Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3597

Appeal PA15-88

Ministry of Government and Consumer Services

April 13, 2016

Summary: The appellant sought information relating to the ministry's decision to discontinue a prosecution of a named company and individual. This order upholds the ministry's decision to withhold some responsive information under section 19 (solicitor-client privilege) and section 13 (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act.* The order finds that there is not a compelling public interest under section 23 of the *Act* in disclosure of the information withheld under section 13. The ministry conducted a reasonable search for responsive records under section 24 of the *Act.*

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13, 19(1), 23 and 24.

BACKGROUND:

[1] The Ministry of Government and Consumer Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to a named company and a named individual. The request was subsequently narrowed to records held by the ministry's consumer protection branch and legal services branch pertaining to the decision to change the venue of a prosecution against the named company and named individual, and records relating to a decision to discontinue the prosecution of that company and individual.

[2] The ministry located records responsive to the request and granted partial access to them, denying access to some of them, in full or in part, pursuant to the

discretionary exemptions at sections 13(1) (advice to government) and 19 (solicitor-client privilege) and the mandatory exemption at section 21(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to deny access to some of the information.

[4] During mediation, the appellant advised that he wanted access to the records that explain why the ministry abandoned its prosecution of the company and individual named in his request. He advised that he believes there is a public interest in the disclosure of the information withheld by the ministry. Accordingly, the public interest override at section 23 of the *Act* is at issue in this appeal.

[5] The appellant also believes that additional records responsive to his request should exist. Whether the ministry conducted a reasonable search for responsive records under section 24 of the *Act* is therefore also at issue in this appeal.

[6] Following a discussion with the mediator regarding the exemptions claimed by the ministry, the appellant identified which specific pages or portions of information he sought access to. The appellant also confirmed that he was not pursuing access to information withheld under section 21(1) of the *Act*.

[7] Subsequently, the ministry issued a revised decision letter granting the appellant access to some information previously withheld under section 13(1) of the *Act,* so that information is not at issue in this appeal.

[8] In its revised decision, the ministry also advised that it was claiming the discretionary personal privacy exemption at section 49(a), in conjunction with section 19 of the *Act,* to withhold a page in the records that contained the appellant's personal information. In its submissions, the ministry advised that it had revised its decision with respect to the application of section 49(a) to that page and that it would be issuing the appellant a decision letter, disclosing the record in full. As a result, the Notice of Inquiry for this appeal sent to the appellant stated that the page (page 106) and the related issues of whether it contained personal information and whether the discretionary exemption at section 49(a) applied, were no longer at issue. However, after further clarification of the ministry's position regarding page 106, it became clear that the ministry intended to disclose only portions of the page, and continue to withhold the remainder under section 19. It issued a further decision letter disclosing portions of the page. The appellant advised that he did not wish to pursue at inquiry the remainder of the page, so it is no longer at issue in this appeal.

[9] Also during mediation, the ministry located an additional five-page responsive record (pages 559 to 563). The ministry issued a supplementary decision letter regarding this record, advising that it was relying on sections 13(1) and 19 to withhold portions of this record. The ministry disclosed to the appellant the remainder of the

record. The appellant confirmed that he wished to pursue access to the withheld portions of this record and it has been included in the scope of the appeal.

[10] As a mediated resolution of this appeal could not be reached, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry.

[11] The adjudicator with initial conduct of this inquiry sought and received representations from the ministry and the appellant. Representations were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appeal was subsequently transferred to me for final disposition.

RECORDS:

[12] The responsive records comprise emails and notes, including draft briefing notes, related to the withdrawal of a prosecution by the ministry. In particular, the following pages of responsive records are at issue in this appeal:

- pages 117 to 119, 127 to 131, 186 to 190, 309 to 310 and 319 to 321 which have been withheld, in full, under section 19 of the *Act*;
- pages 121, 244 and 559-562 which have been withheld, in part, under section 19 of the *Act*;
- pages 1, 121, 126, 239-240 and 559 which have been withheld, in part, under section 13(1) of the *Act;*
- any additional responsive records that might exist.

ISSUES:

A. Does the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* apply to the information at issue?

B. Does the discretionary exemption at section 13(1) (advice or recommendations) of the *Act* apply to the information at issue?

C. Did the institution exercise its discretion under section 13(1), and/or section 19 of the *Act*? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records (section 23 of the *Act*) that clearly outweighs the purpose of the exemption for the information withheld under section 13?

E. Did the institution conduct a reasonable search for records (section 24 of the *Act*)?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* apply to the information at issue?

[13] 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[14] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[15] The ministry represents that both branches of section 19 apply to the records in issue. I will first consider the application of Branch 1 to the records.

Branch 1: common law privilege

[16] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[17] *Solicitor-client communication privilege*

[18] 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 Supreme Court of Canada in *Descôteaux v. Mierzwinski*[2] described the privilege as follows:

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[1] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[2] Ibid at 618.

> ... 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 attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [See Order P-1409]

[19] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[3] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[4] The English Court of Appeal in *Balabel v. Air India*[5] affirmed that 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. It stated that the privilege applies to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

[20] 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.[6]

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[3] Orders PO-2441, MO-2166 and MO-1925.
[4] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[5] [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

Representations of the parties and findings

[21] The ministry's submission is that solicitor-client communication privilege applies to all of the information it withheld under section 19. It says that the records reflect privileged and confidential communications between ministry counsel and clients relating to the seeking and giving of legal advice about matters relating to the prosecution that is the subject of the appellant's request. It says further that the records fall within the continuum of communications between solicitor and client relating to the seeking and giving of legal advice. The ministry also says that the records that contain legal advice, if disclosed, would reveal information about the exercise of prosecutorial discretion. The ministry's submissions go on to further describe the nature of the records it is withholding.

[22] The appellant's submissions do not directly address solicitor-client privilege.

[23] I am satisfied from my review of the records and the ministry's submissions that the records withheld either in full or in part under section 19 by the ministry fall within the scope of solicitor-client communication privilege under section 19(a). The records are confidential communications between a solicitor and client, or their agents or employees, and were made for the purpose of obtaining or giving professional legal advice (pages 117-119, 309-10, 319-321 and 244), or fall within the continuum of communications referred to in *Balabel* above (pages 127-131, 186-190, 559-562 and 121). The records include draft briefing notes that contain legal advice, were the subject of legal review, and were kept confidential as between lawyer and client.

[24] Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.[7] Prosecutorial discretion creates a zone of privacy around such decisions to advance, as stated in *Anderson* [at para 37] "the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice'." I accept the ministry's submission that some of the records that contain legal advice, if disclosed, would reveal information about the exercise of prosecutorial discretion. I will discuss prosecutorial discretion further below.

Waiver

[25] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and

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[7] *Krieger v. Law Society of Alberta*, 2002 SCC 65, at para. 47, cited with approval in *R v Anderson* 2014 SCC 41 at para. 40.

- voluntarily demonstrates an intention to waive the privilege.[8]

[26] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[9]

[27] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[10] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[11]

[28] The ministry's succinct submission is that no waiver of privilege occurred. The appellant's submissions do not raise any issue of waiver and none arises from my review of the records. Therefore, I find that the ministry did not waive privilege over the records withheld under section 19.

[29] Accordingly, I find that Branch 1 of section 19 applies to those records withheld under that section of the *Act*. As I have found that common law solicitor-client communication privilege applies to the withheld records, and there is no issue of waiver of the privilege, it is not necessary to consider the additional grounds for a claim of privilege over the records contained in the ministry's submissions.

Issue B: Does the discretionary exemption at section 13(1) (advice or recommendations) of the *Act* apply to the information at issue?

[30] Portions of pages 1, 121, 126, 239-240 and 559 of the records have been withheld, in part, under section 13(1) of the *Act.* I note that the information withheld on page 239-240 duplicates the information withheld on page 1.

[31] The information withheld under section 13 on pages 121 and 559 was also withheld under section 19 of the *Act*. As I found that section 19 applied to that information, I do not need to consider whether section 13 also applies to it.

[32] The Ministry describes the information withheld under section 13 as portions of email communications between the Director of the Licensing, Inspections and Investigations Branch of the ministry (the director) and ministry investigators under the director's supervision.

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[8] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[9] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[10] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[11] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

General principles

[33] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[34] The purpose of section 13(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[12]

[35] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[36] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[13]

[37] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[38] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[14]

[39] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the

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[12] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[13] See above at paras. 26 and 47.
[14] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[15]

[40] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[16]

[41] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information[17]
- a supervisor's direction to staff on how to conduct an investigation;[18] and
- information prepared for public dissemination[19]

[42] The ministry's submissions are that the withheld email correspondence reflects prior communications between the director and Crown counsel about the prosecution and the Crown's exercise of prosecutorial discretion. They submit that disclosure of the withheld information would, given the withdrawal of the charges in the prosecution, reveal the substance of, or allow accurate inferences about the advice or recommendations made by Crown counsel to the director.

[43] The appellant does not address the application of section 13(1) in his submission.

[44] I have reviewed the information withheld under section 13(1) on pages 1, 239-240 and 126 and am satisfied that the information contains advice and recommendations for the purposes of that section. The withheld portions of the emails contain suggested courses of action and advice about several issues, such as the ministry's investigative practices and processes and how to communicate the decision to withdraw the charges. It is apparent from the context of the records that the advice and recommendations were provided to the director by legal counsel or would allow an accurate inference about advice and recommendations provided to the director by legal counsel.

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[15] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[16] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[17] Order PO-3315.
[18] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[19] Order PO-2677.

Sections 13(2) and (3): exceptions to the exemption

[45] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

[46] Neither party suggested that section 13 (2) or (3) were relevant here and I do not consider these sections have any application to the records withheld under section 13(1).

Issue C: Did the institution exercise its discretion under section 13(1), and/or section 19 of the *Act*? If so, should this office uphold the exercise of discretion?

General principles

[47] The exemptions at sections 13(1) and 19 are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. In an appeal, the Commissioner may determine whether the institution failed to do so.

[48] 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; or
- it fails to take into account relevant considerations.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[50] The ministry emphasises the role that protection of prosecutorial discretion played in its decision to withhold records, and the closely related factor that the withheld records appear in the context of pending litigation.

[51] As I found above, some of the information withheld under section 19, if disclosed, would reveal information about the exercise of prosecutorial discretion.

[52] The appellant's request is founded on an understandable desire to know more about the rationale for the ministry's decision to withdraw charges against a named individual and corporation. He wants to know the basis for the exercise of prosecutorial

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[20] Order MO-1573.

discretion, specifically whether it was made in good faith and with proper motives. He also wants to know whether the individual who made the decision was experienced and that it was the individual's own decision. The ministry points to the court's consistent recognition that there are important policy reasons for maintaining the confidentiality of a prosecutor's exercise of discretion, including protecting such decisions from political interference, and from concerns for public or stakeholder reaction. Unfortunately for the appellant, it is precisely the stakeholder scrutiny that he seeks that encroaches on prosecutorial discretion. I am satisfied that protecting prosecutorial discretion is a legitimate factor that supports the ministry's decision to exercise its discretion to withhold information under section 19.

[53] The ministry also says that it has provided the appellant with an explanation for the withdrawal and that it met with him to do so. I also observe that the ministry exercised its discretion to disclose some information to the appellant.

[54] The appellant's submissions make clear he was not satisfied with the extent of disclosure at the meeting. However, I do consider the ministry's efforts to communicate with the appellant and their partial disclosure of records to suggest that it generally acted in good faith towards the appellant.

[55] Specifically in relation to the section 13 records, the ministry also says that it considered that disclosure could imperil the frankness and candour of communications, including advice and recommendations between crown and investigative staff in prosecution files, which in turn could undermine the ministry's effective enforcement of its regulatory enforcement role.

[56] It is apparent from the ministry's submissions that it exercised its discretion. I am satisfied that in doing so it considered relevant factors consistent with the purposes of the section 13(1) and 19 exemptions including the desire to protect frank communications and solicitor-client privileged communications, including some information that would reveal information about the exercise of prosecutorial discretion. I am satisfied that the ministry did not base its exercise of discretion on irrelevant factors. I find that the exemptions were applied consistently with the purpose of the *Act*.

[57] I therefore uphold the ministry's exercise of discretion to rely on sections 13(1) and 19.

Issue D: Is there a compelling public interest in disclosure of the records (section 23 of the *Act*) that clearly outweighs the purpose of the exemption for the information withheld under section 13?

General principles

[58] Section 23 states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

[59] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[60] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the Commissioner will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[21]

Compelling public interest

[61] In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government.[22] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the records must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[23]

[62] A public interest does not exist where the interests being advanced are essentially private in nature.[24] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25]

[63] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[26]

[64] Any public interest in *non*-disclosure that may exist also must be considered.[27] A public interest in the non-disclosure of the records may bring the public interest in

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[21] Order P-244.
[22] Orders P-984 and PO-2607.
[23] Orders P-984 and PO-2556.
[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Order P-984.
[27] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of "compelling".[28]

[65] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[29]
- the integrity of the criminal justice system has been called into question[30]
- public safety issues relating to the operation of nuclear facilities have been raised[31]
- disclosure would shed light on the safe operation of petrochemical facilities[32] or the province's ability to prepare for a nuclear emergency[33]
- the records contain information about contributions to municipal election campaigns[34]

[66] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[35]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[36]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[37]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[38]
- the records do not respond to the applicable public interest raised by appellant[39]

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[28] Orders PO-2072-F, PO-2098-R and PO-3197.
[29] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[30] Order PO-1779.
[31] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[32] Order P-1175.
[33] Order P-901.
[34] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[35] Orders P-123/124, P-391 and M-539.
[36] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[37] Orders M-249 and M-317.
[38] Order P-613.

[67] The appellant argues there is a public interest in disclosure of the records because of the need to hold a company to account for the damage it did to innocent consumers.

[68] I acknowledge the impact the decision to withdraw the prosecution had on the class of stakeholders directly interested in the withdrawn prosecution, which includes the appellant. However, the need to hold one particular company to account for its treatment of a group of customers is more a private interest for that affected class, than for the broader public in general. While the robust enforcement of consumer protection legislation generally could be considered a matter of broad public interest, the records themselves relate to the rather more narrow issue of the withdrawn prosecution against the named individual and company. The records do not relate to the enforcement of consumer protection legislation generally.

[69] As discussed above, the ministry submits that further disclosure would encroach on prosecutorial discretion and it points to the court's consistent recognition that there are important policy reasons for maintaining the confidentiality of a prosecutor's exercise of discretion, including protecting such decisions from political interference, and from concerns for public or stakeholder reaction. However, it is not a factor that supports their being a public interest in non-disclosure of the records I found could be withheld under section 13, because, in my view, those records do not reveal information about the exercise of prosecutorial discretion.

[70] Due to the lack of public interest in the records and because withholding the records is consistent with the purpose for the exemption under section 13, I find that there is not a compelling interest in disclosure of the records. I therefore find that section 23 does not apply to the withheld records.

SEARCH FOR RESPONSIVE RECORDS

Issue E: Did the institution conduct a reasonable search for records (section 24 of the *Act*)?

[71] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[40] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[72] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

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[39] Orders MO-1994 and PO-2607.
[40] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[41] To be responsive, a record must be "reasonably related" to the request.[42]

[73] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[43]

[74] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[44]

[75] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[45]

[76] The ministry provided a written summary of all steps taken in response to the request. In particular, the ministry says it contacted the requester for additional clarification of the request and worked with the appellant to narrow the scope of the request.

[77] The ministry provided details of searches carried out including: who conducted them, what places were searched, who was contacted in the course of the search, what types of files were searched and what the results of the searches were. It also provided details of its record retention practises.

[78] The ministry was asked to and did provide information about its searches in affidavit form.

[79] The appellant was asked to comment on the reasonableness of the ministry's search for responsive records and provide a reasonable basis for why he believes that additional responsive records might exist. The appellant cited an email, a copy of which he provided with his submissions, as evidence of a record that he had that the ministry had not identified as responsive. However, that email was created after the date of the appellant's access request and also outside of the date range of his narrowed request, which explains why the ministry did not identify it as a responsive record.

[80] The appellant also expresses a concern about the ministry's protocols for deleted emails. The ministry's detailed submission about its records retention practices satisfy me that, without more specific evidence, the ministry has a process for appropriately retaining emails, including emails responsive to the appellant's request.

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[41] Orders P-624 and PO-2559.
[42] Order PO-2554.
[43] Orders M-909, PO-2469 and PO-2592.
[44] Order MO-2185.
[45] Order MO-2246.

[81] For the above reasons I am satisfied that the ministry conducted a reasonable search for records.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: April 13, 2016

Hamish Flanagan
Adjudicator