthermore, it provides specific references to the pages of the records that contain the identified personal information.

[19] The appellant's representations focus on her interest in obtaining the information and the reasons for her request. She does not directly address the issue of whether the information is personal information.

Analysis and findings

[20] Upon my review of the records, I agree with the ministry that they contain the personal information of the individuals identified by the ministry.

[21] In particular, I find that the records contain the personal information of the appellant, as they include information relating to her medical or employment history [paragraph (b) of the definition of personal information], address and telephone numbers [paragraph (d)], personal opinions or views about her [paragraph (g)] and her name where it appears with other personal information relating to her or where the disclosure of her name would reveal other personal information about her [paragraph (h)].

[22] I also find that the brief, severed handwritten notes at pages 181, 182 and 377 contain personal information of counsel for the child. Although counsel for the child is generally referred to in the records in his professional capacity, specific information identified about him is of a personal nature relating to this individual's personal plans and thus qualifies as his personal information [paragraph (h)].

[23] Furthermore, much of the remaining information contains the personal information of other identifiable individuals. However, because of my finding below that these records qualify for exemption under section 19(a) and 49(a), it is not necessary for me to review in detail the specific personal information contained in each of these remaining records.

B. Does the discretionary exemption at section 49(b) apply to the withheld portions of pages 181, 182 and 377?

[24] The ministry takes the position that a number of the records qualify for exemption under section 49(b) of the *Act*; however, given my findings below, I will only review the application of this exemption to the withheld portions of pages 181, 182 and 377.

[25] 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 exemptions from disclosure that limit this general right.

[26] 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. If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester.

[27] Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

[28] Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[29] The ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the withheld portions of pages 181, 182 and 377. The ministry states that the small portions of these pages which were not disclosed to the appellant contain personal information of counsel for the child and reveal his "personal plans."

[30] On my review of the very brief handwritten notations on pages 182, 183 and 377 that were severed from these pages, I am satisfied that they contain brief references to the personal plans of counsel for the child. I note that the remaining portions of these pages were disclosed to the appellant, and the sole information at issue is contained in these brief severances.

[31] Given that the severed information relates only to the personal plans of the child's counsel, I am satisfied that the disclosure of this information would constitute an "unjustified invasion" of the counsel's personal privacy and, in the absence of any representations from the appellant supporting disclosure of this information, I am satisfied that it qualifies for exemption under section 49(b) of the *Act*, subject to my review of the exercise of discretion, below.

C. Does the discretionary exemption at section 49(a) in conjunction with section 19(a) apply to the remaining information?

Section 49(a)

[32] While 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.

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

[34] In this case, the ministry relies on section 49(a) in conjunction with sections 13(1) and 19 to deny access to the records or portions of records which it claims those exemptions apply to, and which also contain the personal information of the appellant. I will now review these exemption claims.

Solicitor-client privilege

[35] The ministry takes the position that all of the records or portions of records remaining at issue qualify for exemption under the solicitor-client privilege exemption in section 19 of the *Act*. Section 19 reads 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.

[36] Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

[37] The ministry takes the position that the records qualify for exemption under branch 1, found in section 19(a).

Branch 1: common law privilege

[38] Branch 1 of the section 19 exemption appears in section 19(a) and 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. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

[39] 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.)].

[40] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[41] 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.)].

[42] 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].

[43] Confidentiality is an essential component of the privilege. Therefore, the ministry 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

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

[45] 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.

[46] Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Analysis and findings

[47] The ministry provides specific representations on the application of section 19 to certain records or types of records. The appellant does not directly address the application of section 19 to the records. I will now review the records in the categories referenced by the ministry to determine whether they qualify under section 19 of the *Act*.

a) Internal records of the OCL prepared during the representation of the child (pages 209, 368, 369, bottom half of 373, 378, 379, 382, 512-513, 548, 556-564, top of page 570, 573 and 577)

[48] The ministry states:

> In this case, an in-house lawyer was appointed to represent the child in the access proceeding before the Superior Court of Justice. A clinical investigator employed by the OCL assisted him. Internal documents were prepared at the OCL during this process. During the course of representing the child, the lawyer and clinical investigator spoke to the parents, the child, and collateral sources of information, and made notes at various stages during the process. There were also internal e-mails exchanged between staff at the OCL, reporting letters, and notations on correspondence.
>
> There is a solicitor-client relationship between the child and his counsel, which has been recognized by the Commissioner in Orders P-1115 and P-1075. As noted in the decision of *CR. v. Children's Aid Society of Hamilton* [2004] O.J. No. 1634, discussions between counsel and the clinical

> investigator are privileged (para. 42), and accordingly, the litigation privilege extends to the clinical investigator assisting counsel.
>
> These records were all prepared for the dominant purpose of litigation. At the time of their creation, counsel was providing legal representation to the child in an ongoing custody/access proceeding between her parents.
>
> Previous orders have held that internal documents in a lawyer's file are subject to litigation privilege. Order P-1551 held that litigation privilege extends to "...communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation."
>
> This principle has been applied to handwritten notes, some of which are at issue on this appeal. In Order MO-2231, it was held that annotations made by a lawyer were exempt under the working papers component of solicitor-client communication privilege ….
>
> Similarly, internal memoranda have been held to be exempt from disclosure….

Findings

[49] On my review of pages 209, 368, 369, the bottom half of 373, 378, 379, 382, 512-513, 549, 556-564, the top of page 570, 573 and 577, I am satisfied that these records qualify for exemption under the litigation privilege in section 19(a) of the *Act*. I am satisfied that these records were prepared for the dominant purpose of using them in the litigation which was ongoing at the time these records were created. As a result, I find that these listed pages fall within the common law litigation privilege aspect of section 19 of the *Act*. Because of this finding, it is not necessary to consider whether the other aspects of the solicitor-client privilege exemption apply to these records.

b) Other records contained in the legal file (pages 410-411 and 359-363)

[50] There are other records contained in the file, which consist of a report (pages 410-411) and certain handwritten notes (pages 359-363). The ministry states that, with respect to the report, litigation privilege also extends to it as it "was obtained by counsel for the child … for the purpose of enabling counsel to obtain background information about the case and formulate a position on behalf of the child client." The ministry also states that "[t]his record was clearly obtained for the lawyer's brief for the existing litigation." With respect to the handwritten notes, the ministry states that they

are contained in the lawyer's file and were placed in that file to assist in the "ongoing litigation on behalf of the child client."

[51] On my review of these two records, I find that, although they were not prepared for the dominant purpose of litigation, counsel, through research or the exercise of skill and knowledge, has selected them for inclusion in the lawyer's brief. [See Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)] As a result, I find that these records also fall within the common law litigation privilege aspect of section 19 of the *Act*.

c) Additional records (pages 320-358 and 383-387)

[52] There is a third category of records which the ministry claims qualify for exemption under the solicitor-client privilege in section 19(a). These are records prepared prior to the assignment of counsel, and include the Intake form filled out by the father (pages 320-358), an Information Sheet (pages 383-384, 387), and an Intake Summary (pages 385-386).

i) Intake form

[53] The intake form at issue is the form filled out by the father. I note that the intake form filled out by the mother has been released to her, and is not at issue in this appeal. I also note that these forms are filled out prior to the assignment of counsel.

[54] Previous orders have reviewed the nature and purpose of the OCL intake forms to determine whether they qualify for exemption under the *Act*. In Order P-1617, the ministry identified the specific purpose for filling out the intake form as follows:

> … the parties are asked to complete intake forms and submit them to the Office of the Children's Lawyer which reviews the forms and determines which type of support is required in each case - legal representative or social worker. Upon review of the intake form, the Office of the Children's Lawyer notifies the court and the parties of its decision. If the Office of the Children's Lawyer decides to become involved in the case, the information in the intake form is shared with the lawyer or social worker assigned to the case.

[55] Order PO-2119 examined the reasons why the intake form is required. The ministry's representations in that appeal stated:

> The parties were asked to submit intake forms to OCL, so that staff could review the forms and determine whether to become involved in the case. If the case is accepted, the intake form is shared with the lawyer or clinical agent assigned to the case, in order to become acquainted with

> the issues and to know where to contact the parties and child. It is therefore submitted that the intake form is prepared specifically by a parent for the Children's Lawyer, *and is used firstly to determine whether to become involved* in the litigation, and thereafter, if the case is accepted, to conduct the case on behalf of the child…. [emphasis added]

[56] In both Orders P-1617 and PO-2119, the decision was made that these intake forms did not qualify for exemption under section 19 of the *Act*. In this appeal, however, the ministry argues that those orders should not be followed, and that these forms do qualify for exemption under section 19(a) of the *Act*.

[57] In considering the application of section 19(a) to the intake form, I have reviewed the decision in *Descôteaux*, referenced above. In that case, the Supreme Court of Canada was asked to determine whether the solicitor-client communication privilege attached to a record that was prepared by a client who was attempting to obtain legal aid. This potential client had to fill out the form that must be completed by those applying for legal aid, and the lower court decision had determined that this form did not contain solicitor-client privileged information. The lower court decision stated:

> The application for legal aid is nothing more or less than a descriptive form filled out by a person wishing to obtain legal aid to let the organization know that he meets the eligibility requirements. There is no relationship at all between the information contained in this form, which deals with the applicant's civil status, matrimonial status and financial situation, and the information he may provide to his counsel in order to obtain legal advice or representation in litigation. Moreover, there is not even a solicitor-client relationship at the time this form is completed, and the retainer does not come into existence until the applicant has been accepted by the appropriate authority, which, in so doing, will have decided that he meets the eligibility requirements. It is only after this administrative decision has been made that there will be created between the applicant citizen and the legal aid lawyer this type of privileged relationship that is scrupulously protected by the common law.

[58] The Supreme Court of Canada rejected the lower court's decision. It stated that all information that a person must provide in order to obtain legal advice, and which is given in confidence for that purpose, enjoys the privileges attached to confidentiality. It also held that this confidentiality attaches to all communications made within the framework of the solicitor-client relationship, to the lawyer as well as to his employees, and that it arises even before the retainer is established, as soon as the client takes the first steps in approaching a law firm. The *Descôteaux* decision was succinctly summarized by Senior Adjudicator John Higgins in MO-2573-I as follows:

In *Descôteaux v. Mierzwinski* … the Supreme Court of Canada addressed the question of whether an application for legal aid, which had been submitted by the applicant to the legal aid office, is subject to solicitor-client privilege. In the circumstances of that case, the Court applied the exception to privilege, relating to communications made to facilitate the commission of a crime, to the financial information in the application, but found the rest of the application to be subject to solicitor-client privilege. In doing so, the Court formalized the implicit view, arising from *Solosky v. The Queen*, [1980] 1. S.C.R. 821, that solicitor-client privilege is not only a rule of evidence, but also a substantive rule. It also found that the substantive rule was applicable to communications made to the legal aid plan in order to be able to retain counsel, and that the inception of privilege did not depend on the retainer having been finalized.

Writing for the Court in *Descôteaux*, Justice Lamer (as he then was) explained how the law of privilege applies in relation to retaining counsel and obtaining legal advice:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

In Order MO-1180, Senior Adjudicator David Goodis found that correspondence pertaining to a possible retainer for the conduct of judicial review litigation was subject to solicitor-client privilege. He stated as follows:

> Record 9 is a letter to the Region from a law firm recommending various other firms to the Region for the purpose of the judicial review proceedings. Record 10 is a letter to the Region from one of the recommended law firms later retained by the Region for those proceedings. Record 10 attached various resumés which are no longer at issue in

> this appeal. Although the Region had not formally retained either law firm at the time of these communications, this does not preclude the application of solicitor-client privilege. As stated by R.D. Manes and M. Silver in Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), at p. 34:
>
> > The solicitor-client relationship arises as soon as the potential client takes the first steps and has the first dealings with the lawyer's office. This relationship arises even before the formal retainer agreement is established, and even if no retainer is taken out.
>
> I am satisfied that Records 9 and 10 are confidential communications made for the purpose of retaining counsel and for the purpose of obtaining or providing legal advice in the context of the judicial review proceedings and, therefore, these records qualify for solicitor-client communication privilege under section 12.
>
> Further, communications between a solicitor and client for the purpose of retaining the solicitor are privileged even if there is no formal retainer agreement [Order P-1631; R.D. Manes and M. Silver, p. 47; *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)].
>
> As well, in Order PO-1714, Adjudicator Holly Big Canoe found that a retainer agreement was privileged. ...

[59] Applying the principle set out above, Senior Adjudicator Higgins determined that the records at issue in MO-2573-I, which were records reflecting discussions and conclusions reached by a client about retaining and instructing counsel, reflected communications made for the purpose of obtaining legal advice, and were therefore subject to solicitor-client privilege. The Senior Adjudicator also referred to Order PO-1714 in support of his finding.

[60] I adopt the approach taken by Senior Adjudicator Higgins to this issue, and apply it to the circumstances of this appeal.

[61] In this appeal, the intake form at issue was required to be filled out by the father of the child. I find that this document is prepared specifically by a parent for the Children's Lawyer, and its primary purpose is to provide information to the OCL to determine whether it ought to represent the child. In that regard, I find that the principles established in *Descôteaux* apply to this form. As in *Descôteaux*, a lawyer's

client (the child) is entitled to have all communications made with a view to obtaining legal advice kept confidential, and I am satisfied that this includes communications provided by the father (on the child's behalf) with a view to the child's obtaining of legal advice. It also includes communications made to the lawyer himself or to employees, and applies regardless of whether the information deals with matters of an administrative nature or with the actual nature of the legal problem.

[62] Accordingly, I find that, based on the principles established in *Descôteaux*, the solicitor-client privilege extends to the intake form and the information contained in it, notwithstanding that the OCL had not yet decided to represent the child.

ii) Other documents

[63] The other documents remaining at issue are an Information Sheet (pages 383-384, 387), and an Intake Summary (pages 385-386).

[64] I have carefully reviewed these records, which were prepared prior to the involvement of the lawyer and clinical investigator. These records either review in some detail the information contained in the intake forms (the Intake Summary), or consist of internal administrative records documenting the processing of or decisions made concerning the involvement of the OCL (the information sheets). I find that these records were prepared by OCL staff so that the Children's Lawyer, in the exercise of his mandate to provide services to children in custody/access cases, could make a decision about the appropriateness of his involvement in the particular case. (See Order PO-2119)

[65] In the circumstances of this appeal, I am satisfied that these documents were prepared to provide information to the OCL to determine whether it ought to represent the child. In that regard, I also find that the principles established in *Descôteaux* apply to these records. The child is entitled to have all communications made with a view to obtaining legal advice kept confidential, and I am satisfied that this also includes records or documents that either summarize the information contained in the intake form (pages 385-386), or records that deal with matters of an administrative nature concerning the representation of the child by legal counsel (pages 383-384 and 387).

[66] Accordingly, I find that, based on the principles established in *Descôteaux*, the solicitor-client privilege extends to pages 383-387, notwithstanding that the OCL had not yet decided to represent the child.

Loss of privilege

[67] The ministry states that the solicitor-client privilege "has not been waived in any way." It states that the documents have only been seen by staff at the OCL and have

not been disclosed to any outside parties (other than for the purpose of processing this access request).

[68] With respect to the litigation privilege, the ministry states:

> Although the trial of the custody/access proceeding has concluded, the decision could be appealed. Furthermore, issues of custody/access can be brought before the court until the child turns eighteen. The Supreme Court of Canada held in *Blank v. Canada (Minister of Justice)*, that "the privilege may retain its purpose - and therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended" (para. 38). Because issues concerning this child could be brought back to court in the future, particularly given the highly litigious nature of this case, litigation privilege continues to apply to the records at issue.

[69] The appellant does not address the issue of the loss of privilege.

[70] Based on the representations of the ministry that related litigation remains pending or may reasonably be apprehended, I am satisfied that the litigation privilege continues to apply to the records at issue. I am also satisfied that the solicitor-client privilege has not been waived in the circumstances of this appeal.

Exercise of discretion

[71] The section 19, 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[72] In addition, the Commissioner 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.

[73] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

Relevant considerations

[74] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations and findings

[75] In the ministry's representations in support of its position that it properly exercised its discretion to apply the exemptions in this case, it states that it exercised

its discretion in good faith in deciding to refuse disclosure under section 49, as has been its historic practice regarding similar records. It then states:

> The OCL has balanced the appellant's right of access to her own personal information, and the principle in [the *Act*] that information should be available to the public, with the right to privacy of other individuals named in the records. The OCL has also considered the context in which the information was collected or provided, the sensitive nature of the litigation and the information, and the importance of maintaining solicitor-client privilege and litigation privilege for a child client. …

[76] The appellant provides lengthy representations, along with numerous attachments, in support of her position that the information at issue ought to be disclosed to her. These include personal comments and perspectives on the reasons why the records were prepared, the reasons why she is interested in the records, and information about the circumstances and the relationships between the individuals mentioned in these records.

[77] On my review of all the circumstances in this appeal, I am satisfied that the ministry has not erred in exercising its discretion not to disclose the portions of the records at issue, as it has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. I note that the ministry identified 577 pages of responsive records, and that access was granted to over 500 pages. Furthermore, of the 75 pages at issue in this appeal, I note that the ministry granted access to portions of a number of those pages, withholding only the portions of the records which they considered qualified for exemption under section 49(a) and (b), and disclosing the remaining portions to the appellant. On my review of the manner in which the ministry exercised it discretion to disclose many pages, and sever the pages at issue, I find that the ministry properly exercised its discretion to apply the exemptions in sections 49(a) and (b) to the information at issue in this appeal.

[78] Having found that pages or portions of pages 182-183, 209, 320-363, 368-369, 373, 377-379, 382-387, 410-411, 512-513, 548, 556-564, 570, 573, and 577 qualify for exemption under sections 49(b) and 49(a) in conjunction with section 19(a), it is not necessary for me to review the possible application of the other exemption claims made.

ORDER:

I uphold the ministry's decision to deny access to the remaining records at issue on the basis of the identified exemptions, and dismiss the appeal.

Original Signed by December 7, 2011
Frank DeVries
Adjudicator