

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3802

Appeal PA15-66-2

Ministry of Community Safety and Correctional Services

January 8, 2018

**Summary:** After requesting all information in the file of his late daughter on a compassionate basis, the appellant appealed the ministry's decision to deny access to some information in her file at the Office of the Chief Coroner. The ministry made additional disclosures during mediation, but continued to withhold some information under sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. It also withheld other information on the ground it is not responsive to the appellant's request as narrowed at mediation to exclude the personal information of other individuals. During the inquiry process, the appellant affirmed his continued interest in the personal information of other individuals. In this order, the adjudicator considers the appellant's right of access to this information, but finds that its disclosure would be an unjustified invasion of personal privacy under section 21(1). In making this finding, she upholds the ministry's decision that the exception for disclosure for compassionate reasons at section 21(4)(d) does not apply. The adjudicator also upholds the ministry's decision to withhold other information under sections 13 and 19. The appeal is dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2 (definitions), 13, 19, 21(1), 21(2)(f), 21(4)(d), 24.

**Orders and Investigation Reports Considered:** PO-3309-I.

### OVERVIEW:

[1] The appellant is the father of a young girl who died in 2011. The appellant made a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

“all medical records” held at the Office of the Chief Coroner that relate to the death of his daughter.

[2] This office addressed the appellant’s appeal of the ministry’s decision on that request in Appeal PA12-114, which resulted in Interim Order PO-3309-I. In that order, among other findings, the adjudicator held that the appellant’s request was limited to his daughter’s medical records, and did not encompass other types of records; as a result, it was not necessary for her to consider the exemptions that had been claimed by the ministry to deny access to non-responsive records. The ministry did, however, disclose some additional responsive records to the appellant as a result of the interim order.

[3] The appellant then made a new request to the ministry under the *Act* for “ALL INFORMATION” in his late daughter’s file “on a compassionate basis.” In its decision letter, the ministry specified that it had considered the appellant’s request in light of its discretion under the *Act* to disclose personal information about a deceased individual to a close relative where it is desirable to do so for compassionate reasons, referring to section 21(4)(d) of the *Act*. The ministry’s decision was to grant partial access to records contained in the file of the Office of the Chief Coroner. The ministry withheld some information in the records, citing the exemptions at sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), and sections 21(1) and 49(b) (personal privacy) of the *Act*. The ministry also claimed that some information in the records is not responsive to the appellant’s request.

[4] The appellant appealed that decision to this office, which opened Appeal PA15-66-2. This order addresses the issues in Appeal PA15-66-2.

[5] During the mediation stage of the appeal process, the ministry disclosed additional records and parts of records to the appellant, and claimed the discretionary exemption at section 49(a) (discretion to refuse requester’s own information) for some of the withheld information. The parties resolved issues relating to the ministry’s search for records, and removed some records and information—including the personal information of other individuals—from the scope of the appeal.

[6] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. In seeking initial representations from the ministry, the adjudicator identified four records as containing the information at issue in the appeal. She also removed as issues the section 49 exemptions claimed by the ministry, as these exemptions are only applicable to records containing the personal information of the individual requesting access, and there is no claim that the appellant is seeking access to his late daughter’s records on her behalf.<sup>1</sup> The ministry provided representations in support of its decision to withhold all or parts of the four records without reference to the section 49 exemptions.

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<sup>1</sup> Section 66(a) of the *Act*. This section addresses the exercise of a deceased’s individual’s right of access under the *Act* by her personal representative in some circumstances.

[7] The ministry's representations were shared with the appellant in accordance with this office's *Code of Procedure and Practice Direction 7*. In response, the appellant asserted that he also seeks access to the withheld portions of two additional records. The ministry was asked for supplementary representations on these records, which it provided. The ministry's supplementary representations were shared with the appellant, who responded to both sets of ministry representations. The ministry was then invited to make reply representations, which it did.

[8] This appeal file was then transferred to me. In this order, I uphold the ministry's decision to withhold portions of six records. I dismiss the appellant's appeal.

### **INFORMATION AT ISSUE:**

[9] At issue in this appeal are the withheld portions of six records.

[10] They are:

- Page 78, an email withheld in full under section 19;
- One portion of page 106, a fax memo, withheld under section 13(1);
- Portions of invoices at pages 288 (duplicated at page 442) and 289 (duplicated at page 443), withheld on the basis they are not responsive to the request, or, alternatively, under section 21(1).

Also at issue is the following additional information identified by the appellant:

- One portion of page 235 (duplicated at page 381), withheld on the basis of section 21(1); and
- One portion of page 398, withheld on the basis it is not responsive to the request, or, alternatively, under section 21(1).

### **ISSUES:**

- A. What is the scope of the request? Is the withheld information in pages 235, 288, 289 and 398 responsive to the request?
- B. If the withheld information in pages 235, 288, 289 and 398 is at issue in this appeal, does it contain "personal information" within the meaning of the *Act* that qualifies for exemption under section 21(1)?
- C. Does the discretionary exemption at section 19 apply to page 78? Did the ministry exercise its discretion under section 19?

- D. Does the discretionary exemption at section 13(1) apply to the withheld information in page 106? Did the ministry exercise its discretion under section 13(1)?

## **DISCUSSION:**

### **A. What is the scope of the request? Is the withheld information in pages 235, 288, 289 and 398 responsive to the request?**

[11] The ministry claims that the withheld portions of page 288 (and its duplicate) and page 289 (and its duplicate) are not responsive to the appellant's request. The ministry made the same claim for the withheld portion of page 398 after it was made aware that the appellant also seeks access to this page.

[12] Under this heading, I will also address page 235 (and its duplicate on page 381). Pages 235 and 398 were not identified as records at issue at the beginning of the inquiry, and were added as records after the appellant informed the adjudicator of his interest in the information withheld from these pages.

[13] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record [...];

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.<sup>2</sup>

[15] To be considered responsive to the request, records must "reasonably relate" to

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<sup>2</sup> Orders P-134 and P-880.

the request.<sup>3</sup>

[16] The initial request is an important starting point in determining the scope of the request, particularly if it is unambiguous. It also serves as the focal point for subsequent clarifications.<sup>4</sup>

[17] The appellant's initial request is clear and unambiguous on its face. He seeks "all information" in his late daughter's file, and does not qualify his request in any way. I also find relevant the fact that the appellant worded the request in this way after this office found that a previous request (for "all medical records" relating to his daughter) was too narrow in scope to encompass non-medical records located by the ministry. The plain wording of the request and the circumstances in which it was made indicate that the appellant intended the request to be broad in scope.

[18] However, there is evidence that the initial request was modified during the mediation stage of the appeal process. The Mediator's Report states:

Following some discussions with the mediator, the appellant advised that he is not pursuing any of his late daughter's medical records nor the personal information of his family members and other individuals. The appellant also identified a number of other specific records that he is not pursuing, such as 42 pages that he had discussed with another mediator during the mediation of a previously adjudicated related appeal.

[19] On this basis, the adjudicator at the inquiry stage excluded the appellant's daughter's medical records and the personal information of other individuals from her description of records at issue in the Notice of Inquiry, which is the document that sets out the issues in an appeal.<sup>5</sup> The ministry accordingly provided representations in support of its severances to the four records identified in the Notice of Inquiry.

[20] On receiving his copy of the Notice of Inquiry and the ministry's representations, the appellant asserted that he seeks "all personal and non-personal information that is in some way related" to his daughter's death, including in two records that had been removed from the scope of the appeal at the outset of the inquiry.

[21] In its reply representations, the ministry observed that the appellant's pursuit of these records contradicts his position at the close of the mediation stage, as described in the Mediator's Report and in the Notice of Inquiry. Nonetheless, at the adjudicator's request, the ministry provided representations in support of its decision to withhold the information of other individuals in the two additional records, while continuing to assert that this information is not responsive to the appellant's narrowed request (or, alternatively, that it is exempt under the personal privacy exemption at section 21(1)).

[22] Based on the information before me, I am satisfied that the ministry reasonably

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<sup>3</sup> Orders P-880 and PO-2661.

<sup>4</sup> Order PO-3309-I.

<sup>5</sup> *IPC Code of Procedure*, section 3.01.

understood the appellant's initial request to have been narrowed at the mediation stage to exclude records of personal information of other individuals.<sup>6</sup> The appellant had the opportunity at the end of the mediation stage to object to the description of his narrowed request in the Mediator's Report, and did not do so.<sup>7</sup> Given this, the mediator and the ministry were entitled to rely on their understanding of the appellant's narrowed request.

[23] On the other hand, the Mediator's Report also identified the personal privacy exemption as one of the issues remaining in dispute at the close of mediation, and included in the list of records remaining at issue certain pages that contain the personal information of other individuals. Based on this, the appellant may have had reason to believe that his right of access to records containing the personal information of other individuals would be decided at the adjudication stage. The ministry also disclosed additional records and parts of records to the appellant after the Mediator's Report was issued; however, at the appellant's request, the file was moved to the adjudication stage without canvassing the effect of the additional disclosure on the outstanding issues in the appeal. Given all the above, the Mediator's Report may not have accurately reflected the records and issues to be adjudicated during the inquiry stage.

[24] Therefore, while I accept that the appellant narrowed his initial request during mediation to exclude certain records and information, I conclude there was some confusion by the start of the inquiry process about what records remained at issue. While the ministry states that the withheld information on pages 288, 289 and 398 is that of deceased individuals who are not related to the appellant's daughter's case, the appellant explicitly affirmed during the inquiry stage that this information is of interest to him. In the circumstances, and in light of the history between the parties, I will consider the issues raised regarding the appellant's right of access to this information. It is unnecessary and unproductive to require the appellant to make a new access request to the ministry when it is clear to me what information he seeks.

[25] The appellant has also asserted his interest in the withheld information on page 235, which is the name of an individual. The ministry acknowledges that this information is related to the appellant's daughter's case, and, if access to this record is at issue in this appeal, the ministry denies access on the basis of section 21(1).

[26] I will next consider the ministry's alternative argument for denying access to all this information.

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<sup>6</sup> The ministry also observes that the narrowed request excludes medical records. Although the appellant asserts that he also continues to seek access to medical records (other than hospital records), the ministry did not withhold any records on the basis they are medical records. As a result, the parties' disagreement about this aspect of the request has no effect on the issues in the appeal.

<sup>7</sup> See sections 6.04 and 6.05 of the IPC's *Code of Procedure*.

**B. If the withheld information in pages 235, 288, 289 and 398 is at issue in this appeal, does it contain “personal information” within the meaning of the Act that qualifies for exemption under section 21(1)?**

[27] The ministry denies access to the withheld information in pages 235, 288, 289 and 398 on the basis of the personal privacy exemption at section 21(1). For this exemption to apply, it is necessary to establish that the withheld information is personal information, and determine to whom that information belongs.

***Personal information***

[28] “Personal information” is defined at section 2(1) of the *Act* to mean recorded information about an identifiable individual, including, at paragraph (h), the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual. Personal information includes information about deceased individuals who have been dead for less than thirty years (section 2(2)).

[29] The severance in page 235 is the name of a nurse whose conduct was under investigation by her regulatory college.

[30] Pages 288 and 289 are invoices to the Office of the Chief Coroner. The withheld portions contain the names of individuals on whom coroners’ examinations were performed, and details, including dates, of those examinations.

[31] The severance in page 398 is the name and the associated file number of a deceased individual with a file at the Office of the Chief Coroner.

[32] All this information is personal information within the meaning of paragraph (h) of section 2(1).

[33] With respect to the severance on page 235, I agree with the ministry that the nurse’s name in a record concerning an investigation into her professional conduct qualifies as her personal information. This is in spite of the *Act’s* exclusion of professional information from the definition of personal information.<sup>8</sup> In the context in which it appears, the individual’s name goes beyond simply identifying her in a business, professional or official capacity, and instead reveals something personal about her. This finding is in line with many previous orders of this office that have found that information concerning an allegation about or an examination into the professional conduct of an individual is that individual’s personal information within the meaning of the *Act*.<sup>9</sup>

[34] The names and other information appearing on pages 288, 289 and 398 appear in a context that identifies the named individuals as deceased individuals who are

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<sup>8</sup> Section 2(3) states: “Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.”

<sup>9</sup> See, for example, Orders P-721, PO-1912, PO-2524, PO-2778, PO-2976.

subjects of interest to the Office of the Chief Coroner. There is no claim that they have been dead for more than thirty years. This information is the deceased individuals' personal information. This is the case even if their names were severed from the records, as the appellant has suggested might be done. Even without being connected to named individuals, the other withheld information in these pages, including details of coroners' examinations performed on them (on pages 288 and 289) and a specific file number at the Office of the Chief Coroner (on page 398), could reasonably be expected to lead to the identification of these individuals if disclosed. Such information also qualifies as their personal information.<sup>10</sup>

[35] In addition, all the withheld information is contained in records responsive to the appellant's request for information relating to his late daughter. At a minimum, the records reveal that the appellant's daughter is deceased and that she has a file at the Office of the Chief Coroner. All the records are therefore also records of personal information of the appellant's daughter, who has not been dead for more than thirty years.

[36] As all this information is the personal information of individuals other than the appellant, the next issue to be addressed is whether it qualifies for exemption under section 21(1) of the *Act*.

### ***Personal Privacy***

[37] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[38] None of paragraphs (a) to (e) applies. The only applicable exception is paragraph (f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

[39] The factors and presumptions in sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). The ministry does not claim that any of the presumptions at section 21(3) applies, and I accept that none does.

[40] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>11</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.<sup>12</sup>

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<sup>10</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] OJ No 4300 (CA).

<sup>11</sup> Order P-239.

<sup>12</sup> Orders PO-1180, PO-2267, PO-2733 and others.



[41] The ministry invokes the factor weighing against disclosure at section 21(2)(f). This section states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether [...] the personal information is highly sensitive[.]

[42] The ministry states that the names and other information appearing on pages 288, 289 and 398 identify deceased individuals in connection with the work of the Office of the Chief Coroner. By its nature, this information is highly sensitive.

[43] The appellant does not appear to dispute that the information of deceased individuals may be highly sensitive. He argues, however, that this factor “should be trumped by the potential mutual interest” of the appellant and the families of the deceased. The appellant believes that his late daughter and any deceased individuals named in the records likely underwent autopsies at approximately the same time; he believes that the tissues of one or more of these other deceased individuals were mixed with his daughter’s tissues during this process. The appellant reports that the ministry has ignored his requests for an investigation into his suspicion, and that he intends to use the information to contact the individuals’ families to resolve the issue.

[44] The disclosure of the deceased individuals’ personal information in these circumstances would, I find, constitute an unjustified invasion of personal privacy. I have considered whether the appellant’s submission implicitly raises any factors favouring disclosure, including for a public scrutiny purpose (section 21(2)(a)), or for the fair determination of the appellant’s rights (section 21(2)(d)), or any other, unlisted, factor favouring disclosure. While the appellant describes a potential shared interest with the deceased individuals’ families, based on information provided to me, I am not satisfied that the families would have an interest in the appellant’s obtaining this information, or in his using it to contact them. On the other hand, I agree with the ministry that the deceased individuals’ information is highly sensitive in the context in which it appears, and that this factor weighs against disclosure.

[45] I also find that this factor weighs against disclosure of the nurse’s name on page 235. This information appears in a summons relating to a complaint about the nurse’s professional conduct. The appellant reports that the summons was issued as part of a regulatory investigation into the nurse’s conduct following his complaint about that individual over five years ago; because he is already aware of the identity of the individual, he argues, its disclosure could not reasonably be expected to cause distress. Even if the appellant is aware of her identity, I am not persuaded that this diminishes the particular sensitivity of the individual’s name appearing in this context. The record does not appear to be a public document, and it is not evident that the investigation to which the record relates resulted in any public decision. Disclosure of the withheld information would link the individual to an investigation when the fact of the

investigation may not be publicly known.<sup>13</sup> I find it reasonable to expect that disclosure of the name in this context could cause significant personal distress.

[46] In deciding that disclosure of all the above information would constitute an unjustified invasion of personal privacy, the ministry considered whether the exception at section 21(4)(d) applies. This section states, in part:

[A] disclosure does not constitute an unjustified invasion of personal privacy if it [...] discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[47] For section 21(4)(d) to apply, three requirements must be met:

1. The records must contain the personal information of a deceased individual;
2. The requester must be the spouse or "close relative" of the deceased individual; and
3. The disclosure of the personal information of the deceased individual must be desirable for compassionate reasons, in the circumstances of the request.<sup>14</sup>

[48] I found above that the records contain the personal information of the appellant's daughter, as well as the personal information of other individuals. The appellant, seeking access to information about his daughter, meets the definition of "close relative" at section 2(1) of the *Act*. The question is whether disclosure of the information at issue is desirable for compassionate reasons in the circumstances of the request.

[49] Past orders of this office have found disclosure to be desirable for compassionate reasons in cases where the information would assist a requester with the grieving process—for example, by providing insight into the circumstances surrounding the death of the deceased relative.<sup>15</sup>

[50] I find reasonable the ministry's decision that disclosure of the information it withheld under section 21(1) would not assist the appellant in this way.

[51] The ministry has disclosed a great deal of information in response to the appellant's request for information about his late daughter. It withheld under the personal privacy exemption only those discrete portions of the records that also qualify as the personal information of other individuals, and which, as described above, is highly sensitive personal information. The appellant maintains that he already knows

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<sup>13</sup> "Addressing Complaints at the College of Nurses of Ontario," available here: <http://www.cno.org/en/protect-public/discipline-decisions/>.

<sup>14</sup> Orders MO-2237 and MO-2245.

<sup>15</sup> Orders MO-2237, MO-2245, MO-2864, PO-2823 and others.

the information that has been withheld on page 235. He has put forth a speculative theory about a link between his daughter and the deceased individuals whose information appears on pages 288, 289 and 398. It is not evident how this information would assist the appellant in understanding the circumstances of his daughter's death. And although the appellant implies that knowing the identity of the other deceased individuals would assist him in the grieving process, the ministry decided in the circumstances that the privacy interests of other individuals outweigh any compassionate ground for disclosure of their information to him. I see no reason to interfere with the ministry's exercise of discretion in this regard.

[52] I uphold the ministry's decision under section 21(1).

**C. Does the discretionary exemption at section 19 apply to page 78? Did the ministry exercise its discretion under section 19?**

[53] The ministry withheld page 78, in full, on the basis of section 19(a). This section states:

A head may refuse to disclose a record [...] that is subject to solicitor-client privilege[.]

[54] Section 19(a) is based on the common law, which encompasses two types of privilege. The ministry relies on the solicitor-client communication privilege in section 19(a). This 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.<sup>16</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>17</sup> 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.<sup>18</sup>

[55] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>19</sup>

[56] The record is an email from a ministry employee to a ministry lawyer and another ministry employee. The ministry describes the record as a request for legal advice from a Freedom of Information Analyst to the lawyer in his capacity as legal counsel and adviser to the ministry on freedom-of-information matters. The ministry states that the email was prepared by the analyst and submitted to the lawyer in confidence, as evidenced by the disclaimer notice in the email.

[57] The appellant observes that an automatic disclaimer notice at the bottom of an

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<sup>16</sup> *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

<sup>17</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>18</sup> *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

<sup>19</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

email claiming that the message may contain privileged and confidential information does not guarantee or attach privilege to the email. While this is true, I am satisfied, based on my review of its contents, that privilege attaches to the record. The record is a direct communication from a ministry employee seeking legal advice from a ministry lawyer. In addition to the automatic disclaimer at the bottom of the email, the message was marked confidential by its author. I am satisfied that the communication was made in confidence.

[58] I reject the argument that any privilege in the record was lost when the sender addressed her request for legal advice not only to the ministry lawyer but also to another ministry employee. Both the sender and this recipient are employees of the client ministry on whose behalf legal advice was being sought. Sharing the request for legal advice with another ministry employee is not akin to disclosure to an outside party. There is no other basis for the appellant's claim that privilege has been waived. I conclude there is no evidence to suggest that privilege in the record has been lost.

[59] I also uphold the ministry's exercise of discretion under section 19. While the appellant asserts that the ministry's decision to withhold the record, in full, on the basis of section 19 demonstrates poor judgment and a lack of sympathy toward the appellant, I am satisfied that the ministry considered relevant factors, including the importance of preserving the solicitor-client relationship and the sympathetic need of the appellant for the information, in its exercise of discretion. I also find proper the ministry's decision that the record cannot be severed to allow for partial disclosure. As a direct communication from client to solicitor that is wholly related to the seeking of legal advice, it is precisely the type of record to which class-based privilege applies. The record, in its entirety, is subject to privilege.<sup>20</sup>

[60] I therefore uphold the ministry's decision to withhold the record in full under section 19.

**D. Does the discretionary exemption at section 13(1) apply to the withheld information in page 106? Did the ministry exercise its discretion under section 13(1)?**

[61] The ministry withheld a portion of page 106 on the basis of section 13(1). This section 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.

[62] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and

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<sup>20</sup> *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, (1997) 102 OAC 71, 46 Admin LR (2d) 115, [1997] OJ No 1465 (Div Ct).

frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>21</sup>

[63] The record is a fax memo from a program analyst in the ministry's Freedom of Information office. The withheld portion is the bottom part of the memo containing the response of an employee of the Office of the Chief Coroner to the program analyst's request for input on a freedom-of-information request made by the appellant. The ministry describes the withheld information as a recommendation from that employee to the ministry's Freedom of Information office on whether records responsive to the appellant's request ought to be released.

[64] The appellant observes that the part of the record immediately preceding the withheld portion contains the following instruction:

Please complete the bottom portion and return to the FOI Unit.

[65] He states that this instruction clearly pertains to the request and does not suggest that the program analyst asked for or provided advice or recommendations, and, "therefore, the record is not clearly identified as containing a recommendation." This is an objection to the ministry's assertion that the portion of the record containing the recommendation is clearly distinguished and delineated from the rest of the page, which the ministry agrees is not a recommendation and which it has disclosed to the appellant.

[66] The *Act* exempts as "recommendations" under section 13(1) material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It is not necessary for the recipient to explicitly request a recommendation in order to find that one has been made. In this case, I find that the withheld portion of the record is an express recommendation from the Office of the Chief Coroner to the Freedom of Information office. The recommendation directly relates to the decision that was to be made by the Freedom of Information office on whether to disclose records in response to an access request. I accept the ministry's evidence that this recommendation could ultimately be accepted or rejected by its recipient, the Freedom of Information office, which is responsible for carrying out the minister's responsibilities under the *Act*.

[67] I also agree with the ministry that the recommendation is clearly distinguishable from the remainder of the record, which has been disclosed to the appellant, and that no further severance is possible. The withheld portion does not contain any information that is excepted from the application of the section 13 exemption under sections 13(2) or (3). For the appellant's benefit, I confirm that this means the withheld information does not include factual material or a final plan or proposal as described in sections 13(2)(a) and (i), two exceptions that the appellant particularly asked that I consider.

[68] Finally, I uphold the ministry's exercise of discretion under section 13. In

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<sup>21</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 43.

withholding only the portion of the record containing an express recommendation and disclosing the remainder of the record, the ministry struck an appropriate balance between protecting the deliberative process of government decision-making and ensuring the appellant's right of access to information about his daughter. The appellant argues that the ministry's decision demonstrates poor judgment and a lack of sympathy toward him, but I find no basis for this conclusion. I am satisfied that the ministry exercised its discretion, and did so in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[69] For all the foregoing reasons, I dismiss the appeal.

**ORDER:**

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

Original Signed By \_\_\_\_\_

Jenny Ryu  
Adjudicator

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January 8, 2018