Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4504

Appeal PA20-00088

Safety, Licensing Appeals and Standards Tribunals Ontario

April 5, 2024

Summary: The Safety, Licensing Appeals and Standards Tribunals Ontario (the tribunal) received a request under the *Act* for access to records related to two cases that the requester had before the tribunal. The tribunal identified records responsive to the request and took the position that the records were not subject to the *Act* due to section 65(3.1) and the common law concept of adjudicative privilege (or deliberative secrecy). Alternatively, the tribunal claimed the discretionary exemption at section 19 (solicitor-client privilege) in relation to some of the responsive records. The requester also alleged a conflict of interest on the part of the individual who processed her access request.

In this order, the adjudicator upholds the tribunal's decision in part. The adjudicator finds that the claim of conflict of interest is not substantiated and dismisses that aspect of the appeal. She upholds the tribunal's decision to withhold the adjudicators' personal notes and draft decisions under section 65(3.1). However, she finds that there is insufficient evidence to conclude that the remaining records at issue are excluded from the scope of the *Act* under section 65(3.1). She also finds that the common law concept of adjudicative privilege or deliberative secrecy cannot be claimed in the alternative to section 65(3.1) in response to a request under the *Act*. As a result, she orders the tribunal to issue an access decision in relation to those records, considering the possible application of section 49(a) (discretion to refuse requester's own personal information), given the nature of the records requested. In addition, the adjudicator decides that the tribunal's claim of section 19 over certain emails is permitted, although this claim was made late. However, she orders the tribunal to consider whether this exemption applies when read with section 49(a), given the nature of the records requested.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.F31, as amended, sections 1(a), 2(1) (definitions of "head" and "personal information"), 19,

42(1)(h), 47(1), 49(a), 62(1), 65(2), 65(3.1), 65(5.2), 65(6)3, and 65(16); *Tribunal Adjudicative Records Act, 2019*, SO 2019, c 7, Sch 60, as amended, section 2; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, as amended, section 3(1)(e).

Orders Considered: Orders P-396, P-623, PO-1832, PO-2113, PO-2331, PO-2381, PO-2639, PO-4102, PO-4349, MO-3664, and MO-3191-I.

Cases Considered: *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673; *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII); *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* [2003] 2 SCR 624, 2003 SCC 58 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597 (CanLII); *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)* 2019 ONCA 518 (CanLII); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII); *Brockville (City) v. Information and Privacy Commissioner, Ontario* 2020 ONSC 4413 (CanLII); *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574; *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445; *Ontario (Minister of Health)* v. *Canoe* [1995] O.J. No. 1277 (Ont. C.A.); *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (ON CA).

OVERVIEW:

[1] This order addresses access to various records relating to two case files at an administrative tribunal.

[2] The Safety, Licensing Appeals and Standards Tribunals Ontario (the tribunal[1]) received a request under the *Act* for records relating to two tribunal files involving the requester, as follows:

> . . . all internal communications that have occurred at the Licence Appeal Tribunal including the names and titles of those involved on both Tribunal files [number] & [other number] pertaining to the claimant [the requester].

[3] After some correspondence between the parties, the tribunal issued a final decision, advising the requester's representative of the following:

> In our response [on a specified date], we advised that [the *Act*] does not apply to any adjudicator's personal notes, draft decisions, draft orders, or communications related to draft decisions, pursuant to subsection 65(3.1) of [the *Act*]. We undertook to process the remainder of your request.

[1] Before the creation of Tribunals Ontario on January 1, 2019, some tribunals were part of the Safety Licensing Appeals and Standards Tribunals Ontario.

> After considering your request, we are writing to advise that we are able to provide you with all communications except those between adjudicator and staff and those encompassed by deliberative privilege.
>
> Although we recognize that we originally responded to requests for information that you are now seeking under [the *Act*], after careful consideration we have determined that the records you seek are subject to deliberative privilege and go to institutional independence and the control of the Tribunal's adjudicative processes.

[4] The requester, now the appellant, appealed the tribunal's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution. During mediation, the mediator addressed the issues on appeal with both parties (including a possible conflict of interest regarding the individual who made the decision), but further mediation was not possible. As a result, the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The adjudicator previously assigned to this appeal began a written inquiry under the *Act* by inviting representations from the tribunal in response to issues set out in a Notice of Inquiry. In addition to responding to those issues, the tribunal added the discretionary exemption at section 19 (solicitor-client privilege), and the claim that the adjudicators' notes are not in the tribunal's custody or control, under section 4(1) of the *Act*. The appellant provided written representations in response, and the parties later provided further representations to the IPC. The adjudicator requested the tribunal provide copies of the records to the IPC. Relying on its claim that the records are excluded under section 65(3.1) (quasi-judicial records) and/or exempt section 19, and/or subject to deliberative privilege, the tribunal provided an affidavit regarding the records instead.[2]

[7] The appeal was then transferred to me to continue the inquiry.

[8] On my review of the file, I decided to ask the tribunal to reconsider its access decision in light of the IPC's ruling in Order PO-4349, also involving a Tribunals Ontario tribunal, the Human Rights Tribunal of Ontario. Order PO-4349 is the IPC's first substantive interpretation of the exclusion at section 65(3.1) of the *Act*. The tribunal reconsidered its decision, and issued a revised decision in which it released additional records to the appellant.

[9] The appellant continued to seek access to the remaining records. The appellant also alleged that the tribunal head had a conflict of interest in making the decision at

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[2] The IPC has published a guidance document regarding claims of solicitor-client privilege where the records have not been provided to the IPC. That document can be accessed here: IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC - IPC.

issue.

[10] As a result, I asked the tribunal to provide the IPC with copies of the remaining records at issue.[3] I clarified to the tribunal that I was not seeking records clearly described in the tribunal's representations, affidavit, and/or correspondence to the IPC as communications with legal counsel for legal advice and withheld under section 19. Nor was I seeking to review records described as adjudicator's personal notes, draft decisions or correspondence containing draft decisions. The tribunal refused to provide the IPC with copies of the requested records and asked that I adjudicate the issues on the basis of the representations and affidavit evidence provided. In these circumstances, and in the interests of fairness and expediency, I decided not to order production of the records and instead to make findings on the evidence before me.

[11] For the reasons that follow, I uphold the tribunal's decision in part. I find that the claim of conflict of interest is not substantiated and I dismiss that aspect of the appeal. I uphold the tribunal's decision that the draft decisions and adjudicator's personal notes are excluded from the scope of the *Act* under section 65(3.1). However, I find that the other records for which the tribunal claimed the exclusion are not excluded, and are subject to the *Act*. Therefore, the tribunal must issue another access decision regarding these records. It must do so after considering the application of sections 47(1) and 49(a) of the *Act*, including for the records over which the tribunal made a late alternate claim of section 19.

RECORDS:

[12] For ease of reference, I will refer to the two tribunal file numbers as Case A and Case B in this order.

[13] This order addresses four groups of records (approximately 456 records in total),[4] based on the tribunal's descriptions of them in its affidavit, as follows in this chart:

Type of record	Total number of records for Cases A and B
adjudicator's personal notes[5]	5

[3] As the previously assigned adjudicator had done, I noted that *Practice Direction 1* of the IPC's *Code of Procedure* makes it clear that, under the *Act*, the Commissioner is entitled to access the records at issue, whether by having them produced or examining them.
[4] The tribunal's affidavit lists approximately 384 records for Case A and approximately 72 records for Case B.
[5] The tribunal's affidavit, at paragraphs 9 (three records) and 16 (two records).

draft decisions[6]	approximately 45
email communications with legal counsel regarding legal advice[7]	approximately 99
the remaining emails[8]	approximately 307

[14] The tribunal claims that the section 65(3.1) exclusion applies to all of the records and I discuss this at Issue B below. It made alternative claims for approximately 104 of these records (five records withheld on the basis they are not in the custody or control of the tribunal and approximately 99 records withheld under section 19).

ISSUES:

A. Was the person delegated by head to make the decision at issue in a conflict of interest when making that decision?

B. Does section 65(3.1) apply to exclude the records from the application of the *Act*?

C. Should the IPC permit the tribunal to rely on the exemption at section 19, though the tribunal did not cite section 19 in its initial access decision?

DISCUSSION:

Issue A: Was the person delegated by the head to make the decision at issue in a conflict of interest when making that decision?

[15] Under the *Act*, someone in an institution is designated to make decisions in response to access requests.[9] This person is referred to as "the head" in the *Act*. The head may delegate this decision-making authority.[10]

[16] Here, the appellant alleges that the individual who decided to claim section 65(3.1)

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[6] *Ibid*, at paragraph 4 (13 records), paragraph 5 (six records), paragraph-6 (13 records), paragraph 11 (six records), paragraph 12 (two records), and paragraph 13 (approximately five records).
[7] *Ibid*, the remaining emails referenced at paragraph 4 (approximately 93 records), paragraph 11 (approximately four records), and paragraph 12 (approximately two records).
[8] *Ibid*, the remaining emails not already referenced in the previous footnotes, that is, at paragraph 5 (approximately one record), paragraphs 6 and 7 (approximately 173 records), paragraph 8 (approximately four records), paragraph 10 (approximately 78 records), paragraph 14 (approximately 40 records), paragraph 15 (approximately nine records), and paragraph 17 (two records).
[9] See the definition of "head" at section 2(1) of the *Act*.
[10] See section 62(1) of the *Act*.

of the *Act* was in a conflict of interest in making that decision. For the reasons that follow, I find that the appellant has not sufficiently established this claim.

Onus of proof

[17] Although counsel for the appellant repeatedly argued that the tribunal did not meet its burden of proof on the issue of conflict of interest, the tribunal does not have such a burden here.

[18] The onus of demonstrating a conflict of interest or bias lies on the person who alleges it, and mere suspicion is not enough.[11] While actual bias need not be proven, the Ontario Court of Appeal has noted that "the threshold for establishing a reasonable apprehension of bias is a high one."[12]

Conflict of interest or bias of individuals who process freedom of information requests

[19] A "conflict of interest" is commonly understood as a situation in which a person, such as an elected official or public servant, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties.

[20] In Ontario, there are various provincial laws and regulations that set out conflict of interest rules that apply, for example, to members of provincial parliament;[13] current ministry employees and public servants employed in and appointed to public bodies;[14] and members of municipal councils and local boards.[15] Previous IPC orders have considered the issue of conflict of interest with respect to staff at institutions that make decisions on access requests from the public under the *Act.*[16] In determining whether there is a conflict of interest, these orders posed the following questions:

(a) Did the decision-maker have a personal or special interest in the records?

(b) Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[21] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the

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[11] See Blake, S., *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.

[12] *Ontario Medical Association v. Ontario* (*Information and Privacy Commissioner*), 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.

[13] *Members' Integrity Act, 1994,* S.O. 1994, c. 38.

[14] Ontario Regulation 381/07 of the *Pubic Service of Ontario Act, 2006,* S.O. 2006, c. 35.

[15] *Municipal Contiict of Interest Act* , R.S.O. 1990, c. M.50.

[16] See, for example, Orders M-640, MO-1285, MO-2073, MO-2605, MO-2867, MO-3204, MO-3208, PO-2381, MO-3513-I, MO-3672, and MO-3955.

kinds of issues which need to be considered in making such a determination.

[22] In carrying out their functions under the *Act*, staff at institutions who make decisions on access requests must comply with precise procedural obligations.[17] However, those obligations are not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication.[18]

Analysis/findings

[23] The parties exchanged representations about the appellant's claim that the individual who made the access decision had a conflict of interest.

[24] By way of background, in the appellant's underlying tribunal proceedings, there was a three-person panel of decision-makers. One of those individuals was also delegated to process access requests under the *Act* ("the delegate"). Due to the conduct of one of the *other* panel members, the tribunal decided to recuse the whole panel from the appellant's underlying proceedings, out of an abundance of caution. This happened twice. The reasons for these recusals are not an issue before me and are outside of my jurisdiction to consider.

[25] What is before me is whether the delegate had a conflict of interest in her decision-making regarding the access request. I find insufficient evidence to accept that she did.

[26] The crux of the appellant's position is that the recusals serve as "a *prima facie* [at first sight] personal and special interest" on the part of the delegate. The appellant makes a number of other points, intermingled with her views about the tribunal proceedings, government appointments, and assumptions about the contents of the responsive records. She submits that the delegate had a personal interest in keeping the records from disclosure, to avoid embarrassing the government and increase her re-appointment chances.

[27] The tribunal explains that the delegate has no personal relationship with, or knowledge of, the appellant (or any of the parties involved in the tribunal matter), or special interest in the records. The tribunal also explains that the delegate ended up making no decisions on the merits of the appellant's tribunal matters. The tribunal submits that its process to recuse the entire panel "underscores the impartiality of" the delegate, as it "further demonstrates that she had no personal or special interests in the records."

[28] While there is no dispute that the delegate who processed the access request was also a decision-maker that the tribunal removed from the adjudication panel twice, the tribunal provided a reasonable and persuasive rebuttal to the appellant's position about

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[17] Such staff may include individuals who may have another role at the tribunal, as quasi-judicial decision-makers.

[18] Order PO-2381, which cited *Imperial Oil Ltd. v. Quebec* (*Minister of the Environment*), [2003] 2 SCR 624, 2003 SCC 58 (CanLII).

this.Furthermore, the *Act* allows for delegation of decision-making.[19] The fact that she was recused as a decision-maker does not undermine this delegation in these circumstances, where there is no evidence of personal knowledge of, or relationship with, the parties, and where the she was not recused because of her own conduct. I agree with the tribunal that the recusal of the entire panel supports a finding of impartiality and lack of personal or special interest in the records when I consider whether the delegate had a conflict of interest in processing the access request.

[29] Regarding the appellant's submission that the re-appointment of the delegate to the tribunal biased her, I do not find it persuasive. It assumes the contents of the records, and it does not consider that the *Act* grants the IPC the power to hear appeals from access to information requesters whose requests have been denied (whether those decision-makers are subject to government re-appointment processes or not).

[30] The tribunal submits, and I find, that any interest that the delegate could "conceivably have in denying access to records is too remote, speculative, and attenuated to give rise to a reasonable apprehension of bias in the eyes of an objective and properly informed observer."[20]

[31] For these reasons, I find that no well-informed person, considering all the circumstances, could reasonably perceive a conflict of interest on the part of the delegate with respect to processing the appellant's access to information request. There is no evidence of a reasonable apprehension of bias with respect to the access to records that she seeks through her request.

Issue B: Does section 65(3.1) apply to exclude the records from the application of the *Act*?

[32] For the following reasons, I uphold the tribunal's decision in part because I find that some of the records at issue are excluded from the scope of the *Act* under section 65(3.1).

Section 65(3.1)

[33] Section 65(3.1) states:

> This *Act* does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.

[34] The meaning of "quasi-judicial capacity" is "'like' or 'similarly' to a judge."[21]

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[19] See section 62(1) of *FIPPA*.
[20] The tribunal cites para. 36 of *Imperial Oil*, *supra*.
[21] *British Columbia* (*Attorney General*) *v. British Columbia* (*Information and Privacy Commissioner) et al.*, 2004 BCSC 1597 (CanLII).

[35] The tribunal has the onus of proving that the records at issue are excluded from the scope of the *Act* under section 65(3.1).[22]

[36] The effect of an exclusion is different from the effect of an exemption. If a record is found to be excluded under the *Act*, that means that the *Act* does not apply to the record. However, an institution may choose to disclose the record outside of the access scheme of the *Act.*[23]

[37] The purpose of the exclusion at section 65(3.1) is to protect the ability of those exercising quasi-judicial functions to express preliminary and tentative remarks, conclusions, or communications that would otherwise have some cognizable impact on the deliberative processes of the decision-make regarding an application, appeal, or other matter they are entrusted to resolve. The purpose of the exclusion at section 65(3.1) of the *Act* is *not* to provide a blanket protection from disclosure to any record that a decision-maker generates, or is generated for a decision-maker, simply on the basis of a connection to the decision-maker. Such an interpretation would be overly broad, capturing records that do not reflect or impact in any way on the decision-maker's deliberative processes.[24]

[38] To qualify for the exclusion at section 65(3.1), a record must be one of the four types of records listed in section 65(3.1):

- "personal notes,"
- "draft decisions,"
- "draft orders," and
- "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity."

[39] In this order, I examine whether the records withheld fall within the first, second, or fourth of the types of records listed above.

[40] Before delving into whether the records are excluded from the scope of the *Act* under section 65(3.1), I will address two preliminary threshold issues raised by the appellant:

- whether the tribunal's decision-makers are acting in a quasi-judicial capacity, and
- whether the exclusion at section 65(3.1) applies to records created before the date that the exclusion was added to the *Act*.

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[22] Order MO-3191-I and PO-4349.
[23] Orders PO-2639.
[24] Order PO-4349.

[41] The answer to both questions is yes, as I explain below.

Does this appeal involve decision-makers that act in a quasi-judicial capacity?

[42] The exclusion at section 65(3.1) only applies only to the four types of records listed above. A critical element of this exclusion is that the records reflect the deliberative process of individuals acting in a quasi-judicial capacity. In its initial representations about the application of the exclusion, the tribunal explained that it is an adjudicative tribunal where its decision-makers act judicially, and whose adjudicative functions require a level of independence similar to the courts'.

[43] The appellant challenges the independence of the tribunal's decision-makers, pointing to the Ontario Court of Appeal decision regarding the same tribunal: *Shuttleworth v. Ontario* (*Safety, Licensing Appeals and Standards Tribunals*).[25] In *Shuttleworth*, the Ontario Court of Appeal upheld the Ontario Divisional Court's decision that there was a reasonable apprehension of a lack of independence regarding a case that was adjudicated at the tribunal.

[44] As I understand the appellant's argument, she submits that the tribunal's decision-making process is not properly independent, and as a result, its decision-makers (including those involved in her two cases) cannot be said to be exercising quasi-judicial capacity. I understand this argument to be made in order to lead to the conclusion that the records at issue would not be covered by the exclusion at section 65(3.1) because the exclusion only covers certain records reflecting the deliberative process of those carrying out quasi-judicial duties.

[45] I do not accept the appellant's argument. The *Shuttleworth* case and the courts' remarks pertain only to the particular circumstances of the matter before it and does not stand for the proposition that the tribunal is inherently lacking in independence.

[46] Furthermore, the appellant's representations regarding the reassignments of decision-makers in her case(s) do not persuade me that the records at issue are not ones involving quasi-judicial decision-makers.

[47] In short, there is no reasonable basis for me to dismiss the section 65(3.1) claim on the grounds that the tribunal's decision-makers do not act in a quasi-judicial capacity.

Can the exclusion at section 65(3.1) apply to records created before the date that the exclusion was added to the Act?

[48] Section 65(3.1) is a relatively new exclusion in the *Act*. The tribunal has the onus of proving that records are excluded from the scope of the *Act* under section 65(3.1).[26]

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[25] 2019 ONCA 518 (CanLII).
[26] Orders PO-4349 and MO-3191-I.

The exclusion became part of the *Act* on July 1, 2019.[27] The appellant submits that section 65(3.1) cannot apply to records *created* before that date. The appellant relies on a Supreme Court of Canada decision in which the Court stated that the rules of statutory interpretation require the Legislature "to indicate clearly any desired retroactive or retrospective effects."[28] The tribunal disagrees, arguing that since the request was made after section 65(3.1) became law, section 65(3.1) is "squarely engaged" and that in processing the request, the tribunal was "compliant with existing legislation."

[49] The parties' positions reflect two underlying questions:

- when an institution can claim the exclusion at section 65(3.1), and
- whether the exclusion can apply to records that existed before the exclusion came into effect.

[50] Regarding the first question, an institution cannot claim the exclusion at section 65(3.1) if section 65(3.1) had not been in force (become part of the *Act*) when the institution received the access request.[29] In other words, if the request in this appeal was made before section 65(3.1) had become a part of the *Act*, then the tribunal would not be able to claim it at all. However, it would still have been open to the tribunal to consider whether other sections of the *Act* apply to the records requested.

[51] Regarding the second question, the exclusion at section 65(3.1) does not say that it only applies to records created from any particular date onwards. That is in contrast to another exclusion added to the *Act* at the same time.[30] Therefore, I do not accept the appellant's position that section 65(3.1) is irrelevant in this appeal.[31]

[52] What is relevant, rather, is when the tribunal received the access request, and what types of records are at issue. Since the appellant made the request after section 65(3.1) came into force, the tribunal can rely on it.

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[27] Section 65(3.1) was added to the *Act*, introduced in the *Tribunal Adjudicative Records Act, 2019* S.O. 2019, c. 78, Sched. 60, which was contained within the *Protecting What Matters Most Act* (*Budget Measures*), *2019*, S.O. 2019, c. 7.
[28] *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49 (CanLII), at paragraph 71.
[29] Order PO-4102.
[30] That is quite different from the other exclusion that became part of the *Act* on the same day that section 65(3.1) did, the exclusion at section 65(16) (adjudicative records). Section 65(16) of the *Act* says: "This Act does not apply to adjudicative records, within the meaning of the Tribunal Adjudicative Records Act, 2019 [*TARA*], referred to in subsection 2(1) of that Act." While this language does not include a date, the other statute that it refers to (*TARA*) does. Section 2(1) of *TARA* provides that certain tribunals shall make available to the public all adjudicative records that relate to proceedings that started from the date that *TARA* became law, subject to the tribunal's ability to make confidentiality orders in respect of the records.
[31] For the appellant's benefit, the issue of retroactive or retrospective application was examined in more detail in the context of another exclusion in the *Act* in Order PO-3862.

What types of records are at issue?

[53] I find that certain of the records are excluded under section 65(3.1). For the remaining records, I find the tribunal's evidence insufficient to establish that the records are excluded.

Adjudicators' personal notes

[54] Given the above-noted purpose of section 65(3.1) of the *Act*, in my view, the category of records listed in section 65(3.1) as "personal notes" reflects the reality that in the process of deciding a matter, a decision-maker may make personal notes before, during, or after a hearing (whether that hearing is oral or in writing). These personal notes would be related to the substantive issue(s) that the decision-maker is tasked with deciding, as a quasi-judicial decision-maker.

[55] I have considered the tribunal's affidavit descriptions of five records in the category of "personal notes." For Case A, the tribunal describes three records as "documents containing the personal notes of adjudicators taken during the proceeding ranging between [specified dates]."[32] For Case B, the tribunal describes two records this way: "personal notes of adjudicators taken on [specified dates]. These notes are in the file to assist the adjudicator in the drafting process."[33]

[56] Considering the purpose and wording of the exclusion, and the tribunal's affidavit descriptions of the above-noted five records, I find that the tribunal has sufficiently established that these five records are excluded as "personal notes," under section 65(3.1) of the *Act*. As a result, the appellant has no right of access to them through the *Act*.

[57] As discussed, the request in this appeal was made after the Legislature added section 65(3.1) to the *Act*. Since the *Act* now contains an exclusion that removes an adjudicator's personal notes from the scope of the *Act*, I will not consider the tribunal's alternative argument, that the personal notes are not within the tribunal's custody or control.[34]

Draft decisions

[58] Draft decisions are another of the four types of records listed in section 65(3.1).

[59] According to the tribunal's affidavit, approximately 45 of the records it withheld contain or include draft decisions: 32 draft decisions for Case A[35] and approximately 13

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[32] The tribunal's affidavit, at paragraph 9.

[33] *Ibid*, at paragraph 16.

[34] Section 10(1) of the *Act* says, in part: "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . ."

[35] The tribunal's affidavit, at paragraphs 4, 5, and 6.

draft decisions for Case B.[36]

[60] Considering the purpose and wording of the exclusion, and the tribunal's evidence set out in its affidavit, I find that the tribunal has established that these records are draft decisions, and I find that they are all excluded from the scope of the *Act* under section 65(3.1). As a result, the appellant cannot access these records through the *Act* either.

The remaining emails

[61] Leaving aside the five adjudicators' personal notes and approximately 45 draft decisions, there are approximately 406 remaining records at issue - emails.[37] The tribunal describes these 406 emails as set out in the appendix to this order. The tribunal made an alternate claim over approximately 99 of these records, which I discuss under Issue C.

[62] To be excluded under section 65(3.1), these remaining emails must qualify as one of the types of records listed in section 65(3.1).

[63] The only remaining type of record that might be relevant here is: "communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity." For the reasons that follow, I do not uphold the tribunal's decision to claim section 65(3.1) over the remaining emails as such communications.

[64] To determine whether section 65(3.1) applies to the remaining emails, I will first discuss the scope and purpose of this exclusion.

<u>The scope and purpose of section 65(3.1)</u>

[65] In Order PO-4349, I reviewed the principles of the common law concept of deliberative secrecy in order to define the scope and purpose of the section 65(3.1) exclusion.

[66] I determined that deliberative secrecy relates to matters which directly affect the decision-maker's actual decision-making about the matter(s) which he or she is tasked to decide. It is understandable that, under the common law, deliberative secrecy would extend to communications related to the assignment of decision-maker(s) to particular cases, in part, due to the tribunal's responsibility to ensure that decision-makers have no personal or other relationships with any parties that may affect the judgment on a matter. However, as discussed, the exclusion at section 65(3.1) of the *Act* specifically lists four categories of records. Therefore, if records relating to the administrative aspects of the decision-making process do not squarely fit into any one of these four categories, they are not excluded under section 65(3.1) of the *Act*.

[36] *Ibid*, at paragraphs 11, 12, and 13.
[37] Approximately 349 for Case A and approximately 57 for Case B.

Are the remaining emails "communications related to draft decisions . . . that are created by or for a person who is acting in a quasi-judicial capacity"?

[67] Not all communications created by or for a person who is acting in a quasi-judicial capacity qualify for the exclusion at section 65(3.1) of the *Act*. Only communications "related to" draft decisions are excluded from the scope of the *Act*.

[68] The meaning of the words "related to" is considered in light of the jurisprudence about this phrase (or similar phrases) found in other exclusions from the *Act*.

[69] In determining whether the records at issue have "some connection" to labour relations matters, the Ontario Divisional Court upheld and affirmed the approach in Order MO-3664,[38] ruling the "some connection" standard must, involve a connection that is relevant to the scheme and purpose of the *Act*, understood in their proper context, and that the institution in that case had failed to meet that standard. The Divisional Court stated:

> The "some connection" standard still must involve a connection that is relevant to the statutory scheme and objects understood in their proper context. *It is very significant that there was no evidence adduced before the acjudcator that would help her understand how the release of legal fee figures from negotiations would have any effect on labour relations, let alone an unbalanced or destabilizing effect*[39] [Emphasis mine.]

[70] In Order PO-4349, I applied this approach to the exclusion at section 65(3.1), and I do so here as well.

[71] For the remaining emails at issue to be excluded under section 65(3.1), *each* email withheld must be a communication that has "some connection" to a draft decision, to the extent that it has some relevance to the purpose of the exclusion - protecting records that have some bearing on the deliberations of a decision-maker from access under the *Act*.

[72] Based on the tribunal's affidavit evidence, the remaining emails for Cases A and B are emails between adjudicators and staff relating to managing the file, adjudicators and staff relating to scheduling, between staff and staff. In addition, Case A has an email between two adjudicators "discussing the file" and Case B has emails between counsel and staff.

[73] I find that the additional details provided about such emails (as set out in the Records section, above) are not particularly helpful to discerning whether the emails are communications related to draft decisions. I find the tribunal's descriptions to be vague and too general to support a finding that the remaining emails are excluded under section

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[38] In *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

[39] *Ibid*, at paragraph 39.

65(3.1).

[74] They are also not sufficiently clear, either: for example, what is the difference between information related to "managing the file" and "related to scheduling", or what would a staff member's communications about "managing a file" have to do with the adjudicator's draft decision? It does not necessarily follow that communications "related to scheduling" would be related to a draft decision.

[75] Likewise, it is does not necessarily follow that "discussions between adjudicators and staff related to preparing case files" would be related to a draft decision. These emails could include communications advising, for example, that evidence has been filed such that the adjudicator can now review the file. These types of communications would not reflect anything about the adjudicator's deliberative process itself as found in their draft decisions.

[76] Descriptions like, "discussions between adjudicators and staff on draft correspondence" do not contain any information to explain how the correspondence reflects the adjudicator's deliberative process. In Order PO-4349, I specifically rejected the tribunal's claim of section 65(3.1) over emails between staff (sometimes involving the adjudicator) regarding what to say in correspondence to the appellant about when her decision would be issued.

[77] Therefore, I find that these descriptions considered individually or altogether do not sufficiently establish that the remaining emails are communications excluded by section 65(3.1).

[78] In addition, the tribunal made certain general arguments related to its independence and control of its own process in support of its claim that section 65(3.1) applies. It also made comparisons to judges' records being inaccessible under the *Act*. The tribunal made these arguments to the previously assigned adjudicator, before the IPC issued Order PO-4349. In that order, I considered and rejected these arguments.[40] To the extent that the tribunal may still be relying on these arguments (after Order PO-4349 was issued), such arguments are likewise not accepted for the same reasons.

[79] Having considered the tribunal's affidavit evidence and representations, I am unable to determine the specific subject matter of each remaining email at issue such that I can determine whether each relates in any discernable way to any issues raised in the appellant's cases at the tribunal, any submissions made in the proceedings, any aspect of the decision-maker's deliberative or reasoning processes, the contents of any draft decision or the possible outcome of any decision that would ultimately be reached. More specifically with respect to emails just between staff, I am unable to conclude on the evidence whether they indicate that the decision-maker sought or was provided with any input with respect to his or her deliberative processes on any substantive elements

[40] Order PO-4349, at paragraphs 89-91.

of a draft decision.

[80] In the circumstances, I am unable to find that the remaining emails qualify for the exclusion at section 65(3.1). As a result, I will order the tribunal to issue an access decision with respect the remaining emails (that is, the approximately 406 described above). Given the nature of the request, it is likely that some or all of these records contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act*. As a result, the tribunal's new decision will have to consider whether to make the decision under section 47 of the *Act*.

Issue C: Should the IPC consider the tribunal's late reliance on the exemption at section 19, though the tribunal did not cite section 19 in its initial access decision?

[81] Although it did not initially claim the application of discretionary exemptions in the alternative to its exclusion claim, the tribunal took the position that the section 19 exemption applied to some records (approximately 99 emails),[41] in its initial representations. For the reasons that follow, I allow the late-raising of this exemption over these emails.

[82] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in IPC appeals. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC.

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[41] Based on the tribunal's affidavit, the remaining emails that I am referring to are described in the following paragraphs of the affidavit:

- Paragraph 4 - approximately 93 emails, described as follows: "E-mails between counsel and staff ranging from December 22, 2017 to July 29, 2019 where counsel provided advice on procedural issues. The e-mails also contain case status updates." The full description of the records in paragraph 4 says that of the approximately 106 e-mails, 13 contain draft decisions. Given my decision about draft decisions under Issue A, that leaves approximately 93 emails.
- Paragraph 11 - approximately four emails, described as "E-mails from adjudicators to legal counsel seeking legal advice ranging from July 17, 2019 to August 13, 2019." The full description of the records in paragraph 11 says that of the approximately 10 e-mails described in this paragraph, six contain draft decisions. Given my decision about draft decisions under Issue A, that leaves approximately four emails.
- Paragraph 12 - approximately two emails, described as "E-mails between counsel and staff all sent on July 17, 2019. The e-mails are following up on decision reviews and drafts, seeking advice on procedural issues and seeking or providing case updates." The full description of the records in paragraph 12 says that of the approximately four e-mails described in this paragraph, two contain draft decisions. Given my decision about draft decisions under Issue A, that leaves approximately two emails.

> If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[83] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[42]

[84] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[43] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[44]

[85] It is the appellant's position that there would be prejudice to her by allowing section 19 to be raised and considered late, but not to the tribunal. In support of this, she described matters related to her health which I will not detail in this public order. She also invokes concerns arising out of *Shuttleworth*. She also argues that if section 19 had been claimed in the first instance, she would have invoked "[section] 42 (1)(h) for which there is no exemption."

[86] Section 42(1)(h) of the *Act* is not of assistance to the appellant. Section 42 lists exceptions to the general rule that institutions should not disclose personal information.[45] The exception at paragraph (h) says:

> An institution shall not disclose personal information in its custody or under its control except . . . in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates[.]

[87] While I acknowledge that the appellant has experienced challenges set out in more detail in her representations; however, I am not persuaded that allowing the tribunal to claim section 19 after the inquiry started would be prejudicial to her. After all, as the tribunal submits, it raised section 19 in the alternative to an exclusion, which was another means of refusing to disclose the records under the *Act*, so there was no legitimate expectation of receiving these records through her request. The fact that the appellant

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[42] *Ontario* (*Ministry of Consumer and Commercial Relations v. Fineberg*), Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*) [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[43] Order PO-1832.
[44] Orders PO-2113 and PO-2331.
[45] Section 42 opens with the words "An institution shall not disclose personal information in its custody or under its control except . . ."

has health issues does not necessarily engage section 42(1)(h).

[88] Having considered the parties' representations, I have decided that the tribunal's late section 19 claim over emails it described as involving communications with legal counsel for advice will be considered. I agree with the tribunal that solicitor-client privilege is fundamental tenet in law that is central to the administration of justice. It cannot be undermined by virtue of it being raised as an alternative argument on appeal. Again, this is not a situation where the tribunal initially decided to disclose these emails, and then resiled from that position in reliance on section 19. I also find that the appellant has not been prejudiced by the late raising of this discretionary exemption because she was given a full opportunity to provide representations about its application during the inquiry into the appeal.

[89] In addition, I find that the tribunal *would* be prejudiced by not being allowed to claim a privilege that the Supreme Court of Canada has said must be maintained "as close to absolute as possible."[46] By allowing the tribunal to claim the solicitor-client privilege exemption over certain emails, the integrity of the appeals process would not be compromised in any way, but it would be compromised if I did *not* allow the tribunal to claim the exemption, given the importance of the exemption and the interests it seeks to protect.

The tribunal has not considered whether each record contains the appellant's personal information

[90] I have determined that I am unable to make a determination about the tribunal's application of section 19 at this time. That is because the request in this appeal is for records related to two tribunal case files of the appellant. Therefore, it is reasonable to expect that at least some (if not all) of the emails over which the tribunal claimed section 19[47] may contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act.*[48]

[91] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides some exemptions from this general right of access to one's own personal information.

[92] Section 49(a) of the *Act* says:

> A head may refuse to disclose to the individual to whom the information relates personal information,

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[46] *Canada* (*Privacy Commissioner*) *v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574, citing *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445, at para. 35.
[47] See Note 41.
[48] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." This definition includes a list of examples of personal information, but it is not a complete list. This means that other types of information may qualify as "personal information" under the *Act*.

> where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[93] The discretionary nature of section 49(a) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.[49] If an institution refuses to give an individual access to their own personal information under section 49(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[94] Therefore, given the reasonable expectation that many (or all) of the emails over which the tribunal claimed section 19 contain the personal information of the appellant, the tribunal was required to first assess whether each email contains the appellant's personal information.

[95] The tribunal does not appear to have done so. It did not claim section 49(a), read with section 19. Furthermore, based on my review of its representations about its exercise of discretion under section 19, I cannot conclude that the tribunal considered the presence of the appellant's personal information in any of these emails and, if so, whether it should release any record to the appellant because the record contains her personal information.

[96] In the circumstances, the IPC cannot properly assess the tribunal's section 19 claim. As a result, I will order the tribunal to:

- consider whether each record over which it has made a claim of section 19 contains the appellant's personal information and exercise its discretion accordingly; and,
- issue a revised access decision regarding any such records.

ORDER:

1. I uphold the tribunal's decision in part. I uphold its decision the adjudicators' personal notes and draft decisions are excluded from the scope of the *Act* under section 65(3.1).
2. I allow the appeal, in part. I do not uphold the tribunal's decision that the remaining approximately 406 records are excluded under section 65(3.1) of the *Act*.
3. I order the tribunal to issue an access decision about all of the 406 emails after considering sections 47(1) and 49(a) for each record.

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[49] Order M-352.

4. For the purposes of the procedural requirements of the access decision, the tribunal is to treat the date of this order as the date of the request. Original signed by: Marian Sami Adjudicator

Original signed by: April 5, 2024

Marian Sami
Adjudicator

APPENDIX

[97] Records for Case A are described in the tribunal's affidavit evidence as follows:

Paragraph number	Number of records	Description of records
4	approximately 106	E-mails between counsel and staff ranging from December 22, 2017 to July 29, 2019 where counsel provided advice on procedural issues. The e-mails also contain case status updates. Of the 106 e-mails, 13 contain draft decisions.
5	approximately seven	E-mails from one adjudicator to another adjudicator discussing the file ranging from June 26, 2017 to February 6, 2018. Six e-mails contain draft decisions.
6 and 7	approximately 186	E-mails from adjudicators to staff relating to case managing the file ranging from December 22, 2017 to March 5, 2019. Thirteen contain draft decisions. Specifically, the e-mails involve: a) Staff bringing case information to an adjudicator's attention; b) Adjudicators providing staff with instructions related to processing steps; c) Discussions between adjudicators and staff related to preparing case files; d) Discussions between adjudicators and staff on draft correspondence; and e) Discussions related to status of procedural issues.
8	approximately four	E-mails from adjudicators to staff relating to scheduling ranging from June 20, 2017 to December 14, 2017.

9	three	Documents containing the personal notes of adjudicators taken during the proceeding ranging between February 1, 2018 to February 6 2018.
10	approximately 78	Staff to staff e-mails ranging from October 27, 2017 to March 25, 2019 relating to the file. The e-mails are about: a) Ensuring adjudicators' instructions are followed; b) The status of processes such as decision review; c) Whether decisions regarding procedural issues are awaiting counsel input; d) Issues related to proposed letters to parties, such as who should sign and what content should be included; and e) Resolving scheduling and adjudicator assignment issues for pending events.

[98] Records for Case B are described in the tribunal's affidavit evidence as follows:

Paragraph number	**Number of records**	**Description of records**
11	approximately 10	E-mails from adjudicators to legal counsel seeking legal advice ranging from July 17, 2019 to August 13, 2019. Six include draft decisions.
12	approximately four	E-mails between counsel and staff all sent on July 17, 2019. Two include draft decisions. The e-mails are following up on decision reviews and drafts, seeking advice on procedural issues and seeking or providing case updates.
13	approximately five	E-mails from one adjudicator to another adjudicator ranging from May 1, 2019 to August 12, 2019. All contain draft decisions and discuss specific issues.

14	approximately 40	E-mails from adjudicators to staff relating to case managing the file ranging from March 29, 2019 to August 8, 2019. The e-mails involve: a) Staff bringing case related issues to an adjudicator's attention; b) Adjudicators providing staff with instructions related to processing steps; c) Discussions related to preparing case files; d) Discussions related to draft correspondence; and e) Discussions related to status of procedural issues.
15	approximately nine	E-mails between adjudicators and staff relating to scheduling ranging between March 5, 2019 to June 14, 2019.
16	two	Personal notes of adjudicators taken on May 28, 2019 and June 20, 2019. These notes are in the file to assist the adjudicator in the drafting process.
17	two	Staff to staff e-mails dated August 8, 2019 and August 21, 2019 related to proposed letters to parties addressing what content should be included.