Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3929

Appeal PA17-248

Ministry of the Attorney General

February 20, 2019

Summary: This appeal deals with the appellant's access request to the Ministry of the Attorney General (the ministry) for letters, emails, voicemails and communications about specified court files and the appellant. The ministry granted partial access to the records it identified as being responsive to the request, but denied access to certain records, or portions thereof, claiming the application of the discretionary exemptions in section 13(1) (advice or recommendations) and 19 (solicitor-client privilege). In this order, the adjudicator finds that the exemptions are more properly dealt with under section 49(a) (discretion to refuse requester's own personal information), in conjunction with the section 13(1) and 19 exemptions, and she upholds the exemptions. She upholds the ministry's exercise of discretion and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c.F.31 sections 2(1) (definition of "personal information"), 13(1), 19 and 49(a).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for letters, emails, voicemails and communications about specified court files and the requester.

[2] The ministry granted partial access to records that were responsive to the request. The ministry denied access to records either in whole, or in part, claiming the application of the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege). In addition, some information was

identified and withheld by the ministry as being not responsive to the request. The requester (now the appellant) appealed the ministry's decision to this office.

[3] During the mediation of the appeal, the ministry issued a revised decision to the appellant, releasing additional information to him, and providing an index of records identifying the specific subsections of section 19 that were claimed. Also during mediation, the appellant clarified with the mediator that he was not seeking access to the information identified as not responsive in the records.

[4] The file was then moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the ministry and the appellant. As the records appeared to contain the personal information of the appellant, the adjudicator added the issue of the possible application of section 49(a) (discretion to refuse requester's own personal information) to the scope of this appeal.

[5] The appeal was then transferred to me to continue the inquiry. For the reasons that follow, I uphold the ministry's decision, as well as its exercise of discretion, and I dismiss the appeal.

RECORDS:

[6] There are 1397 pages of emails that were withheld either in part or in full. The ministry submits that there are approximately 73 pages of records at issue, and that the remaining pages are duplicates.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) exemption apply to the information at issue?

C. Does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the records?

D. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[7] The records at issue relate to an assessment hearing that was held in the Superior Court of Justice. The purpose of the hearing was to assess a bill of costs that was delivered by the appellant's former solicitor to him. In his representations, the appellant makes a number of allegations about both the ministry and his former solicitor, and requests that a public inquiry be conducted regarding the assessment hearing and its outcome. This office does not have the jurisdiction to address the concerns raised by the appellant relating to the alleged conduct of the ministry and his former solicitor. This order deals solely with the issues raised as a result of the access request made by the appellant under the Act.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
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> (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;

[9] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

Representations

[10] The ministry submits that the records contain the appellant's personal information. In particular, the ministry argues that the records contain his personal information as defined in paragraphs (c), (f) and (h) of the definition of personal information in section 2(1). The records, the ministry further submits, contain the appellant's name and an identifying number associated with him. In addition, the ministry submits that included in the records are letters sent by the appellant to the ministry identifying his concerns, as well as the responses to those letters.

[11] The appellant does not dispute that the records contain his personal information.

Analysis and findings

[12] Upon my review of the representations of the parties and the records themselves, I find that they contain the personal information of an identifiable individual, namely the appellant. The records contain the appellant's name with an identifying number, falling within paragraph (c) of the definition of personal information in section 2(1) of the *Act*. In addition, I find that the records contain letters that the appellant sent to the ministry in confidence, falling within paragraph (f) of the definition. Lastly, I find that the records contain the appellant's name along with other personal information about him, which qualifies as his personal information under paragraph (h) of the definition.

[13] Having found that the records contain the appellant's personal information, I will now determine whether the withheld records, or portions thereof, are exempt from disclosure under section 49(a) of the *Act*.

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[1] Order 11.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) exemption apply to the information at issue?

[14] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[15] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[16] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[2]

[17] Section 13(1) states:

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

[18] 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 frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[3]

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

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

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[2] Order M-352.
[3] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

to take.[4]

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

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

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[5]

[23] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[6]

[24] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so, even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[7]

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

- factual or background information[8]
- a supervisor's direction to staff on how to conduct an investigation[9]
- information prepared for public dissemination[10]

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[4] See above at paras. 26 and 47.
[5] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[6] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[7] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[8] Order PO-3315.
[9] Order P-363, upheld on judicial review in Ontario *(Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[10] Order PO-2677.

Representations

[26] The ministry is claiming the application of section 13(1) to the following pages of the records:

> 9,[11] 45, 88, 246, 254, 287, 293, 310, 316, 328, 334, 341, 348, 355, 379, 382, 390, 526, 594, 596, 608, 609, 621, 626, 669, 715, 716, 771, 819, 820, 821, 976, 1054, 1077, 1078, 1081, 1082, 1084 and 1113.

[27] The ministry argues that the vast majority of these records consist of email communications between public servants in which suggested courses of action are provided to the recipient, as to how to respond to correspondence sent by the appellant to the ministry, or what action to take regarding a meeting with the appellant. These suggested courses of action, the ministry argues, will be ultimately accepted or rejected by the recipient. Therefore, the ministry submits, the suggested courses of action constitute recommendations to government.

[28] Other records consist of email communications between public servants in which the writer provides advice in the form of alternative courses of action that could be taken in responding to correspondence sent by the appellant to the ministry.

[29] [29] Lastly, the ministry submits that the exceptions to the exemption listed in sections 13(2) and 13(3) do not apply.

[30] The appellant submits that the records contain factual information, which qualifies as an exception to section 13(1) under section 13(2) and should, therefore, be disclosed to him. In addition, the appellant argues that any advice that was given to the ministry regarding a writ not being valid, should have been provided to him, as he was a self-represented litigant.

Analysis and findings

[31] I have reviewed all 1397 pages of records, and I note that while it appears that the ministry has withheld a significant amount of information from the appellant, in fact, it has not, due to the fact that there is a staggering amount of duplication of the contents within the records. This applies equally to the information withheld under both sections 13(1) and 19.

[32] With respect to the possible application of the discretionary exemption in section 49(a), in conjunction with section 13(1), I find that the information the ministry withheld under these sections is exempt from disclosure, subject to my findings regarding the ministry's exercise of discretion. I find that the information at issue

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[11] Page 9 was actually disclosed to the appellant by the ministry as part of its revised decision letter.

contains suggested courses of action that will ultimately be accepted or rejected by the decision maker. In particular, I find that these suggested courses of action as to how to respond to the appellant's inquiries were made by ministry staff to the decision maker, and, therefore qualify as advice or recommendations under section 13(1). Contrary to the appellant's assertions, the withheld information does not contain factual information, but rather advice or recommendations.

Issue C: Does the discretionary exemption in section 49(a), in conjunction with section 19 apply to the records?

[33] The ministry is claiming that both the common law solicitor-client communication privilege and the statutory solicitor-client communication privilege apply to exempt the records under section 19 of the *Act* which states, in part:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[34] 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) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[35] At common law, solicitor-client privilege encompasses two types of privilege, including solicitor-client communication privilege.

[36] 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.[12] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[13] 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.[14]

[37] Confidentiality is an essential component of the privilege. Therefore, the

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

institution must demonstrate that the communication was made in confidence, either expressly or by implication.[15] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[16]

[38] 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.[17]

[39] 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.[18]

Branch 2: statutory privilege

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

Representations

[41] The ministry is claiming the application of section 19 to the emails at the following pages:

> 13, 14, 22, 28, 60, 61, 62, 64, 73, 249, 250, 255, 256, 257, 465, 466, 505, 506, 507, 772, 773, 841, 843, 909, 915, 987, 988, 1042 and 1043.

[42] The ministry submits that some of these emails contain draft letters to the appellant that were prepared for review by counsel and for the provision of legal advice regarding the content of the letters. The ministry argues that it is clear from the content of the letters that they were meant to remain confidential, and that they are direct communications between a solicitor and his or her client for the purpose of obtaining and providing legal advice.

[43] Other emails are requests from ministry staff to counsel for legal advice regarding how to respond to the appellant, or are emails advising other staff of the legal advice that had been provided by counsel. All of these emails, the ministry argues,

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[15] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[16] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[17] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[18] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

were meant to be confidential and reveal communications between a solicitor and his or her client for the purpose of obtaining and providing legal advice.

[44] Lastly, with respect to waiver, the ministry submits that no actions were taken by any party either explicitly or implicitly that would constitute waiver.

[45] The appellant submits that the ministry was not a party to the proceedings that are the subject matter of the request and, accordingly, the ministry cannot claim solicitor-client privilege. In addition, the appellant argues that the ministry waived its privilege when it communicated directly with the appellant's former lawyer, but not with him.

Analysis and findings

[46] On my review of the records, I accept the ministry's claim that the records, or portions thereof which were withheld under section 19, are exempt from disclosure under both branches of section 19, subject to my findings regarding the ministry's exercise of discretion. In particular, I find that all of the withheld information consists of direct communications of a confidential nature exchanged between the ministry's legal counsel and ministry staff, for the purpose of seeking and giving of legal advice, or falls within the type of information that is part of a continuum of communications between lawyer and client, necessary in order to permit advice to be sought and received.

[47] As previously stated, the appellant submits that the ministry was not a party to the court proceedings that are the subject matter of the request and, accordingly, the ministry cannot claim solicitor-client privilege. In addition, the appellant argues that the ministry waived its privilege when it communicated directly with the appellant's former lawyer, but not with him. As I stated, I have found that the withheld information consists of communications between ministry staff and the ministry's legal counsel, in which staff sought legal advice from their internal legal counsel during the course of their duties. The fact that the ministry was not a party to the appellant's legal matter is not relevant. Ministry staff are permitted to seek legal advice during the course of their duties. Concerning the appellant's claim that the ministry waived its legal privilege by communicating with the appellant's opposing counsel, I note that the information that was withheld under section 19 consists of internal communications between ministry staff and their legal counsel and do not involve the appellant's opposing counsel. There is no evidence before me to suggest either explicitly or implicitly that the ministry has waived its privilege with respect to the information it withheld under section 19.

[48] Accordingly, I find that the solicitor-client communication privilege at both common law (section 19(a)) and pursuant to the statute (section 19(b)), apply to exempt the information for which it was claimed from disclosure.

Issue D: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[49] The section 49(a) 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.

[50] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[51] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] This office may not, however, substitute its own discretion for that of the institution.

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[20]

- 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 and 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;
- 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;

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[19] Order MO-1573.
[20] Orders P-344 and MO-1573.

- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations

[53] The ministry submits that it exercised its discretion properly, taking into account all relevant factors and not taking into account any irrelevant factors. It argues that it took the purposes of the *Act* into consideration, as well as the purposes of the exemptions in sections 13(1) and 19. With respect to section 13(1), the ministry submits that it took into consideration the importance of the preservation of an effective and neutral public service by ensuring that staff employed or retained by an institution are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

[54] Concerning its exercise of discretion under section 19, the ministry submits that it took into consideration the purpose of section 19, which is to protect direct communications of a confidential nature between a solicitor and client to ensure that clients are not discouraged from confiding in their lawyer on future legal matters.

[55] The ministry further submits that it considered that: none of the records would exist were it not for the appellant's letters to the ministry; the records contain the appellant's personal information; and the appellant is an individual. It did not consider, the ministry states, any sympathetic or compelling need to disclose the exempt information to the appellant.

[56] Lastly, the ministry submits that it made every effort to disclose as much of the record as was possible without revealing the advice or recommendations of a public servant or without waiving the solicitor and client privilege.

[57] The appellant submits that the ministry did not exercise its discretion properly and, in fact, exercised its discretion in bad faith and for an improper purpose, namely by providing correspondence to his former lawyer stating that a writ was not valid, but then not removing the writ. The appellant further argues that the ministry has selectively provided only some of the information to him, and did not take into consideration the fact that he is an individual whose rights are affected by the information in the records. Lastly, the appellant submits that if access to information is selective to special interests, as is the case here, the public's confidence in the judicial process will be eroded.

Analysis and findings

[58] I have carefully considered the representations of both parties. I find that the ministry took into account relevant factors in weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that they considered

the appellant's position and circumstances and balanced them against the importance of solicitor-client communication privilege and the ability of staff to provide free and frank advice to decision makers. I am also mindful that during the mediation of the appeal, the ministry re-exercised its discretion and disclosed further records to the appellant. In my view, the ministry has disclosed as much information as possible to the appellant that is not exempt from disclosure.

[59] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion with respect to the information which I have found to be exempt from disclosure under section 49(a), in conjunction with sections 13(1) and 19 of the *Act*, and I uphold its exercise of discretion.

ORDER:

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

Original Signed By: February 20, 2019
Cathy Hamilton
Adjudicator