Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4406

Appeal PA20-00068

Ministry of Health

June 20, 2023

Summary: The ministry received an access request for records between the ministry and two specified organizations on the topic of "Conscience Rights for Health Care professionals" for a specified time period. The ministry denied access, in full, to the responsive records, relying on section 19 (solicitor-client privilege) of the *FIPPA* or common law settlement privilege. In this order, the adjudicator finds that neither branches of section 19 applies to exempt the records. Instead, she finds that the records are exempt under common law settlement privilege.

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

Cases Considered: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319; *Sable Offshore Energy v. Ameron International*, 2013 SCC 37; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52; *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, 2010 ONCA 681; *Clayton v. SPS Commerce Canada Ltd.*, 2018 ONSC 5017; *Howes v. Howes*, 2018 ONSC 6297; *Richmond (City) v. Campbell,* 2017 BCSC 331.

OVERVIEW:

[1] In June 2016, Medical Assistance in Dying (MAID) became a legal health care service in Canada. Subsequently, federal MAID legislation was enacted through Bill C-14, which made amendments to the *Criminal Code*, to govern the legal provision of MAID in Canada.

[2] The Christian Medical and Dental Society of Canada (CMDS), the Canadian Federation of Catholic Physicians' Societies, the Canadian Physicians for Life (CPL) and five individual physicians (applicants) brought a constitutional challenge to the College of Physicians and Surgeons of Ontario's (CPSO) policies on professional obligations and human rights on MAID (the policies) alleging that the policies violate their constitutional rights under the *Canadian Charter of Rights and Freedoms*.

[3] The Ontario government intervened at the Divisional Court to support the upholding of the policies. In January 2018, the Divisional Court released its decision and dismissed the constitutional challenge.

[4] The applicants appealed the decision to the Ontario Court of Appeal. Subsequently, the Ontario government advised the Court and the other parties that it was withdrawing its intervention in *CMDS v. CPSO* litigation.

[5] After the Ontario government had withdrawn, in the period leading up to and after the Court of Appeal hearings, in an effort to resolve the then-active *CMDS v. CPSO* litigation, the Ministry of Health (the ministry) facilitated discussions between the litigants (also known as the affected parties in this appeal – the CPSO, the CMDS and CPL) to end the litigation.

[6] In that context, the appellant made a request to the ministry, under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), for information regarding certain lobbying activities or other communications from a named individual acting as president of a particular organization, or any other representative of that organization, or by one of two identified consulting firms that might be engaged by that organization.

[7] After discussion between the ministry and the appellant, the request was clarified to cover the time frame from June 8, 2018 to April 1, 2019 about the following:

- any emails, presentations, and letters from representatives of the particular organization (including consulting firms acting for that organization) made to the ministry on the topic of "Conscience Rights for Health Care professionals;" and

- notes created from in-person or telephone meetings between the ministry and the above-mentioned people and organizations related to this topic.

[8] The ministry issued a decision identifying 56 responsive records, and denying access to them, in full, under section 19 (legal privilege) of *FIPPA*. Six of the 56 responsive records were also withheld, in part, under 21(1) (personal privacy) of *FIPPA*.

[9] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[10] During mediation, the ministry maintained its denial decision and also claimed section 18(1)(e) (economic or other interests) as an additional basis for denying access

to some of the records.

[11] The adjudicator initially assigned to this appeal invited the ministry, the appellant and three affected parties to provide representations on the issues in this appeal. She received representations from all the parties. This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided that I did not require further submissions before making my decision.

[12] For the reasons that follow, I find that the records are not exempt under section 19 but are exempt under common law settlement privilege, which *FIPPA* has not specifically abrogated. I dismiss the appeal.

RECORDS:

[13] The ministry identified 56 responsive records: 46 records from the ministry's strategic policy and planning division (SPPD), and 10 records from the minister's office (MO).

[14] The ministry has withheld all 56 records in their entirety under common law settlement privilege.

[15] The records at issue consist of email chains of various dates with various individuals, along with attachments.

DISCUSSION:

[16] The sole issue in this appeal is whether the records at issue are exempt under *FIPPA*.

[17] The ministry claims that all the records at issue are exempt under section 19 of *FIPPA*, specifically settlement privilege. Section 19 exempts certain records from disclosure because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution.

[18] It states, in part:

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

[19] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for crown counsel") is a

statutory privilege. The institution must establish that one or the other (or both) branches apply.

[20] While the ministry claims that both branches apply to the withheld records, based on my review of the records and representations, I find that neither branch applies to exempt the information because of the lack of involvement of counsel. I will explain in further details below.

[21] Given my finding in this order, I will not address whether some of the records are exempt under solicitor-client communication privilege or legal advice, the ministry's alternative arguments.

[22] I note that CMDS and CPL separately provided representations but their representations mainly state their support of the ministry's position that settlement privilege applies to the records at issue. CPSO also submitted representations but they are very similar to the ministry's arguments.

Branch 1: common law privilege

[23] While at common law, solicitor-client (communication) privilege and litigation privilege have been recognized as two distinct forms of class privilege, the courts have read both types of privilege into the language of section 19(a) based on a number of factors including their close historic connection at common law. Collectively, these are generally referred to as Branch 1.

Common law solicitor-client communication privilege

[24] 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.[1] 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.[2] 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.[3]

[25] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[4]

[26] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in

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[1] Orders PO-2441, MO-2166 and MO-1925.
[2] Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] 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.
[4] Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27.

confidence, either expressly or by implication.[5] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[6]

Common law litigation privilege

[27] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[7] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[8]

[28] This privilege protects records created for the dominant purpose of litigation. It protects a lawyer's work product and covers material going beyond communications between lawyer and client.[9]

[29] Litigation privilege does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[10]

Branch 2: statutory privileges

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

[31] This privilege also applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[11] However, unlike common law litigation privilege, it creates a permanent exemption from

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[5] General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[6] Kitchener (City) v. Ontario (Information and Privacy Commissioner), 2012 ONSC 3496 (Div. Ct.)
[7] Blank v. Canada (Minister of Justice) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39) ("Blank").
[8] Order MO-1337-I and General Accident Assurance Co. v. Chrusz, cited above; see also Blank v. Canada (Minister of Justice), cited above.
[9] Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167 (C.A.).
[10] Ontario (Ministry of Correctional Service) v. Goodis, 2008 CanLII 2603 (ON SCDC).
[11] See Ontario (Attorney General) v. Big Canoe, [2006] O.J. No. 1812 (Div. Ct.); Ontario (Ministry of Correctional Service) v. Goodis, cited above.

disclosure (minimally with respect to a Crown law criminal brief).[12]

Representations

[32] The ministry submits that common law settlement privilege applies to the records and as such the records are exempt under branch 1 of section 19. The ministry submits that settlement privilege applies as the records were obtained and exchanged in the course of settlement discussions and would reveal the substance of such discussions.

[33] The ministry relies on the Supreme Court of Canada's decision in *Union Carbide Canada Inc. v. Bombardier* [13] for the principle that settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality.[14] In addition, the ministry notes that *Union Carbide* stands for the principle that parties do not have to use the words "without prejudice" to invoke the privilege as what matters instead is the intent of the parties to settle the action.[15]

[34] The ministry also relies on the Supreme Court of Canada's decision in *Sable Offshore Energy v. Ameron International Corp.*[16] for the principles that common law settlement privilege is a class privilege and the protection are for settlement negotiations, whether successful or not.[17]

[35] In addition, the ministry submits that branch 2 applies to all of the records at issue. It cites *Liquor Control Board of Ontario v. Magnotta Winery,* [18] where the Ontario Court of Appeal held that records prepared for use in the mediation of settlement of litigation are exempt under the statutory privilege in section 19 of the *Act* to protect the confidentiality of settlement discussions. The ministry acknowledges that the records were not prepared by crown counsel, nor were they prepared for crown counsel.

[36] Alternatively, the ministry submits that common law settlement privilege applies to exempt the records at issue. It submits that the Office of the Information and Privacy of British Columbia has recognized settlement privilege in recent orders as a separate basis to withhold records from disclose.[19] The ministry notes that these decisions followed the BC Supreme Court's ruling in *Richmond (City) v. Campbell*.[20] In that case, the Court found that BC's *Freedom of Information and Protection of Privacy Act* did not

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[12] Ontario (Attorney General) v. Holly Big Canoe, 2002 CanLII 18055 (ON CA) at paras 12-13, and Liquor Control Board of Ontario v. Magnotta Winery Corporation, 2010 ONCA 681 at paras 39-41 ("Magnotta").
[13] 2014 SCC 35 ("Union Carbide").
[14] Union Carbide, above at para. 34.
[15] Union Carbide, above.
[16] 2013 SCC 37 ("Sable").
[17] Sable, above at paras. 12 and 17.
[18] Magnotta, above at note 12.
[19] See Order F21-11 (City of White Rock), 2021 BCIPC 15; Order F17-35 (City of Vancouver), 2017 BCIPC 37.
[20] 2017 BCSC 331 ("Richmond").

contain express language that abrogated settlement privilege and therefore the records at issue in that case were protected by common law settlement privilege.[21] The ministry submits that the same reasoning applies in this appeal.

Findings and analysis

[37] For the reasons that follow, I find that the records at issue are neither exempt under branch 1 nor branch 2 of section 19.

[38] With respect to branch 1, the records do not contain any direct communication of a confidential nature between a lawyer and their client, nor do they contain any direct legal advice from a lawyer. As such, I do not find that the records are exempt under solicitor-client communication privilege, which as noted above is an aspect of branch 1.

[39] As well, the records are not exempt under common law litigation privilege under branch 1 as, amongst other reasons, the litigation has ended.[22]

[40] In *Blank v. Canada (Ministry of Justice)*,[23] the Supreme Court of Canada read litigation privilege into "solicitor-client privilege", which left open whether branch 1 of section 19 could be interpreted as also encompassing settlement privilege, a third distinct form of legal class privilege.

[41] In *Richmond*,[24] the BC Supreme Court states the following about the distinction between solicitor-client privilege and settlement privilege:

> I am not aware of any authorities in which the term "solicitor-client privilege" was held to include settlement privilege or was used to describe settlement privilege. While both privileges serve the goal of the effective administration of justice, they are very different. Legal advice privilege [solicitor-client privilege] serves that goal through protecting the confidentiality of communications between a lawyer and client, while settlement privilege serves that goal by encouraging free discussion between adverse parties towards reaching a settlement and the terms of any settlement.[25]

[42] I agree with and adopt the reasoning in the above case for the purpose of this appeal.

[43] I also note that settlement privilege does not share the same historic connection

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[21] Richmond, above at paras. 71 and 72.
[22] On November 8, 2018, the Government of Ontario withdraw its status as intervenor in the litigation. On May 15, 2019, the Ontario Court of Appeal issued a decision in this litigation (2019 ONCA 393).
[23] Blank, above at note 7.
[24] Richmond, above at note 21.
[25] Richmond, above at para 67.

that solicitor-client and litigation privilege share. As well, one significant distinguishing feature of settlement privilege is that it is shared by opposing parties whereas both solicitor-client and litigation privilege apply to one side of a dispute.

[44] Moreover, in *Sable*, cited by the ministry, the Supreme Court of Canada has stated that settlement privilege is neither an aspect of solicitor-client privilege nor litigation privilege, but rather a distinct form of class privilege.[26]

[45] I note that the IPC has not found that branch 1 includes settlement privilege. And I am not prepared at this time, on the basis of the ministry's limited representations and in the face of the *Sable* decision, to find that branch 1 of section 19 includes settlement privilege.

[46] With respect to branch 2, the ministry concedes that the records were not prepared by or for Crown counsel. I note that the ministry relies on *Magnotta* where the Ontario Court of Appeal held that the records prepared by or for Crown counsel for use in the mediation or settlement of litigation are exempt under branch 2 of section 19.[27] However, while I have no trouble with the general proposition that branch 2 includes records prepared or for use in the mediation or settlement of litigation, in that case the records were prepared by or for LCBO counsel and in this case the ministry has, as noted, conceded the records were not prepared by or for Crown counsel. As such, I find that branch 2 cannot apply to exempt the records from disclosure.

[47] As neither branches of section 19 applies, I will now turn to consider whether common law settlement privilege may apply to the records.

Settlement privilege

[48] Settlement privilege is a common law class privilege that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute.[28] It applies to agreements made as a result of settlement discussions as well as offers and compromises made during negotiations.[29]

[49] In *Clayton v. SPS Commerce Canada Ltd.*, the Ontario Superior Court of Justice found that settlement privilege applies if the following three criteria[30] are met:

1. A litigious dispute must be in existence or within contemplation;

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[26] Sable, above at note 16 at para. 4.
[27] Magnotta, above at note 4 at paras. 36 and 38.
[28] Union Carbide, above at note 11 at para. 1.
[29] Magnotta, above at note 4; Sable, above at note 7 at para. 17.
[30] Clayton v. SPS Commerce Canada Ltd., 2018 ONSC 5017 (CanLII), at para. 8; Howes v. Howes, 2018 ONSC 6297 (CanLII), at para. 14

2. The communication must be confidential and made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and

3. The purpose of the communication must be to attempt to effect a settlement

[50] Settlement privilege is held by the parties to the litigation, and while it can be waived by the parties, such waiver cannot be unilateral – all parties to the litigation must agree before any elements of their settlement discussions can be disclosed. It also applies whether or not a settlement is reached.[31] It only arises in the context of existing or contemplated litigation, but lawyers need not be involved for a successful claim of settlement privilege and it may apply to records in the possession of third parties, including the mediator.

[51] While settlement privilege is typically claimed by parties to the litigation, the Courts have found that it applies to communications with non-parties or to documents held by non-parties, so long as the three criteria listed above are met.

[52] Relevant to the current appeal is *Aly v. Halal Meat Inc. et al*,[32] where the Ontario Superior Court of Justice found that settlement privilege applied to the communications of two non-parties who had been asked by the parties to the litigation to assist them in resolving their litigation by engaging in informal mediation discussions.

[53] As seen above, the Courts have recognized that settlement privilege is important to the secure and effective administration of justice and it is a distinct class privilege.

[54] The Williams Report and the enactment of *FIPPA* pre-date the Supreme Court of Canada's decision in *Union Carbide*. In other words, while *FIPPA* is meant to be a comprehensive scheme, it has not, in my view, kept pace with the developments in the protections afforded to settlement discussions at common law. The legislature can codify the common law. It can also enact exceptions to the right of access that reflect but do not mimic the common law. However, in this case, *FIPPA* is simply silent on settlement privilege over records that are not prepared by or for crown counsel.

[55] As *FIPPA* does not specifically contain an exemption relating to settlement privileged records, and settlement records not created by or for Crown counsel are not covered under branch 2 of section 19, I have decided I must consider whether the legislature created a comprehensive access regime requiring the disclosure of settlement privileged records (falling outside of branch 2) or whether settlement privilege is a class privilege sufficiently central to the proper administration of justice that it must be given effect in the absence of express legislative abrogation.

[56] In *Magnotta*, the Ontario Court of Appeal states the following about the

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[31] Sable, above at note 16 at para 17.
[32] 2012 ONSC 2585 ("Halal Meat").

abrogation of common law settlement privilege:

> Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 11; and Lavallee, Rackel & Heintz v. Canada (Attorney General), 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61, at para. 18. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege. *Section 19 does not contain express language that would abrogate settlement privilege. Accordingly, in my view, it ought not to be so interpreted.*[33] [emphasis added]

[57] The Court of Appeal went on to note that it did not have to decide whether common law settlement privilege applied, because the records in that case were prepared by or for crown counsel. While the above passage may be seen as *obiter*, I find it instructive nevertheless.

[58] In *Magnotta*,[34] the Ontario Divisional Court states the following about the importance of settlement privilege:

> …the law is well-settled that there is a significant public interest in protecting the confidentiality of settlement discussions in order to make the process as effective as possible. Confidentiality of settlement discussions should be "sedulously fostered".
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> …
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> What may have been true in 1980 is not necessarily true in 2009. Almost 30 years have passed. From Rush to Kelvin, above, the common law has expanded settlement privilege from a rule of evidence to an overriding public interest in favour of settlement. [35]

[59] The *Magnotta* Divisional Court also points out the following asymmetry:

> It denies to all government institutions the privilege available to private litigants otherwise found to be applicable to mediation and settlement materials. All private litigants can engage in settlement discussions

[33] Magnotta (Divisional Court), 97 O.R. (3d) 665 at para 38 ("Magnotta (Divisional Court)").
[34] Magnotta (Divisional Court), above.
[35] Magnotta (Divisional Court), above at paras. 58 and 62.

> confident that settlement materials will remain confidential. The IPC would have it that the Crown can not. That is true asymmetry.[36]

[60] In my view, absent clear and explicit statutory language abrogating it, common law settlement privilege should apply (if the three criteria listed above are met) as it would be unreasonable and unjust to deprive government litigants, litigants with claims against government or subject to claims by government, or litigants otherwise engaged in confidential settlement discussions in which the government was participating, of the settlement privilege available to all other litigants. Not allowing settlement privilege would discourage third parties from engaging in meaningful settlement negotiations with government institutions, which would be costly to taxpayers or otherwise unfairly limit options for the efficient resolution of litigation available to purely private parties.

Does common law settlement privilege apply to the records?

[61] Having found that common law settlement privilege applies to records held by institutions subject to *FIPPA*, in the absence of any express legislative abrogation, I will now consider whether the records are exempt as settlement privilege communications.

[62] In this case, the then-active *CMDS v. CPSO* litigation was the litigious dispute at the time of the settlement discussions which the ministry facilitated between the affected parties. All the records at issue originate in this time frame. As such, the first criterion has been met.

[63] On my review of the records, I find that the second and third criteria are also met in this case. It is clear that the communications between the ministry and the affected parties were confidential and made with the express or implied intention that they were not to be disclosed. I note that the parties involved signed non-disclosure agreements in regard to their discussions. I also note that some of the records referenced or were marked as "confidential and without prejudice". Although the ministry was not a party to the litigation, as it had withdrawn its intervenor status, I accept that the ministry was acting as an informal mediator and facilitating settlement discussions between the affected parties. The Court has recognized that settlement privilege could apply to the communications of two non-parties who were asked by the parties to the litigation to assist them in resolving their litigation by engaging in information mediation discussions as was the case with the ministry.[37] I also find that the purpose of the communications reflects the ministry's attempts to effect a settlement between the affected parties.[38] As such, in this specific case, I find that the settlement privilege applies to exempt the records at issue.

[64] Given my finding that settlement privilege applies to exempt the records at issue,

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[36] Magnotta (Divisional Court), above at para. 91.
[37] Halal Meat, above at note 32.
[38] I am unable to provide further details without disclosing the substance of the settlement discussions between the parties.

it is not necessary for me to also consider the ministry's alternate claims that the records are exempt under sections 18(1)(e) and/or 21(1).

ORDER:

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

Original signed by: June 20, 2023

Lan An
Adjudicator