

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4608

Appeal PA21-00469

Ministry of Natural Resources and Forestry

February 19, 2025

Summary: An individual asked the Ministry of Natural Resources and Forestry (the ministry) for certain records under the *Freedom of Information and Protection of Privacy Act*. The ministry provided partial access to the records. The ministry did not disclose some records and information because they were covered by the solicitor-client privilege exemption (section 19).

The appellant disagreed with the ministry's decision to withhold the records and information. The appellant also argued that the ministry's search with respect to one part of the request was not reasonable.

In this order, the adjudicator upholds the ministry's decision to withhold records and information under the solicitor-client privilege exemption. However, the adjudicator does not uphold the ministry's search. She orders the ministry to conduct another search and issue a new access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 24.

Orders Considered: Orders P-134, P-880, PO-2624, MO-2789, MO-3409, and MO-3326.

Cases Considered: *Susan Hosiery Ltd. v Minister of National Revenue*, 1969 CanLII 1540 (CA EXC), 2 Ex CR 27; *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.).

OVERVIEW:

[1] This order determines whether the Ministry of Natural Resources and Forestry (the ministry) conducted a reasonable search for records with respect to one part of the request submitted by the appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In addition, this order determines whether the records and information that the ministry withheld are exempt under section 19 (solicitor-client privilege) of the *Act*.

[2] The appellant submitted an 8-part request under the *Act*. The ministry issued a decision granting partial access to records and information. The ministry denied access to withheld records and information on the basis of the solicitor-client privilege and personal privacy (section 21(1)) exemptions. The ministry later issued a revised decision denying access to some records on the basis that the information was published or available to the public (section 22). The ministry also deemed some information non-responsive to the request.

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

[4] The IPC attempted to resolve the matter through mediation. During mediation, the ministry issued a revised decision disclosing two additional records in full. The appellant removed from the scope of the appeal the issues of the personal privacy exemption, information published or available to the public exemption, and non-responsiveness of records. However, the appellant raised a concern that no records were produced in response to part 2 of the request and asserted that additional records ought to exist, raising the issue of reasonable search. The ministry indicated that it conducted a reasonable search for all responsive records, including part 2 of the request.

[5] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process. An IPC adjudicator decided to conduct an inquiry under the *Act*. She sought, received and shared parties' representations in accordance with the IPC's *Code of Procedure* and the *Practice Direction Number 7*. The appeal was then transferred to me to continue the inquiry. I reviewed the materials and determined that I did not require further representations before making my decision.

[6] For the following reasons, I uphold the ministry's decision in part. I uphold the ministry's decision to withhold records under the solicitor-client privilege exemption. However, I do not uphold the reasonableness of the ministry's search. I order the ministry to conduct a further search for responsive records.

RECORDS:

[7] The records remaining at issue are records withheld under the solicitor-client

privilege exemption.

ISSUES:

- A. Did the ministry conduct a reasonable search for records responsive to part 2 of the appellant's request?
- B. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the records?

DISCUSSION:

Issue A: Did the ministry conduct a reasonable search for records responsive to part 2 of the appellant's request?

[8] The appellant asserts that additional records exist beyond those found by the ministry with respect to part 2 of the request. Therefore, I must decide whether the ministry conducted a reasonable search for records as required by section 24 of the *Act*.¹

[9] 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.² The *Act* does not require the ministry to prove with certainty that further records do not exist. However, it must provide enough evidence to show that it made a reasonable effort to identify and locate responsive records;³ that is, records that are "reasonably related" to the request.⁴

[10] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁵

[11] Part 2 of the appellant's request is a request for the following records:

All records, correspondence or communications in the possession of the Ministry or [the specified office] about [the specified property]. This request is for records from [specified dates].

Ministry's representations

[12] The ministry submits that it conducted a reasonable search for responsive records,

¹ Orders P-85, P-221 and PO-1954-I.

² Orders M-909, PO-2469 and PO-2592.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Order MO-2246.

including with respect to part 2 of the appellant's request. In support, the ministry provides an affidavit from its employee who oversaw and coordinated the search for responsive records.

[13] The ministry says that it did not seek clarification from the appellant about part 2 of the request because part 2 was clear. The ministry interpreted part 2 literally as a request for all records of any kind, including correspondence or communications, that related to the specified property between specified dates.

[14] As part of preparing its response to the access request, the ministry held a meeting with staff from the specified office during which staff discussed where responsive records could be located. It was determined that, since the whole request related to a specified municipal survey and subsequent appeals, responsive records would only be located at the specified office or with the Ministry's Legal Services Branch. Staff who might have responsive records were also identified.

[15] The following locations within the specified office were searched for responsive records: staff email folders, shared drives, hard drives, Crown survey records spreadsheets, filing cabinets, and paper files in the office's records vault. The following keywords were used during the search: the specified municipal survey number, the property with respect to which the specified survey was conducted, and names of private surveyors involved in the file. The ministry did not use the property specified in part 2 of the request as a keyword because it determined that all responsive records would be captured by its search due to the nature of the property at issue in part 2 of the request and the nature of the specified municipal survey.

[16] The ministry adds that all responsive records were still in its possession because no responsive records were subject to retention policies.

[17] The ministry notes that it located a large number of records as a result of its search but that only few of them related to the property specified in part 2 of the request. The ministry explains that there would have been little correspondence at the specified office about the property due to the nature of the property and the nature of the specified municipal survey.

[18] The ministry says that, after the appellant raised the issue of the reasonableness of the ministry's search, it conducted an additional search specifically using a keyword that referred to the property at issue in part 2 of the request. The search was conducted in the same locations and by the same individuals as the first search. The search revealed four records: three had been disclosed to the appellant in full with the initial decision, and one was withheld as non-responsive.

Appellant's representations

[19] The appellant relies on the ministry's own evidence to submit that the ministry's search with respect to part 2 of the request was unreasonable. The appellant says that

part 2 of the request is not a request connected to the specified municipal survey: it seeks all records with respect to the property specified in it. However, the appellant says, the ministry unilaterally determined that the whole request, including part 2, related to the specified municipal survey (and related appeals). As a result, the ministry searched only for the records related to the specified municipal survey (and related appeals) and at the two offices that would have those records.

[20] The appellant submits that they were not informed by the ministry about its decision to narrow the scope of the search with respect to part 2 of the request or provided with an opportunity to clarify part 2 of the request.

Ministry's reply representations

[21] The ministry was provided with an opportunity to reply to the appellant's representations. The ministry advised that it had no additional information to provide and did not submit reply representations.

Analysis and finding

[22] I find that the ministry's search for responsive records for part 2 of the request was unreasonable because the ministry unilaterally narrowed the scope of part 2 of the request.

[23] 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

[24] Having considered the language of the appellant's request in its entirety and part 2 of the request, I find that a plain reading of part 2 of the request would have interpreted this part to be for all records in possession of the ministry related to the specified property. Seven parts of the request that are not at issue in this appeal seek records related to the specified municipal survey. These parts of the request specifically refer to the specified municipal survey. In contrast, part 2 of the request is not limited to the records related to the specified municipal survey. Its language is broad, and it does not refer to the specified municipal survey.

[25] While the ministry's description of its interpretation of part 2 of the request is consistent with my finding, the ministry's representations and search confirm that it conducted its search based on the assumption that all parts of the request seek records related to the specified municipal survey. The search was limited to the two offices that would have records related to the specified municipal survey. The staff who conducted the search were staff of the specified office. The staff searched within the specified office and used keywords that related to the specified municipal survey.

⁶ Orders P-134 and P-880.

[26] The ministry's evidence confirms that the specified office would have few records related to the property at issue in part 2 of the request due to the nature of the property. Given the scope of the ministry's mandate, I find that there is a reasonable basis to conclude that other ministry's offices have records related to the property at issue in part 2 of the request.

[27] Both parties agree that the ministry did not consult with the appellant about the scope of part 2 of the request. The ministry cannot rely on a narrow interpretation of the scope of part 2 of the request if it failed to seek clarification about its scope.⁷

[28] To conclude, the appellant's request in part 2 should be interpreted to mean all records in possession of the ministry related to the property identified in part 2 of the request, and the ministry did not search for these records. I will therefore order the ministry to conduct a search for responsive records on this basis.

Issue B: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the records?

[29] The ministry relies on the solicitor-client privilege exemption at section 19 of the *Act* to withhold records and information.

[30] Section 19 states:

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 or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[31] Section 19 contains two "branches." The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*. The institution must establish that at least one branch applies.

[32] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege. The ministry does not assert that litigation privilege applies to the records and information at issue. Accordingly,

⁷ Order P-134.

I will only consider whether the common law solicitor-client communication privilege applies to the records at issue.

[33] The common law 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.⁸ The rationale for the privilege is to ensure that a client may freely confide in their lawyer on a legal matter.⁹

[34] 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.¹⁰ The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.¹¹ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.¹²

[35] 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.¹³

[36] The ministry did not assert that the second branch of the solicitor-client privilege exemption applies to the withheld records and information. Therefore, I will not discuss it below.

Ministry's representations

[37] The ministry submits that IPC Order PO-3856 dealt with some of the records that are at issue in this appeal. In PO-3856, an IPC adjudicator upheld the ministry's decision to withhold those records under the solicitor-client privilege exemption. The ministry says that the solicitor-client privilege exemption applies to these records in the context of this appeal on the same basis that the IPC adjudicator found that it applied in PO-3856.

[38] The ministry submits that the remaining records are similar in nature to those considered in PO-3856. The ministry says that the records include emails and attachments which fall within the continuum of communications that relate to the seeking or giving of legal advice.

[39] The ministry says that many records consist of communications between ministry counsel and ministry staff. These communications contain a request for legal advice, the provision of legal advice or the provision of information to keep the other individual(s)

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Orders PO-2441, MO-2166 and MO-1925.

¹⁰ *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.

¹¹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 [*Susan Hosiery Ltd.*].

¹² *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

¹³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

informed so that legal advice may be sought or provided as required.

[40] The ministry says that the records also contain communications between ministry counsel; ministry counsel and a legal advisory office within the Government of Ontario; and ministry staff. While those communications were not directly sent to or from ministry counsel to ministry staff, they address matters with respect to which counsel were consulted.

[41] Finally, the ministry says that the records contain communications between ministry staff and representatives of a municipality, which were shared with ministry counsel; or communications between ministry counsel and outside counsel, which were then shared with ministry staff.

[42] The ministry submits that the solicitor-client privilege exemption is a “class-based” exemption, and therefore the entire communication that contains communication between a solicitor and a client is exempt, not merely portions that contain advice. The ministry says that it considered whether the records contain communications for other purposes that do not entail legal advice and severed those portions in one record.

Appellant’s representations

[43] The appellant disagrees that the solicitor-client privilege exemption applies to the records that contain communications between ministry staff and representatives of a municipality, which were then shared with ministry counsel; or communications between ministry counsel and outside counsel, which were then shared with ministry staff.

[44] First, the appellants says that communications between the ministry and the municipality is not covered by the solicitor-client privilege because the ministry did not claim solicitor-client relationship between it and the municipality. Further, the appellant says that it would not be appropriate for there to be a solicitor-client relationship or the exchange of legal advice between the ministry and the municipality because the ministry’s employee – the Surveyor General – adjudicated a claim in which the municipality was a party to the proceeding.

[45] Second, the appellant says that communications between the ministry and the municipality or its representatives are not covered by the solicitor-client privilege because the ministry did not establish that the municipality or its representatives were involved in a manner that furthered solicitor-client relationship between ministry counsel and ministry staff. The appellant says that communications between a counsel and a third party could be covered by the solicitor-client privilege only if the third party is part of a team working together with counsel or is intimately involved in a manner that makes them essential to the existence of the solicitor-client relationship.¹⁴ The appellant says that the solicitor-client privilege does not apply to communications that were simply included within a chain

¹⁴ The appellant cited paragraph 150 in *Wintercorn v Global Learning Group Inc.*, 2022 ONSC 4576 to support its position.

of communication between ministry counsel and ministry staff.

[46] The appellant says that if communications between the ministry and the municipality were later forwarded to or included with communications between ministry counsel and ministry staff, the communications can be easily severed.

[47] The appellant also makes an argument about why the litigation privilege does not apply. However, since the ministry does not claim that the litigation privilege applies to the withheld records and information, I will not reproduce the appellant's argument on this issue.

Analysis and finding

[48] I find that the solicitor-client communication privilege applies to the withheld records and information, and they are exempt from the disclosure under section 19 of the *Act*.

[49] Ministry staff sought and received legal advice from ministry counsel with respect to several matters. The records at issue contain communications related to the advice. The records contain direct communications, comprised of emails and attachments, between ministry counsel and ministry staff. The records also contain ministry counsel's working papers and other communications.¹⁵ There is one record that does not contain communications, but disclosure of this record would reveal the legal advice provided.

[50] Many records that contain communications between ministry counsel and ministry staff contain a request for legal advice or the provision of legal advice. Such records directly fall within the scope of the exemption.

[51] Other records that contain communications between ministry counsel and ministry staff contain communications that were sent with the purpose of keeping ministry counsel or ministry staff informed so that advice may be sought or provided as required. In some cases, as part of those communications, emails between ministry staff or ministry counsel and other individuals were forwarded to the other. This group of records falls within the exemption because the records constitute a continuum of communications between ministry counsel and ministry staff.

[52] The ministry states that some records contain communications between its staff and the municipality, or its counsel and the municipality. Having reviewed these records, I find that they do not contain standalone communications between ministry staff and the municipality or ministry counsel and the municipality. These records contain communications between ministry staff and ministry counsel or between ministry staff or between ministry counsel. They contain a request for legal advice, an offer or provision of legal advice, and the sharing of information so that legal advice may be sought or

¹⁵ Some records contain communications between ministry counsel; ministry counsel and a legal advisory office of the Government of Ontario; ministry counsel and non-legal staff; and ministry staff.

provided as required. All communications with the municipality are either attachments to these communications or emails forwarded as part of these communications. The solicitor-client privilege is “class-based”, which means that the entire communication is protected, not only portions that contain actual advice.¹⁶ Therefore, these communications are covered by the solicitor-client communication privilege in their entirety and cannot be severed.¹⁷

[53] The records also contain ministry counsel’s working notes related to formulating or giving legal advice. I find that these notes can be withheld based on “working papers” aspect of the privilege.¹⁸

[54] Finally, there are certain records that contain communications but not between ministry counsel and staff. I find that these records are exempt because their disclosure would reveal the subject matter with respect to which legal advice was sought or the content of communications between ministry counsel and ministry staff.¹⁹

[55] Having found that the records are covered by the solicitor-client privilege exemption, I will now turn to the issue of the ministry’s exercise of discretion.

Exercise of discretion

[56] The section 19 exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for the exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[57] 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. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ The IPC cannot, however, substitute its own discretion for that of the institution.²¹

[58] The ministry submits that it again properly exercised its discretion with respect to the records in this appeal that were considered in IPC Order PO-3856. The ministry considered the circumstances of the request, the purposes of the *Act*, the nature of the exemption, and the importance of the solicitor-client relationship, including the preservation of confidentiality of communications in the course of seeking and giving legal advice. The ministry submits that the reasoning in IPC Order PO-3856 with respect to

¹⁶ *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.).

¹⁷ Order MO-3409.

¹⁸ *Susan Hosiery Ltd.*, *supra*, note 11.

¹⁹ Orders PO-2624, MO-2789 and MO-3326.

²⁰ Order MO-1573.

²¹ Section 54(2).

these records still applies because the circumstances did not change. With respect to the remaining records, the ministry says that it exercised its discretion to withhold them for the same reasons. The ministry particularly emphasized that the preservation of the solicitor-client privilege should be given significant weight.²²

[59] The appellant did not make representations on the issue of the ministry's exercise of discretion.

[60] The ministry claims that it relied on IPC Order PO-3856 in exercising its discretion. I find this is irrelevant. Given that the current request encompassed the records at issue in Order PO-3856 and additional records, I find the ministry was obligated to exercise its discretion anew with respect to all the records.

[61] Accordingly, having reviewed the ministry's representations as well as the records at issue, I find that the ministry exercised its discretion properly. The ministry considered relevant factors. It was appropriate for the ministry to give significant weight to the importance of maintaining the solicitor-client privilege. There is no evidence before me that the ministry exercised its discretion in bad faith, for improper purpose or taking into consideration irrelevant factors.

ORDER:

1. I uphold the ministry's decision to withhold records based on the solicitor-client privilege exemption and dismiss this aspect of the appeal.
2. I order the ministry to conduct a search for responsive records based on my findings outlined above with respect to the scope of part 2 of the request and issue, in accordance with all applicable provisions of the *Act*, an access decision to the appellant regarding any records located in its further search(es). The date of this order must be treated as the date of the request for administrative purposes.

Original Signed by: _____
Anna Kalinichenko
Adjudicator

February 19, 2025 _____

²² The ministry relied on Order PO-2940 and *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 to support its position.