Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3804-I

Appeal PA16-252

Ministry of Municipal Affairs and Housing

January 15, 2018

Summary: The Ministry of Municipal Affairs and Housing (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for materials used to train referees conducting hearings under the *Line Fences Act*. The ministry located a document entitled "An Appeal Hearing under the *Line Fences Act"* and provided partial access to it, withholding the remainder pursuant to the discretionary solicitor-client privilege exemption at section 19 of the *Act*. In this order, the adjudicator upholds the ministry's application of section 19 to the withheld information but orders it to re-exercise its discretion with respect to that information.

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: Orders MO-1172, MO-2945-I, MO-3373, MO-3253-I, PO-1928, PO-2719, PO-2784, PO-3514 and PO-3546.

Cases Considered: *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner),* 2013 FCA 104; *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 1854; *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.); and *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85.

BACKGROUND:

[1] The appellant is an individual who was a party to a hearing before a Fence Line Referee under the *Line Fences Act*.[1] Following the hearing, which it is evident the appellant found unsatisfactory, he submitted a request to the Ministry of Municipal Affairs and Housing (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all training and/or instruction manuals and/or guides for the use of the Referee Line Fences Act and the Deputy Referees."

[2] The ministry identified a responsive record entitled "An Appeal Hearing under the *Line Fences Act"* and issued a decision granting partial access to it, withholding some information in reliance on the discretionary exemption for solicitor-client privilege found at section 19 of the *Act*. The ministry later (in its representations to this office) explained that the record was subject to solicitor-client privilege in its entirety, but that the ministry exercised its discretion under section 19 to disclose portions of it while maintaining its section 19 claim over the remainder.

[3] The appellant appealed the ministry's decision to this office, seeking access to the withheld information. Mediation did not resolve the appeal, and the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I invited and received representations from the ministry, followed by the appellant's representations, the ministry's reply representations and the appellant's sur-reply representations. The parties' representations were shared with one another in accordance with this office's *Practice Direction 7: Sharing of Representations*.

[4] In this order, I uphold the ministry's application of the section 19 exemption to the withheld information, but order it to re-exercise its discretion with respect to that information.

RECORD:

[5] The record at issue is a 12-page document entitled "An Appeal Hearing under the *Line Fences Act*", prepared by a ministry lawyer. In this order, I refer to the record as "the record at issue" or alternatively, "the training document".

ISSUES:

A. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to the record at issue?

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[1] R.S.O. 1990, c. L. 17.

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

DISCUSSION:

A. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to the record at issue?

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

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
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> (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.

[7] 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. In this appeal, the ministry claims that both branches apply.

Branch 1: common law privilege

[8] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege, and litigation privilege. The ministry claims the application of common law solicitor-client communication privilege to the record at issue. Litigation privilege has not been claimed.

[9] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[2] 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 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.[4] The privilege may also

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders PO-2441, MO-2166 and MO-1925.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[10] 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]

The ministry's representations

[11] The ministry submits that a ministry lawyer prepared the record in 2011 to provide legal advice to the Referee and the Deputy Referees (the referees) concerning the application of the *Line Fences Act* (*LFA*) and the conduct of a hearing under the *LFA*. The record was prepared specifically as part of a training session hosted by the ministry for the newly appointed referees. The ministry submits that the record has not been made public and was given only to the relevant ministry employees and the referees.

The appellant's representations

[12] The appellant submits that the referees are not part of the ministry. He submits, further, that there is no indication in the record to suggest that it was to be kept secret, and that the nature of the information in the record – advice aimed at ensuring that hearings are fair and impartial – indicates the public nature of the advice.

[13] The appellant also argues that at the time that the record was prepared, the referees had not held any hearings, and therefore cannot have divulged to the lawyer any privileged information. He cites *Descoteaux v. Mierzwinski*[7] and *Solosky v. The Queen*[8], among other court decisions, for the proposition that the essence of solicitor-client privilege is the protection from disclosure of the client's communications to a legal professional, rather than a lawyer's communications to his or her client.

[14] The appellant speculates that the withheld information likely advises referees to conduct their hearings differently in some respects from how his hearing was conducted.

The ministry's reply representations

[15] The ministry submits that its lawyer was giving advice to both its employees and the referees and that the ministry formed a solicitor-client relationship with both of them. The ministry explains that ministry employees requested that the ministry lawyer prepare the record to help in the training of the new referees, and that the ministry

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[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[7] Cited above.
[8] [1980] 1 S.C.R. 821.

lawyer also participated in the training session with the referees. In the ministry's submission, the ministry lawyer was providing legal advice to both the referees and to the ministry employees.

[16] In response to the appellant's suggestion that solicitor-client communication privilege is to protect a client's communications, and not a lawyer's, the ministry cites *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner),*[9] and submits that all communications between a client and solicitor relating to the seeking, formulating or giving of legal advice are privileged along with the communications within the continuum in which the solicitor tenders advice.

[17] The ministry also relies on the Divisional Court's decision in *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner)*,[10] which I discuss below.

The appellant's sur-reply representations

[18] The appellant made several points in his sur-reply representations, which I address in my findings below.

Analysis and findings

[19] For the following reasons, I find that common law solicitor-client communication privilege applied to the record at issue initially. I address the issue of possible subsequent waiver of that privilege separately.

[20] To begin, I accept that the training document was created by legal counsel for ministry employees and referees. The document includes discussions of the statutory requirements of a fair hearing; the necessity of maintaining a record of proceedings; the requirement that the hearing be open to the public; oath administering requirements; parties' right to representations; consent orders; adjournments; jurisdictional questions; protection from self-incrimination; summonses; rules of evidence; and requirements for decisions.

[21] I agree with the ministry that the record consists of a direct communication of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice. In this case, the ministry's counsel provided the record to ministry employees, who used the record in the training that those employees and ministry counsel provided to the referees. The training document represents legal advice that the ministry's counsel provided to ministry employees and referees.

[22] The appellant submits in his sur-reply representations that the advice in this case

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[9] 2013 FCA 104 (*Public Safety*).
[10] [2004] O.J. No. 1854.

consists of “merely tips for the fair and impartial application of the *Statutory Powers Procedure Act*, along with an admonition to adopt procedures that a reasonable person would consider fair”. While it is true that not everything communicated by a lawyer to their client is necessarily legal advice,[11] the “tips” in this case consist of advice regarding the legal principles applicable to a particular legal context – a hearing under the *Line Fences Act*. Moreover, as noted by the Divisional Court in *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner)*,

> The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically…

[23] From my review of the record, I find that it consists of legal advice.

[24] I have also considered the appellant’s submission that referees are not part of the ministry. Disclosure of the legal advice in the record outside of the ministry could constitute a waiver of privilege, as discussed more fully below. However, the *Line Fences Act* is administered by the ministry, and referees are appointed under the *Line Fences Act* to conduct hearings under the *LFA*.[12] I find, therefore, that the referees who received the record at issue were either employees or agents of the ministry for the purposes of the application of solicitor-client privilege.

[25] With respect to the appellant’s submission that there is no indication in the record that it was to be kept confidential, the ministry submitted a copy of the email that its legal counsel sent to a ministry employee attaching the record at issue. The email indicates that the record is to be placed in the binders, which I understand to mean the binders of training materials for the training session with the new referees. The ministry also stated that the record has not been made public and was given only to the relevant ministry employees and the referees. Under the circumstances, I am satisfied that the manual was implicitly provided in confidence to the ministry employees and referees.

[26] The appellant also suggests that the advice at issue is not confidential because it did not involve the government as a party in adversarial proceedings, but rather as a decision maker. However, common law solicitor-client communication privilege is distinct from litigation privilege, and there is no requirement for the existence or contemplation of an adversarial proceeding for solicitor-client communication privilege to apply.

[27] The appellant also submits that solicitor-client communication privilege is

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[11] See *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 at para 24.

[12] See sections 1 (definition of “referee”) and 27 of the *Line Fences Act.*

intended to protect a client's communications to a lawyer, and that since the referees were newly appointed, they would not have held any hearings or divulged any privileged information to the ministry lawyer. In making this submission, the appellant implies that a communication from a solicitor to a client is not privileged unless it would reveal a communication from the client to the solicitor. However, the law of solicitor-client communication privilege does not contain any such restriction. 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. As noted by the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, the purpose behind solicitor-client privilege is

> the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them.[13]

[28] The courts and this office have consistently found that legal advice that counsel provides to an institution, or its agents or employees, is covered by solicitor-client communication privilege.[14] Moreover, the Divisional Court has found that solicitor-client communication privilege applies specifically to training records. In *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner)*,[15] the Court rejected the notion that records must be used in relation to a particular process to qualify for solicitor-client privilege. The records at issue in that case were guidelines and training materials prepared by in-house counsel of the Family Responsibility Office at the request of the Director. The records, which dealt with how and when default proceedings should be commenced, were circulated to the ministry's Family Responsibility Office (FRO) enforcement officers and lawyers retained by the FRO. In reversing this office's finding that the records were not privileged, the Divisional Court stated as follows:

> In our view, the Commissioner appears to have put too much emphasis on the fact that these documents were entitled manuals and were to be directives and guidelines for the Director's agents…
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> [The] Commissioner … erred in finding that the documents, in order to be exempt under the common law solicitor-client privilege, must relate to particular proceedings, or a "particular legal context" and that the records in question … did not have a "particular legal context" in the requisite sense so as to enjoy the exemption. In coming to that conclusion, she

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[13] *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, cited above.

[14] See, for example, *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 1854, and Orders MO-3253-I, PO-2719, PO-2784, PO-3514 and PO-3546.

[15] Cited above.

> applied an incorrect legal test in considering the documents in question. For this reason the Commissioner's decision with respect to the s. 19 exemption cannot stand…
>
> It is well accepted that solicitor-client privilege protects both written and oral communications. Furthermore, there is no requirement that solicitor-client communications relate to a discrete transaction or particular litigation. (See *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, supra.)
>
> The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically…
>
> An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a discussion of how the enforcement officers should interact with the panel lawyers on these matters.
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> … Based on the court's examination of the records, the documents are clearly the product of those confidential communications. In the unique circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our view, does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel. There is no basis in law for terminating the solicitor-client privilege on these facts.

[29] In concluding that the phrase "particular legal context" need not be confined to a particular matter, the Divisional Court stated:

> We are also of the view that the Commissioner's interpretation and application of the term "particular legal context" cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege…While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under the [*Family Responsibility and Support Arrears Enforcement Act*] on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded the Director under the *FRSAEA* in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a "particular legal context" as described in the case of *Balabel and Another v. Air India*, [[1988] 2 W.L.R 1036].

[30] The Divisional Court distinguished the facts before it from those in an earlier Order of this office upon which the adjudicator had relied. In Order PO-1928, Adjudicator Dora Nipp found that solicitor-client privilege did not apply to training materials that had been prepared by the staff of the Office of the Children's Lawyer and used by clinicians to train lawyers and social workers on how to interview children. The Court stated:

> [The training materials at issue in PO-1928] were indeed generic training materials on a non-legal subject. […] [T]he documents in this case are very different. Contrary to the Commissioner's findings, the conclusions reached in PO-1928 are not similarly applicable in this case.

[31] The Divisional Court's reasoning has been applied in subsequent orders of this office, including Orders PO-2719, PO-2784, PO-3514, and PO-3546. Each of these cases involved manuals, policy and procedure documents, or guidelines prepared by counsel for the institution for the institution's staff or agents.

[32] I find that the Divisional Court's reasoning is applicable here as well. Having reviewed the record at issue, I find that it consists of legal advice provided by ministry counsel to ministry employees and referees with respect to how to conduct a hearing under the *Line Fences Act*. As noted above, the record at issue includes discussions of the statutory requirements of a fair hearing; the necessity of maintaining a record of proceedings; the requirement that the hearing be open to the public; oath administering requirements; parties' right to representations; consent orders; adjournments; jurisdictional questions; protection from self-incrimination; summonses; rules of evidence; and requirements for decisions. The record is a confidential communication from ministry counsel to ministry employees and referees consisting of legal advice. Although the appellant argues that the training document pre-dates any

hearings, this is immaterial. The "particular legal context" in this case consists of appeal hearings to be conducted under the *Line Fence Act,* not any one hearing in particular.

[33] In conclusion, subject to my finding on waiver of privilege, below, I am satisfied that the record at issue is subject to the common law solicitor-client communication privilege in section 19(a). In light of my conclusion, I do not need to decide whether it is also subject to the branch 2 statutory communication privilege found in section 19(b).

Loss of privilege - waiver

[34] 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 voluntarily demonstrates an intention to waive the privilege.[16]

[35] 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.[17]

[36] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

[37] The parties did not make any representations specifically on whether the privilege over the information disclosed to the appellant was waived. The ministry submitted that the record at issue was subject to solicitor-client communication privilege, but that it exercised its discretion in favour of disclosure of some of the information while claiming section 19 over the remainder. This would appear to be a clear case of express waiver of privilege over the information disclosed to the appellant. That information is not at issue in this appeal.

[38] What remains to be decided is whether, by disclosing that information, the ministry has also waived the privilege in the information that it withheld. In the Notice of Inquiry that I issued to the parties, I posed the following question:

> The ministry has disclosed portions of the record to the appellant. Does this partial disclosure of the record constitute waiver of the privilege over the remainder of the record? Please explain.

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[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[18] 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.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

Representations

[39] The ministry submits that granting the appellant access to part of the record does not prevent the ministry from claiming privilege over the unreleased portions of the record. The ministry refers to *Stevens v. Canada (Prime Minister)*,[20] where the Federal Court of Appeal held that, in the context of the federal *Access to Information Act*, the release of a portion of a privileged record did not prevent the federal government from claiming privilege over the rest of the record. The ministry submits that the release of a portion of the training document to the appellant was clearly carried out on the basis that the ministry was claiming the section 19 exemption over the unreleased portions of the record.

[40] The ministry also refers to Order MO-1172, where the adjudicator referred to *Stevens* and found that there was no waiver of privilege where a small portion, or the "bottom line" of a record containing legal advice was disclosed to a third party. The ministry submits that both *Stevens* and Order MO-1172 refer to the environment in which an institution operates, which may include its desire to be transparent by releasing a portion of a record where privilege is claimed for the rest of the record. The ministry submits that if I were to find that the ministry, in providing the requester with partial access to the record, waived privilege over the entire record, this could lead to institutions not providing partial access to records over which section 19 is claimed. It submits that such a finding could have the effect of causing institutions to exercise their discretion to release less information in response to a request, in order to preserve the privilege in the record. In the ministry's submission, this would conflict with the purposes of the *Act*, one of which is to provide a right of access to information in accordance with the principle that necessary exemptions from the right of access should be limited and specific.

[41] The appellant did not provide representations specifically on the waiver issue, but did offer representations on the ministry's exercise of discretion in choosing to withhold the portions that it did. I address this under Issue B, below.

Analysis and findings

[42] The ministry responded to the appellant's access request by providing partial disclosure of the record and claiming the section 19 exemption over the remainder. Under these circumstances, I am satisfied that the ministry did not voluntarily demonstrate an intention to waive the privilege in the withheld information by releasing other portions of the record. I find, therefore, that there has been no express waiver of privilege in the withheld information.

[43] The question remains whether there has been a waiver of privilege other than by

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[20] (1998), 161 D.L.R. (4th) 85.

express intention. In *S. & K. Processors Ltd.,*[21] the decision setting out the common law test for waiver of privilege, the British Columbia Supreme Court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require." The Court referred to the proposition that "double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived".

[44] The *Stevens* decision referred to by the ministry concerned an access request made under the federal *Access to Information Act* for disclosure of billing accounts and supporting documents of Commission Counsel in respect of a Commission of Inquiry. The requester was provided with some information in the billings, but the narrative portions were withheld. The Federal Court of Appeal found that the narrative and certain other portions of the billings were communications for the purpose of obtaining legal advice. The Court found that the portions withheld by the government were subject to solicitor-client privilege and that, in fact, the government had disclosed more than it was required to. On the subject of waiver, the Court stated as follows:

> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government *qua* client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

[45] In Order MO-1172, the adjudicator found that a City of Vaughan report contained a small portion of the "bottom line" of the advice provided to council from the city's solicitor, as it briefly outlined the City Solicitor's view of what the city was entitled to do and what was required in order for it to do so. The adjudicator noted that it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. She found that in many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its

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[21] Cited above, and referenced in Order MO-2945-I.

functions. The adjudicator found that this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication.

[46] The adjudicator cited *Stevens* and stated that in determining whether an institution has waived solicitor-client privilege by partial disclosure of a privileged document, this office must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

[47] In a subsequent order, Order MO-2945-I, the adjudicator found that the disclosure of a four-page executive summary of a much longer legal opinion provided to the Town of Aurora did not result in waiver of privilege over the legal opinion:

> By its nature an executive summary is unlikely to disclose the entire contents of the document it is intended to summarize. I have reviewed the executive summary under discussion in this appeal. It is a four-page document that: explains the purpose of the legal opinion that it summarizes (namely, to provide an opinion on the town's liability for legal expenses relating to a defamation action); sets out a chronology of events giving rise to the action and the town's involvement in its funding; provides a summary of the findings on the basis of which two specific recommendations were made; and sets out those recommendations. According to the town, the executive summary was specifically created to provide public transparency while at the same time preserving confidentiality in the full 28-page legal opinion.
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> I am satisfied that the disclosure of facts and key findings contained in the much longer legal opinion that is represented by the release of the executive summary can be described as "relatively minimal".
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> I am also persuaded that the town's attempt to provide transparency in one aspect of its decision-making process, by soliciting the creation of and publicly disclosing the executive summary of the privileged opinion, has not resulted in any unfairness or inconsistency requiring a finding of implied waiver. In its submissions the town focuses on the fact that the defamation action at the heart of the facts in this appeal is a proceeding between the former Mayor and third parties, and that the town is not itself involved in litigation with the appellant or with the former Mayor. The town submits that implied waiver has no application in circumstances where the parties are not involved in litigation.
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> Courts have considered the notion of fairness as between parties to litigation in considering whether implied waiver has been established. This office has considered this question in the context of access to information

> appeals and not only where the parties in an inquiry are also litigants in court proceedings. On the facts, however, I do not see how the release of the executive summary leads to a finding that fairness or consistency requires disclosure of the records at issue.
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> As indicated, the appellant submits that the town solicited the creation of the executive summary "for the sole purpose of releasing it to the public in order to tarnish [the former Mayor's] good name." The appellant suggests that this is a kind of unfairness that can be remedied through disclosure of the full legal opinion. The appellant also submits that it requires access to the information on which the legal opinion was based in order to prove its suspicion that the town provided Law Firm 2 with "misleading or incomplete information to intentionally skew the legal opinion."
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> I find that the appellant's objections to the executive summary do not raise the kind of unfairness that necessitates a finding of implied waiver, with its consequent puncturing of the solicitor-client privilege. The appellant's assertions as to the motivations of the town are speculative and provide an insubstantial basis for such a measure. As well, they are very different from the kinds of circumstances the courts have taken into account where implied waiver is found, such as litigants who wish to "cherry-pick" privileged communications to gain an advantage, or where a privileged communication has been put in issue in a proceeding.
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> The circumstances before me are more analogous to those in the above-cited orders where the minimal release of information in a legal opinion, which results in a measure of transparency about a public body's activities, does not support a conclusion that the solicitor-client privilege no longer applies.
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> I find therefore that there has been no implied waiver of privilege.

[48] In Order MO-3373, the Chief of Toronto Police Services had sought three legal opinions for the purpose of determining the applicable law as it applies to carding practices. The police subsequently disclosed the existence of the opinions and their conclusions in public meetings and in a Police and Community Engagement Review (PACER) report. In finding that this disclosure did not result in waiver of privilege over the opinions themselves, the adjudicator stated as follows:

> To begin, I find that the police obtained the legal opinions to "seek legal advice on the legality of the conduct of street checks and their consistency with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*", as set out in the document provided by the board to the chief when the legal opinions were provided to the

board. Although the police subsequently referenced the three legal opinions in the public meetings and in the PACER report, I note that the three legal opinions were sought by the police on questions of law. The legal opinions provide legal advice on questions of law from lawyers of diverse experience.

Although I accept that the bottom-line legal advice contained in the three legal opinions are referenced in some detail, particularly in the excerpts from the PACER report, I also note that although the PACER report refers to the legal advice it received from the three lawyers, it summarizes this information in a general way in the relevant portion of the report. Furthermore, as noted by the police in their representations, the board sought out and received its own separate legal opinion. The representations read:

> The mere disclosure of the bottom line of legal advice provided to the chief cannot be taken to constitute reliance on that advice as a good faith basis for a policing policy adopted by the Board on an issue that has been the subject of scrutiny, debate, and public consultation for over three years, *and on which the Board sought out and received its own separate legal opinion*. [emphasis added]

I also note that one of the contributing authors of the PACER report is in-house counsel for the police.

Furthermore, I note that by its nature a summary is unlikely to disclose the entire contents of the document it is intended to summarize, let alone three separate opinions. I have reviewed the information contained in PACER report, for which the summary of the legal portion consists of six pages. These six pages include an identification of the legal issues, a background section and a brief summary. It then identifies five specific legal issues and provides a one or two-paragraph summary of the advice relating to each. The summary then provides a conclusion and, on the final page, catalogues three main categories of "measures to reduce risk of harm occasioned by data collection."

In contrast, as noted above, the records at issue are three legal opinions prepared by three named lawyers of diverse experience. Each of the legal opinions was provided in two parts and, combined, the number of pages total approximately 38. In the circumstances, I find that the disclosure of the information found in the PACER report, which summarizes certain findings in the three legal opinions, can be described as "relatively minimal".

[49] The adjudicator went on to refer to Order MO-1172, which I have discussed

above, and stated:

> I agree with this statement regarding the public interest in disclosure of a summary of some "bottom-line" information in the interest of transparency.
>
> On my review of the "bottom-line" advice that has been publicly disclosed, as well as on my review of the legal opinions themselves, I conclude that the police's attempt to provide transparency in one aspect of its decision-making process, by publicly disclosing the summary of the legal opinions, has not resulted in any unfairness or inconsistency requiring a finding of implied waiver.
>
> Lastly, I have considered the appellant's position that the principle of fairness allows for privilege to be waived by implication where a client's conduct reaches a certain point of disclosure, and that I ought to find that the police implicitly waived any privilege in the legal opinions when they raised the legal advice in defence of their position that the practice of carding was legal and in support of their position as to the appropriate policy response to carding by the chief and the board. As noted above, the appellant refers to the *Campbell* case in support of his position, and the police take the position that the principles set out in *Campbell* do not apply.
>
> The appellant states that a client can waive privilege by directly raising legal advice in a pleading or proceeding, thereby putting that legal advice in issue. He refers to *Campbell*, where the RCMP relied on the advice of the Department of Justice in court to support its position that its actions were in good faith, and where the court found that the RCMP had waived privilege by implication and that the appellants were "entitled to have the bottom line of that evidence corroborated." The appellant acknowledges that the litigation context in *Campbell* is different than the context in this appeal; however, he submits that it is a strong indicator that the chief waived privilege by implication by sharing the bottom line of the legal advice, especially because the police will ultimately rely on that advice as support for certain actions and policies.
>
> …
>
> I have reviewed the *Campbell* decision and the representations of the parties on the possible impact of that decision to the issues before me. I find that the circumstances giving rise to the disclosure of the legal advice in *Campbell* are quite distinct from the ones at issue in this appeal, and do not apply in the circumstances this appeal, where a public institution references legal advice sought and received in the context of making

> decisions on matters of public policy. The legal opinions (as well as other legal advice provided to the board) were one component of the process undertaken by the board to make the decisions it did. In addition, on my review of the statements made by the chief and the deputy chief in the public meetings referenced by the appellant, I conclude that the references to the "bottom-line" advice by these individuals is insufficient to support a finding of implied waiver of solicitor-client privilege as found in *Campbell.* As a result, I find that the principle of fairness does not result in a finding that privilege in the legal opinions was waived by implication.

[50] The record at issue in the present appeal is a training document for referees who conduct appeal hearings under the *Line Fences Act*. Referees carry out quasi-judicial functions and determine the rights of parties who appear before them. In my view, the ministry's disclosure of a large portion of the training document was in keeping with its responsibilities with respect to the public interest, which include maintaining a "policy of transparency" regarding information which is used in the referees' decision-making process under the *Line Fences Act.* I agree with the ministry that to find that it has waived privilege over the undisclosed portions of the record in this case would discourage institutions from making disclosure of portions of privileged records, in the public interest. In my view, in general, sharing documents of this nature publicly should be encouraged rather than discouraged.

[51] I acknowledge that in Order MO-1172, and other orders that have found that the disclosure of the "bottom line" of a legal opinion does not result in waiver of the privilege in the underlying communication, the adjudicators found that the institution had made a "relatively minimal" degree of disclosure. Even in Order MO-2975-I and Order MO-3373, discussed above, where several pages of material summarizing the legal opinions at issue had been disclosed, the adjudicators found that the disclosure amounted to relatively minimal disclosure. However, I note that on the facts of those cases, the adjudicators found that the disclosure was minimal in relation to the opinions themselves. In my view, this accords with the notion that it is the quality, as well as the quantity, of the disclosed information relative to the withheld information that is important in deciding whether fairness requires a finding of implied waiver.

[52] In the present appeal, large portions of the training document itself have been disclosed, while other portions have been withheld. This is unlike the orders discussed above, where the opinions themselves were withheld but summaries were disclosed. However, having reviewed the portions disclosed in relation to the withheld portions, I am satisfied that the disclosure is "relatively minimal" in the sense that the portions disclosed do not contain meaningful information about what has been withheld.

[53] I have also considered whether there exists the kind of unfairness that necessitates a finding of implied waiver. I do have some concerns (as does the appellant) about potential inconsistency in the manner in which the ministry has severed the record, although I cannot be specific without disclosing the content of the

withheld information. I will address those concerns below in my review of the ministry's exercise of discretion. However, while there are unquestionably gaps in what the ministry has disclosed to the appellant, I find that this has not resulted in any unfairness or inconsistency to the extent that a finding of implied waiver in required. Even if the appellant is taking measures to challenge the referee's decision, the advice that the ministry's lawyer gave to the referees is unlikely, in my view, to have an impact on any review of the referee's decision. This is unlike the types of circumstances that have resulted in findings of implied waiver by the courts, as noted by the adjudicator in Order MO-2945-I, such as litigants who wish to "cherry-pick" privileged communications to gain an advantage, or where a privileged communication has been put in issue in a proceeding.

[54] I conclude that there has been no express or implied waiver of privilege over the withheld information, and that, therefore, that information is exempt under section 19(a) of the *Act*, subject to my review of the ministry's exercise of discretion.

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

[55] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[56] 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.

[57] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[58] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[23]

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[22] Order MO-1573.
[23] Orders P-344 and MO-1573.

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[59] The ministry submits that it exercised its discretion pursuant to the above-noted factors. It submits that while the appellant has a right to access information, the ministry has a legitimate interest in ensuring that its position in preserving the privilege in the redacted information is maintained.[24] In the ministry's submission, it was appropriate for it to exercise its discretion under section 19 to withhold the portion of the records which was "squarely within the scope of the section 19 exemption". The ministry also points out that it exercised its discretion to disclose some of the record to the appellant. It submits that its discretion was not exercised unreasonably, in bad faith or for an improper purpose, and that it weighed the relevant considerations. It submits that its exercise of discretion is consistent with its responsibility to the broader public.

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[24] The ministry refers to *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860.

[60] The appellant submits that even if the record is privileged, the "so-called discretion" exercised by the ministry in disclosing parts of it and suppressing the other parts of it makes no sense in the context of genuine solicitor-client privilege, but appears to have a totally different, and improper purpose. As noted previously, the appellant speculates that the information that the ministry has withheld from him indicates that a hearing under the *Line Fences Act* should be conducted differently in some respects from how his hearing was conducted.

Analysis and findings

[61] Having reviewed the withheld information, I am not satisfied that I should uphold the ministry's exercise of discretion in this case. While the ministry has stated that it has an interest in maintaining privilege over the redacted information, it has not explained why this is the case with respect to the information it withheld and not with respect to the remaining information which is also privileged but which it decided to disclose. In other words, the ministry has not explained its rationale for distinguishing the withheld information from the information that it chose to disclose. While the ministry submits that the withheld portion of the record is squarely within the scope of the section 19 exemption, the entire record was subject to solicitor-client communication privilege. The ministry has not otherwise explained how the withheld information is different from the information it decided to disclose and what factors led it to treat this information differently.

[62] In particular, with respect to the ministry's submission that its exercise of discretion is consistent with its responsibility to the broader public, the ministry has not explained how withholding the particular information that it chose to withhold is consistent with its responsibility to the broader public and its policy of transparency. While the ministry may have legitimate reasons for making the distinction it did, those reasons have not been explained to me. As a result, based on the information provided by the ministry, I am unable to conclude that it considered only relevant factors in deciding to withhold the information at issue.

[63] As a result, I will order the ministry to re-exercise its discretion and to notify the appellant of its decision following the re-exercise of its discretion.

ORDER:

1. I order the ministry to re-exercise its discretion with respect to the information withheld under section 19 and to issue a notice of its decision following the re-exercise of its discretion. The notice is to be issued by **February 12, 2018** and is to be provided to the appellant and copied to this office.

2. I remain seized of this appeal to address any matters resulting from provision 1 of this order.

Original Signed by: January 15, 2018

Gillian Shaw
Adjudicator