Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4601

Appeal PA21-00373

Ministry of Agriculture, Food and Rural Affairs

January 31, 2025

Summary: The appellant sought access to certain records of a specific lawyer that related to an investigation of him. The ministry granted the appellant access to some of the records responsive to his access request. It denied access to information and records that it claimed were solicitor- client privileged. It also withheld information in the records that it viewed as not being reasonably related to the request. The appellant challenged the ministry's decision and the reasonableness of its search for responsive records.

In this order, the adjudicator upholds the ministry's decision that the withheld information and records are either exempt solicitor-client privileged communications or information that is not responsive to the appellant's request. She upholds the ministry's exercise of discretion and its search for records, and she dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, sections 2(1) (definition of "personal information"), 19(a), 24 and 49(a).

Orders and Investigation Reports Considered: Order PO-4111-F.

OVERVIEW:

[1] This appeal concerns records of a former lawyer for the Ontario Racing Commission (ORC) regarding an investigation of the appellant. It arises from Order PO-4111-F, issued by the Information and Privacy Commissioner of Ontario (the IPC), involving the appellant and the Ministry of the Attorney General [representing the Alcohol

and Gaming Commission of Ontario (AGCO)]. The appellant was a veterinarian who was the subject of investigations and proceedings before the AGCO and the College of Veterinarians of Ontario (the college).

[2] Order PO-4111-F explained that, on April 1, 2016, the ORC merged with the AGCO, and on the merger date, the AGCO assumed the ORC's previous responsibility for the regulation of horse racing. In that order, the Ministry of the Attorney General stated that it did not have custody or control of the former ORC lawyer's records and could not search them because the former ORC lawyer did not join the AGCO; the former ORC lawyer's records were in the custody or control of the Ministry of Agriculture, Food and Rural Affairs (the ministry).

[3] In order provision 2 of Order PO-4111-F, the IPC ordered the Ministry of the Attorney General to forward "the part of the appellant's May 2017 request for regulatory or non-criminal investigation records the [ORC] sent to the college between March 1, 2013 and April 1, 2016" to the ministry, and to treat February 19, 2021, as the date of the request.

[4] Working with the appellant, the ministry clarified the wording of his access request before searching for responsive records. The parties agreed that the access request is for:

> ...regulatory records or non-criminal investigation records of former litigation counsel for the ORC [named individual] and of any other former ORC employees in the custody or under the control of [the ministry] sent to the college regarding the [ORC] investigation of [the appellant] between [date], 2013, and [date], 2016. For the purposes of clarity, records in the custody or under the control of the ministry are limited to those of former ORC employees who did not move to the [AGCO] after the merger in April 2016.

[5] In response to the appellant's request, the ministry located 62 responsive records (132 pages in total) consisting of emails, reports and correspondence. The ministry issued a decision granting the appellant partial access. It granted him full access to 18 records.[1] The ministry relied on the discretionary solicitor-client privilege exemption in section 19(a)[2] to withhold information in three records and to withhold 15 other records completely. The ministry relied on the mandatory personal privacy exemption in section 21(1) to withhold information in two records, and it withheld information in 10 records that it deemed non-responsive to the request. Finally, the ministry identified 14 records as duplicates.

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[1] Records 18, 19, 20, 21, 22, 28, 34, 35, 40, 45, 46, 47, 49, 51, 53, 54, 58, and 59.

[2] The ministry also claimed the discretionary solicitor-client privilege exemption in section 19(b) of the *Act.* Because I find, below, that the ministry has established the application of section 19(a), I will only address that exemption. I will not address section 19(b) further.

[6] The appellant was dissatisfied with the ministry's decision and appealed it to the IPC. The IPC attempted to mediate the appeal. During mediation, the ministry granted the appellant full access to records 42 and 44, for which it had initially claimed section 21(1). As a result, records 42 and 44, and section 21(1) are no longer at issue in this appeal.

[7] The appellant asserted that the ministry has additional responsive records, raising the issue of whether the ministry conducted a reasonable search. He also confirmed that he seeks the information that the ministry withheld as being non-responsive to the request. As a result, section 24 of the *Act* was added as an issue. The appellant also argued that, because the records have been disclosed in a public forum, the absurd result principle should be considered as an issue. Finally, the appellant confirmed that he does not seek access to the duplicate records,[3] which were then removed from the scope of the appeal.

[8] A mediated resolution was not achieved, and the appeal was transferred to adjudication. An IPC adjudicator decided to conduct an inquiry under the *Act* and invited the parties' representations. Included in the Notice of Inquiry sent to the parties were the issues of whether the records contain the appellant's personal information and whether the discretionary exemption in section 49(a) (discretion to refuse access to a requester's own personal information), read with the section 19(a) solicitor-client privilege exemption, applies. The parties submitted representations that another IPC adjudicator shared in accordance with the IPC's Code of Procedure.

[9] The appeal was then transferred to me to complete the inquiry. In this order, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[10] Remaining at issue in this appeal are the following records and information:

Records	**Exemptions claimed**
Part of 1 All of 3-7, 10-15, 23, 25-27	solicitor-client privilege - section 19(a)
Parts of 8, 16 and 17	responsiveness of the record - section 24 solicitor-client privilege - section 19(a)

[3] Records 2, 9, 24, 29, 31, 32, 33, 41, 43, 45, 48, 49, 50, 52, 54, 57, 61 and part of 60 and 62.

Parts of 30, 36-39, 55, 56, 60 and 624	responsiveness of the record - section 24

ISSUES:

A. Is the withheld information in records 8, 16, 17, 30, 36-39, 55, 56, 60 and 62 responsive to the request and within the scope of the appeal?

B. Did the ministry conduct a reasonable search for records?

C. Do the records 1, 3-7, 8, 10-17, 23 and 25-27 contain the appellant's "personal information" as defined in section 2(1) of the *Act*?

D. Does the discretionary exemption at section 49(a), read with section 19(a), or at section 19(a) alone, apply to records 1, 3-8, 10-17, 23, and 25-27?

E. Did the ministry exercise its discretion under section 49(a) and 19(a) appropriately?

Issue A: Is the withheld information in records 8, 16, 17, 30, 36-39, 55, 56, 60 and 62 responsive to the request and within the scope of the appeal?

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> > (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] To be considered responsive to the request, records must "reasonably relate" to

[4] Records 60 and 62 are emails and only the withheld information in the emails is at issue (not the attachments, which have been released to the appellant in record 59).

the request.[5] Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.[6]

[13] The ministry submits that it clarified the scope of the appellant's request with him and liberally interpreted the clarified wording of the access request. It explains that its Freedom of Information and Records Management Advisor (the Advisor), who coordinated its search for records, worked with the appellant to help him reformulate the request within the meaning of section 24(2) of the *Act* so that it could search for responsive records. The ministry provides an affidavit sworn by the Advisor (the affidavit) and submits that the affidavit establishes that the ministry did not apply a literal or overly technical interpretation to the clarified request. In further support of this submission, the ministry states that after confirming the wording of the request with the appellant, it provided records that went beyond the scope of the request, in order to be helpful, even though it could have withheld that information as non-responsive. The Advisor's affidavit confirms the ministry's submission, and describes the consultation and search processes. The affidavit is further described in Issue B below.

[14] The ministry asserts that the appellant should not be permitted to expand the scope of this appeal to include records that are not responsive to his request. Addressing the withheld non-responsive information at issue, the ministry explains that these parts of the records are exchanges that were not "…of former litigation counsel for the [ORC] and of any other former ORC employees in the custody or under the control of [the ministry] sent to the [college]…". Specifically, the ministry explains that:

- record 30 was not sent by any former ORC employee or to the college; record 36 was not sent to the College
- record 37 duplicates part of record 36 and includes a further email that was not sent by any former ORC employee or to the college
- record 38 duplicates most of record 37 and does not relate to any ORC investigation
- record 39 duplicates an email in record 36 and includes a further email that was not sent by any former ORC employee or to the college
- records 55, 56, 60 and 62 are internal ORC emails
- the withheld non-responsive information in records 16 and 17 is a phone number and an internal conference call password for a meeting

[5] Orders P-880 and PO-2661.
[6] Orders P-134 and P-880.

- the withheld non-responsive information in records 25 and 26 refers to an unrelated inquiry.

[15] The appellant does not directly respond to the ministry's submissions on the withheld information at issue. He argues that responsiveness can only be determined based on the words of his request and the circumstances associated with specific records. He asserts that he is disadvantaged in making representations on this issue because the ministry's representations do not include record specific information that would allow him to make precise representations. He adds that the ministry fails to identify why it lists some records as responsive in the original index but now claims they are not responsive.

[16] Having considered the parties' representations and examined the information in the records, I agree with the ministry that the information withheld as non-responsive in records 8, 16, 17, 30, 36-39, 55, 56, 60 and 62 is outside the scope of the appellant's request. Details of the ministry's help to the appellant to clarify and reformulate his request, including its affidavit evidence, establish that the ministry properly clarified the scope of the appellant's request. Also, based on my review of the information withheld as non-responsive and the information the ministry released to the appellant, I am satisfied that the ministry interpreted the wording of the request generously.

[17] The withheld information is not responsive to the appellant's request in the precise ways the ministry describes (set out in paragraph 14 above): it does not fit within the appellant's request for records of the named former ORC lawyer or former ORC employees that was sent to the college regarding the ORC's investigation of the appellant. The ministry's submissions on why the withheld information in each record is not responsive are clear and specific, despite the appellant's argument to the contrary. Although the ministry does not address the withheld information in record 8 in its representations, I confirm it is not responsive to the appellant's request because it does not relate to the ORC's investigation of him.

[18] Accordingly, I find that the information withheld as non-responsive in records 8, 16, 17, 30, 36-39, 55, 56, 60 and 62, is non-responsive and outside the scope of this appeal. I uphold the ministry's decision to withhold it.

Issue B: Did the ministry conduct a reasonable search for records?

[19] Because the appellant claims that additional records exist beyond those found by the ministry, I must decide whether the ministry conducted a reasonable search for records as required by section 24 of the *Act*.[7] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's decision. Otherwise, I may order the ministry to conduct another search for records.

[20] The *Act* does not require the ministry to prove with certainty that further records

[7] Orders P-85, P-221 and PO-1954-I.

do not exist.[8] However, the ministry must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[9] that is, records that are "reasonably related" to the request.[10] Although the appellant is not expected to identify precisely which records the ministry has not identified, he still must provide a reasonable basis for concluding that such records exist.[11]

[21] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[12] I will order a further search if the ministry does not provide enough evidence to show that it has made a reasonable effort to identify and locate all the responsive records within its custody or control.[13]

[22] The ministry submits it conducted a reasonable search for records as required by section 24. It states that its Advisor, an experienced and knowledgeable employee, processed the access request and searched for records reasonably related to the request. The Advisor's affidavit confirms she has been employed by the ministry for almost a decade. The affidavit sets out the steps the Advisor took in response to the request, identifying the various ministry staff and branches she contacted that searched for records, the places and record holdings searched, and the search terms used.

[23] In her affidavit, the Advisor confirms that the ministry retained custody and control of the Outlook accounts of the former ORC staff who did not transfer to the AGCO during the period of the appellant's request. She states that she opened the deactivated Outlook account of the former ORC lawyer named in the appellant's request through a special process and searched it for responsive records; through this search, she identified seven other former ORC employees and confirmed that four had transferred to the AGCO. The Advisor confirms that she searched the Outlook accounts of the three former ORC employees who did not transfer to the AGCO and located responsive records. Finally, the Advisor confirms that she did not conduct a search of physical and paper records of the former ORC record series, since the AGCO, and not the ministry, has custody and control of those records. Included as an appendix to the affidavit is documentation confirming the transfer of records from the ministry to the AGCO.

[24] The ministry adds that it consulted other experienced employees knowledgeable in the subject matter of the request, including at the Ministry of the Attorney General and the AGCO, to assist in clarifying the request. It also worked with the appellant to help him reformulate the request within the meaning of section 24(2) of the *Act* so that a reasonable search could be undertaken. The ministry explains that it identified all former ORC employees, beyond those referred to in Order PO-4111-F, whose Outlook account

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[8] *Youbi-Misaac* v *Information and Privacy Commissioner of Ontario*, 2024 ONSC 5049 at para 9.
[9] Orders P-624 and PO-2559.
[10] Order PO-2554.
[11] Order MO-2246.
[12] Orders M-909, PO-2469 and PO-2592.
[13] Order MO-2185.

records were in its custody or control. Also, the ministry oversaw, coordinated and conducted the search for responsive records using search terms identified through discussion with its employees who are knowledgeable in the subject matter of the request. The ministry concludes by arguing that the appellant has not provided a reasonable basis for his claim that additional responsive records exist.

[25] The appellant submits that the ministry's search for responsive records was not reasonable because the ministry failed to contact the lawyer who was directly involved in the disclosures and ask about the disclosures directly. He asserts that the ministry should have contacted the lawyer to ask about any other storage location or sharing mechanisms used, or any other records shared with the college that were not found through the ministry's search. The appellant claims the ministry's search was too narrowly focused on email communications, when physical or paper records could have been shared in by courier or in person.

[26] The appellant asserts that additional records exist. As an example, he refers to an email from the lawyer to a law firm discussing the exchange of audio recordings. He notes that the ministry has not identified any audio recordings in the responsive records. He claims that this example demonstrates that the ministry's search was inadequate and unreasonable. He also suggests that some of the AGCO employees who previously worked at the ORC dislike him, and their statements and efforts should be taken with caution.

[27] I have considered the parties' representations, and I am satisfied that the ministry's search was reasonable. The ministry's Advisor is an experienced employee knowledgeable in the subject matter of the request. She made reasonable efforts to conduct a thorough search for responsive records, as confirmed in the detailed affidavit evidence she provides. This evidence – confirming the staff and branches asked to conduct a search, the types of files searched, the search terms used, and the steps taken in conducting the searches – is sufficient to establish that the ministry made a reasonable effort to find all responsive records in its custody or control. Given the ministry's evidence of the extent of its search, the appellant's assertion – that the ministry should have contacted the lawyer directly about other areas to be searched – does not establish a reasonable basis to conclude that additional responsive records exist.

[28] Regarding the appellant's submission that records in the form of audio recordings were referenced in one of the records, an explanation is found in the affidavit evidence: the Advisor confirms that physical and paper records of the former ORC record series are not in the ministry's custody or under its control since they were transferred to the AGCO. While it is possible that additional records of the ORC's investigation of the appellant may have existed at one time, or may exist elsewhere, I accept that the ministry conducted a reasonable search for responsive records in its custody or under its control when it received the access request: in this case, February 2021, some 5-8 years after the period specified by the appellant. Considering the evidence before me, the appellant's representations do not provide a reasonable basis for me to conclude that the ministry has further responsive records in its custody or under its control. Accordingly, I uphold

the ministry's search as reasonable.

Issue C: Do records 1, 3-7, 8, 10-17, 23 and 25-27 contain the appellant's "personal information" as defined in section 2(1) of the *Act*?

[29] To decide which sections of the *Act* may apply to the remaining records at issue, I must first determine whether they contain the "personal information" of the appellant. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Information is about an "identifiable individual" if it is reasonable to expect that the individual can be identified from the information either by itself or if combined with other information.[14] Section 2(1) of the *Act* gives a list of examples of personal information, and paragraph (h) of the definition is relevant here. It reads:

> "personal information" means recorded information about an identifiable individual, including,
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> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[30] Generally, information about an individual in their professional or business capacity is not considered to be "about" the individual.[15] However, information relating to an individual in a professional or business capacity may still be "personal information" if it reveals something of a personal nature about the individual.[16]

[31] The ministry submits that the records at issue do not contain the appellant's personal information because they contain only information about him in his professional capacity. The ministry notes that the records were created when the appellant was practising as a licensed veterinarian; thus, working in his profession. The ministry notes that the records do not contain information about the appellant's conduct or refer to any charges laid, or actions taken against him. It submits that previous IPC orders[17] have found that the names of people charged for licensing violations in their business capacity did not qualify as personal information because it did not reveal anything of a personal nature about them. It concludes by arguing there is nothing of an inherently personal nature about the appellant in the records at issue.

[32] The appellant agrees with the ministry that any records at issue that were created

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[14] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] OJ No 4300 (CA).
[15] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(3) and 2(4).
[16] Orders P-1409, R-980015, PO-2225 and MO-2344.
[17] Orders MO-2342 and MO-2719.

when he was practising would relate to him in his professional capacity. However, he states that he was not practising when the ORC investigation was conducted. The appellant submits that the contents of each record at issue must be considered to determine whether each contains his personal information within the meaning of the *Act*.

[33] I have considered the parties' submissions and reviewed the records at issue to determine whether they contain the personal information of the appellant. Records 1 and 8 contain the appellant's name and reveal that he is being investigated in his professional capacity. Although these records relate to the appellant in his professional capacity, they reveal something of a personal nature about him: that he is being investigated. I find that records 1 and 8 contain the appellant's name and other information about him that qualifies as his personal information within the meaning of paragraph (h) of the definition of "personal information" in section 2(1) of the *Act*. Records 3-7, 10-17, 23, and 25-27, do not contain the appellant's name. However, records 14-17 and 23 contain the appellant's initials and information about the investigation of him which, together, reveal something of a personal nature about him and are sufficient to identify him. I find that records 14-17 and 23 also contain the appellant's personal information. As a result, I will consider the appellant's right of access to the information in records 1, 8, 14-17 and 23 under section 49(a), read with section 19(a) of the *Act*.

[34] I find that the remaining records, records 3-7, 10-13, and 25-27, do not contain the appellant's personal information. I will therefore consider the application of section 19(a) to these records.

Issue D: Does the discretionary exemption at section 49(a), read with section 19(a), or at section 19(a) alone, apply to records 1, 3-8, 10-17, 23, and 25-27?

[35] Section 49 provides some exemptions from the general right of access individuals have under section 47(1) of the *Act* to their own personal information held by an institution. Section 49(a) of the *Act* reads, in part:

> A head may refuse to disclose to the individual to whom the information relates personal information, where section . . . 19 . . . would apply to the disclosure of that personal information.

[36] 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.[18] Since the ministry refuses to give the appellant access to the records, which contain his personal information, it must show that it considered whether the records should be released to him under section 49(a), read with section 19(a). The ministry bears the burden of establishing that the records are exempt as solicitor-client privileged records under section 19(a). The ministry must also explain how and why it exercised its discretion to

[18] Order M-352.

withhold all these records, even though it could have decided to release them to the appellant.

[37] Section 19(a) exempts records from disclosure that are subject to solicitor-client privilege. It is based on common law, and it reads:

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

[38] Both the ministry and the appellant provide confidential representations. I have considered the parties' complete representations, including all confidential representations. In this order, I describe the parties' non-confidential representations. Having considered the parties' complete representations and reviewed the withheld information and the Memorandum of Understanding (MOU), described in more detail below, I find that the records are exempt under section 49(a), read with section 19(a), or section 19(a) alone. My reasons follow.

The records are solicitor-client privileged

[39] Solicitor-client communication privilege protects direct communications of a confidential nature between the lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[19] The privilege covers the request for advice, the legal advice itself, and communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[20] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[21] Confidentiality is an essential component of solicitor-client communication privilege.

[40] The ministry submits that the withheld records and information set out the college's solicitor-client communications (records 4, 7, 10, 23) as well as ORC solicitor-client records. It argues that the solicitor-client communication privilege at section 19(a) applies due to the common interest privilege it shares with the college over the records at issue.

[41] The ministry states that it shares a common interest with the college through a MOU they entered in 2012. It explains that the MOU, signed by the former ORC lawyer mentioned in the appellant's request, sets out the common interest where it refers to, among other things, the need to "share investigative findings and materials in respect to applicants, registrants and licensees…[and] to provide an efficient channel for the passage of such information." The ministry explains that the MOU predates the records

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[19] *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[20] *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[21] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex CR 27.

at issue and applies to them, such that all the records fall within the scope of the MOU. The ministry adds that its common interest with the college in the records is also clear on the face of the records. The ministry notes that three paragraphs of the MOU clearly and specifically address the confidentiality of the information to be shared between it and the college and reinforce the reference to the confidential and privileged nature of the information set out in the signature lines of the emails in records 23 and 24. The ministry provides a copy of its MOU with its representations.

[42] The ministry confirms that there has been no waiver of privilege over the records.

[43] The appellant challenges the ministry's solicitor-client privilege claim as being too broadly made. He asserts that solicitor-client privilege does not extend to all documents that "bear the touch of a lawyer." He argues that the exemption for solicitor-client privilege can only be applied in specific circumstances. The appellant submits that the ministry does not provide enough detail for him to assess whether each record contains confidential information between a solicitor and a client communicated for the purpose of requesting or receiving legal advice. He asserts that without that specific information from the ministry, the ministry has failed to establish the application of the exemption. I do not accept the appellant's representations on this point. The ministry's detailed representations, including affidavit evidence about the records at issue, is sufficient to enable him to respond to the ministry's submission.

[44] The appellant argues the ministry's claim of a common interest between the ORC and the college is not valid because the records are discussions among lawyers without the involvement of a client. In support of his assertion, he notes that the college and the ORC have separate mandates and statutes under which they operate, and these different statutory goals should be considered when considering a common interest. He contends that if the ministry and the ORC had a common interest there would be governing clauses within their respective statutes addressing the common interest.

[45] The appellant also argues that waiver of privilege is relevant. He suggests that if the MOU contemplates the sharing of legal strategies and advice between the ORC and the college, then privilege in that information has been waived. The appellant asserts that the only purpose of the MOU is the sharing of information for intended litigation under the enabling statutes of the ORC and the college, and there is no specified contemplation of litigation in the MOU; therefore, the terms of sharing information do not specifically relate to any litigation on the part of either the ORC or the college. The appellant challenges the validity of the MOU, claiming it exceeds the ORC's jurisdiction and attempts to circumvent the protections of personal and confidential information afforded by the *Act,* and the oversight powers of the Legislature.

[46] I am not persuaded by the appellant's submissions because they do not align with the contents of the records at issue. On my review of the records, I confirm that all of them are common law solicitor-client communication privileged since they are communications sent by or to the former ORC lawyer named in the request, in confidence,

for the purpose of formulating legal advice. Regarding the appellant's submissions challenging the validity and jurisdiction of the MOU, I point him to the recitals and body of the MOU for responses to his concerns about the legal authority under which the MOU was entered into and operates. In any event, the validity of the MOU is not a requirement to establish that there was a common interest; what is relevant is how the parties dealt with the information.

[47] The ministry's representations confirm that the withheld information was communicated in confidence, as expressly provided for by the MOU, between the ministry and the college. I also note that, on their face, the records establish that their purpose was the confidential formulation and communication of legal advice between the ministry and the college. I am satisfied that the ministry and the college shared the information in the records in accordance with and in furtherance of their common interest, which is confirmed in their MOU. This common interest of the ministry and the college in the communications set out in the records preserves the privilege and is sufficient to avoid waiver. Accordingly, I find that section 49(a), read with section 19(a), or section 19(a) alone applies to the records.

[48] The appellant asserts that the absurd result principle applies to the records because, he claims, they have been disclosed in a public forum. He alleges that because the college is a public agency that holds public hearings, the withholding of the records at issue in this appeal is an absurd result that contradicts the purposes of the *Act.* The ministry responds that the appellant may be confusing the concept of waiver of solicitor-client privilege with the absurd result principle. The ministry correctly submits that the absurd result principle does not apply to the records in this appeal because the withheld information is not withheld under a personal privacy exemption.[22] The ministry states that the information at issue is not within the appellant's knowledge. It adds that even if the information were, generally, within the appellant's knowledge, applying the absurd result principle to the records would be inconsistent with the purpose of the solicitor-client privilege exemption – preserving the ability of parties with a common interest to freely collaborate and further their mutual interest knowing that their confidential discussions will not be disclosed. I agree with the ministry.

[49] Subject to my consideration of the ministry's exercise of discretion, below, I find that the records 8, 14-17 and 23 are exempt under section 49(a), read with section 19(a), and records 3-7, 10-13, and 25-27 are exempt under section 19(a).

Issue E: Did the ministry exercise its discretion under sections 49(a) and 19(a) appropriately?

[50] Because the section 49(a) and 19(a) exemptions are discretionary, the ministry

[22] The absurd result principle arises when the personal privacy exemption at section 21(1) or 49(b) has been relied on to withhold information, but withholding the information would be absurd because the individual seeking the information originally supplied or is otherwise aware of it. See Orders M-444 and MO-1323.

may to decide to release information even if the information qualifies for exemption. The ministry must exercise its discretion. On appeal, the IPC may determine whether the ministry failed to do so. As well, the IPC may find that the ministry erred in exercising its discretion where, it did so in bad faith or for an improper purpose, it took into account irrelevant considerations, or it failed to take relevant considerations into account. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[23]

[51] Relevant considerations include the purposes of the *Act*, including the principles that: information should be available to the public, individuals should have a right of access to their own personal information, and exemptions from the right of access should be limited and specific. Other relevant considerations may be:

- the wording of the exemption and the interests it seeks to protect
- whether the requester is an individual who seeks his own personal information
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

[52] The ministry submits that it exercised its discretion not to release the withheld information in good faith, for a proper purpose, taking into account relevant considerations. The ministry submits that is considered the significance of the solicitor-client privilege exemption and the need to protect that confidential information and balanced that against the interests of being as transparent as possible with the appellant. The ministry notes that it granted the appellant full access to 25 records and portions of the remaining responsive records. In this way, the ministry states that it applied the exemption in a limited and specific way preserving only solicitor-client privileged information. The ministry asserts that releasing privileged information could have a chilling effect on the future ability of parties to work in the common interest. This includes parties having a common interest being able to freely discuss their options without fear that the details of those discussions may be released.

[53] The appellant claims that the ministry failed to take into account all relevant circumstances and did not exercise its discretion properly. In his submissions on this issue, the appellant explains that the purpose of his access request was to obtain relevant records for another proceeding. He alleges that the ministry's discretion may have been improperly affected by certain communications with the college. He submits that a good faith exercise of discretion would have considered his intended purpose for the request. He argues that the ministry exercised its discretion in bad faith to protect the joint interest

[23] Order MO-1573.

of the ORC and the college and to disadvantage him by denying him access to relevant information that is essential for the other proceeding. He asserts that procedural fairness and transparency at the level of the government agency demands that the withheld information be released to him. He also alleges that the ministry exercised its discretion in bad faith with the clear intention to protect the college and the ORC from any civil and criminal liability.

[54] Having considered the parties' representations, I am satisfied that the ministry's exercise of discretion was appropriate. To begin, the ministry released a considerable amount of information to the appellant, withholding limited information, which I have found to be exempt solicitor-client privileged information. The ministry appropriately considered the significance of the solicitor-client privilege exemption and gave it proper weight, while also recognizing the fact that the appellant's request was for records relating to an investigation focused on him. Although the appellant alleges impropriety and bad faith in the ministry's exercise of discretion, he supports his position with complaints about other matters between himself and the college; these complaints do not establish bad faith. By contrast, the ministry's decision to release information to him and to withhold only the solicitor-client privileged information at issue, supports its submission that it exercised its discretion in good faith, for a proper purpose, taking into account relevant considerations. As a result, I uphold the ministry's exercise of discretion.

ORDER:

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

Original Signed by: January 31, 2025

Stella Ball
Adjudicator