

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3933-F

Appeal PA16-252

Ministry of Municipal Affairs and Housing

February 26, 2019

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 Interim Order PO-3804-I, the adjudicator upheld the ministry's application of section 19 to the withheld information but ordered it to re-exercise its discretion with respect to that information. In this order, the adjudicator upholds the ministry's re-exercise of discretion.

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

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

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

¹ R.S.O. 1990, c. L. 17.

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 access to a large portion of 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. I conducted a written inquiry and, in Interim Order PO-3804-I, I upheld the ministry's application of the section 19 exemption to the withheld information, but ordered it to re-exercise its discretion with respect to that information.

[4] The ministry re-exercised its discretion and maintained its decision to withhold the information at issue. The appellant was given the opportunity to make representations on the ministry's re-exercise of discretion but he did not do so.

[5] In this final order, I uphold the ministry's exercise of discretion and dismiss the appeal.

RECORD:

[6] 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 "the training document".

DISCUSSION:

[7] The only issue to be decided in this final order is whether I should uphold the ministry's exercise of discretion in deciding to withhold the portions of the training document that it did.

[8] In Interim Order PO-3804-I, I found that the entire record was subject to solicitor-client privilege. I accepted that the training document was created by legal counsel for ministry employees and referees and 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. I found that the training document represents legal advice that the ministry's counsel provided to ministry employees and referees.

[9] Further, I found that the ministry did not waive privilege in the withheld information when it disclosed large portions of the training document to the appellant. I found that 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 agreed with the ministry that to find that it had 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.

[10] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that the institution could withhold it. In Interim Order PO-3804-I, I did not uphold the ministry's exercise of discretion. I noted that the ministry had stated that it has an interest in maintaining privilege over the redacted information, but had not explained its rationale for distinguishing the withheld information from the information that it chose to disclose. I stated that while the ministry may have legitimate reasons for making the distinction it did, those reasons had not been explained to me. As a result, based on the information provided by the ministry, I was unable to conclude that it had considered only relevant factors in deciding to withhold the information at issue. I ordered the ministry to re-exercise its discretion with respect to the information it withheld under section 19.

[11] The ministry issued a decision letter to the appellant confirming that, after re-exercising its discretion, its decision remained unchanged. I then asked the ministry for representations explaining the considerations it took into account in its re-exercise of discretion.

[12] In its decision and its representations, the ministry identified the following factors that it had (and had not) taken into account in exercising its discretion:

- The ministry explained that it was of the view that the information it had chosen to disclose to the appellant consisted of factual information on a legal topic, but was not legal advice. When it reviewed the request, it decided that this information was not subject to the section 19 exemption. The ministry further states that in its representations during my inquiry, it did not claim that the entire record was subject to privilege.
- The ministry explained that it has a process to ensure that irrelevant information is not considered in processing freedom of information requests, and that the persons collecting the record and deciding whether to disclose it did not know the appellant's name.
- The ministry considered the importance of solicitor-client privilege, which protects the candid communications of a confidential nature necessary between a lawyer and client.

- In re-exercising its discretion with respect to the withheld information, the ministry considered whether this information related to the appellant personally or to his *Line Fences Act* hearing, and was of the view that it did not.

[13] As noted above, the appellant did not provide representations on the ministry's exercise of discretion.

Analysis and finding

[14] Having reviewed the ministry's decision letter following its re-exercise of discretion, and its representations, I am satisfied that I ought to uphold its exercise of discretion.

[15] I accept that the person who severed the records was unaware of the appellant's identity when severing the records. Moreover, from my review of the redacted information, it does not appear to relate directly to the appellant's stated concerns with respect to his *Line Fences Act* hearing. I am satisfied that the ministry did not sever the record in such a way as to "hide" information from the appellant in particular, as the appellant appears to suggest.

[16] I also agree with the ministry that the training document is a general guide that is not related to the appellant or his hearing in particular. This was a relevant factor for the ministry to consider in exercising its discretion.

[17] I now turn to the ministry's assertion that it never claimed that the entire record was subject to the section 19 exemption, and that only the redacted portions were. In my view, the ministry clearly submitted in its representations that the entire record was privileged in its entirety and that it had disclosed much of it as an exercise of its discretion. Moreover, I found in Interim Order PO-3804-I that the record as a whole was privileged. It would not be open to the ministry to argue otherwise at this stage of the inquiry.

[18] However, I do not view the ministry's representations as an attempt to re-open my findings in Interim Order PO-3804-I. Rather, the ministry is attempting to answer my question as to why it treated some information in the record differently from the remainder.

[19] I disagree with the ministry's submission that the information it disclosed was legal "information" (which would not be subject to solicitor-client privilege) while the information it withheld was legal "advice" (which would fall within the privilege). However, I accept that the ministry was of the view that the information it withheld was of a different kind from that which it disclosed. The nature of the information is a relevant consideration in the exercise of discretion.

[20] As noted above, the ministry has disclosed much of the record to the appellant. I am satisfied from the ministry's decision and representations on its re-exercise of

discretion that it did not consider any irrelevant factors in choosing to withhold the information at issue. The Supreme Court has recognized the particular importance of solicitor-client privilege, stating that it must be as close to absolute as possible to ensure public confidence and retain relevance.² In the circumstances, I am not prepared to send the matter back to the ministry for a further re-exercise of its discretion.

ORDER:

I uphold the ministry's re-exercise of discretion and dismiss the appeal

Original signed by

Gillian Shaw
Senior Adjudicator

February 26, 2019

² See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.