Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3307

Appeals PA12-346, PA12-347 and PA12-384

Ministry of Health and Long-Term Care

February 18, 2014

Summary: The appellant made a request to the Ministry of Health and Long-Term Care (the ministry) for access to all records relating to a named individual, company and pharmacy and the Ontario Drug Benefit program. The ministry denied access to all of the records, claiming the application of the discretionary exemptions in sections 14(1)(a),(b),(c), 14(2)(a) (law enforcement), 19 (solicitor-client privilege) and the mandatory exemption in 21(1) (personal privacy), relying on the factor in section 21(2)(f) and the presumption in section 21(3)(f) of the *Act.* In addition, the ministry advised that some of the information was being withheld, claiming the application of section 8 of the *Personal Health Information Protection Act* (*PHIPA*). During the mediation of the appeals, the ministry disclosed certain records to the appellant, such that the exemption in section 21 of the *Act* and information withheld under *PHIPA* were no longer at issue. In this order, the adjudicator upholds the ministry's decision, in part, and orders it to disclose some records to the appellant. The ministry's exercise of discretion is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(a) and 19.

OVERVIEW:

[1] The ministry provided extensive background information relating to the subject matter of the request. Through the Ontario Drug Benefit Program (ODB), the ministry provides coverage for most of the cost of over 3,800 prescription drug products for

Ontarians who are eligible to receive benefits under the *Ontario Drug Benefit Act* (*ODBA*). Government expenditures for the ODB program represent approximately nine percent of the total health care spending in the province.

[2] The 3,800 prescription drug products that are covered under the ODB program are referred to as "listed drug products." When an ODB recipient receives a prescription for a listed drug product, he or she may fill the prescription at a community pharmacy. Approximately 3,500 pharmacies in Ontario have the ability to bill the ministry for supplying a listed drug product to an ODB recipient. A pharmacy that wishes to participate in the ODB program must submit an application to the ministry for billing privileges under the *ODBA*. If the ministry determines that it is in the public interest to grant a pharmacy billing privileges, the pharmacy will enter into an agreement with the ministry and will then be connected to an on-line processing and adjudication system, which allows a pharmacy to bill the ministry for the ODB drug products it has supplied to recipients.

[3] Pharmacies are entrusted to submit claims for supplying listed drug products to ODB recipients on an honour system. The ministry has inspectors who review claims submitted to it for payment and identify trends in the claims data that may suggest inappropriate billing. If an inspector identifies irregularities in a pharmacy's billings, they may commence an inspection of the pharmacy under the *ODBA*. As part of an inspection, pharmacy records may be examined to determine if there are discrepancies between the quantity of drug products purchased by the pharmacy and the quantity of drug products billed to the ministry. If a discrepancy is found, the ministry may have reasonable grounds to believe that the pharmacy submitted claims for payment to the ministry without having supplied any drug product to an ODB recipient.

[4] A ministry inspection may lead to a pharmacy's repayment of claims that were improperly billed to the ministry, the revocation of the pharmacy's billing privileges, the suspension of any outstanding payments owed to the pharmacy and the termination of the pharmacy's agreement with the ministry.

[5] The requester in this matter is a pharmacy which was subject to a ministry inspection as described above. The ministry's inspection revealed that the pharmacy had submitted improper claims to it that were not eligible for reimbursement under the ODB program. The inspection also revealed a discrepancy between the quantity of product purchased from suppliers with the quantity billed to the ministry. The pharmacy was provided with an opportunity to respond to the inspection findings. After considering the results of the inspection and the explanations provided by the pharmacy, the ministry revoked the pharmacy's billing privileges under the *ODBA*, suspended its right to receive payment under the *ODBA*, and terminated the pharmacy's agreement with it.

[6] The requester subsequently made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for the following information:

> All correspondence, communications, deleted emails, emails, meeting minutes, records, memorandums, notes and material (electronic, digital and hard copy) (collectively the "Material") relating to or involving [a named company, a named pharmacy, and a named individual] and without limiting the generality of the foregoing, any of the aforementioned Material in the possession of:
>
> 1. The Ontario Public Drugs Programs; or
>
> 2. The Office of the Executive Officer and the Assistant Deputy Minister.

[7] The ministry advised the requester that the request would be divided into four batches. Batch #1 relates to all hard copy files, batches #2 and #3 relate to all email files and batch #4 relates to all other electronic files.

[8] The ministry also issued decision letters denying access to all of the records, claiming the application of the discretionary exemptions in sections 14(1)(a),(b),(c), 14(2)(a) (law enforcement)[1], 19 (solicitor-client privilege)[2] and the mandatory exemption in 21(1)(a) (personal privacy), relying on the factor in section 21(2)(f) and the presumption in section 21(3)(f) of the *Act.* In addition, the ministry advised that some of the information was being withheld, claiming the application of section 8 of the *Personal Health Information Protection Act* (*PHIPA*).

[9] The requester (now the appellant) appealed the ministry's decisions to this office. In response, this office opened three appeal files.

[10] Appeal PA12-346 relates to batch #1 of the records. Appeal PA12-347 relates to batch #2 of the records, and appeal PA12-384 relates to batches #3 and #4 of the records.

[11] During the course of mediation, the appellant clarified that he is legal counsel to all of the named parties listed in his request. The ministry advised that in light of this, it was no longer claiming the exemption in section 21(1) of the *Act* with respect to information relating to the appellant's clients.

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[1] Claimed for all four batches.
[2] Claimed for batch 2.

[12] The appellant also advised the mediator that he was not seeking any personal information or any personal health information relating to any individuals other than his clients. Consequently, section 8 of *PHIPA* and section 21(1) of the *Act* are no longer at issue in this appeal.

[13] In addition, the ministry advised that some of the records at issue were disclosed to the appellant's clients in another proceeding. As a result, the appellant confirmed that he is not seeking access to records that have already been released to his clients.

[14] No further mediation was possible and the appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry and the appellant. Portions of the ministry's representations met the confidentiality criteria set out in this office's *Practice Direction 7*, and were not shared with the appellant on that basis.

[15] During the inquiry, the ministry issued a supplementary decision letter, disclosing record 10 of batch 1 in full, to the appellant. The ministry also advised in its representations that it was no longer relying on the discretionary exemption in section 14(2)(a) for any of the records. Therefore, that exemption is no longer at issue in these appeals.

In addition, in its representations the ministry raised for the first time the application of the discretionary exemptions in section 19 to one of the records in batch 3 and section 14(1)(l) to three of the records in batch 2. Therefore, the late raising of discretionary exemptions has been added as an issue in appeals PA12-347 and PA12-384.

[16] Lastly, in its representations the ministry advised that record 4 of batch 1 was mistakenly included in the compilation of responsive records. The ministry stated that this record relates to a completely different file and is in no way connected to the pharmacy named in the request. The ministry went on to apologize for the error and asked that I remove the record from the appeal. I have carefully reviewed record 4 of batch 1 and I find that it does not relate to the individual, company and pharmacy named in the request. The record, which is a letter, relates to another individual and another pharmacy. Therefore, I find that this record was identified as responsive by the ministry in error and is not responsive to the request. Consequently, I have removed it from the scope of this inquiry.

[17] This order disposes of the issues raised as a result of the appellant's access request. For the reasons that follow, I uphold the ministry's decision, in part, and order it to disclose some records to the appellant. I also uphold the ministry's exercise of discretion.

RECORDS:

PA12-346

[18] The records at issue in batch 1 are records 1-3, and 5-6.

PA12-347

[19] The records at issue in batch 2 are records 1, 3, 6-15 and 17-19.

PA12-384

[20] The records at issue in batch #3 are records 1, 2, 6, 7, 9, 11, 12, 14, 15, 17, 19-21 and 23-30, and in batch #4 are records 2 and 2a.

ISSUES:

A: Can the ministry raise discretionary exemptions during the inquiry?

B: Do the discretionary exemptions at sections 14(1)(a) and/or 14(1)(b) apply to the records?

C: Does the discretionary exemption at section 19 apply to the records?

D: Did the institution exercise its discretion under sections 14 and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Late Raising of Discretionary Exemptions

[21] The ministry raised the application of the discretionary exemptions in section 14(1)(l) to records 13, 15 and 17 in batch 2 and section 19 to record 23 in batch 3 during the inquiry of these appeals.

[22] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period

> shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[23] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[3]

[24] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant.[4] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[5]

[25] The ministry states that it acknowledges that it did not raise the application of section 14(1)(l) in its decision letter or index and that it is now raising it beyond the 35 day period for "late raising" of discretionary exemptions.[6] The ministry states:

> Nevertheless, the ministry respectfully submits that the appellant is not prejudiced by the Ministry's delay in this case because access to the record[s] w[ere] denied in its original decision based on other "law enforcement" exemptions under section 14. In other words, the record[s] h[ave] consistently been withheld and its reasons for doing so are similar to the reason the Ministry is raising at this point in the appeal.

[26] With respect to record 23 of batch 3, the ministry states that as a result of a clerical error, it omitted to note that it was relying on the exemption in section 19. The ministry goes on to ask that I consider the application of the exemption in section 19 despite the late raising. The ministry argues that the appellant will not be prejudiced by allowing the late raising of section 19, as access to the record was denied in its original decision letter on the basis of section 14. The ministry states that it had intended to rely on both sections 14 and 19 to exempt record 23 from disclosure.

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[3] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[4] Order PO-1832.

[5] Orders PO-2113 and PO-2331.

[6] The ministry is claiming this exemption with respect to records 13, 15 and 17 of batch 2.

[27] The appellant submits that the ministry should not be entitled to rely upon discretionary exemptions raised at the "11th hour." The appellant further submits that the ministry turned its mind to the applicable appropriate exemptions at the time it responded to the request. To allow the ministry to raise these exemptions following mediation in which the appellant narrowed the issues in good faith and in which the ministry had asserted the exemptions it believed were the strongest, the appellant argues, would be prejudicial to him and "erode the sanctity of the process."

[28] In reply, the ministry submits that the appellant is not prejudiced, nor is the "sanctity of the process" eroded, because the fresh exemptions are akin to the exemptions originally claimed for the records, and the ministry's raising of them did not result in any delay of the process. Further, the ministry argues that it raised these exemptions in its first representations and, therefore, the appellant has had time and an opportunity to respond to the issue, and has done so. Lastly, the ministry submits that the prejudice to it in disallowing the section 19 claim in these circumstances would outweigh any prejudice to the appellant in allowing it.

[29] It is not necessary to me to make a finding regarding the late raising of discretionary exemptions, because, as set out in Issue C, below, I find the relevant records to be exempt from disclosure under section 14(1)(a) of the *Act*.

Issue B: Do the discretionary exemptions at sections 14(1)(a), 14(1)(b), 14(1)(c) apply to the records?

[30] The ministry submits that the exemptions in sections 14(1)(a) and (b) apply to the following records:

- Records 1-3 and 5-6 of batch 1[7];
- Records 10,[8] 11, 12a,[9] 13, 14, 15, 17, 18 and 19 of batch 2;
- Records 1, 2, 6, 7, 9, 11, 12, 14, 15, 17, 19, 20, 21, 23, 24 and 29[10] of batch 3; and
- Records 2 and 2a of batch 4.

[7] Records 1 and 5b are duplicates.
[8] This record is a duplicate of record 6 of batch 1.
[9] This record is a duplicate of record 5 of batch 1.
[10] This record is a duplicate of record 15 of batch 2.

[31] Further, the ministry submits that records 13, 15 and 17 of batch 2 are also exempt under section 14(1)(c) of the *Act*.

[32] Section 14(1) states, in part:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[33] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[34] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings;[11] and
- a police investigation into a possible violation of the *Criminal Code*;[12]

[11] Orders M-16, MO-1245.
[12] Orders M-202, PO-2085.

[35] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[13]

[36] Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[14]

[37] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[15]

[38] The ministry argues that all of the records listed above relate to both a law enforcement matter and an investigation undertaken with a view to a law enforcement proceeding. In particular, the ministry submits that some of the records contain data, evidence, interviews, inspector's detailed log notes, and findings it used and determined in the course of its inspection of the pharmacy.

[39] The ministry also provided more detailed representations, which were withheld as they met the confidentiality criteria set out in this office's *Practice Direction 7*. Although I am unable to detail these representations, I relied on them in making my findings.

[40] The appellant states that section 14 of the *Act* requires that the law enforcement matter in question be ongoing or in existence and that the exemption does not apply when the matter is completed. In the current case, the appellant advises that the ministry issued a final notice terminating the pharmacy's Ontario Drug Benefits privileges last year, and therefore, this final notice was the conclusion of the law enforcement matter.

[41] The appellant goes on to state:

> Even if there was an ongoing law enforcement matter, disclosure of the responsive records could not be reasonably expected to interfere with the law enforcement matter. As the pharmacy's Ontario Drug Benefit privileges have been terminated, there can be no prospect of interference in the law enforcement matter. In addition, [the ministry], which bears the onus of establishing an exemption, has not detailed specifically how

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[13] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[14] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[15] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

> the release of records 11 and 19 for example, the ministry's inspector's interviews with the pharmacists, could interfere in the law enforcement investigation. Simply claiming a blanket exemption over all documents is, respectfully, not sufficient to render them exempt.

[42] Lastly, the appellant submits that the records over which the ministry is claiming section 14 constitute a report as described in section 14(4) of the *Act*. The appellant argues that the ministry's inspection of the pharmacy was not complaint driven, but was a routine inspection and that the exception in section 14(4) applies and the records ought to be disclosed.

[43] In reply, the ministry states that it is no longer relying on section 14(2)(a) as an exemption for any of the records at issue, because the records do not constitute "reports" as that term has been interpreted by this office. Therefore, the ministry concludes that the exception in section 14(4) to which the appellant refers is irrelevant, as the exemption in 14(2)(a) is no longer at issue.

Section 14(1)(a): law enforcement matter

[44] The matter in question must be ongoing or in existence.[16] The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.[17]

[45] "Matter" may extend beyond a specific investigation or proceeding,[18] and the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.[19]

[46] I find that all of the records for which the ministry claimed the application of the discretionary exemption in section 14(1)(a) are exempt from disclosure. I am persuaded by the confidential representations provided by the ministry that the disclosure of these records could reasonably be expected to interfere with a law enforcement matter. I am unable to provide more detailed reasons for this finding, as I am relying on the portions of the ministry's representations that met the confidentiality criteria of this office's *Practice Direction 7* to make this finding.

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[16] Order PO-2657.
[17] Orders PO-2085, MO-1578.
[18] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[19] Order PO-2085.

Issue C: Does the discretionary exemption at section 19 apply to the records?

[47] The ministry is claiming the application of the discretionary exemption in section 19 to the remaining records at issue, which are records 1, 3 and 6-9 of batch 2, and records 24-28 and 30 of batch 3.

[48] Section 19 of the *Act* states as follows:

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

[49] 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), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

[50] 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.[20]

[51] 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.[21]

[52] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[22]

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[20] 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).
[21] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[22] Orders PO-2441, MO-2166 and MO-1925.

[53] 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.[23]

[54] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[24]

[55] 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.[25]

[56] The ministry submits that the records listed above are exempt under section 19(a) because they consist of confidential communications between legal counsel and their ministry clients. These communications, the ministry argues, reflect part of the "continuum of communications" between counsel and client and that the records fall squarely within the common-law solicitor-client privilege because they contain counsel's advice, requests for instructions and requests for information in order to provide advice.

[57] More specifically, the ministry states:

> The Ministry submits that although records 7-9 of batch 1 reflect discussions between Ministry counsel and counsel for a third party, the records themselves are nevertheless confidential communications between Ministry counsel and his clients. They report on the discussions, and contain advice about them.
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> . . .
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> Similarly, the document contained in record 28 of batch 3 reflects legal counsel's advice regarding the content and drafting of the document. The Ministry submits that the counsel's comments on the document are equivalent to counsel's "handwritten notes" that reflect legal counsel's review of the contents of the document and contains advice regarding certain aspects of it. In Order PO-2997, the IPC characterized such records as forming part of counsel's working papers "directly relating to seeking, formulating or giving legal advice."

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[23] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[24] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[25] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[58] The appellant acknowledges that solicitor-client privilege protects direct communications of a confidential nature between a solicitor and client, or their agents and employees, made for the purpose of obtaining or giving professional legal advice. The continuum of communication applies to information passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed.

[59] The appellant further submits that the following records do not fall within the solicitor-client exemption:

- records 7-9 reflect discussions between the ministry's legal counsel and counsel for a third party. The third party could freely publish or pass the information along if it sought to do so. As a result, there solicitor-client privilege does not attach to the communications because there was no expectation of confidentiality and there was no solicitor-client relationship between the parties to the communication. If the records contain the ministry's legal counsel's advice to his client in response to the third party communications, those portions can be redacted;

[60] In reply, the ministry clarifies that although portions of records 7-9 reflect discussions between ministry counsel and counsel for a third party, they are not verbatim transcripts of those discussions and they also include ministry counsel's analysis and advice on those discussions. The ministry disagrees that the contents of the discussion with the third party and/or its counsel must be produced since those discussions have been communicated through these records by ministry counsel to his client so that his client has enough information to provide instructions.

[61] I have reviewed the records at issue and describe them as follows:

- Record 1 of batch 2 is an email between ministry staff and legal counsel in which legal advice is sought by staff and given by legal counsel;

- Record 3 of batch 2 is an email between ministry staff and legal counsel in which legal advice is sought and given with respect to a draft document;

- Record 6 of batch 2 is an email between ministry staff and legal counsel in which legal staff seeks information from ministry staff in order to provide an opinion to staff in response to the pharmacy's legal counsel;

- Record 7 of batch 2 is an email from legal counsel to ministry staff, which sets out a discussion between the ministry's legal counsel and the pharmacy's legal counsel. Portions of the email reveal legal analysis and advice from the ministry's legal counsel to staff. Other portions set out factual information only concerning the substance of the discussion with the pharmacy's legal counsel;

- Record 8 of batch 2 is an email between ministry staff, its legal counsel and the pharmacy's legal counsel. Portions of the email reveal legal analysis and advice from the ministry's legal counsel to staff. Other portions set out factual information from the pharmacy's legal counsel;

- Record 9 of batch 2 is an email between ministry staff and its legal counsel, which summarizes the substance of a discussion that took place between the ministry's counsel and the pharmacy's legal counsel. No legal advice is sought or given;

- Records 25-28 of batch 3 are emails between ministry staff and its legal counsel. In the emails, legal counsel requests information from staff while drafting a document. In addition, staff request legal advice from counsel regarding the document; and

- Record 30 of batch 3 is an email between ministry staff and legal counsel in which legal advice is sought by staff and given by counsel.

[62] I find that records 1, 3, 6, 25-28 and 30 consist of communications between ministry staff in which legal advice is sought and given or in which legal counsel is seeking information from staff in order to provide a legal opinion. Consequently, these communications are exempt under branch one of section 19, subject to my finding in regard to the ministry's exercise of discretion, as they consist of communications between a solicitor and client that are subject to the common-law solicitor-client privilege.

[63] Similarly, portions of records 7 and 8 are exempt from disclosure under branch one of section 19, subject to my finding in regard to the ministry's exercise of discretion, as they too consist of communications between ministry staff in which legal advice is given. Consequently, these portions of the communications are exempt, as they consist of communications between a solicitor and client that are subject to the common-law solicitor-client privilege.

[64] Conversely, I find that other portions of records 7 and 8, and record 9 in its entirety are not exempt under section 19 of the *Act*. These portions, in whole or in part, represent direct communications between the pharmacy's legal counsel and the ministry or reveal the substance of discussions that took place between ministry staff and/or the ministry's legal counsel and the pharmacy's legal counsel. This is information that is already known to the pharmacy's legal counsel and, therefore, cannot be subject to solicitor-client privilege as between the ministry and its legal counsel. Consequently, I order the ministry to disclose portions of records 7 and 8 and all of record 9 of batch 2 to the appellant.

Issue D: Did the institution exercise its discretion under sections 14 and 19? If so, should this office uphold the exercise of discretion?

[65] The sections 14 and 19 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.

[66] 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.

[67] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

[68] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[28]

- 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, and 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 any affected persons;

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[26] Order MO-1573.
[27] Section 54(2).
[28] Orders P-344, MO-1573.

- 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; and
- the historic practice of the institution with respect to similar information.

[69] The ministry submits that it exercised its discretion properly, taking into account relevant considerations and not taking into account irrelevant considerations. With respect to section 14, the ministry submits that it only applied the exemption to a select portion of records and that it disclosed the majority of the responsive records to the appellant.

[70] Concerning section 19, the ministry states that it weighed the principle of the public's right of access to government information against the importance of keeping privileged communications between legal counsel and the ministry confidential. The ministry states that it relied on the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*[29] in exercising its discretion under section 19 in that it considered not only the public interest in disclosure, but also the compelling public interest that exists in upholding the solicitor-client privilege. To that end, the ministry argues that it determined that the public interest in maintaining the integrity of the privilege should be protected.

[71] The ministry also provided more detailed representations, which were withheld as they met the confidentiality criteria set out in this office's *Practice Direction 7*. Although I am unable to detail these representations, I did rely on them in making my findings.

[72] The appellant submits that the ministry failed to describe in detail its exercise of discretion in its representations. The appellant argues that in applying blanket exemptions without justifying in detail the specific reasons for the exemption, the ministry has failed to exercise its discretion. The appellant states:

> Simply stating that production of a record would compromise investigative techniques for example, demonstrates a failure to exercise discretion and to consider the partial production of the record, redacted to protect the "investigative techniques."

[29] [2010] 1 S.C.R. 815.

[73] The appellant also submits that the ministry did not take the following considerations into account when purporting to exercise its discretion:

- 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 wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information; and
- whether disclosure will increase public confidence in the operation of the institution.

[74] In reply, the ministry submits that it exercised its discretion based on the relevant factors described in its original representations.

[75] I have carefully considered the representations of both parties. I find that the ministry took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that they considered the appellant's position and circumstances and balanced it against the sensitivity of law enforcement matters and the importance of the solicitor-client privilege, in exercising its discretion not to disclose the information at issue. I am also mindful that the ministry has disclosed the majority of the responsive records to the appellant.

[76] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion under section 14(1) and 19. Therefore, I uphold the ministry's exercise of discretion to apply the exemptions in sections 14(1) and 19 to the withheld information that I did not order disclosed.

[77] In sum, I uphold the ministry's decision, in part. I uphold the application of the discretionary exemption in section 14(1)(a) to all of the records for which it was claimed. I uphold the application of the discretionary exemption in section 19 to some of the records for which it was claimed, and I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose record 9 of batch 2 to the appellant by **March 24, 2014** but not before **March 18, 2014**.

2. I order the ministry to disclose portions of records 7 and 8 of batch 2 to the appellant by **March 24, 2014** but not before **March 18, 2014**. I have highlighted the portions of the records that are **not** to be disclosed to the appellant.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the ministry provide me with a copy of the records sent to the appellant.

Original Signed By: February 18, 2014
Cathy Hamilton
Adjudicator