Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4267

Appeal PA19-00514

Ministry of the Attorney General

June 23, 2022

Summary: An individual submitted a request to the ministry under the *Act* for certain documents pertaining to the decision to repeal and replace legislation pertaining to Crown liability.

The ministry denied access to the records based on the Cabinet records and solicitor-client privilege exemptions in sections 12(1) and 19 of the *Act*. In this order, the adjudicator upholds the ministry's decision to withhold the records on the basis of the section 12(1) exemption for Cabinet records for some of the records, and the section 19 exemption for solicitor-client privilege for the remaining records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 12(1), 12(2), 19, 19(a), and 23.

Orders and Investigation Reports Considered: Orders PO-3973 and PO-3111.

Cases Considered: *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association* (*Criminal Lawyers' Association*), [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Ontario government introduced legislation by way of Bill 100,[1] that (among other changes) included the introduction of new legislation, the *Crown Liability and*

[1] Bill 100 - *Protecting What Matters Most Act* (*Budget Measures*)*, 2019,* S.O. 2019, c.7.

Proceedings Act, 2019 (*CLPA*),[2] and repealed existing legislation, the *Proceedings Against the Crown Act* (*PACA*).[3] *Bill 100* had first reading on April 11, 2019, passed second reading and was referred to the Standing Committee on Finance and Economic Affairs (the Standing Committee) on May 2, 2019. After consideration by the Standing Committee, *Bill 100* passed third reading and received Royal Assent on May 29, 2019. The *CLPA* came into force on July 1, 2019.

[2] On August 21, 2019, an individual submitted a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for certain documents pertaining to the decision to introduce the *CLPA* and repeal the *PACA,* and related matters. After discussions between the requester and the ministry, the request was narrowed as follows:

> Final materials approved at the Assistant Deputy Attorney General level or above regarding the options and analyses considered for the new *Crown Liability and Proceedings Act, 2019*, including the repeal of the *Proceedings against the Crown Act*. Time period requested July 11, 2018 to [August 21, 2019].

[3] The ministry identified responsive records and issued a decision letter denying access to them based on the Cabinet records and solicitor-client privilege exemptions in sections 12(1) and 19, respectively. The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The appeal was assigned to a mediator to explore the possibility of resolution. During mediation, the ministry provided the IPC with the records. The records consist of slide decks, attendee packages for Cabinet or Cabinet committee meetings and analyses prepared to recommend government amendments to the *CLPA* made at the Standing Committee.

[5] At mediation, the ministry confirmed its position. The appellant asserted that additional responsive records should exist, thereby raising the issue of reasonable search. A mediated resolution was not achieved and the file was moved to the adjudication stage of the appeal process.

[6] A written inquiry occurred in which the ministry and the appellant provided representations addressing the facts and issues in the appeal. In accordance with the *Code of Procedure* and *Practice Direction 7,* only the non-confidential portions of the ministry's representations were shared with the appellant.

Reasonable search

[7] As indicated, the appellant raised the issue of reasonable search, asserting that

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[2] S.O. 2019, c. 7, Sched. 17.
[3] R.S.O. 1990, c. P.27 (repealed, see 2019, c. 7, Sched. 17, s. 33).

additional records ought to exist. During the inquiry, the ministry explained the steps that it took to carry out the search, emphasizing that the search was confined to the narrowed request, above. In response, the appellant stated that having reviewed the ministry's explanation, "it appears the Ministry conducted a full search within the parameters of the narrowed request."

[8] In light of the appellant's view and because she did not put forward any basis to suggest that there are additional records responsive to the narrowed request, the issue of reasonable search is no longer at issue in the appeal.[4]

Records at issue

[9] During the inquiry, the ministry provided the IPC with a fresh copy of the records, explaining that some records that ought to have been included had been omitted from the original bundle and that some pages had been included in error. I have adjudicated this appeal on the basis of the corrected copy of the records provided by the ministry.[5]

Brief conclusion

[10] In this order, I uphold the ministry's decision to withhold the records on the basis of the section 12(1) exemption for Cabinet records for records 1-11 and 17-18, and the section 19 exemption for solicitor-client privilege for records 12-16 and 19.

RECORDS:

[11] The following table describes the records at issue.

Records	General description
1, 2, 3, 6, 11 and 17	Slide decks dated prior to the introduction of Bill 100.
5, 7, 8, 9, 10 and 18	Attendee packages for meetings prior to the introduction of Bill 100.
4	Excerpt from a table of legislative proposals dated prior to the introduction of Bill 100.

[4] Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist: see Order MO-2246.

[5] The appellant was invited to make representations about this issue and conceded that she did not seek records that were not responsive to the request.

12, 13, 14, 15 and 16	Records titled, "Motion Analysis." These motions analyses describe proposed amendments the *CLPA* to be introduced by government members at the Standing Committee. (I will refer to these at motions analyses.)
19	Slide deck dated after *CLPA* came into force.

ISSUES:

A. Does the mandatory exemption for Cabinet records at section 12(1) apply to records 1-11 and 17-18?

B. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records remaining at issue (12-16 and 19)?

C. Did the ministry exercise its discretion under section 19? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the mandatory exemption for Cabinet records at section 12(1) apply to records 1-11 and 17-18?

Does section 12(1) apply?

[12] To deny access to the information in records 1-11 and 17-18 (records that pre-date the introduction of *Bill 100*), the ministry relies on the introductory wording of the mandatory Cabinet records exemption in section 12(1) and the exemptions described in paragraphs 12(1)(b) and 12(1)(f).

[13] Section 12(1) protects certain records relating to meetings of Cabinet (also referred to as Executive Council) or its committees. The relevant portions of this section are:

> 12(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including, […]
>
> > (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
> >
> > […]

(f) draft legislation or regulations.

[14] Because of the introductory wording of section 12(1), it is well established that records that would reveal the substance of deliberations of Cabinet or its committees qualify for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f).[6]

[15] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.[7] The ministry must provide evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.[8]

[16] To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.[9] To qualify for exemption under section 12(1)(f), a record must consist of draft legislation or regulations.

Representations

[17] The ministry and the appellant have made general arguments about how section 12(1) should be interpreted and applied, which I will outline immediately below. The ministry has also made more detailed arguments in relation to the records at issue. I will discuss these arguments under the heading "Analysis and findings," below.

Ministry

[18] As context, the ministry explains that the *CLPA* addresses Crown liability, sets limits on it and sets out procedural rules that apply in proceedings against the Crown. As described above, the *CLPA* is new legislation. The ministry says that given the legislative nature of many of the records and the involvement of Cabinet in the legislative process leading to the enactment of the *CLPA*, several of the records are exempt under section 12(1).

[19] The ministry provides context to, as I understand it, emphasize the importance of the section 12(1) exemption. It notes that section 12(1) is a mandatory exemption and reminds that it is one of the exemptions that is not subject to the public interest override at section 23 of the *Act.*

[20] The ministry refers to the discussion about the importance of Cabinet confidence

[6] Orders P-22, P-1570 and PO-2320.
[7] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[8] Order PO-2320.
[9] Order PO-2320, PO-2554, PO-2677 and PO-2725.

in the Williams Commission's report, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (Williams Commission report)[10] (page 85):

> … if Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.

[21] The ministry says that section 12(1) should be interpreted in a way that balances the competing interests at stake, referencing Order PO-3973[11] and *O'Connor v. Nova Scotia* (*O'Connor*),[12] a Nova Scotia Court of Appeal decision referred to in Order PO-3973 that describes the balance as one between a citizen's right to know what government *is doing* and government's right to consider what it *might do* behind closed doors.

[22] Both parties refer to Order PO-3973, an order that rejected the Cabinet Office's claim that the Premier's mandate letters issued to Cabinet ministers are exempt under section 12(1). I will refer to this as Order PO-3973 or the "mandate letters order" below. Order PO-3973 was upheld on judicial review in *Ontario* (*Attorney General*) *v. Information and Privacy Commissioner*,[13] but the Supreme Court of Canada has agreed to hear an appeal.

[23] The ministry says that *what the government is doing* is the subject of the decision or the decision as communicated. It says that *what the government might do* is the substance of the deliberations. It references the following passage from the mandate letters order (paragraph 98):

> I would not limit the substance of deliberations… to records which permit inferences to be drawn regarding discussion of the pros and cons of a course of action. In my view, the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process.

[24] Turning to the facts at hand, the ministry says that the version of the *CLPA* that

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[10] Toronto: Queen's Printer, 1980.
[11] Order PO-3973 deals with access to the Premier's mandate letters. It was upheld on judicial review at *Ontario* (*Attorney General*) *v. Information and Privacy Commissioner*, 2020 ONSC 5085 (Div. Ct.); upheld on appeal at *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*), 2022 ONCA 74 (C.A.); leave to appeal to the Supreme Court of Canada granted (Docket No. 40078).
[12] 2001 NSCA 132.
[13] Cited above.

was passed into law constitutes what the government *is doing* and the records at issue in the appeal relate to what *might the government have done*.

[25] Regarding section 12(1)(b), the ministry agrees with the principles outlined above pertaining to the IPC's prior treatment of that section, and also adds two points. First, it argues that draft records prepared for a Cabinet committee that were never put before the committee also qualify for the exemption at section 12(1)(b), citing Orders P-73, PO- 2186-F and PO-2556. Second, it says that section 12(1)(b) will apply where information contained in a record was put before Cabinet even though the actual record itself did not go before Cabinet, citing Orders P-226 and PO-2725.

[26] Regarding section 12(1)(f), the ministry submits that not only drafts of legislation or regulations, but also records that could reveal the content of those drafts, are covered by section 12(1)(f), citing Orders PO-1851-F, PO-2068, PO-2186-F, PO-1663, PO-3006-I and PO-3675.

[27] Turning to the records in general, the ministry says that they are exempt for two inter-related reasons. First, it says that the records contain policy options or recommendations that were prepared and submitted for consideration by Cabinet or one of its committees or that disclosure would permit the drawing of accurate inferences "with respect to material submitted to Cabinet or committee," and therefore the records are exempt under section 12(1)(b).

[28] Second, the ministry says that there is a "clear link" between the contents of the records and deliberations of Cabinet or one of its committees. It says that, therefore, the records are protected by the introductory wording of section 12(1) because disclosure would allow for the drawing of accurate inferences about the substance of protected deliberations. Further, it says that the records reflect the views of the Attorney General as submitted to Cabinet or committee and expressed within Cabinet's deliberative process.

Appellant

[29] The appellant explains that she seeks information about how the government made the decision to repeal *PACA* and introduce the *CLPA,* explaining that accessing information about how decisions were reached is contemplated by the Ministry of Government and Consumer Services publication, *Freedom of Information and Protection of Privacy Manual* (page 6).[14]

[30] As context, the appellant outlines the common law and prior legislation in Ontario pertaining to liability of the Crown. She says that the *CLPA* "contained novel, controversial provisions which purported to further shield the Crown from suit and triggered much criticism." The appellant asserts that there is no public record of any consultations about Crown liability reform leading to the *CLPA.* As I understand the

[14] Queen's Printer for Ontario, 2018.

argument, the appellant believes there ought to have been more public consultation about these significant changes.

[31] The appellant argues that the section 12(1) exemption ought to be interpreted narrowly to accord with the purposes of the *Act.* She says that the *Act* is remedial and a public-entitlement conferring statute, that it ought to be interpreted in a way that will best ensure the attainment of its purposes, and that any doubt arising from difficulties of language should be resolved in favour of disclosure. She points to section 1(a) of the *Act,* which states its purposes, including that information should be available to the public and that necessary exemptions to this right of access ought to be limited and specific. She says that the right to access information is necessary to allow the public to participate meaningfully in the democratic process.

[32] She observes that the Supreme Court of Canada has affirmed the fundamental importance of allowing for public access to government information, referring to *Dagg v. Canada* (*Minister of Finance*) (*Dagg*),[15] in which the Court held that "open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions."

[33] The appellant refers to *Carey v. Ontario,*[16] a Supreme Court of Canada decision dealing with the Ontario *Evidence Act* and Cabinet confidence. The appellant says that *Carey v. Ontario* is instructive in the context of the *Act* because it suggests that the scope of Cabinet immunity must also be considered in light of other important public interests.

[34] Based on *Carey v. Ontario,* the appellant argues that Cabinet confidence is not unlimited or absolute. She says that in *Carey v. Ontario,* the Supreme Court observed, "the idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion."

[35] The appellant notes that the Supreme Court acknowledged that Cabinet confidence can promote candour in discussions but also that this rationale for protecting Cabinet confidence is "very easy to exaggerate." She says that the Supreme Court in *Carey v. Ontario* (at para 94) reasoned that the government's interest in Cabinet confidence must therefore be balanced against other competing interests.

[36] The appellant also refers to the mandate letters order as an example of the importance of striking a balance between varying interests.

[37] The appellant also refers to *O'Connor*,[17] the 2001 decision of the Nova Scotia Court of Appeal considering Nova Scotia's equivalent to section 12(1). The appellant points to the following passage (paragraph 94):

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[15] [1997] 2 S.C.R 403 at paras 1, 59-63.
[16] [1986] 2 SCR 637.
[17] Cited above.

> There is no shortcut to inspecting the information for what it really is and then conducing the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations.

[38] The appellant acknowledges that although IPC adjudicators have concluded that whether a record was in fact placed before Cabinet is not necessarily determinative of whether it would reveal the substance of deliberations, it is necessary for the institution to provide sufficient evidence to establish a link between the content of the record at issue and the substance of Cabinet deliberations, citing the mandate letters order.

Reply

[39] The ministry says that the appellant's views about the level of consultation leading to the introduction of the *CLPA* are not relevant to the issues in the appeal. It says that whether prior consultation occurred is not relevant to determining whether section 12(1) of the *Act* applies.

Analysis and findings

[40] As noted above, the ministry has made more specific arguments in the context of each record at issue, which I will outline below. In reaching the conclusions below, I have also reviewed and considered the records themselves.[18]

Attendee packages (records 5, 7, 8, 9, 10 and 18)

Ministry's detailed representations

[41] The ministry explains that records 5, 7, 8, 9, 10 and 18 comprise attendee packages for ministry representatives at meetings of the Cabinet or a specified Cabinet committee. Building on its arguments set out above, the ministry says that the attendee packages are exempt from disclosure under section 12(1) because their disclosure would reveal the substance of deliberations of Cabinet or its committees.

[42] The ministry submits that the key purpose of the attendee packages was to assist and advise Cabinet and specified Cabinet committee(s) with the options available to reform Crown liability and to provide recommendations. The ministry says that the records reflect the views of the Attorney General, a member of Cabinet, that were expressed during the specified Cabinet or committee deliberative processes.

[43] The ministry submits that with the exception of the speaking notes, these records were also submitted to the specified meetings of Cabinet or its committee

[18] The appellant argued that I should use the powers under the *Act* to compel the ministry to provide copies of the records at issue to the IPC so that they may be reviewed. The ministry provided the IPC with copies of the records at issue during the mediation stage of the appeal, so an order compelling the ministry to provide them was not necessary.

during the legislative reform process.

[44] The ministry has identified five meetings to which each of the attendee packages correlates and has provided confidential copies of excerpts from agendas for some of these meetings to illustrate that most of the records in the attendee packages were put before Cabinet or the committee, as the case may be.

[45] With respect to the speaking notes, the ministry argues that although they were not submitted to Cabinet or a Cabinet committee, disclosure would nevertheless allow for accurate inferences to be made about Cabinet deliberations because they were prepared for ministry representatives present at the specified Cabinet or committee meetings and there is a link between these notes and the content of the other records, and for that reason their disclosure would reveal the substance of Cabinet deliberations. In support, the ministry refers to Order PO-3839-I.

[46] The ministry says that the records comprising the attendee packages also contain policy options or recommendations within the meaning of section 12(1)(b) and are therefore exempt under that section, as well as the introductory wording of section 12(1).

[47] Lastly respecting these records, the ministry says that records 9, 10 and 18 also contain draft regulations or legislation, which are (it points out) expressly exempt under section 12(1)(f).

Finding about attendee packages

[48] I have carefully reviewed the records and correlated them with the confidential information provided by the ministry. The attendee packages consist of speaking notes, Cabinet Office briefing notes, slide decks, assessments notes, submissions, ministry approval forms, and draft orders in council. Portions of records 9 and 10 and 18 contain draft legislation or regulations.

[49] To begin, I find that the draft legislation or regulations contained in records 9, 10 and 18 are exempt under section 12(1)(f), based on the clear wording of that paragraph.

[50] Regarding the remainder of the information in records 5, 7, 8, 9, 10 and 18, I am satisfied that disclosure of this information would reveal the substance of deliberations of the Cabinet or specified committees of Cabinet. These records are therefore exempt in their entirety under section 12(1).

[51] I have reached this conclusion because I am satisfied that the content of the records, including the speaking notes, consists of information that was presented to Cabinet or specified Cabinet committees to consider when deciding among policy choices pertaining to Crown liability. I am also satisfied, although it is not a determinative factor, that most of the records at issue were in fact provided to Cabinet

or a specified committee for the purpose of assisting Cabinet or the committee to decide an issue. Lastly, I am satisfied that in the context of these records and the issues discussed in them, there were decisions to be made and that disclosure of these records would reveal the substance of deliberations in making those decisions.

[52] To arrive at these conclusions (and the conclusions set out below in relation to the other records), I also considered the appellant's arguments about the approach to be taken to interpreting section 12(1). To recap, the appellant's arguments focus on how open government is necessary to ensure meaningful public debate and why, therefore, she says that the exemptions in the *Act* ought to be interpreted narrowly. In particular regarding Cabinet confidentiality, the appellant argues – as I understand it – that it should not be interpreted in a way that overemphasizes or exaggerates the purpose for which it exists.

[53] In my view, the approach I have taken, which is consistent with other adjudicators deciding similar issues,[19] is consistent with the approach urged by the appellant. I have carefully examined the records and considered whether there is an evidentiary link between the records and deliberations. In my view, the ministry has not attempted to apply the exemption in an overly broad manner but rather has carefully and candidly identified a subset of the responsive records for which an evidentiary link could be shown.

[54] I acknowledge that the appellant is dissatisfied with the policy-making process leading to the *CLPA.* I agree with the ministry that these concerns are not relevant to whether the exemption applies to the records before me.

[55] In sum, I find that section 12(1) applies to records 5, 7, 8, 9, 10 and 18 in their entirety.

Slide Decks (records 1, 2, 3, 6, 11, and 17)

Ministry's detailed representations

[56] The ministry submits that records 1, 2, 3, 6, 11 and 17, all of which are slide decks, contain policy options or recommendations. The ministry says that the records in this bundle may not have been submitted to Cabinet but they were prepared for submission to Cabinet or one of its committees. The ministry says that it is readily apparent that the records in this bundle are virtually identical to those versions of the materials that were submitted to Cabinet in the attendee packages discussed above.

[57] The ministry says that the records in this bundle should be exempt for three related reasons. First, although they were superseded by other versions, the slide decks were prepared for submission to Cabinet and contain policy options or recommendations and are accordingly directly protected by section 12(1)(b).

[19] See discussion in Order PO-3973, the mandate letters order.

[58] Second, because these records are so similar to those found in the attendee packages discussed above, disclosure would permit the accurate drawing of inferences with respect to protected Cabinet submissions.

[59] Third, the ministry says that there is a link between the contents of these records and those that were placed before Cabinet, meaning that they reveal the substance of deliberations of Cabinet or one of its committees.

Finding about the slide decks

[60] I have carefully reviewed the slide decks and compared them with the attendee packages discussed in more detail above, including the dates marked on them. I am satisfied that disclosure of records 1, 2, 3, 6, 11 and 17 would reveal the same information described above in relation to the attendee packages. Specifically, I am satisfied that their disclosure would reveal information that was presented to Cabinet or specified Cabinet committees to consider when deciding among policy choices pertaining to Crown liability. Like the records above, I am also satisfied that the slide decks would reveal the decisions to be made.

[61] I have reached this conclusion in consideration of the content of the slide decks and their alignment with the briefing notes, the assessments and speaking notes discussed above. In my view, there is a clear link between these records and the substance of Cabinet deliberations that did occur.

[62] I find that records 1, 2, 3, 6, 11 and 17 are exempt under section 12(1).

Extract from chart of legislative proposals (record 4)

Ministry's detailed representations

[63] The ministry explains that record 4 is an extract from a table of legislative proposals relating to amendments to Crown liability. It says, "[i]n effect, this record is a very short summary of the much more detailed considerations found in the more expansive Cabinet notes addressed above." The ministry concedes that the table was not submitted to Cabinet but it says that the content of the record is the same as the material that was submitted, discussed in relation to the first bundle above. It says that there is a "direct correlation" between the legislative proposals and the records submitted to Cabinet.

Finding about record 4

[64] Having closely reviewed the information in record 4 and comparing it with the information in the attendee packages outlined above, I agree with the ministry that it consists of an abbreviated version of the considerations and proposals that were presented to Cabinet or specified Cabinet committees.

[65] I am accordingly satisfied that disclosure of record 4 would reveal the substance of actual Cabinet deliberations – that is, the policy choices and the decisions to be made

by Cabinet or its committees. I find that the extract is exempt under section 12(1) in its entirety.

Does the exception for Cabinet consent at section 12(2) apply?

[66] Section 12(2) establishes two exceptions to the section 12(1) exemption, only one of which is relevant to the present appeal:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
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> …
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[67] The head of an institution is not required under section 12(2)(b) to seek the consent of Cabinet to release the record. However, the head must at least turn their mind to it.[20]

Representations

[68] The ministry says that the head considered seeking consent from the Cabinet to disclose the records but decided not to do so based on several factors:

- The content of the *CLPA* is the subject of litigation and is being debated and defended in courts. The ministry considered that the public interest in transparency relating to the legislation is being served through that process.
- The purpose of the exemption is to ensure full and frank deliberations.
- The ministry is of the view that the records are also solicitor-client privileged.

[69] The ministry says that because of the above factors, there was no reasonable expectation that Cabinet would consent to disclosure. In addition, the ministry head assessed that the public interest in preserving confidentiality of the records outweighed the public interest in disclosing them.

[70] The appellant disagrees with the ministry's decision not to seek Cabinet consent. She says that in making the decision not to seek consent, the ministry acknowledged that there is public debate and litigation about the changes leading to the *CLPA*, but she disagrees with the ministry's assessment that the courts are the best forum for this debate. The appellant says that the ministry's approach failed to recognize that a pre-requisite for a fair and informed public debate is government transparency and access to information.

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[20] Orders P-771, P-1146 and PO-2554.

[71] The appellant says that the ministry's approach has contributed to the stifling of public debate about the *CLPA* by first not initiating "any kind of public consultation" on the matter and then asserting in this appeal that the exemptions in the *Act* apply to exempt from disclosure any records that could shed light on the decision.

Finding

[72] The consideration by a head of whether or not to seek consent under section 12(2)(b) is different from an examination of whether a head ought to exercise their discretion to disclose a record that is otherwise exempt.[21] In the context of section 12(1), the head cannot decide to disclose the records without first seeking Cabinet consent. Section 12(1) is a mandatory exemption.

[73] All that I must therefore decide is whether the head considered whether to seek consent. I am satisfied that they have. The ministry has provided a comprehensive and coherent set of reasons why the head decided not to seek consent.

[74] I therefore find the exception in section 12(2)(b) of the *Act* does not apply in the circumstances.

Issue B: Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records remaining at issue (12-16 and 19)?

[75] The ministry relies on the discretionary solicitor-client privilege exemption in sections 19(1)(a) and (b) to deny access to all of the records at issue.

[76] Above, I have determined that several of the records are exempt under section 12(1). I will therefore consider only the ministry's section 19(1) claim for the records remaining at issue: 12-16 and 19. Records 12-16 are motions analyses, which consist of analyses, prepared by legal counsel, of amendments recommended to be made to the *CLPA,* to be tabled by the government members of the Standing Committee. Record 19 is a slide deck prepared to brief a new incoming Attorney General and is dated after the *CLPA* came into force.

[77] Section 19 exempts certain information from disclosure, either because it is subject to solicitor-client privilege or because it was prepared by or for legal counsel for an institution. It states, in part:

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

[21] Order PO-2114-F.

> (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[22]

[78] The IPC and the courts have referred in previous decisions to section 19 as comprising two "branches." The first branch, found in section 19(a) ("subject to solicitor- client privilege"), is based on common law. The second branch, found in section 19(b)[23] ("prepared by or for Crown counsel") contains a statutory privilege created by the *Act*.

[79] The ministry submits that the records at issue in this appeal are exempt under section 19 because they consist of information that is solicitor-client communication privileged at common law (branch 1) or that is subject to the statutory communication privilege (branch 2). As I will explain below, because I find that the records at issue are subject to the common law communication privilege in branch 1, it is not necessary to consider or discuss further branch 2.

[80] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[24] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[25] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[26] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[27]

Representations

Ministry

[81] The ministry agrees with the principles outlined above in relation to common law solicitor-client communication privilege.

[82] Because the ministry claimed that all of the records at issue were subject to section 19, it argued in general that changes to Crown liability "necessarily require an assessment of the law," requiring confidential legal advice. It characterized the reform of Crown liability as "legally-driven process that involved legal advice to the Ministry at every step."

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[22] Section 19(c) relates to educational institutions and hospitals and is therefore not relevant to this appeal.
[23] Section 19(c), "prepared by or for counsel employed or retained by an education institution or a hospital" is, as noted, not relevant to the present appeal
[24] Orders PO-2441, MO-2166 and MO-1925.
[25] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[27] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[83] Regarding the *motion analyses* (records 12-16), the ministry says that they were prepared by ministry legal counsel, including lawyers in the Civil Law Division and "legislative counsel."[28] The ministry refers to Orders P-1570 and PO-3654 as examples of orders where an IPC adjudicator has held that communications with legislative counsel are protected by section 19(a).

[84] The ministry also provided confidential copies of other communications pertaining to the motion analyses that, it says, illustrate how they were prepared. In reliance on these confidential materials, the ministry argues that the motion analyses reflect legal advice and consist of confidential communications from ministry counsel with respect to amendments to be proposed to the *CLPA* at the Standing Committee (at second reading of Bill 100).

[85] The ministry says that the motion analyses reflect ministry's counsel's "assessment of [Bill 100] as passed by second reading and proposed changes to ensure that the provisions of the [Bill 100] will legally satisfy the direction of Cabinet." The ministry elaborates that the motion analyses contain "confidential legal advice" that was prepared for the use of the government members of the Standing Committee. The ministry says that the members may or may not have accepted this advice or may have deviated from it in the course of the committee proceedings. It says, lastly, that the analyses were not disclosed to the public or other members of the committee and remained confidential.

[86] The ministry explains that *record 19* is a slide deck that was prepared by ministry counsel in the Civil Law Division for purposes of briefing the new incoming Attorney General about the *CLPA.* The ministry says that the information in the slide deck contains an assessment of the *CLPA* and its legal effect by specified government lawyers who prepared the slide deck and briefed the Attorney General. The ministry says that the content of the slide deck is confidential and occurred within the continuum of communications for the purpose of seeking or giving legal advice.

Appellant's representations

[87] The appellant disputes that all the records at issue are covered by solicitor-client privilege and she also submits that the ministry acted unreasonably when it exercised its discretion not to disclose records that are covered by privilege. The appellant's arguments are intertwined, so I will address both of these arguments below and also at Issue C (Exercise of Discretion).

[88] The appellant says that records are not covered by solicitor-client privilege simply by virtue of the presence or involvement of a government lawyer. On this point, the appellant says that the ministry has failed to distinguish between legal advice and policy

[28] The ministry has a "Legislative Counsel" office that, according to the Employee and Organization Directory for the Government of Ontario (INFO-GO), "provides legislative drafting services to Ministers of the Crown, Members of the Legislature and applicants for private bills," among other duties.

advice. She says that not all advice rendered by a lawyer constitutes legal advice. She refers to *R. v. Campbell,*[29] a decision of the Supreme Court of Canada in support, referring to the following passage:

> … it is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. … what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise but draws on department know- how. Advice given on matters outside the solicitor-client relationship is not protected.

[89] The appellant submits that government lawyers have dual functions and operate in varying capacities. She says that the ministry's assertion that its lawyers were in some capacity connected to the records is insufficient to "anchor" the privilege. She emphasizes the underlined portion of the quote above.

[90] The appellant submits that the ministry's position that "the legal nature of the *CLPA* means that any work that went into its creation necessarily involved legal advice," would mean that the government is shielded from disclosure of any record that has a "legal nature." She says that such a broad approach is to the detriment of open government and the public's ability to exercise their right to access information.

[91] The appellant also argues that the approach taken by the ministry – to characterize the reform as of a "legal nature" – is at odds with historic prior practices of the government when considering reform to Crown liability, citing a 1986 consultation paper that resulted in revisions to *PACA.*

Ministry's reply

[92] The ministry denies that the government counsel were involved in providing policy advice. It says that it is "readily apparent" from the records that counsel was not providing policy advice, but confidential legal advice about the status of Crown liability and the legal ramifications of potential legislative changes.

[93] Regarding the appellant's arguments about the 1986 public consultation that led to reforms to the *PACA,* the ministry says that the records at issue in the present appeal are distinct. It explains that the records available to the public in the 1986 project were developed *for the public* and they are therefore not comparable to the records at issue in this appeal.

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[29] [1999] 1 S.C.R. 565.

Analysis and findings

[94] I have carefully reviewed the *motions analyses*, together with the underlying confidential material provided by the ministry. I have also considered the ministry's evidence that the information contained in the analyses was not disclosed to members of the Standing Committee, other than government members, nor was it disclosed in the committee deliberations.

[95] I am satisfied that the motions analyses contain legal advice and opinions of ministry legal counsel (either from the Civil Law Division or the office of Legislative Counsel). The records themselves contain advice and opinions and I am satisfied therefore that they consist of solicitor-client communication privileged information and are accordingly exempt under section 19(a).

[96] I have carefully reviewed the content of *record 19*, the slide deck prepared for the incoming Attorney General, as well as the purpose for which it was prepared. I am satisfied that the slide deck consists of solicitor-client communication privileged information. The record at issue is itself a direct communication from ministry legal counsel to the Attorney General and it is precisely the kind of communication that is protected by solicitor-client privilege.

[97] In reaching the above conclusions, I have been mindful of the appellant's arguments that not every action carried out by a government lawyer is covered by solicitor-client privilege. Having reviewed the information at issue, however, I have no doubt that the information at issue is legal advice.

[98] I find that records 12-16 and 19 are exempt pursuant to section 19(a). I will next consider whether to uphold the ministry's exercise of discretion.

Issue C: Did the ministry exercise its discretion under section 19? If so, should I uphold the exercise of discretion?

[99] Although I have determined that the records 12-16 and 19 are exempt under section 19, I must also address whether the ministry nevertheless considered whether to disclose the information at issue. This is because the section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it.[30]

[100] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose,

[30] A similar analysis is not necessary for the records that I found are exempt under section 12(1) because section 12(1) is a mandatory, not discretionary, exemption.

- it takes into account irrelevant considerations,
- it fails to take into account relevant considerations.

[101] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] The IPC may not, however, substitute its own discretion for that of the institution.[32]

[102] Relevant considerations may include:[33]

- 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,
- the historic practice of the institution with respect to similar information.

Positions of the parties

[103] The ministry says that it considered whether to disclose the information exempt under section 19 by taking into account the following factors:

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[31] Order MO-1573.
[32] Section 54(2).
[33] Orders P-344 and MO-1573.

- the purpose of the *Act,* including in particular the principle that information should be made available to the public,
- that the exemption at stake protects solicitor-client privilege, which it says has been recognized as integral to the solicitor-client relationship,
- that the information at issue is not personal information,
- that there is a great deal of litigation surrounding the *CLPA* and that disclosure could prejudice the ministry's position in current or future proceedings,
- that it is, it says, the practice of the ministry to keep this type of information confidential.

[104] The ministry says that in the context of section 19, the decision to disclose otherwise exempt information is the same as deciding whether to waive solicitor-client privilege over the information at issue.

[105] The ministry states that it did not exercise its discretion in bad faith or for any improper purpose and that it took into account only relevant factors.

[106] The appellant argues that the ministry unreasonably exercised its discretion to refuse to disclose the records at issue by "ignoring the direct and compelling public interests at play," citing Order PO-3111. The appellant does not elaborate on Order PO-3111; however, I will discuss it further below. She submits that the way the ministry exercises its discretion must be consistent with the purposes of the *Act* that allows for only "limited" or "specific" exemptions.

[107] Further, the appellant says that the ministry must exercise its discretion in accordance with the purposes of the *Act,* including "by balancing the importance of the interest protected by the particular exception to disclosure against the public interest in open government, public debate and the proper functioning of government institutions," quoting from *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association* (*Criminal Lawyers' Association*).[34]

[108] The appellant says that the ministry ought to have considered whether disclosure could increase public confidence in the operation of the ministry.

[109] The appellant is critical of the assessment described by the ministry, above. She says that the ministry has not carried out a balancing of the competing public interests at stake when exercising its discretion not to disclose information that it could withhold because it is exempt under section 19.

[110] As noted above, the appellant also argues that in the past the government has

[34] [2010] 1 S.C.R. 815 at para 45-50.

provided the public with information about potential Crown liability reform, citing a 1986 reform project as an example.

[111] In reply, the ministry says (as also discussed above) that the government's actions in relation to the 1986 Crown liability legislative reform project are not comparable to the present appeal because the records are distinct. If there is a past practice that is relevant, the ministry says that it is not to waive privilege over privileged information.

Analysis and finding

[112] At this stage, my only task is to decide whether to uphold the ministry's exercise of discretion when it decided not to disclose the records that I have determined are exempt under section 19. As I noted above, in the case of discretionary exemptions, an institution may decide to disclose records or information that would otherwise qualify for exemption.

[113] I am not able to substitute my own view but I must be satisfied that the ministry did, in fact, consider the possibility of disclosing exempt information and that when it did so, it took into account relevant considerations.

[114] The importance of the IPC's role in reviewing the residual discretion to disclose information that is otherwise exempt was discussed in the Supreme Court of Canada decision referred to by the appellant, *Criminal Lawyers' Association.*[35]

[115] In accordance with the guidance in *Criminal Lawyers' Association,* I have reviewed the ministry's representations about whether it considered to nevertheless disclose privileged information and the factors that it took into account to reach the decision not to do so. I am satisfied that the ministry considered the possibility of disclosure, but in consideration of relevant factors, decided against it.

[116] I acknowledge that the appellant does not agree with the weight apparently given by the ministry to the various factors. I also acknowledge that she is concerned, as I understand it, that the ministry conducted a result-based analysis geared to a decision not to disclose. Giving the appellant's arguments a broad reading, she may be suggesting that the ministry exercised its discretion in bad faith.

[117] I do not agree. When I consider the information at issue and the factors listed by the ministry, I am not able to conclude that the ministry's approach was carried out in bad faith. In my view, the ministry properly considered the impact of disclosure within a broader context and with regard to the public scrutiny that is coming to bear on the *CLPA.*

[118] I reviewed Order PO-3111, cited by the appellant. Order PO-3111 is an example

[35] Cited above.

of an adjudicator upholding an institution's exercise of discretion to withhold records that were determined to be exempt under sections 13(1) and 19. Order PO-3111 also discusses the approach to be taken when deciding whether there was a "compelling public interest" within the meaning of section 23 of the *Act* sufficient to override the section 13(1) exemption for advice and recommendations. The public interest override at section 23 of the *Act* is not at issue in this appeal because section 19 is not one of the exemptions that is capable of being overridden by the section 23 override.[36] Although the public interest is a factor to be taken into consideration in exercising discretion under section 19, I am satisfied that the ministry gave any public interest in disclosure due consideration.

[119] Lastly, I considered but did not find relevant the appellant's arguments that in relation to a 1986 legislative Crown liability reform initiative, the government provided information to the public. This appeal is not a review or assessment of the manner in which the government consulted in the lead-up to Bill 100.

ORDER:

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

Original Signed by: June 23, 2022
Valerie Jepson
Adjudicator

[36] Section 23 states: An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.