Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3400

Appeal PA13-198

Ministry of the Attorney General

September 23, 2014

Summary: The Ministry of the Attorney General received a request under the *Freedom of Information and Protection of Privacy Act* for access to a report relating to the issue of dishonest police testimony. The ministry denied access to the report and draft versions of it, relying on the discretionary exemptions in section 13(1) (advice or recommendations) and section 19 (solicitor-client privilege) to do so. However, it disclosed to the appellant a copy of a related Practice Memorandum entitled "Police Testimony." Appealing the ministry's decision, the appellant raised the possible application of the public interest override in section 23 of the *Act.* The ministry's decision to withhold the report and versions of it under section 19 is upheld.

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

Cases Considered: *Ministry of the Attorney General v. Tom Mitchinson, Assistant Information and Privacy Commissioner, and Jane Doe, Requester,* Toronto Doc. 190/02 (Div. Ct.); *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association,* 2010 SCC 23, [2010] 1 SCR 815.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report relating to "the issue of police officers who are found by judges to have lied in court" and to records relating to consultations within the ministry or with Ontario police forces regarding the report.

[2] The ministry located records responsive to the request and notified the requester of the fee to process the request. In response, the requester narrowed the scope of the request to include only the final report and the drafts leading up to it. The ministry then issued a decision denying access to the report and drafts of the report, in their entirety, and granting complete access to a Practice Memorandum entitled "Police Testimony." The ministry relied on the discretionary exemptions in section 13(1) (advice or recommendations) and sections 19(a) and (b) (solicitor-client privilege) to withhold the report and its drafts.

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

[4] During mediation, the appellant raised the possible application of the public interest override in section 23 of the *Act* as an issue in the appeal. Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process for an inquiry under the *Act.* I sought and received representations from the parties and shared these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.*

[5] In this order, I uphold the ministry's decision to withhold the records under section 19 and dismiss the appeal.

RECORDS:

[6] The records at issue are the Report to the Attorney General of Ontario From the Chief Prosecutor, and sixteen draft versions of the report.

DISCUSSION:

A. Does the discretionary exemption at section 19(a) or (b) apply to the records?

[7] The solicitor-client privilege exemption in section 19 gives institutions the discretion to withhold privileged records from disclosure. Section 19 states, in part:

> 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
>
> …

[8] Section 19 contains two branches. Branch 1, set out in section 19(a), is based on the common law, while Branch 2, set out in section 19(b), is a statutory privilege. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The only type relevant in this appeal is the former.

[9] 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.[1] The rationale for this privilege is to ensure that a client may freely confide in her lawyer on a legal matter.[2] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[3] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[4] 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.[5]

[10] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The ministry's representations

[11] The ministry submits that the exemptions in sections 19(a) and (b) apply to all of the records in their entirety, making its section 13(1) claim somewhat redundant. It states that it relies on the common law solicitor-client communication privilege component of section 19(a) and the legal advice component of section 19(b) as the basis for withholding all of the records. The ministry states that the solicitor-client communication privilege provided under section 19(a) protects the report as it is a direct confidential communication between a solicitor and client made for the purpose of giving professional legal advice.[6] It adds that the privilege also applies to the legal advisor's working papers directly related to formulating or giving legal advice,[7] and therefore, the privilege also protects the drafts of the report at issue in this appeal.

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[1] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[2] Orders PO-2441, MO-2166 and MO-1925.
[3] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[4] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[5] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[6] *Supra*, note 1 above.
[7] *Supra*, note 4 above.

[12] The ministry states that the statutory solicitor-client privilege under section 19(b), which is available in the context of materials created by or for Crown counsel for use in giving legal advice or conducting litigation, requires two criteria to be satisfied:

i. the record must have been prepared by or for counsel employed or retained by an institution; and

ii. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[13] The ministry states that section 19(b) encompasses the same two types of privilege as derived from the common law in section 19(a), and that the statutory and common law privileges exist for similar reasons. It asserts that although the wording of sections 19(a) and (b) is different, this office's orders have held that their scope is essentially the same, and it relies on the following passage from Order P-1342[8]:

> [I]n essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation.

[14] The ministry asserts that the fact that the records are properly exempt from disclosure under section 19 is beyond dispute. It explains that the report and its various drafts were prepared by the Chief Prosecutor for the Attorney General and include information about the nature of the issue and an appropriate response by Crown counsel when the issue arises. The ministry asserts that this is legal advice and is covered by solicitor-client privilege. The ministry continues that section 19 makes it clear that the exemption applies equally when the lawyer is Crown counsel giving advice to an institution. It adds that unlike section 13, section 19 creates no distinction between portions of a record that are factual in nature and those that form part of the advice; as such, section 19 applies to exempt all of the records in their entirety from disclosure.

[15] The ministry concludes by arguing that the public interest override in section 23 of the *Act*, although raised by the appellant, does not extend to the section 19 exemption. It relies on the decision of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[9] which found that section 23 had no application to records found to be exempt under section 19.

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[8] Upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4496 (Div. Ct.). See also Order MO-124.
[9] [2010] 1 S.C.R. 815.

The appellant's representations

[16] The appellant's main argument in his representations is that the report is administrative rather than legal in nature. He explains that the report was produced in response to a series of investigative reports by the Toronto Star, the first of which was published on April 26, 2012. He continues that the Star's investigation found more than 100 cases of police deception across Canada and that Ontario, like most provinces, had no formal mechanism to investigate allegations of police lying in court. After the Star published the first article in its investigation, the Attorney General announced that the author of the report would look into the issue. The appellant argues that the solicitor-client exemption should not apply because the ministry is inappropriately asserting the existence of privilege on the basis that the author of the records happens to be a lawyer. He asserts that the report is administrative in nature, and not legal. He further argues that the author is a public servant producing a report and he supports his argument by stating that the author is not among the three individuals identified in the ministry's 2013 organizational chart as "legal counsel" to the Deputy Attorney General, who report to the Attorney General. The appellant states that the author of the report is an employee of Ontario's public service who was tasked with authoring a report on an issue that undermines the credibility of the province's justice system. As such, it is not appropriate to claim solicitor-client communication privilege for the records at issue.

[17] The appellant submits that the ministry has not satisfied both criteria required to qualify for exemption under Branch 2. He relies on a passage from Order P-1342 to argue that Branch 2 "is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships." He argues that it is insufficient that the author of the report is a Crown attorney; rather, the author must have prepared the records "for use in giving legal advice, or in contemplation of litigation, or for use in litigation."

[18] The appellant also argues solicitor-client privilege may have been lost in this appeal. He states that many orders of this office have determined that privilege is waived when the records document a communication made in open court, and he refers me to Orders P-1551 and MO-2006-F. The appellant states it is difficult to thoroughly argue this point because he has not seen the report at issue; however, he assumes the report references and reviews cases where Ontario judges have made comments and findings concerning a police officer's credibility and honesty. He adds that such comments and findings cannot be subject to solicitor-client privilege if they have already been made in open court.

[19] The appellant states that the report presumably describes how Crown counsel, as employees of the ministry, and in turn, government employees, should act if they have concerns about the truthfulness of a police officer's testimony or evidence. He states that the report formalized a reporting mechanism that did not previously exist that holds government employees accountable in preserving the integrity of the justice

system; he argues this is a matter of administrative accountability. The appellant also notes there are multiple reports written by lawyers and judges appointed by the Attorney General and he refers me to three such examples. He then concludes by stating that if the section 19 exemption is upheld in this appeal, this office risks reinforcing a "near-impenetrable shield that surrounds the ministry, preventing citizens from accessing public records from the ministry because its employees happen to be lawyers."

The ministry's reply representations

[20] The ministry replies that the appellant's argument that the report is administrative in nature is a gross mischaracterization of the contents of the report, the author who produced it, the recipient to whom it was addressed, and the purpose for which it was created. The ministry asserts that the report was prepared by legal counsel and provides legal advice to the Attorney General of Ontario. It states that the report was prepared by the Assistant Deputy Attorney General (ADAG). The ministry argues that the appellant has significantly understated the ADAG's role both within the ministry, in general, and in producing the report in particular. It continues that the ADAG, acting in his capacity as a member of the Law Society of Upper Canada, Chief Prosecutor of Ontario, and Crown counsel, is clearly a legal advisor within the ministry, and is far more than a general public sector employee. The ADAG is responsible for the prosecution and appeals of all criminal law and quasi-criminal matters within the province. The ADAG is also tasked with providing legal advice on criminal and quasi-criminal matters to the Crown, Attorney General, Deputy Attorney General and other ministries as required. As legal advisor to the Attorney General, Deputy Attorney General and government, the ADAG is required to have an advanced understanding of criminal law, criminal evidence, as well as, trial and appellate procedure.

[21] The ministry asserts that in preparing the legal advice that he did, the ADAG was acting in his capacity as legal counsel and advisor to the Attorney General in addressing a legal issue that had arisen with respect to police officers lying under oath in court. It was precisely because of the ADAG's legal position and designation that he was asked to prepare a legal opinion and provide legal advice on a very specific and narrow issue relating to the role and responsibility of the Crown and the recommended process to deal with such circumstances. The ministry explains that the ADAG consulted with others about the prospective process to be undertaken, thereby helping him form the legal opinion and advice that he did. The legal advice was addressed solely to the Attorney General and took into account legal considerations and obligations, and represented the type of advice that would normally be provided by any member of the legal profession to a client.[10]

[10] Order 170.

[22] The ministry concludes by submitting that the report deals with legal issues and contains legal advice, and was assembled considered and prepared by legal counsel; therefore, it qualifies for exemption under section 19.

Analysis and findings

[23] Having reviewed the representations of the parties and the records at issue, I agree with the ministry that the records are exempt under both sections 19(a) and (b). I accept the ministry's submissions that the report was prepared by the ADAG in his capacity as Crown counsel and one of the most senior legal advisors in the ministry, for use in giving legal advice to the Attorney General. On its face, the report is a direct confidential communication addressed to the Attorney General, who requested it from his legal advisor. The report contains legal advice, formulated by the ADAG for the Attorney General, on legal issues affecting the Criminal Law Division that directly relate to the administration of justice. The draft versions of the report are the ADAG's working papers setting out his legal advice in its formulation phase; using the same reasoning, they too are solicitor-client privileged.

[24] I do not accept the appellant's argument that the ministry is inappropriately relying on the solicitor-client privilege exemption because the ADAG "happens to be a lawyer." The solicitor-client relationship between the ADAG and the Attorney General in the generation of the report is undeniable. The ADAG is the Chief Prosecutor of Ontario responsible for the prosecution and appeals of all criminal law and quasi-criminal matters within the province. I accept that it is because of the ADAG's legal expertise in criminal prosecution and his position as senior Crown counsel that the Attorney General sought the ADAG's legal advice on what steps the ministry should take regarding instances of dishonest police testimony; an issue which the appellant states undermines the credibility of the province's justice system. Inherent in this point made by the appellant is the fact that a report on this issue affecting the province's justice system would have to be prepared by someone who has the requisite legal expertise and first hand understanding of the province's justice system; namely, Crown counsel. The fact that the record is called a report does not detract from its legal character. The "report" title may have contributed to the appellant's assumption that the report and its contents are administrative, and not legal, in nature; however, this assumption is wrong. Consequently, I reject the appellant's argument that the report is not subject to solicitor-client privilege because it is administrative in nature.

[25] I also reject the appellant's argument that any privilege attaching to the records was lost by virtue of the information being disclosed in open court; the appellant's assumption about what is contained in the report is incorrect on this point as well. None of the information in the report has lost its solicitor-client privilege on account of the existing privilege being waived.

[26] Finally, I reject the appellant's argument that the ministry is asserting a privilege for Crown counsel that is more expansive or durable than that which is available at common law to other solicitor-client relationships. The report is a direct confidential written communication from a legal advisor to a client setting out advice on a course of action regarding a legal issue. It is therefore subject to solicitor-client privilege here, where the legal advisor is a government lawyer, just as it would be if a lawyer in private legal practice had provided this legal advice to the Attorney General.

[27] The appellant's arguments have been advanced before in a similar appeal adjudicated by this office years ago. That appeal considered the application of the solicitor-client privilege exemption to a memorandum from the Director of Crown operations to the Attorney General on the issue of trial delays. In Order PO-1994, Former Assistant Commissioner Tom Mitchinson accepted the appellant's arguments that the memorandum was not made for the purpose of providing legal advice, but rather, for the purpose of providing operational advice; and on this basis, he found that the memorandum was not subject to solicitor-client privilege. Order PO-1994 was subsequently overturned by the Divisional Court.[11] In finding that the memorandum was exempt under the solicitor-client privilege exemption in section 19, the Court reasoned:

> (i) the memorandum is written by a senior prosecutor in the criminal law division of the Ministry on the subject of litigation strategy in proceedings in which the Attorney General of Ontario conducts prosecutions on behalf of the Crown, a party to the prosecution.
>
> (ii) on first reading, the memorandum, being devoid of legal citations and quotations from legal authors, may appear to be a collection of statistics regarding the operations of the courts of the province and criminal charges. However, on closer scrutiny, the memorandum reveals that it incorporates legal advice encompassing the author's legal opinion and his prognosis of the legal ramifications and consequences of the vintage and growing number of outstanding cases in the criminal courts of Ontario. The memorandum contains the advice of an experienced prosecutor about dealing with the problem of criminal trial delays. This memorandum could not have been authored by anyone except an experienced prosecutor who is alive to the state of the law and what has transpired "in the field" in recent years. The memorandum synthesizes cause, effect and the strategy required to solve the legal problem that arises with criminal trial delays.[12]

[28] Although the content of the report at issue in this appeal and that of the memorandum at issue in PO-1994 differ, the Divisional Court's ruling directly applies to

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[11] *Ministry of the Attorney General v. Tom Mitchinson, Assistant Information and Privacy Commissioner, and Jane Doe, Requester,* Toronto Doc. 190/02 (Div. Ct.).
[12] *Ibid*, paragraph 13.

this appeal. The report was written by the Chief Prosecutor in the province responsible for criminal prosecutions on the subject of the Crown's current and recommended practice in situations where a judge makes comments on the possibility that a police officer has lied under oath in a proceeding in which the Attorney General of Ontario conducts prosecutions on behalf of the Crown, a party to the prosecution. Although the report does not contain legal citations and quotations from legal authors, it incorporates legal advice setting out the author's legal opinion of the practice that should be followed when a judge makes comments about deliberate police dishonesty under oath, having taken into the account relevant legal issues regarding witness testimony and the legal ramifications of such comments and of the resulting or recommended actions taken by Crown counsel. The report contains the advice of an experienced prosecutor about dealing with the issue of dishonest police testimony and its impact on the administration of justice. The report could not have been authored by anyone except an experienced prosecutor who is alive to the state of the law, what has transpired "in the field" in recent years and to the current practice in the ministry's Criminal Law Division.

[29] In accordance with the Divisional Court's ruling, I find that the report and the draft versions of it are subject to solicitor-client privilege. I further find that the records are exempt under both sections 19(a) and (b), subject to my review of the ministry's exercise of discretion below.

B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[30] 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, the Commissioner may determine whether the institution failed to do so. 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.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution.[14]

[13] Order MO-1573.
[14] Section 54(2) of the *Act*.

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[15]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- 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.

[33] In its representations, the ministry states it recognizes that in general, access to information should be granted except when it is required to withhold the information under the *Act*, or where it remains in the public interest to deny access. It continues that in this case, it decided to exercise its discretion not to disclose the records in good faith, with full appreciation of the relevant facts on appeal and on a proper application of the relevant principles of law. The ministry submits that it considered the following factors in exercising its discretion under section 19:

- the interests inherent within the section 19 exemption
- the appellant's interest in gaining access to the records
- the sensitive nature of the records' contents and the confidential context of their creation
- the ability of government employees, including legal counsel, to work closely together toward administering justice in a fair, equitable and effective manner

[15] Orders P-344 and MO-1573.

- the fact that it disclosed a comprehensive Practice Memorandum on the topic identified by the appellant

- the law and principles enunciated by the Supreme Court of Canada in determining that the records were clearly solicitor-client privileged and exempt from the public interest override in section 23.

[34] In his representations, the appellant states that he accepts that the ministry weighed numerous factors in making its decision as described in its submissions. However, he submits that the ministry failed to properly exercise its discretion under section 19. The appellant states that the topic of the report – the undermining of the justice system by dishonest police testimony – is one of great public interest; especially when compared to other reports commissioned by the Attorney General available on the ministry's web site. The appellant asserts the ministry failed to exercise its discretion appropriately in part, as a result of its "misguided belief that the internal operations of the ministry are protected under solicitor-client privilege because the public servants also happen to be lawyers."

Analysis and findings

[35] I am satisfied that the ministry properly exercised its discretion under section 19 in deciding to withhold the report and the drafts versions at issue in their entirety. The ministry considered the nature of the information in the records and the interests that the solicitor-client privilege exemption seeks to protect, which are significant. The requester is seeking access to a report that is in essence a legal opinion on a sensitive legal issue that affects the ministry and the administration of justice. In deciding to withhold the records, the ministry appropriately considered its disclosure of the Practice Memorandum to the appellant. The Practice Memorandum was attached to the report at issue. It is five pages long and it is addressed to counsel in the ministry's Criminal Law Division. It is longer that the report and contains much relevant information in response to the appellant's request, including: guidance to Crown counsel in circumstances of dishonest police testimony; instructions on the steps to be taken in such situations; and a template of the reporting letter to be used. Disclosure of this Practice Memorandum is a relevant and important consideration in the ministry's exercise of discretion, and it satisfies the principle of the *Act* that information held by government institutions should be public, which the appellant has raised in the form of the public interest override.

[36] The ministry also appropriately considered the fact that the solicitor-client privilege exemption is not subject to the public interest override in section 23 of the *Act*, as confirmed by the Supreme Court of Canada in *Ontario (Public Safety and*

Security) v. *Criminal Lawyers' Association*.[16] Accordingly, there is no need for me to consider the possible application of the section 23 public interest override in this appeal.

[37] I find that the ministry exercised its discretion under section 19 appropriately and I uphold its exercise of discretion.

ORDER:

I uphold the ministry's decision to withhold the records as exempt under section 19 and dismiss the appeal.

Original Signed By: September 23, 2014
Stella Ball
Adjudicator

[16] *Supra*, note 9.