

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3996

Appeals PA15-657 and PA16-436

Ministry of the Environment, Conservation and Parks

October 1, 2019

Summary: This order addresses two requests made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a community lot owners' association's use of algaecides to control invasive aquatic weeds and algae breakouts in the community's ponds. The Ministry of the Environment, Conservation and Parks (the ministry) issued separate decision letters for each request. For the first request, it granted partial access to the responsive records, denying access to portions of them pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*. For the second request, which was filed later, it granted partial access to the responsive records, denying access to portions of them pursuant to section 21(1) as well as to the discretionary exemption for solicitor-client privileged information at section 19 of the *Act*. The requester appealed both of the ministry's decisions.

In this order, the adjudicator finds that sections 21(1) and 19 apply to the information for which they have been claimed and upholds the ministry's decision to deny access to the information in both appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21 and 19.

Order Considered: Order PO-2115.

OVERVIEW:

[1] The Ministry of the Environment and Climate Change¹ (the ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a named lot owners' association regarding its "use of chemical treatment (pesticides) to control invasive aquatic weeds and algae breakouts in their lakes (ponds)." For the first request (which became Appeal PA15-657), the requester specified that he seeks access to communications both to and from the Minister of the Environment and to and from ministry staff in offices in Toronto, Kingston and Ottawa, and seven named individuals. For the second request (which was filed at a later date and became Appeal PA16-436), the requester sought access to communications about this matter to and from four named individuals who served as Minister of the Environment.

[2] As background, the lot owners' association is made up of 39 lot owners in a subdivision community that has two ponds on its recreational lands. Management of the recreational lands is carried out by the lot owners' association based on a majority vote of the lot owners. It is the position of the majority of the lot owners that the use of algaecide is a necessary part of their program to maintain these privately owned ponds for recreational use. A small number of lot owners have objected to the use of algaecide in the ponds. Most of the correspondence that is responsive to the requests is correspondence sent to the ministry and/or to the Minister by lot owners objecting to the use of algaecide in the ponds on their common, recreational land.

Request in Appeal PA15-657

[3] For the first request, the ministry located responsive records. It then notified, in accordance with section 28(1)(a) of the *Act*, a number of parties who might be affected by the disclosure of the records, including members of the lot owners' association (the affected parties) whose correspondence figured among the responsive records. All of the affected parties who were members of the lot owners' association objected to the disclosure of any of the correspondence that they sent to the ministry in relation to the lot owners' association's use of algaecide in their ponds. The ministry also notified a number of corporate affected parties who also made their views known to the ministry.

[4] After considering the submissions of the affected parties, the ministry issued a decision granting partial access to the responsive records. Portions of the records were withheld pursuant to the exemptions at sections 13(1) (advice or recommendations), 17(1) (third party information), 19(a) and (b) (solicitor-client privilege), 21(1) (personal information), and 22(a) (information to be published), as well as the exclusion in section 65(8.1)(a) (research) of the *Act*. The ministry also noted that some portions of

¹ Now the Ministry of the Environment, Conservation and Parks.

the records were severed as they were deemed to be not responsive to the request or duplicate information.

Request in Appeal PA16-436

[5] For the second request, the ministry located the responsive records for that request, which consisted of correspondence between any one of the four named individuals who served as Minister and a number of individual members of the identified lot owners' association about the use of algicide. As the records responsive to the second request were of the same nature as those sought in the earlier request and all of the records responsive to the second request were also at issue in the first request, the ministry did not notify the affected parties under section 28(1) a second time. It took the view that the affected parties had already made it clear that they objected to the disclosure of their personal information in the context of the requested records. The ministry issued a decision granting access to the responsive records in part, denying access to the portions of the information relating to the affected parties pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*.

Appeal

[6] The requester, now the appellant, appealed both of the ministry's decisions to deny access to portions of the responsive records. None of the affected parties appealed either of the ministry's decisions to disclose portions of the responsive records.

[7] During the mediation of both appeals, the ministry provided this office and the appellant with an index of records for each set of responsive records. Following a review of this index with the mediator, the appellant narrowed the scope of the appeals. The appellant confirmed that he seeks full access to correspondence from the affected parties *to* the ministry or the Minister that were withheld under section 21(1) of the *Act*. The appellant clarified that he no longer seeks access to any correspondence *from* the ministry or the Minister to the affected parties. As a result, records containing this type of correspondence from the ministry are no longer at issue.

[8] From his review of the index for Appeal PA15-657, the appellant advised that in addition to the correspondence from affected parties to the ministry, he is also seeking full access to the following records which are identified on the ministry's index as internal ministry correspondence:

- Email update - July 17, 2018 1:54 pm [pages 3542-3544]
- Information Note - August 19, 2009 [pages 3377-3379]
- Information Note – April 23, 2010 [pages 5352-5355]
- Information Note – July 2, 2013 [pages 3335-3338]

[9] The appellant confirmed that other than the correspondence and the four records identified above, he is not seeking access to any of the other records identified on the index as responsive to his request. As a result, sections 13(1), 17(1), 22(a) and 65(8.1)(a) of the *Act* and any records for which these sections were claimed are no longer at issue. He also confirmed that he does not seek access to any portions of records, or records, that the ministry deemed as not responsive or duplicate.

[10] As a mediated resolution could not be reached, the files were transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. For each of the appeals, I initially sought and received representations from the ministry, the non-confidential portions of which were shared with the appellant in accordance with the confidentiality criteria set out in this office's *Code of Procedure and Practice Direction Number 7*.

[11] I also sent a copy of the Notice of Inquiry to nine affected parties who might have an interest in the disclosure of the records that remain at issue, inviting them to provide their views on the disclosure of their personal information. Seven affected parties chose to submit representations; all of them objecting to the disclosure of information relating to them. Two affected parties did not respond to the Notice of Inquiry. I determined it was not necessary to share the affected parties' representations with the appellant, but in the Notice of Inquiry sent to him, I outlined the reasons why they objected to the disclosure of their personal information.

[12] The appellant then provided representations, which I determined did not need to be shared with the ministry or the affected parties.

[13] In this order, I find that the information that the ministry has withheld under section 21(1) amounts to the personal information of the affected parties, the disclosure of which would amount to an unjustified invasion of their personal privacy. Therefore, I find that it is exempt from disclosure. I also find that the information for which the ministry has claimed section 19 qualifies for exemption under that section as information that is subject to solicitor-client privilege. I uphold the ministry's decisions, in both appeals, not to disclose the information at issue.

RECORDS:

Appeal PA15-657

[14] The ministry has provided an 89-page index detailing approximately 10,000 pages of records that are responsive to the appellant's first request. As the appellant has indicated that he no longer seeks access to any communications from the ministry or any ministers to the affected parties, those that remain at issue are communications from the affected parties to the ministry, portions of which have been withheld under sections 19 and 21(1) of the *Act*. As the affected parties have not appealed the ministry's decision, only the severed portions of the correspondence remain at issue.

[15] Also at issue, in addition to the correspondence mentioned above, are the withheld portions of the following records, described on the ministry's index as "internal correspondence:"

- Email update - July 17, 2018 1:54 pm [pages 3542-3544] (section 21(1))
- Information Note - August 19, 2009 [pages 3377-3379] (section 21(1))
- Information Note – April 23, 2010 [pages 5352-5355] (sections 21(1) and 19)
- Information Note – July 2, 2013 [pages 3335-3338] (section 21(1))

Appeal PA16-436

[16] The ministry provided a one-page index identifying the 78 pages of responsive records that were withheld in full or in part pursuant to section 21(1) of the *Act*. As the appellant has indicated that he no longer seeks access to any communications from the ministry or Minister to the affected parties, the pages of correspondence that remain at issue, in full or in part, are 1, 2, 5-12, 15-21, 24-29, 32-34, 41-43, 52-58, 62-71, 74-82, and 84-87. These pages contain correspondence from the Minister (or any one of the four named individuals who served as Minister) from the affected parties.

Duplication in the responsive records for Appeals PA15-657 and PA16-436

[17] All of the responsive records that are at issue in Appeal PA16-436 are also at issue in Appeal PA15-657. Additionally, there is some duplication among the records at issue in Appeal PA15-657.

PRELIMINARY MATTER:

[18] The appellant submits that his representations are based on his position that he requires the records for litigation purposes and the ministry did not properly consider section 64 of the *Act* when deciding to withhold the records and portions of records at issue under section 21(1) of the *Act*.

[19] Section 64 of the *Act* reads:

(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[20] Section 64 does not create a substantive right of access.² Section 64 establishes that the exemptions and exclusions set out in the *Act* are not to be taken to limit the disclosure of information that may be required through a separate process, such as under the rules of a court or tribunal. This section also acknowledges that a court or tribunal may require or compel the disclosure of information that is exempt or excluded from disclosure under the *Act*. The fact that a record may be useful in a court case does not itself result in a finding that an institution must disclose such record or did not exercise its discretion properly in not disclosing such record.³

[21] The appellant's position that he requires the information that has been withheld under section 21(1) for the purposes of litigation is, however, a relevant consideration in the determination of whether its disclosure constitutes an unjustified invasion of personal privacy of identifiable individuals. As I will discuss in further detail below, one of the factors to consider when making such a determination is whether the information at issue may be said to be "relevant to a fair determination of rights affecting the person who made the request[.]"⁴ I will consider the appellant's position that he requires the records for litigation purposes, in my analysis of whether section 21(1) applies – specifically, in my consideration of the factor weighing in favour of disclosure at section 21(2)(d) (relevant to a fair determination of rights) of the *Act*.

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 mandatory exemption at section 21(1) apply to the information for which it was claimed?
- C. Does the discretionary exemption at section 19 apply to the information on page 5353 for which it was claimed?
- D. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

² See Order M-852, which addresses the municipal equivalent of section 64.

³ Order PO-2899-R. Unlike that order, however, in these appeals, the majority of the information has been withheld under section 21(1) of the *Act*, which is a mandatory, not a discretionary exemption, with the result being that the ministry did not exercise its discretion in denying access.

⁴ Section 21(2)(d) of the *Act*.

DISCUSSION:

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

[22] For the exemption at section 21(1) to apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. The ministry submits that all of the records contain information submitted by affected parties that can be described as their "personal information."

[23] The relevant portions of the definition of "personal information" at section 2(1), include:

"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,

...

(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;

[24] 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.⁵

[25] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁶

Representations

[26] The ministry submits that the records contain information that "falls squarely within the type of information that is at the core of protecting personal privacy."

[27] It submits that following the narrowing of the request, the majority of the records at issue originate from affected parties "who are connected to the subject matter by personal interest." The ministry notes that as none of the correspondence indicates any professional or official designation, it takes the position that the affected parties made the communications in a personal capacity.

[28] The ministry submits that the correspondence reveals information that falls within paragraphs (a) and (d) of the definition of "personal information" as it contains the affected parties' contact information. It submits that in some circumstances, the correspondence also contains information about the educational, medical and employment history of identifiable individuals, which falls within paragraph (b) of the definition.

[29] The ministry further submits that the records themselves amount to correspondence sent to the ministry that is implicitly or explicitly of a private or confidential nature which fits within paragraph (f) of the definition of "personal information" in section 2(1).

[30] Finally, the ministry submits that the correspondence contains the names of identifiable individuals together with other personal information about them as contemplated by paragraph (h) of the definition of "personal information" in section 2(1).

[31] All of the affected parties who responded to the Notice of Inquiry objected to the disclosure of the entirety of their correspondence on the basis that it amounts to their "personal information" as that term is defined in the *Act*. Some of them explain that they wrote the ministry as private individuals and private property-owners with respect to questions and concerns they had as co-owners of the common areas of their community, specifically, about the use of algacide in the ponds. They explain that they

⁵ Order 11.

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

sent the correspondence from their personal email accounts in a personal capacity as co-owners of the common ponds and not in a professional capacity.

[32] In particular, the arguments that the affected parties make to support their position that the correspondence that they sent to the ministry consists of personal information include the following:

- The community in which the appellant and the affected parties live is small and the people objecting to the use of algaecide in the ponds make up an even smaller group (the owners of approximately four lots) who are known in the community as the "dissenters." Among that group, the owners of one of the lots disclosed to the board that they had not written to the ministry, which reduces the number of owners whose correspondence figures amongst the responsive records to the owners of three lots. Therefore, the affected parties submit that disclosing the correspondence, even without their names, would render them completely identifiable to the appellant and other members of the community, particularly given its nature and content. [Introductory wording of the definition of "personal information" in section 2(1)]
- The affected parties submit that even among the small group of individuals objecting to the use of pesticides, they have their own individual concerns and subject matter focus regarding the use of algaecides. As a result, the content of their correspondence, which at times includes references to specific scientific or research findings and particularities of their specific concerns, could result in the identification of the individuals who drafted each particular piece of correspondence. [Introductory wording of the definition of "personal information" in section 2(1)]
- The affected parties submit that the correspondence includes information such as their age and marital status. Some of them also submit that the correspondence describes their personal medical concerns or their employment history, the disclosure of which would render them identifiable to the appellant, among others [Paragraphs (a) and (b)]
- The affected parties submit that the correspondence always includes their email addresses and sometimes their addresses, telephone numbers or other identifying numbers assigned to them. [Paragraphs (c) and (d)]
- The affected parties reiterate that they communicated with the ministry through their private email addresses as private property owners and not in any professional capacity. They submit that the emails were not intended for "public consumption," and the correspondence is implicitly of a private or confidential nature. [Paragraph (f)]

- The affected parties submit that the correspondence contains their viewpoints and opinions about the use of pesticides and algacides in the ponds in their community. [Paragraph (e)]
- The affected parties submit the correspondence sent to the ministry was implicitly of a private nature and that they have the right to communicate with government authorities on contentious issues without fear of reprisal [Paragraph (f)]

[33] All of the affected parties who made representations submit that the correspondence that they sent to the ministry contains a sufficient amount of different types of personal information, the disclosure of which would enable the appellant to identify the individual who prepared the correspondence.

[34] The appellant does not make any specific representations on whether the information at issue amounts to the personal information of the affected parties.

Analysis and finding

[35] Having considered the representations of the parties and having reviewed the content of the records at issue, I agree with the ministry and the affected parties that the records at issue contain information that qualifies as the personal information of the affected parties as that term is defined in section 2(1) of the *Act*. None of the records contain the personal information of the appellant.

[36] Specifically, I find that the correspondence at issue contains recorded information about identifiable individuals of the types set out in the introductory wording of the definition of "personal information" in section 2(1) as well as in paragraphs (a), (b), (c), (d), (e), (f), and (h) of that definition. In all correspondence, the individual sending the correspondence identifies themselves by name and provides their contact information, including their address and email.

[37] Moreover, I find that even if the names and contact information of the individuals sending the correspondence were severed, the information that remains contains other types of personal information that are so interwoven in the content of the correspondence that, if disclosed, the individual who wrote it would be identifiable. I find that none of the correspondence can be severed in a manner to remove the personal information to ensure the writer could not be identified. The correspondence originates from a very small number of lot owners who have publicly objected to the use of algacides and pesticides in the community's shared ponds, and only one of them has publicly stated that they did not correspond with the ministry about the matter. In my view, the fact that each correspondence details the affected parties' respective concerns in significant detail including, in some cases, medical issues, makes it impossible to render it de-identifiable.

[38] Therefore, I find that all of the information that was severed as personal

information, including the entirety of the correspondence of the affected parties, qualifies as the personal information of identifiable individuals as contemplated by section 2(1) of the *Act*.

[39] As I have found that the information at issue consists of the personal information of identifiable individuals, and not the appellant,⁷ I will review whether the mandatory exemption at section 21(1) applies to the records at issue.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

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

[41] Section 21(1)(f) is the only exception that might apply in the circumstances of these appeals. It allows for disclosure of personal information if it would not be an unjustified invasion of personal privacy. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[42] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁸

[43] If no section 21(3) presumption applies and none of the exceptions in section 21(4) apply, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.¹⁰

⁷ If the records had contained the appellant's personal information, the relevant exemption would be the section 49(b) which is discretionary, rather than mandatory.

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767 (Div. Ct.).

⁹ Order P-239.

¹⁰ Orders PO-2267 and PO-2733.

[44] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹¹

Representations

[45] The ministry submits that the presumptions at sections 21(3)(a) and (d) apply to some of the information in the records. Those sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(d) relates to employment or educational history[.]

[46] In confidential representations, the ministry identifies the specific pages that it argues contain information that is subject to each of those presumptions. It identifies five pages in total. The ministry also submits that none of the information in these pages is subject to an exception listed in section 21(4) and it maintains that the public interest override at section 23 does not apply.

[47] With respect to the remaining pages that contain the personal information of identifiable individuals, the ministry submits that their disclosure would also constitute an unjustified invasion of personal privacy of the individuals to whom it relates as contemplated by section 21(1) and is therefore exempt from disclosure under section 21(1). The ministry submits that in making its determination of whether the disclosure of this personal information could result in an unjustified invasion of personal privacy under section 21(1), it considered the criteria set out in section 21(2) of the *Act*. In particular, it states that it considered the factors weighing against disclosure in sections 21(2)(f) and (h). Those sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

¹¹ Order P-99.

[48] The ministry submits that the correspondence was provided to the ministry by the individuals to whom the information relates with the expectation that the information would remain confidential and that it would not be shared with anyone as contemplated by section 21(2)(h). The ministry notes that much of the correspondence is explicitly labelled "private and confidential," with some of it containing more detailed confidentiality clauses.

[49] The ministry also submits that the content of the correspondence reveals the context and circumstances surrounding each individuals' personal concerns about the use of algaecide in their community which is personal information of a highly sensitive nature as contemplated by section 21(2)(f).

[50] The appellant does not specifically address the possible application of section 21(1) to the information at issue. As mentioned above, the appellant's representations focus on his position that he requires access to the information to defend himself in litigation.

[51] Although the appellant does not specifically refer to any of the factors set out in section 21(2) of the *Act*, his representations suggest that he believes the factor at section 21(2)(d), weighing in favour of disclosure, is relevant. Section 21(2)(d) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

[52] The appellant's representations provide background information and considerable detail about a number of legal actions in which he is involved. He argues that he should be granted access to the withheld information to support his right to continue to try to clear his name.

[53] With his representations, the appellant provided a number of documents. In most cases, the appellant did not specifically explain how these documents support his position that he requires the withheld information for the purposes of legal matters in which he is involved. These documents include:

- An order issued by a Deputy Judge during a trial management conference on June 16, 2015 where the Deputy Judge ordered the parties to exchange all relevant documentation including "all redacted documents" from the ministry.
- A decision on a motion for an order for production of documents held by the ministry that the appellant's lawyer brought on his behalf, mid-trial. In the Deputy Judge's decision on the motion, dated February 16, 2016, he declined to make an order for production requiring the ministry to produce the records in

question. He stated that the evidence provided by the plaintiff and witnesses during the trial, combined with the documentation already produced, would provide sufficient evidence for him to render a decision with respect to the claim of defamation and the counterclaim.

- A decision issued by the Deputy Judge, dated June 21, 2016.

Analysis and finding

[54] None of the parties have argued that any of the exceptions at sections (a) to (e) of section 21(1) apply and I find none applies in the circumstances. The parties also do not argue that any of the exceptions in section 21(4) apply, and I find that none of them do. Additionally, neither party has argued that the public interest override at section 23 of the *Act* has any application in the circumstances of these appeals. I have no evidence before me that it does.

[55] The question that I must consider to determine whether the information at issue has been properly withheld under the mandatory exemption at section 21(1), is whether disclosure of that information would result in an unjustified invasion of personal privacy of the individuals to whom that information relates. If it would, then the section 21(1)(f) exception is not made out and the information is exempt under section 21(1).

[56] As mentioned, if any part of section 21(3) applies, disclosure is presumed to amount to an unjustified invasion of personal privacy. Having reviewed the content of the correspondence at issue, I accept that some of the records contain information that relates to medical diagnosis, condition, treatment or evaluation within the meaning of the presumption against disclosure at section 21(3)(a). I also find that some of the records contain information that relates to employment or educational history as contemplated by section 21(3)(d). In its confidential representations, the ministry has identified the specific pages of records that contain this information. Therefore, I accept that the disclosure of the information for which the ministry has claimed the application of section 21(3)(a) and (d) is presumed to be an unjustified invasion of personal privacy of the individuals to whom the information relates. As none of the exceptions in section 21(4) apply and there is no evidence before me to suggest that the public interest override should be considered, I find that the presumption against disclosure applies and I will uphold the ministry's decision not to disclose this information.¹²

[57] With respect to the remainder of the information, as no presumption applies, I must consider the relevant factors weighing for and against disclosure, including those

¹² In light of my decision below with respect to the remainder of the information, it is not necessary for me to identify the specific portions of the records that contain information that falls within either section 21(3)(a) or (d).

set out in section 21(2) of the *Act*.

[58] For disclosure to not be considered an unjustified invasion of privacy under section 21(1), a factor weighing in favour of disclosure must be established. The only factor weighing in favour of disclosure that might apply in the circumstances of these appeals is section 21(2)(d), which was raised implicitly by the appellant through his representations. Section 21(2)(d) requires the ministry to consider whether the disclosure of the information is relevant to a fair determination of rights affecting the person who made the request.

[59] For section 21(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹³

[60] It is clear from the evidence before me that the appellant was the defendant in a small claims court action. A judgement on this matter was issued on June 21, 2016. From the documents that he has provided to me, it is clear that during the course of the trial, the appellant and his lawyer sought records on a similar subject matter to those responsive to the request. Accordingly, I accept that the appellant has a legal right to defend himself in relation to a defamation suit against him.¹⁴ I find that part 1 of the test under section 21(2)(d) has been met.

[61] From the evidence before me, it is clear that in the original claim referenced by the appellant and its counter claim, a judgment was issued on June 21, 2016. There is no evidence that an appeal of that judgment has been sought and, if so, whether it is ongoing. Therefore, I have insufficient evidence before me to conclude whether the

¹³ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁴ If the appellant's position is that he requires the information for the six subsequent claims filed against him, although he has stated that such claims exist and are being pursued, he has not provided substantive evidence to demonstrate that they do.

proceeding in relation to the original claim has been completed or is ongoing. There is similarly insufficient evidence before me to support a conclusion that a number of other claims referenced by the appellant either exist or are contemplated. Accordingly, I find that part 2 of the test has not been met.

[62] All four parts of the test must be met for the factor at section 21(2)(d) to apply, and part 2 has not been met. Accordingly, I find that this factor weighing in favour of disclosure is not a relevant factor in the circumstances of these appeals.

[63] With respect to the factors weighing against disclosure at sections 21(2)(f) and (h) however, I accept that they both apply and are relevant.

[64] To be considered highly sensitive under section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁵ Having reviewed the content of the correspondence, I note that it contains sensitive personal information, including the affected parties views and opinions about how the use of algaecides in their environment impacts them. I accept the ministry's position that it is reasonable to expect that disclosure of much of this type of information would cause significant personal distress to the individuals to whom that personal information relates. As a result, I find that this factor weighing against the disclosure of the personal information at issue is relevant to the determination of whether that disclosure amounts to an unjustified invasion of the affected party's personal privacy.

[65] Section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Therefore, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁶ My review of the correspondence sent to the ministry by the affected parties reveals that there was a reasonable expectation on the part of both parties that it would remain confidential and that it would not be shared with individuals outside the ministry. As noted by the ministry, most of it is explicitly labelled "private and confidential" or contains a confidentiality clause. Moreover, even if some of the individual correspondence is not explicitly labelled, given the nature of the personal information that it contains, I accept that there was an implicit expectation on the part of both the ministry and the affected parties who supplied the information, that it would not be shared.

[66] I have found above that the factor favouring disclosure at section 21(2)(d) does not apply. I have also found that the factors at sections 21(2)(f) and (h) are relevant considerations. As previously mentioned, in order to find that disclosure does not

¹⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁶ Order PO-1670.

constitute an unjustified invasion of personal privacy, factors favouring disclosure in section 21(2) must be present and outweigh the factors weighing against disclosure. In the circumstances of these appeals, I have found that no factors favouring disclosure apply. Accordingly, the exception in section 21(1)(f) is not established and the mandatory exemption at section 21(1) applies.

[67] In light of my findings above, I find that the information that has been withheld by the ministry under section 21(1) is subject to that mandatory personal privacy exemption, and I uphold the decision not to disclose it.

Issue C: Does the discretionary exemption at section 19 apply to the information on page 5353 for which it was claimed?

[68] Section 19 of the *Act* exempts records subject to solicitor-client privilege from disclosure. It reads:

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
- (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.

[69] 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.

[70] The ministry has withheld portions of page 5353 from disclosure under section 19 on the basis that it forms part of the solicitor-client continuum of communications under branch 1 of that section.

Solicitor-client communication privilege under branch 1

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

privilege does not cover communications between a solicitor and a party on the other side of a transaction.

The parties representations

[72] The ministry submits that the information that it has severed from page 5353 under section 19(a) of the *Act* is subject to solicitor-client privilege because it would reveal the content of communications between a solicitor (Crown counsel) and a client (the ministry) which relates to legal advice that was sought and provided. The ministry submits that the legal advice was provided on a confidential and privileged basis. It also submits that the possibility of waiving the privilege was considered and rejected due to the nature of the specific advice that was communicated in the records.

[73] The ministry explains that it has severed a paragraph in an internal information note prepared by a ministry supervisor that reveals legal advice received from Crown counsel. In support of its position, the ministry points to Order PO-2115 in which former Assistant Commissioner Tom Mitchinson found that when ministry staff substantively refers to or passes on legal advice received by Crown counsel, the continuum of communication between the solicitor and the client must be maintained.

[74] In his representations, the appellant does not specifically comment on the possible application of section 19(a) to this or any other record, nor does he respond to the ministry's submissions on this issue.

Analysis and findings

[75] Having considered the ministry's representations on this issue and having reviewed the specific information that it severed on page 5353 of the records, I agree with the ministry that the information is exempt under section 19(a) of the *Act*. I accept that the severed paragraph, which is contained in an internal information note, contains confidential legal advice provided to the ministry by Crown counsel. Therefore, I accept that it forms part of the continuum of communications between solicitor and client. Accordingly, I find that it is exempt from disclosure as solicitor-client privileged information under section 19(a) of the *Act*.

Issue D: Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[76] The exemption at section 19 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. In addition, the Commissioner may find that the institution erred in exercising its decision where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant consideration; or it fails to take into account relevant considerations.

[77] In either case, this office may sent the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ However, this office may not substitute its own discretion for that of the institution.¹⁸

[78] In its representations, the ministry submits that it severed only the information that directly reveals the substance of communications between counsel and client. It also submits that it balanced the interests of the ministry with those of the appellant by disclosing as much information as could reasonably be disclosed, while respecting the purpose of the exemption under section 19(a), which is to protect communications of a privileged nature between solicitor and client. The ministry states that in exercising its discretion it considered the factors frequently identified in orders issued by this office.

[79] Having considered the ministry's explanation of how it exercised its discretion to withhold the information that it severed on page 5353 under section 19(a) of the *Act*, I am satisfied that it was exercised appropriately. I find that the ministry considered the nature of the information and the interests that the solicitor-client privilege exemption seeks to protect, which are significant. In addition, I find that it is clear the ministry balanced those interests against the interests of the appellant by severing only what was necessary to protect the legal decision-making process and the ability of legal counsel to provide frank and effective legal advice to its client.

ORDER:

I uphold the ministry's decision and dismiss these appeals.

Original signed by _____
Catherine Corban
Adjudicator

October 1, 2019 _____

¹⁷ Order MO-1573.

¹⁸ Section 54(2) of the *Act*.