

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4587

Appeal PA23-00226

Ministry of Agriculture, Food and Rural Affairs

January 14, 2025

Summary: A requester asked the ministry for communications related to the revoking of a grant that his organization had received. The ministry located several email chains but withheld most of them under section 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator agrees that the records should not be disclosed because of section 19, with the exception of one email chain between ministry staff. He orders this email chain disclosed.

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

Orders Considered: Order PO-4484.

OVERVIEW:

[1] The Ministry of Agriculture, Food, and Rural Affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

[Ministry] representatives contacted Ministry of Tourism Culture and Sport regarding [two named organizations and requester] which lead to revoking an approved Reconnect-Grant by the Ministry of Tourism. Please provide ALL communications and all details of the communication and who initiated,

and approved the interference with another Ministry since the charity [named organization] is a separate entity from [named organization].

[2] The ministry located 35 responsive records, consisting of emails and attachments. Access was denied to 29 of those records in their entirety under section 19 (solicitor-client privilege) of the *Act* and to six of those records in part, relying on section 19 to deny access to the remaining portions of the records. The ministry also denied access to portions of the records as non-responsive to the request.

[3] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the appellant advised the mediator that he does not seek access to the non-responsive information severed by the ministry and accordingly these portions are not at issue in the appeal.

[4] The ministry confirmed that it continues to rely on section 19 to deny access to the remaining records and portions of records. The appellant confirmed that he continued to seek access to the records and portions of records withheld under section 19.

[5] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeal process. I conducted an inquiry where I sought and received representations from the ministry and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] For the reasons that follow, I partially uphold the ministry's decision. I find that all of the records, with the exception of record 1, are exempt from disclosure under section 19 of the *Act*, and I uphold the ministry's decision for these records. For record 1, I find that it is not exempt from disclosure under either section 19(a) or (b), and I order it disclosed.

RECORDS:

[7] There are 35 records at issue consisting of emails and attachments described in the index of records that was provided to the appellant.

DISCUSSION:

Preliminary Issue – Records found exempt from disclosure in Order PO-4484

[8] The ministry submits that I should consider the findings in Order PO-4484 and should apply them to the records at issue in the present appeal. Order PO-4484, issued on February 22, 2024, addressed a similar appeal of a decision of the Ministry of Tourism, Culture, and Sport (MTCS). The ministry submits that some records and portions of records at issue are identical to records that were found to be exempt from disclosure in Order PO-4484, where section 19 was also claimed.

[9] The ministry also submits that other records and information, although not identical to the MTCS records in Order PO-4484, contain information that was paraphrased or summarized in MTCS records or will allow reasonable inferences to be made regarding the information in those records. The ministry submits that the findings in Order PO-4484 about the identical records and similar information should prevail in this appeal.

[10] The appellant did not provide representations on the ministry's position regarding the records.

[11] I have considered the ministry's arguments and I agree that some of the records in the two appeals are identical, and others contain similar information. However, as the exemption claims for each appeal rely on the specific context of the records as they relate to each ministry, I will consider ministry's exemption claims on their own, rather than rely on the findings in Order PO-4484.

Solicitor-Client Privilege

[12] The sole remaining issue in this appeal is if the discretionary solicitor-client privilege exemption at section 19 of the *Act* applies to the records at issue. Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. Sections 19(a) and (b), relied on by the ministry, state:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege,

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation ...

[13] 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 at least one of the branches applies.

[14] Solicitor-client communication 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.¹ 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.²

[15] The branch 2 exemption is a statutory privilege that applies where the records

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² *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.

were “prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons.

[16] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³

[17] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.⁴ There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.⁵ Generally, disclosure to outsiders of privileged information is a waiver of privilege.⁶ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁷

Representations

[18] The ministry provided representations on the rationale behind solicitor-client privilege, stating that it exists to ensure that a client can confide in its lawyer on a legal matter without reservation.⁸ It states that common law solicitor-client privilege [section 19(a)] and statutory privilege [section 19(b)] apply to the withheld records, and that there has been no express or implied waiver of either form of privilege.

[19] For section 19(a), the ministry, referencing PO-4484 and PO-1551, submits that solicitor-client privilege applies to the legal advice, requests for legal advice, and any communications between the lawyer and client with a view to keeping both informed so that advice can be sought and given, referring to this as a continuum of communications. It states that such communications must be made in confidence for solicitor-client privilege to apply, and that the expectation of confidentiality can be express or implied.⁹

[20] The ministry provided representations on how the records fit within the above framework and are therefore exempt from disclosure under section 19(a). As the ministry’s representations would reveal the contents of the records at issue, I have not summarized them here. Generally speaking, the ministry submits that the records relate to consultations and discussions between ministry staff and legal counsel relating to

³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁴ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁵ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁶ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

⁷ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

⁸ The ministry cites PO-1551, MO-2166, PO-2441, and PO-2940 in support of its general position.

⁹ The ministry cites *Descoteaux v. Mierzwinski*, [1982] 1 SCR 860 and *General Accident Assurance Co. v. Chrusz*, (1999) 45 O. R. (3d) 321 (CA).

matters underlying the request. It notes that the majority of records at issue form part of email chains and contain significant duplicate information. It submits that the responsive portions of records were provided, received, and kept in confidence in conformity with the requirements for all such information in the continuum of communications between Crown counsel and clients.

[21] The ministry submits that the records are also exempt under section 19(b) because they were prepared by Crown counsel or prepared for Crown counsel for use in giving legal advice. It states that the Supreme Court of Canada has recognized the broader and categorical nature of the statutory exemption, holding that it "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."¹⁰ It submits that once the records fall within the plain and ordinary meaning of the wording of section 19(b), the records qualify for exemption.¹¹ It states that the courts have made clear that the privilege applies to the entirety of the communication between solicitor and client and not only the portions that involve actual advice.¹² It states that even if some records contain factual background information, this information could not be severed and should not be ordered released as it directly relates to and informs the legal issue that was under consideration by Crown counsel.

[22] The appellant did not provide specific representations on the application of section 19, but submits that freedom of information legislation was designed to create transparency regarding government actions. He states that in the matter underlying the request there was "a clear violation of not separating legal entities and using internal blackmailing to achieve compliance in a legal dispute not related to the Charitable Organisation." He states that he is seeking the information at issue to determine if government agencies were misled in the matter underlying the request. He states that the "firewall of lengthy legal arguments against the disclosure of 'who did it' makes a farce of the 'Freedom of information' as a tool of accountability."

Analysis and finding

[23] The common law solicitor-client communication privilege aspect of section 19(a) protects direct communications of a confidential nature between lawyer and client, or their agents and employees, made for the purpose of obtaining or giving legal advice. Having reviewed the records, I find they are mostly, on their face, direct communications of a confidential nature between ministry legal counsel and ministry staff for the purpose

¹⁰ The ministry cites *Ministry of Public Safety and Security and Attorney General of Ontario v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815 (citing *R. v. McClure*) at para 75 and *Miranda v. Richer* [2003] S.C.R. 193.

¹¹ The ministry cites *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812.

¹² The ministry cites *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* [1998] O.J. No. 420 (Div. Ct.), Leave to appeal granted [1998] O.J. No. 2261 (CA); Appeal allowed [1999], 118 O.A.C. 108 (CA); Leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (SCC) regarding PO-2051.

of obtaining or giving legal advice.

[24] As I stated in Order PO-4484, which addressed the same underlying events, while I understand that the appellant is concerned about the ministry's conduct in the events preceding the access request, this does not change the fact that the records reflect legal advice that was sought and received by ministry staff in response to various issues related to these events. Furthermore, I agree with the ministry's position that while the portions withheld under section 19 contain background information, they cannot (with some exceptions, discussed below) be severed in a manner that provides any meaningful disclosure while protecting solicitor-client privilege.

[25] Additionally, there is no argument or evidence to suggest that the ministry waived solicitor-client communication privilege for these emails. As such, I find that with one exception the records are exempt from disclosure under section 19(a). I will review the ministry's exercise of discretion to withhold these records below.

[26] The one exception to my finding on the application of section 19(a) to the records, is record 1. Record 1 consists of communications between ministry staff related to the matter underlying the request, but does not contain communications between a lawyer and client, nor does it provide any insight into any of the records that do contain these communications. While I agree with the ministry's position [when referring to section 19(b)] that records that relate to and inform the legal issue under consideration by Crown counsel should not be ordered disclosed, I do not agree that the section 19 exemption is so broad as to encompass any record that relates to any matter that was at some point considered by Crown counsel.

[27] Even accepting, as the ministry notes in its representations, the fairly broad nature of section 19(b), there still must be some connection between the record and solicitor-client communications. In the case of record 1, which in its entirety solely relates to communications between ministry staff and does not discuss any possible litigation or even whether legal advice has been or will be sought, I find that the connection is not there and disclosing the record will not provide any insight into solicitor-client communications. Additionally, based on the record and the information provided by the ministry, I find that the record was not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. As such, I find that it is not exempt under section 19(a) or (b), and I will order it disclosed.

Exercise of discretion

[28] As described above, I find that most of the records are exempt from disclosure under section 19 of the *Act*. The section 19 exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[29] 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, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[30] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ The IPC cannot, however, substitute its own discretion for that of the institution.¹⁴

Representations, analysis and finding

[31] The ministry submits that it considered the appellant's interests in disclosure of the records against the need to preserve solicitor-client privilege, which it states recognizes the need to preserve confidence in the solicitor-client relationship. It submits that disclosure of records protected by solicitor-client privilege would have a chilling effect on the ability of clients to freely seek and obtain legal advice from lawyers. It notes that it considered the previous and consistent practice of decisions made on records of a similar nature, and whether the disclosure of records would increase public confidence in the operations of the ministry.

[32] The appellant did not provide specific representations on the ministry's exercise of discretion.

[33] I have reviewed the considerations relied upon by the ministry and I find that it properly exercised its discretion in deciding to withhold the records under section 19. Based on its representations, it considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the records with the purpose of the section 19 exemption. I find that the ministry did not exercise its discretion to withhold the information for any improper purpose or in bad faith, and that there is no evidence that it failed to take relevant factors into account or that it considered irrelevant factors. Accordingly, I uphold the ministry's exercise of discretion in denying access to records 2-35 under section 19.

ORDER:

1. I uphold the ministry's decision for records 2-35.
2. I order the ministry to disclose a copy of record 1 to the appellant by **February 11, 2025**.
3. In order to verify compliance with Order provision 2, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant.

¹³ Order MO-1573.

¹⁴ Section 54(2).

Original Signed by: _____
Chris Anzenberger
Adjudicator

January 14, 2025 _____