Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3611

Appeal PA14-220

Ministry of the Attorney General

May 19, 2016

Summary: The appellant made a request to the ministry for a report relating to the bail court system authored by a specified individual. The ministry denied access to the report on the basis of the discretionary solicitor-client privilege in section 19. The adjudicator upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

Orders and Investigation Reports Considered: MO-2166 and PO-1994.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following report: "Remanding the Problem: An Evaluation of the Ottawa Bail Court", by a named individual in 2007. He indicated that the report is 91 pages in length.

[2] The ministry located an 89-page report that has a slightly different title: *Remanding the Problem: An Examination of the Ottawa Bail Court*. It then sent a decision letter to the appellant in which it denied access to this record under the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. In particular, the ministry cited sections 19(a), (b) and (c). The appellant appealed the ministry's decision.

[3] During mediation, the ministry stated that it was relying only on subsections (a) and (b) of 19.

[4] The adjudicator assigned to this file sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The file was then assigned to me to dispose of the issue on appeal.

[5] In this order, I uphold the ministry's decision and find the record is exempt under section 19.

RECORDS:

[6] The record at issue consists of a report called, *Remanding the Problem: An Examination of the Ottawa Bail Court*, by a named individual, 2007.

ISSUES:

A. Is the record exempt under the discretionary exemption in section 19 of the *Act*?

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

DISCUSSION:

Is the record exempt under the discretionary exemption in section 19 of the Act?

[7] The sole issue to be determined is whether the record is exempt under section 19 of the *Act*. 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

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

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

[10] 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 his or 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 solicitor and client aimed at keeping both informed so that advice can be sought and given.[3]

[11] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[4]

[12] 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] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[6]

Representations

[13] The ministry provided the following background to the application of the section 19 exemption:

> [The named individual] holds a PhD in Criminology from the University of Toronto and is currently an associate professor at the University of Ottawa. Crown counsel at the ministry reached out to [the named individual], as an expert in her field, to review and analyze case management data from the Ottawa bail courts. She was asked to prepare a report detailing her analysis, her findings, and her opinions. [The named individual] was provided with case management data collected and maintained by the ministry in order to prepare her report. [The named individual's] report was ultimately intended to assist Crown counsel in formulating legal advice for the ministry with respect to the bail process in Ontario.
>
> In late 2006 [the named individual] was provided with a 10-page contract (with an attached 22-page appendix), setting out the terms that would govern the provision of her services. Included in that contract was a term respecting the confidentiality of her work.

[14] The ministry further submits that the contract specified that all property rights of the report belonged to the ministry and that it retained property rights in any material provided to the named individual in order to draft the report. Furthermore, the ministry

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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*, [1982] 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] *Kitchener (City)* v. *Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

notes that the confidentiality term survived the expiration or termination of the agreement between itself and the named individual.

[15] The ministry notes that the named individual signed the contract and in 2007 she produced a report pursuant to that agreement. That report is the subject of the request.

[16] The ministry submits that it relies on both branches of section 19 to withhold the record at issue. It further submits that while both branches require the communication to be confidential, subsection 19(b) further requires the following:

- the record must have been prepared by or for Crown counsel; and,
- the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[17] The ministry cites Order MO-2166 and submits that both this office and the Courts have recognized that solicitor-client communication privilege can extend to third parties who act as experts. The ministry submits that in the present appeal, Crown counsel was tasked with providing legal advice to the ministry with respect to the operation of bail courts in Ottawa and in Ontario generally as part of the Upfront Justice project. It states:

> In order to provide an informed legal opinion, Crown counsel required the services of a third party expert to perform a statistical analysis and to offer an expert opinion on the results of that analysis. Accordingly, the exchange of information between Crown counsel and [the named individual] formed part of the continuum of communications protected by solicitor-client privilege.

[18] The ministry submits that the record at issue meets the traditional criteria that make out solicitor-client protected communication in that:

- The report was intended to be confidential.
- The report was prepared "for Crown counsel".
- The report was prepared for use in giving legal advice, in this case, advice relating to the operation of bail Courts in Ottawa, and in Ontario generally.

[19] The ministry submits that there has been no waiver, express or implied, of solicitor-client privilege since the report was created.

[20] The appellant submits that section 19 does not apply to the record as the ministry has failed to provide clear evidence showing that "…[the named individual's] report was originally and dominantly authored for the purposes of legal advice or in contemplation of litigation." The appellant states:

> The context in which the report was produced challenges the use of the discretionary exemption along with the claims for solicitor-client privilege. There has been no dispute by the Ministry of the Attorney General that *Remanding the Problem: An Evaluation of the Ottawa Bail Court* was part of the Upfront Justice Framework/Initiative/Strategy of MAG. In being part of this framework, [the named individual's] report was not for use in giving legal advice and should not be seen as part of the continuum of communications. Rather, [the named individual's] report is part of more generic managerial, operational and policy strategies used by MAG to deal with pressing criminal justice problems. In many cases, these are often called *corporate initiatives*.

[21] The appellant submits that the ministry's characterization of the report in its initial decision letter to him is evidence that the report was not prepared for the purpose of giving legal advice. The appellant notes that the decision letter states:

> While the Ministry does recognize that this report is not publicly available, it is routinely cited in a number of [the named individual's] reports and journal articles that are publicly available. The findings of the report were intended for *Ministry purposes only* and were not to be published at any time. [emphasis in original]

[22] The appellant further submits that the report was prepared for the Justice on Target initiative which the appellant notes was to address a particular problem and thus cannot be characterized as part of a continuum of communications that would impact litigation or provide legal advice. The appellant states:

> The publications of the Ministry of the Attorney General and other Ontario Ministries clearly show that there is no legal issue for which [the named individual] produces legal advice or informs ongoing litigation. Instead, there is research needed to assess and build capacity for corporate initiatives.

[23] Finally, the appellant submits that the fact that the named individual signed the confidentiality agreement with the ministry does not establish that the product of that agreement is solicitor-client privileged for the purpose of providing legal advice.

[24] The ministry was provided with an opportunity to respond to the appellant's representations and provided extensive representations about the ministry's decision to contract with the named individual to provide the report. I reproduce some of the background here:

> In the spring of 2005, the Premier asked the Attorney General and the Minister of Community Safety and Correctional Services to modernize/transform the justice sector. Among the many proposals to the Premier was the Upfront Justice Strategy. On November 3, 2006, Cabinet

approved the Upfront Justice Strategy submission. Treasury Board subsequently approved funding for the project.

The Upfront Justice Strategy operated within the Criminal Law Division of the Ministry of the Attorney General. Included within the ambit of the Criminal Law Division are the various Crown Attorney's offices across the province, the Criminal Law Policy Branch, as well as the office of the Assistant Deputy Attorney General, Criminal Law Division (the ADAG-CLD). The Upfront Justice Strategy evolved into the broader Ministry initiative of Justice on Target (JOT) which was launched in September 2008. With the assistance of the Policy Branch and the leading experts in the field (which included [the named individual]), the office of the ADAG-CLD, provided confidential legal advice and practice direction to the entire prosecution service of Crown Attorneys and Assistant Crown Attorneys regarding bail decisions that they must make on a day-to-day basis as criminal prosecutors.

There were many interrelated and interdependent initiatives that formed part of the Upfront Justice Strategy and eventually part of JOT. Such initiatives included:

- Dedicated case management teams;
- Short-Term bail court and early justice teams;
- Expanding Pre-Charge police/crown consultation;
- Police/Crown disclosure;
- Community Justice Initiative (Direct Accountability/Diversion); and
- Evaluation

[25] The ministry submits that the goal of JOT was to "modernize and improve efficiencies in all aspects of the legal and practical decision-making by Crown counsel in the prosecution of bail court matters." One way to achieve this efficiency is enhanced legal guidance and direction to Crown counsel regarding the manner in which they analyze, review, and approach the prosecution of accused persons in bail court.

[26] The ministry submits that given the scope of the strategy, the ministry retained leading criminologists and social science evaluators in the field to assist with the development of the strategy. The ministry relied on this body of research to evaluate existing legal advice, and to draft enhanced legal advice and practice direction to all Crown counsel in Ontario. A new practice direction PM, (Practice Memorandum) [2010] No. 2, on bail was sent to the prosecution service on May 20, 2010 and was in force as of May 25, 2010. As part of the Criminal Law Policy Branch's work on bail, the practice

memorandum was designed to constitute consolidated legal advice regarding bail decisions that had previously been found in a number of different practice memoranda.

[27] The ministry further explains:

> An integral part of providing enhanced guidance to Crown counsel in the conduct of bail hearings was to better understand the bail court data that was already in existence. Portions of this data was held and maintained within the ministry. [The named individual] was hired in her capacity as an expert criminologist and social scientist to conduct a statistical analysis of the ministry's data. She was retained to provide a report that included a description of her study, her methodology, and a presentation of her findings, including recommendations for targeted interventions directed to Crown counsel in the legal review and prosecution of bail matters.

[28] The ministry submits that the named individual produced the report, conducting an empirical analysis and recommending target interventions, which informed Senior Crown counsel's legal advice to Crown counsel, on the following issues:

- Adjournments in video remand (responding more effectively to unnecessary requests by the defence);
- Continuity of personnel in bail court (improving case ownership by justice participants, including Crown);
- Charges that were withdrawn by the Crown during the bail process (enhanced charge screening);
- Time spent by the Crown preparing and reviewing criminal bail files;
- Time spent reviewing release plans and looking into sureties;
- Early resolution of charges during the bail process; and
- The assignment of Crowns.

[29] The ministry states that the named individual's report was provided to the ministry, including Senior Crown counsel, and specifically to the Director of Upfront Justice, for use in all aspects of bail decision making. The ministry submits that Senior Crown counsel considered the report and its recommendations and legal advice was ultimately conveyed in many different forms to the entire prosecution service, including Confidential Legal Advice Directives, Crown Policy Memoranda, and General Practice Directions. The ministry states:

> As with many evolving legal issues, Crown counsel are provided with confidential legal advice and direction that informs the manner in which they make legal decisions every day in bail courts across the province.

[30] While the ministry submits it does not have to provide evidence of the legal advice rendered as a result of the named individual's report, it identified some examples of legal advice provided to the Criminal Law Division of the ministry by Senior Crown counsel, relating to bail initiatives. The ministry also provided two examples of the legal advice provided to the Criminal Law Division. The first is an email to members of the Criminal Law Division relating to legal advice that formed part of the Justice on Target initiative as it applied to their daily practice. The second is a practice memorandum on the subject of bail. The ministry submits that the two documents evidence the "nature of the strategic legal advice and direction that was subsequently provided to Crown counsel in the prosecution of bail matters, which were in part informed by the findings and recommendations made by the named individual in her report."

[31] The ministry notes that both of these documents originated with the Office of the Assistant Deputy General, Criminal Law Division and were informed by Crown counsel involved with Justice on Target. The ministry states:

> Both documents constitute legal advice to front-line Crown prosecutors involved in the bail process. It is no coincidence that, like [the named individual's] report, they deal with such issues as:
>
> - The need for expediency in bail proceedings;
> - Adjournment requests by the Crown;
> - The Crown's position in response to defence adjournment requests;
> - The Crown's position on bail in relation to the nature of the charge;
> - Early resolution of charges during the bail process;
> - What type of information is important enough to form the basis for a Crown adjournment request; and
> - The assignment of Crowns.

[32] The ministry submits that the leading case of the extension of solicitor-client privilege to third parties is the decision of the Court of Appeal in *General Accident Assurance Co.* v. *Chrusz*[7]. The ministry states:

> According to the Court, the extension of solicitor-client privilege to third parties in certain cases is well-settled. When an individual is retained by a client or by counsel, to convey/interpret/translate information from sources internal to the client, and that third party serves as a channel of communication between the client and solicitor, then the communications

[7] (1999), 45 O.R. (3d) 321 (C.A.).

> **to** or **from** the third party by the client **or** solicitor will be protected by the privilege. [emphasis in original]

[33] The ministry submits that the named individual was hired by the ministry to review, analyze, and suggest targeted interventions, based on bail data that was gathered by, and in the possession of, the ministry. That internal data was supplied by the ministry and was covered by the confidentiality agreement signed by the named individual. The named individual's work was then presented to the ministry and to Senior Crown counsel, including the Director of the Upfront Justice Strategy. Following a careful review of the research, Senior Crown counsel formulated legal advice to the ADAG, Criminal Law Division, in the form of draft legal proposals.

[34] The ministry also addresses the appellant's argument that the record at issue represents policy advice and not legal advice. The ministry states:

> There is no support for the proposition that the mere existence of a policy on a particular issue transforms all subsequent and related legal advice into policy advice. What the IPC **has** explained is that communications with a lawyer will **not** be protected where an individual who happens to be a lawyer, is not acting in his or her capacity as a lawyer (or in this case, as Crown counsel). However, this is not the case in the matter under appeal. [The named individual] was asked to complete the report for the client Ministry so as to assist Crown counsel in providing legal advice to the ministry who, in turn, provided legal and strategic advice, as well as practice directives, to Assistant Crown Attorneys across the province in 2010. Irrespective of whether the request was rooted in an existing policy objective, the legal advice (which clearly engaged legal considerations) was provided by Crown counsel, acting in their role as legal counsel.

[35] The appellant was provided with an opportunity to respond to the ministry's representations. He reiterates his position that the record at issue should be characterized as policy rather than legal advice. Further, he submits that the confidentiality term of the contractual agreement between the ministry and the named individual should have no bearing on whether the report is found to be solicitor-client privileged. Finally, the appellant asked that I consider the following to determine whether the record at issue is solicitor-client privileged:

- The dominant and original purpose of the report.
- Not all communications to Crown counsel constitute legal advice.
- Commenting on a legal issue does not always constitute legal advice.

[36] The appellant submits that the record at issue must have been originally and dominantly "authored for the purposes of legal advice or for contemplation in litigation" and cites Orders PO-1663 and M-173, P-454 and P-463. The appellant submits that I

should look at the conditions and the purposes for which the report was contracted and produced.

[37] The appellant further questions the evidence provided by the ministry to establish the continuum of communications and submits that privilege should not apply where it is unclear whether communications were provided "merely for information."

[38] Finally, the appellant submits that the report should be disclosed because of the policy recommendations it contains and the need for public assessment of these recommendations before they are implemented by the ministry. In my view, the appellant's comments on this last issue are more relevant to the question of the ministry's exercise of discretion and I will set them out there.

Analysis and Finding

[39] Based on my review of the record at issue and the parties' representations, I find that the record at issue is solicitor-client communication privileged. I accept the ministry's representations that the information in the record at issue, specifically the named individual's analysis of the ministry's bail data and targeted recommendations, were used by Senior Crown counsel to provide legal advice to Crown counsel operating in bail courts across the province. I further accept that the content of the report was intended to be treated as confidential by both the named individual and counsel at the ministry for the purposes of providing confidential legal advice. Finally, I find that the ministry has not waived its privilege in the record.

[40] Adjudicator Kate Corban in Order MO-2166 considered the application of the solicitor-client communication privilege to records containing information from an affected party who advised the City of Hamilton's lawyer regarding the Red Hill Creek Expressway project. The adjudicator first considered whether communications between the affected party and the city's lawyer could be considered communications between a client and legal advisor. The adjudicator reviewed both the rational set out in *General Accident* v. *Chrusz*, set out above in the ministry's representations and the Supreme Court of Canada's decision in *Smith* v. *Jones*[8].

[41] Adjudicator Corban reviewed the rule in *General Accident* v. *Chrusz* above and stated:

> …the determination of the extension of the solicitor-client privilege depends not on whether the third party is an agent, but on the third party's function. The Court goes on to explain that if the third party's retainer extends to a function that is essential to the existence or operation of the solicitor-client relationship, then the privilege should cover any communications that are in furtherance of that function and that meet the criteria for solicitor-client.

[8] *Smith* v. *Jones*, [1999] 1 S.C.R. 455.

[42] The adjudicator applied this rationale and determined the following:

> ..I am persuaded that the law firm retained the affected party to act for the law firm, specifically acting under the direction of the lawyer responsible for the City's file, to assist in providing the most comprehensive and accurate legal advice to the City on the complicated matter that is the Red Hill Creek Expressway project. I find that her assistance and her specific expertise related to that which the lawyer was retained to advise upon, and was essential to the operation of the solicitor-client relationship, namely the provision of legal advice to the City.

[43] Adjudicator Corban noted that the fact that the "affected party" in her appeal was not a lawyer did not negate the application of the solicitor-client privilege and states:

> In her representations, the affected party submits that her role was to draw upon her *professional background and experience to provide expert advice* to assist the lawyer in providing legal services to the City. She submits that the lawyer's advice to the City depended on her expertise to understand the developing situations related to the Red Hill Creek Expressway matter, to ensure he was alerted to issues with potential legal consequences and generally provided him with a detailed understanding of merging context, politically, legally and environmentally.

[44] I accept that rationale of the solicitor-client communication privilege and apply it here. I find that the Director of the Upfront Justice Strategy (counsel for the ministry) retained the named individual to provide her expertise by reviewing, analyzing and suggesting targeted interventions based on the bail court data provided by the ministry. After reviewing the report, Senior Crown counsel formulated legal advice to prosecution service Crown counsel based, in part, on information from the report.

[45] The ministry identified the legal advice provided and sought as *the improvement of efficiencies in the bail court system* and explains:

> Efficiencies to the bail process can be achieved in many ways, including enhanced legal guidance and direction to Crown counsel regarding the manner in which they analyze, review, and approach the prosecution of accused persons in bail court. The decision to release or seek the detention of an accused person in the bail context is complex and involves legal submissions that are specific to the case and the person. As always, the balance between a person's fundamental right to liberty and public safety is a paramount consideration for all Crown counsel in Ontario. In this regard, public safety demands that the decision to release an accused would present if released into the community and what safeguards must be in place to manage the risk to public and individual safety, and to ensure the accused's attendance in court. Any improvements to the bail

> process must also be cognisant of the high volume of criminal charges that flow through the bail courts in major cities, and to the diverse needs of the communities in smaller and/or remote jurisdictions.

[46] I accept the ministry's submission that the scope of determining and defining initiatives for bail efficiency improvements would require Senior Crown counsel to provide legal advice to the prosecution service. The ministry provided examples of the practice direction and practice memorandum relating to bail and Justice on Target provided to the prosecution service. These documents contain legal advice and direction to Crown counsel for the purposes of aiding their decision-making and actions during bail hearings. Based on my review of the record at issue, the representations of the parties and the evidence provided by the ministry, I find that the record at issue was integral to the legal advice being given by Senior Crown counsel. Accordingly, I find that the record at issue is solicitor-client communication privileged for the purposes of section 19.

[47] Before I consider the application of the ministry's exercise of discretion under section 19, I would like to address the appellant's argument about whether the report constitutes policy or legal advice.

[48] Although I concur with the appellant's position that not all communications by Crown counsel would constitute legal advice, this does not affect my finding above. In Order PO-1994, former Assistant Commissioner Tom Mitchinson considered the application of section 19 to a memorandum of the Director of Crown Operations to the Attorney General. In considering whether the record at issue contained legal advice, the Assistant Commissioner identified the different roles that Crown Counsel at the ministry may hold. He states:

> The Ministry of the Attorney General is somewhat unique in its structure and functions. In discharging its responsibilities for the administration of the provincial judicial system, the Ministry must and does employ a large number of lawyers who provide a wide range of legal services. In some cases, of which the Director of Crown Operations is a good example, individual lawyers employed by the Ministry are required to perform a combination of responsibilities, both legal and operational. I have no difficulty in accepting that the Criminal Law Division as a whole, which includes a regionalized Crown Operations structure, has as its primary responsibility the provision of legal services to the province's criminal court system. However, it is important to recognize that this Division (as well as others in the Ministry) is also responsible for a range of operational responsibilities, similar in nature to other operational divisions that exist throughout the various ministries of the Ontario Government. It is the managers who discharge these operational responsibilities and, in my view, not all advice provided by management staff in the various Divisions of the Ministry of the Attorney General is necessarily or inherently legal advice protected by solicitor-client privilege. One must look to the nature

> of the advice itself, and distinguish between legal advice that warrants specific treatment in accordance with the common law requirements of solicitor-client privilege, and operational advice that should be considered under section 13(1) of the *Act* in the same manner that similar types of advice is handled in other institutions.[9]

[49] In the circumstances of the present appeal, Senior Crown counsel were providing legal advice to the prosecution service and not operational advice. The appellant submits that there is a clear division between legal advice and other types of policy advice, factual analysis, historical or other research or status reports. The appellant submits that since there is a clear divide between legal and policy advice, I should consider whether the record at issue could be severed to disclose the non-privileged information to him.

[50] I do not agree that there is a clear division in the record between information that can be characterized as policy advice and information that is legal advice. For the purposes of improving efficiencies in the bail system, I find that it would be difficult to clearly divide information that is legal advice from information that is operational or policy advice as the policy advice necessarily informs the legal advice. I accept the ministry's statement that:

> In a ministry that employs approximately 1,000 Crown counsel who appear in bail courts across the province each day, policies and directions related to bail, by their very nature, will include legal advice to all Crowns. The appellant's argument assumes that all advice to lawyers can be neatly carved out into separate policy or legal advice categories or that the two cannot co-exist. This is obviously not the case, as is evident in practice memoranda routinely issued to Crown counsel, wherein practical legal advice is often rooted in larger, macro-level, policy advice or initiatives.

[51] Based on my review of the record, I do not accept the appellant's position that the record at issue represents policy advice and not legal advice. The report does not solely contain a policy or operational review of the bail process in Ontario. Moreover, I find that I am not able to sever the record in order to disclose non-privileged information to the appellant.[10]

[52] In summary, I find that section 19 of the *Act* applies to the record.

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[9] I note that the record at issue in Order PO-1994 was a memorandum written by the Director of Crown Operations, a lawyer, dealing with trial delays in criminal proceedings. The former Assistant Commissioner found that this record was "operational and not legal in nature". On judicial review, the Divisional Court set aside Order PO-1994, finding that the memorandum contained the advice of an experienced prosecutor about dealing with the problem of criminal trial delays. *Ministry of the Attorney General* v. *Tom Mitchinson, Assistant Information and Privacy Commissioner, and Jane Doe, Requester*, Toronto Doc. 190/02 (Div. Ct.).

[10] See Div. Ct., *supra.*

A. Did the ministry properly exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[53] The exemption at section 19 is discretionary. It 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.

[54] 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.

[55] In any of these cases this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[56] The appellant submits that due to the important subject matter of the named individual's report and the implications of this report on the bail system across the province, the public should be given a chance to review her advice. The appellant states:

> Meaningful change in the bail process will unquestionably impact frontline prosecutorial decisions, liberties of accused people and security of the public. If the goal is meaningful change, it is expected that research will be use[d] [to] diagnose the issues and provide sound, evidence-based solutions. While I accept wholly MAG's claims about the public interest in the commission of research, the public interest also lies in making this research available for the public to assess, the research community to debate and evaluators to test the success or failure of the bail court reform in Ontario.

[57] The ministry submits that it properly exercised its discretion under section 19 not to disclose the record at issue. In doing so, the ministry submits that it considered: the interests inherent in the section 19 exemption; the interest of the public in accessing research commissioned by the ministry; the appellant's interests in gaining access to the records; the fact that the records do not implicate the appellant's personal information; the absence of any sympathetic or compelling need, on the part of the appellant, to receive the information; the near "absolute nature" of solicitor-client privilege; and the historic practice of the ministry with respect to solicitor-client protected communications.

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[11] Order MO-1573.
[12] Section 54(2).

[58] While I find the appellant's argument compelling, the public interest override in section 23 of the *Act* does not apply to a record withheld under section 19. The public's access to government held-records is one of the purposes of the *Act* but this right is subject to necessary exemptions that are applied in a limited and specific manner.

[59] In the circumstances, I find that the ministry's exercise of discretion was proper. I find that it properly considered the interests sought to be protected under the section 19 exemption, the historic practice of the ministry with regard to disclosure of the information and nature of the information and its sensitivity to the ministry. I uphold the ministry's exercise of discretion to withhold the record under section 19.

ORDER:

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

Original Signed By: May 19, 2016

Stephanie Haly
Adjudicator