

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4624

Appeal PA21-00608

Alcohol and Gaming Commission of Ontario

March 26, 2025

Summary: The former spouse of an individual made a request to the AGCO under the *Freedom of Information and Protection of Privacy Act* for records about an investigation following the death of the individual. The requester stated that she was exercising a right of access on behalf of their deceased spouse under section 66(a) of the *Act*.

The AGCO withheld the responsive records in their entirety under sections 49(a) (discretion to refuse requester's own information), read with law enforcement exemptions (sections 14(2)(a), 14(1)(c), and 14(1)(d)), the personal privacy exemption (section 49(b)), the solicitor-client exemption (section 19), and the third-party information exemption (section 17(1)). The AGCO also claimed that some of the records were protected under section 49(a), read with section 19 during the inquiry.

In this order, the adjudicator partially upholds the AGCO's decision. He finds that the requester is exercising a right of access on behalf of the deceased individual. He finds that some of the records are exempt from disclosure under section 49(b), but there are portions that do not contain personal information and should be disclosed. He finds that the other records are not exempt from disclosure and orders them disclosed, with the exception of some records that are protected by sections 19 and 49(a), read with section 14(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1), 14(1), 14(2), 17, 19, 49(a), 49(b), 66(a).

Orders Considered: Orders MO-2025, M-82, MO-2442, PO-4459, and MO-4503.

OVERVIEW:

[1] The Alcohol and Gaming Commission of Ontario (the AGCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the AGCO's investigation file relating to the death of an individual. The requester is the executor of the deceased individual's estate.

[2] The AGCO located records responsive to the request and issued a decision to the requester, granting access to one record, in full, and denying access in full to the remaining records. The AGCO claimed the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 14 (law enforcement) and 19 (solicitor-client privilege) of the *Act* to the information it withheld. In addition, the AGCO advised the requester that access to some information was denied as it was not responsive to the request.

[3] The requester (now the appellant) appealed the AGCO's decision to the Information and Privacy Commissioner of Ontario (the IPC). During mediation, the appellant provided a copy of the Certificate of Estate Trustee with a Will and a copy of the coroner's report. She stated that it was her belief that she was entitled to access the records under section 66(a) (access by a personal representative) of the *Act*.

[4] The AGCO reviewed the documents and maintained its original decision, but also gave the appellant an index of records outlining the specific exemptions claimed for each record, as well as adding the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information) and 49(b) (personal privacy) of the *Act* to most of the information.

[5] The appellant advised that she wished to pursue access to all of the remaining information, including non-responsive information. The adjudicator initially assigned to the appeal sought and received representations from the AGCO, the appellant, and an affected party (a restaurant involved in the investigation). Representations from a second affected party, an individual, were also sought, but none were received.

[6] During the inquiry, the appellant stated that she was not seeking access to information the AGCO claims is unresponsive to the request, and accordingly this is no longer at issue in the appeal.

[7] The appeal was then transferred to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek further representations. For the reasons that follow, I partially uphold the AGCO's decision. I find that the majority of the records are exempt from disclosure, but the records the AGCO withheld under section 17(1), and some of the records it withheld under sections 19, 49(a), and 49(b) are not.

RECORDS:

[8] The records at issue, along with the claimed exemptions, are outlined in the following table:

Description	Page numbers	Exemption(s) claimed
AGCO Inspection Reports ¹	1-4	49(a) read with 14(2)(a), 14(1)(c), 14(1)(d) and 49(b)
AGCO Inspector's Handwritten Notes	5-29	49(a) read with 14(2)(a), 14(1)(d) and 49(b)
AGCO Investigation Records	30-41	49(a) read with 14(2)(a), 14(1)(d) and 49(b)
Document	42-43	19
Deputy Registrar's Review Submission	46-50	49(a) read with 14(2)(a), 14(1)(c), 14(1)(d), 19 and 49(b)
Email Correspondence	51-55	17(1) and 19

ISSUES:

- A. Can the appellant exercise a right of access on behalf of the deceased?
- B. Does the discretionary personal privacy exemption at section 49(b) apply to the records?
- C. Does the discretionary exemption at section 49(a), allowing the AGCO to refuse access to a requester's own personal information, read with the sections 14(1)(c), 14(1)(d) and 14(2)(a) exemptions apply to the records?
- D. Does the discretionary solicitor-client privilege exemption at section 49(a), read with section 19, or section 19 on its own apply to the records?
- E. Did the AGCO exercise its discretion under sections 19, 49(a), and 49(b)? If so, should the IPC uphold the exercise of discretion?

¹ Pages 44-45 of the records were also identified as being at issue during the inquiry, but these pages are identical to pages 3-4.

- F. Does the mandatory exemption at section 17(1) for third party information apply to the records?

DISCUSSION:

Issue A: Can the appellant exercise a right of access on behalf of the deceased?

[9] The appellant claims that she is exercising a right of access on behalf of her deceased husband. Section 66(a) states:

Any right or power conferred on an individual by this *Act* may be exercised,
if the individual is deceased, by the individual's personal representative
if exercise of the right or power relates to the administration of the
individual's estate;

[10] Under this section, the appellant can exercise the deceased's right of access under the *Act* if she can demonstrate that she is the personal representative of the deceased, and the right she wishes to exercise relates to the administration of the deceased's estate. If the appellant meets the requirements of this section, then she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased himself.²

[11] The appellant provided documentation showing that she is the personal representative of the deceased, and this was not disputed by the AGCO. In order to determine the access rights of the appellant, I must determine if the access request relates to the administration of the deceased's estate.

Representations, analysis and finding

[12] The AGCO provided minimal representations on the application of section 66(a), generally stating that the appellant has a right of access related to the administration of the deceased individual's estate.

[13] The appellant submits that she is the executor of the deceased individual's estate and the estate is the plaintiff in a civil lawsuit against the restaurant that was involved in the individual's death. Referencing Order MO-2025, the appellant submits that civil actions involving the estate of a deceased person are consistent with the purposes of administering the estate where the estate itself stands to recover damages. She submits that the records at issue are therefore directly relevant to the administration of the estate, and she has the same access rights as the deceased individual.

² Orders M-927 and MO-1315.

[14] Based on its overall representations, particularly its claims that many records are exempt from disclosure under sections 49(a) and (b), which only apply if the information at issue contains the personal information of the requester, the AGCO does not appear to dispute the appellant's claims about her right of access. Additionally, while it is not necessarily the case that section 66(a) grants a personal representative the same access rights as a deceased individual in the case of a wrongful death lawsuit,³ the AGCO did not dispute the appellant's claim that the estate itself stands to recover damages. Accordingly, as it relates to the administration of the deceased's estate, I find that the appellant has the same access rights as the deceased individual, and I will assess the AGCO's exemption claims on that basis.

Issue B: Does the discretionary personal privacy exemption at section 49(b) apply to the records?

The records contain the personal information of the deceased individual and other individuals

[15] The AGCO has claimed section 49(b) for most of the records, as described in the above table. Before I consider this exemption, I must first determine if the records contain "personal information" and if so, whether the personal information belongs to the deceased individual, other identifiable individuals, or both. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

[16] 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 an individual can be identified from the information either by itself or if combined with other information.⁴ The definition of "personal information" in section 2(1) of the *Act* gives a list of examples of personal information.

[17] All of the records except the document on pages 42-43, and the email correspondence (and attachment) on pages 51-56 contain the deceased individual's personal information.⁵ This information generally consists of descriptions of the events leading to his death. Additionally, the same records contain information about other individuals, which the AGCO says is their personal information, and the appellant disputes. With the exception of a small note on page 1 of the records and some small portions of the handwritten notes, the records also do not contain the appellant's own personal information.

³ See, for example, Order M-400 and PO-1849.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ These records relate to the restaurant and the AGCO's investigation of it, but do not contain any personal information.

[18] The appellant, referencing Order M-82, submits that information that was provided about the deceased individual by the affected parties is not information about the affected parties, and instead is solely about the deceased individual. I disagree. In this case, the information provided by other parties to the AGCO investigator, even if generally about the deceased individual and the circumstances of his death, also reveals information about their conduct during the events leading to the individual's death. Even if it reveals something of a personal nature about the deceased individual, it also reveals how these individuals interacted with the AGCO in the following investigation, and it is therefore also their personal information. As such, I will consider the application of section 49(b) to the information at issue.

[19] The appellant also submits that any information about the business is not personal information. I agree, and I will discuss this in the context of severing information that is exempt from disclosure, below.

Section 49(b)

[20] 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 right.

[21] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[22] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.⁶

[23] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b). Additionally, the requester's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.⁷

[24] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). None of the parties claim, and I find, that none of the exceptions in section 21(1) apply to the information at issue. Section 21(2) provides a list of factors for the AGCO to consider in making this determination, while section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In their

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 49(b).

⁷ Order PO-2560.

representations, the AGCO and the appellant have relied on or discussed the presumption in section 21(3)(b) and the factors in sections 21(2)(a), (b), (c), (d), (h), and (i):

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny

(b) access to the personal information may promote public health and safety

(c) access to the personal information will promote informed choice in the purchase of goods and services

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request

(h) the personal information has been supplied by the individual to whom the information relates in confidence

(i) the disclosure may unfairly damage the reputation of any person referred to in the record

[25] In determining whether the disclosure of the information of the other parties would be an unjustified invasion of personal privacy under section 49(b), therefore, I will consider and weigh the relevant factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁸ The appellant also raised the application of section 21(4)(d), disclosure for compassionate reasons, which I will address below.

Representations, analysis, and finding

21(3)(b): Investigation into a possible violation of law

[26] The AGCO claims section 21(3)(b) applies to the information at issue. Under section 21(3)(b), the disclosure of an individual's personal information to another individual is presumed to be an unjustified invasion of personal privacy if the personal

⁸ Order MO-2954.

information:

... was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation of law or to continue the investigation.

[27] Even if no criminal proceedings were commenced against any individual, as is the case in this appeal, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.⁹ Based on my review of the records for which section 49(b) was claimed, the personal information in them was compiled as part of an AGCO investigation into a possible violation of law.

[28] The appellant agrees that the information relates to a possible violation of law by a business, but not “the individual to whom the request relates.” I agree that the appellant is seeking information related to the deceased individual, rather than the business specifically, but this does not prevent the section 21(3)(b) presumption from applying. Regardless of who the personal information specifically relates to, it is not disputed that the information was collected by the AGCO as part of an investigation into a possible violation of law, and the presumption against disclosure therefore applies.

21(2)(a): public scrutiny

[29] This section supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.¹⁰ It promotes transparency of government actions. The appellant generally states that the information would subject the activities of the AGCO and the Ontario Provincial Police (OPP) to public scrutiny.

[30] In my view, while the information was compiled by the AGCO and the OPP was involved in the investigation, the appellant has provided no evidence that the conduct of these organizations should be scrutinized in the circumstances of the appeal. While I understand that the appellant takes issue with the restaurant’s actions that the AGCO investigated, it is not clear what purpose disclosure of the records would serve when scrutinizing the AGCO or OPP, other than to say that they investigated the incident underlying the request. Accordingly, I find that this factor does not apply.

21(2)(b): promoting public health and safety

[31] This factor supports disclosure where disclosure of the personal information would promote public health and safety. The appellant submits that this factor applies because access to the information could prevent other individuals from being subjected to the actions that lead to the death of the individual.

⁹ Orders P-242 and MO-2235.

¹⁰ Order P-1134.

[32] While the AGCO clearly has a mandate in protecting the public when conducting these types of investigations, it is not clear how information about how the AGCO investigated the restaurant would itself promote public health and safety. However, the personal information collected during the investigation provides some insight into the restaurant's conduct, and I find that this factor applies, favouring disclosing the personal information related to the restaurant's actions and conduct surrounding the individual's death.

21(2)(c): promote informed choice in the purchase of goods and services

[33] This factor weighs in favour of disclosure where disclosure of the personal information would promote informed choices in the purchase of goods and services. The appellant submits that this section applies because disclosure of the information would shed light on the restaurant's role (if any) in the circumstances leading to the individual's death, and would help the public make informed choices in the future. While this would not apply to the entirety of the withheld information, I agree that some of the personal information obtained in the investigation could assist with this, and I find that this factor applies for this information.

21(2)(d): fair determination of rights

[34] The appellant submits that this factor applies. This section weighs in favour of disclosure of the personal information where the personal information is needed to allow the appellant to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?¹¹

[35] The appellant submits that the right in question is a right existing in a law, related to the civil action of the estate, and this proceeding is ongoing. She says that the circumstances of the death are directly relevant to the determination of the rights in question, and the personal information is required to prepare for the proceedings because

¹¹ See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

as plaintiffs in the civil action, the appellant needs to know the full circumstances surrounding the death of the individual.

[36] I agree that the information at issue would be relevant to a civil action brought by the estate regarding the individual's death. However, I do not find that the information is required to prepare for any proceedings or to ensure an impartial hearing.

[37] Previous IPC orders, such as MO-2442, have found that the existence of alternative means to obtain the information, such as through a court order, diminish the weight that should be placed on section 21(2)(d).¹² Conversely, it has also been found, such as in Orders PO-4459 and MO-4503, that the appellant is entitled to seek the information in the most cost-efficient manner possible. The present appeal differs from Orders PO-4459 and MO-4503, where the appellants sought the names of individuals to begin a civil action, in that the appellant here has already initiated a civil action. Here, the claim has already been initiated by the appellant, and any information that is relevant to the civil action could be obtained through that process. As such, I find that this factor does not apply.

21(2)(h): information supplied in confidence

[38] The AGCO submits that the information was supplied in confidence, but did not provide further representations on the section. This factor weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."¹³

[39] The appellant submits that any information supplied by other parties would relate to the deceased individual, rather than the individual themselves, so this factor would not apply. As I found when deciding that the information at issue is personal information, although the information relates to the deceased individual generally, it also relates to the parties who supplied it. Additionally, previous decisions have found that personal information provided to law enforcement is done so in confidence, even without an explicit guarantee being given.¹⁴ I adopt this reasoning in the present appeal, and find that this would also apply to an AGCO investigation. As such, I find that this factor applies, favouring withholding the information.

21(2)(i): unfairly damage reputation

[40] The AGCO generally submits that this factor applies, but did not provide specific representations. The appellant disputes this, stating that any damage to the reputation

¹² See also, for example, MO-3631.

¹³ Order PO-1670.

¹⁴ See, for example, Order MO-3028.

of individuals would not be unfair. I agree, and find that the factor does not apply.

Balancing the factors, severances, and compassionate grounds

[41] With the exception of the small amount of information on page 1 and some of the handwritten notes, the following discussion relates to the access rights of the deceased individual which the appellant is exercising under section 66(a) (as discussed in Issue A). For the information on page 1 and portions of the handwritten notes which contain the appellant's personal information, I am considering the appellant's own access rights to this information.

[42] I have considered and weighed the submissions of the parties, the section 21(3)(b) presumption against disclosure, and the factors discussed above. Although I have found that the section 21(2)(b) and 21(2)(c) factors favour disclosing the withheld personal information, I find that this is not sufficient to outweigh the section 21(3)(b) presumption against disclosure for law enforcement information and the section 21(2)(h) factor for information supplied in confidence. Accordingly, I find that the information should not be disclosed.

[43] However, there is a substantial amount of information that the AGCO has withheld that provides information about the circumstances of the individual's death that only includes the personal information of the deceased individual. I find that this information, consisting of summaries of the findings in the inspector's report, should be disclosed as it relates to the administration of the estate and does not contain the personal information of other parties (subject to my review of the other claimed exemptions, discussed below).

[44] I will now discuss the appellant's possible right of access to more of the deceased individual's personal information due to compassionate reasons. The appellant claimed that the information should be disclosed for compassionate reasons under section 21(4)(d). As will be discussed below, this section applies to the spouses or close relatives of a deceased individual.

[45] The appellant submits that she is the former spouse of the deceased individual, and neither her nor her children are privy to the information surrounding the individual's untimely death. Referencing Order MO-2245, the appellant submits that it is generally the person's spouse or close relatives who are in the best position to know if disclosure of particular kinds of information is in their best interests, and submits that the information should be disclosed.

[46] In order for this section to apply, the following conditions must apply:

1. the records must contain the personal information of someone who has died,
2. the requester must be a spouse or "close relative" of the deceased individual, and

3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.¹⁵

[47] It is not disputed that the records contain the personal information of the deceased individual, and I agree that disclosure of some of the information could potentially be desirable given the circumstances of the request. Personal information about an individual who has died can include information that also belongs to another individual. However, the overall circumstances must be considered when deciding whether the disclosure of information under section 21(4)(d) would interfere with that individual's right to privacy.¹⁶

[48] It is not clear to me that the appellant, as the former spouse of the deceased individual, is entitled to claim the exception in section 21(4)(d). However, given my finding below, I do not need to make this determination. The information that I have found exempt from disclosure under section 49(b) consists of specific statements given to the investigator by witnesses, as contained in the investigator's notes and some portions of the inspection report. However, I have also found that some of the records could be severed to remove any personal information of other individuals.¹⁷ When I consider the information that will be disclosed as the result of this order, I find that the section 21(4)(d) exception does not apply to the remainder of the withheld information, as the appellant will have (as a result of this order) already received a substantial amount of information about the death, with only the specific statements by identifiable individuals withheld.

Issue C: Does the discretionary exemption at section 49(a), allowing the AGCO to refuse access to a requester's own personal information, read with the sections 14(1)(c), 14(1)(d) and 14(2)(a) exemptions apply to the records?

[49] The AGCO has claimed the discretionary exemption at section 49(a), read with sections 14(1)(c), 14(1)(d), and 14(2)(a) to withhold some of the records, as outlined in the above table. It claimed sections 49(b) for these same pages, and as I have found that most of them are exempt from disclosure under section 49(b), I will only consider section 49(a) for the portions on page 3 that I have found to not be covered by section 49(b), and the Deputy Registrar's submission on pages 46-50.

[50] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. In this case, the appellant is advancing this right on behalf of her deceased former spouse, for the purposes of estate administration. Section 49 provides some exemptions from this general right of access to one's own personal information.

[51] Section 49(a) of the *Act* reads:

¹⁵ Orders MO-2237 and MO-2245.

¹⁶ Order MO-2237.

¹⁷ Subject to the other claimed exemptions, discussed below.

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

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.

[52] The discretionary nature of section 49(a) ("may" refuse to disclose) 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

[53] In this case, the AGCO relies on section 49(a) read with sections 14(1)(c), 14(1)(d), and 14(2)(a). Section 14 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[54] Sections 14(1)(c) and (d) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source

[55] Section 14(2)(a) states:

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law

Representations, analysis, and finding

[56] The AGCO submits that disclosure of some of the information would reveal the identity of a confidential source, and should therefore be withheld under section 14(1)(d). As I am only considering the portions that would not reveal the identity of other parties (aside from the Deputy Registrar's submission, which I discuss below), I find that this section is not applicable.

[57] The AGCO also submits that disclosure of the information would reveal an investigation technique or procedure, and provided examples of this in its

¹⁸ Order M-352.

representations, which it asked be kept confidential. The appellant disputes that the section applies, stating that in order for an investigative technique or procedure to be covered by section 14(1)(c), it must either not be generally known to the public, or, even if it is not generally known, disclosure must hinder or compromise the effective utilization of the technique or procedure.¹⁹

[58] For section 14(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.²⁰ Here, the information at issue provides some information about the AGCO's investigative process but it is so general that I find that section 14(1)(c) does not apply.

[59] For section 14(2)(a), the AGCO submits that the withheld records are reports prepared in the course of law enforcement, investigation, or inspections. It states that it is not a routine report as the investigation was triggered by a specific incident. The appellant submits that many of the investigative records only include mere observations and recordings of facts, and the exemption should not apply.

[60] I agree that the Inspection Report on pages 3-4 is not a routine inspection report, and the section 14(4) exception to the exemption is not applicable. However, I agree with the appellants' position that the Inspection Report consists of mere observations or recordings of fact that the investigator compiled as part of his investigation. I find that the report is analogous to a police occurrence report, which have been found to not qualify as law enforcement reports within the meaning of section 14(2)(a).²¹ The investigator summarizes the information he collected during the investigation, and the report consists primarily and essentially of descriptive material, with only a few comments that might be considered evaluative in nature. As such, I find that the report on pages 3-4 is not exempt from disclosure under section 14(2)(a).

[61] Conversely, I find that the Deputy Registrar's submission, which contains information that was collected by the investigator, as well as additional evaluative comments, is a report within the meaning of section 14(2)(a), and is therefore exempt from disclosure under section 49(a), read with section 14(2)(a).

Issue D: Does the discretionary solicitor-client privilege exemption at section 49(a), read with section 19, or section 19 on its own apply to the records?

[62] The AGCO initially claimed section 19 for a two-page document (pages 42-43), as well as email correspondence on pages 51-56 (all of which do not contain personal information), and during the inquiry expanded its claim to also include other records (which contain the personal information of the deceased individual and the appellant and

¹⁹ The appellant references Order P-200.

²⁰ Orders P-170, P-1487, MO-2347-I and PO-2751.

²¹ See, for example, Order M-1109.

are therefore dealt with under section 49(a)).²² 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. It states, in part:

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 ...

[63] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up 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*.

[64] The AGCO must show that at least one branch applies. It claimed sections 19(a) and (b) for pages 42-43, and only claimed section 19(a) for the email correspondence. In its representations, it also claimed section 19(a) for pages 3-4.

[65] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[66] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.²³ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.²⁴ 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.²⁵

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

²² The AGCO also claimed section 19(a) for pages 1-2, 5-29, 30-41, and 44-45 in its representations. This would be a late-raised claim under the IPC’s *Code of Procedure*, but because I have found that these records, with the exception of the portions I ordered disclosed, are exempt from disclosure under other exemptions, I will not address the AGCO’s late section 19 claim. It also claimed it for pages 3-4, portions of which I have ordered disclosed. This is a late-raised claim, but as they are making the same arguments for this portion as the other records for which the claim was not late-raised, I discuss the application of section 49(a), read with section 19 below.

²³ Orders PO-2441, MO-2166 and MO-1925.

²⁴ *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁵ *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.

confidence, either expressly or by implication.²⁶ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.²⁷

[68] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.²⁸ The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.²⁹ This privilege protects records created for the dominant purpose of litigation. It protects a lawyer’s work product and covers material going beyond communications between lawyer and client.³⁰

[69] Litigation privilege does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.³¹

[70] The branch 2 exemption is a statutory privilege that applies where the records were “prepared by or for counsel employed or retained by an institution 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. Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

[71] Statutory litigation privilege applies to records prepared by or for Crown counsel or counsel employed or retained by a hospital or educational institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.³²

[72] 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.³³ 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.³⁴ Generally, disclosure to outsiders of privileged information is a waiver of

²⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

²⁸ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

²⁹ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

³⁰ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

³¹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

³² See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

³³ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

³⁴ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

privilege.³⁵ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.³⁶

Representations, analysis, and finding

[73] The AGCO provided confidential representations in support of its privilege claims, which I have considered but not reproduced. Generally, it submits that records in the file that were forwarded to AGCO legal counsel led to the creation of the record on pages 42-43. It provided confidential representations explaining why the email correspondence was protected by both sections 19(a) and (b).³⁷ It also claimed that information in the inspection reports on page 3, which I found are not exempt from disclosure under sections 49(a) and (b), were forwarded to the AGCO's legal services division for review and advice.³⁸

[74] The appellant submits that section 19 does not apply merely because the records were forwarded to legal counsel at some point, as this does not meet the definition of a protected communication, nor is it consistent with the purpose of the protection afforded by solicitor-client privilege. She explains that accepting the AGCO's arguments would mean that any document could be protected from disclosure by simply forwarding it to legal counsel. She also explains that neither statutory solicitor-client privilege or statutory litigation privilege apply to the records.

[75] The record on pages 42-43 is a letter that was sent to an individual regarding the investigation. While the AGCO says that information that was reviewed by legal counsel was used to create it, it has not claimed that the letter is a draft version for which legal advice was sought, or otherwise explained how it is subject to solicitor-client privilege.³⁹ As a letter that was sent to a third-party, it is, on its face, not subject to solicitor-client privilege. The AGCO did not address this in either its confidential or non-confidential representations, and I therefore find that section 19 does not apply. Alternatively, I find that even if the letter were subject to solicitor-client privilege, disclosure of the letter to the party it is addressed to, who does not have a common interest with the AGCO, waived that privilege.

[76] The records on pages 51-56 are described by the AGCO as email correspondence and attachments. Some of the emails are between AGCO staff and legal counsel, and I find that these portions are exempt under section 19(a), subject to my review of the

³⁵ 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.).

³⁶ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

³⁷ The AGCO also requested that its section 19(b) claim generally be kept confidential in its representations, but the claim does not meet the IPC's confidentiality criteria.

³⁸ As these records contain the information of the appellant (when exercising the deceased's right of access), the correct exemption is section 49(a), read with section 19, but the AGCO claimed section 19 on its own.

³⁹ The AGCO's confidential representations explained the context of the letter, but provided minimal explanation regarding why it was subject to solicitor-client privilege.

AGCO's exercise of discretion, below. However, there are a significant number of emails that are correspondence between the AGCO and legal counsel for a party that the AGCO is investigating, along with a corresponding attachment. As the appellant notes in her representations, to accept the AGCO's argument that any document that was at some point reviewed by a lawyer is protected by section 19 would defeat the *Act's* access scheme. The AGCO has not explained how email correspondence to adverse legal counsel qualifies for exemption under section 19, and I find that it does not.

[77] For the portions of pages 3-4, which contain the personal information of the deceased individual, the AGCO has not explained why the records are subject to solicitor-client privilege, aside from its general claim that it was provided to legal for review. The fact that a document was provided to legal counsel for review does not itself mean that it is exempt from disclosure under section 19.⁴⁰ Accepting this argument would mean, as the appellant submits, that any document reviewed by legal counsel would be exempt from disclosure. As such, I find that these portions are not protected by section 49(a), read with section 19.

Issue E: Did the AGCO exercise its discretion under sections 19, 49(a), and 49(b)? If so, should the IPC uphold the exercise of discretion?

[78] The sections 19, 49(a), and 49(b) exemptions are 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.

[79] 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.⁴¹ The IPC cannot, however, substitute its own discretion for that of the institution.⁴²

Representations, analysis, and finding

[80] The AGCO provided limited representations on its exercise of discretion, submitting generally that it exercised its discretion in deciding to not release the records.

[81] The appellant submits that the AGCO erred in its exercise of discretion. She submits that it did not state which factors it considered, and that its representations show that it took irrelevant considerations into account. She states that the AGCO focused on protecting the privacy of individuals and businesses that provided information, but to whom the information does not relate. She submits that this information is not properly

⁴⁰ See, for example, PO-4587.

⁴¹ Order MO-1573.

⁴² Section 54(2).

protected by legislation. She states that the estate of a deceased individual should have a right of access to the individual's information for the purposes of administering the estate, and exemptions should be limited and specific. She notes that there is a compelling reason to release the information when considering the circumstances of the individual's death, and that releasing details of the investigation will increase public confidence in the AGCO.

[82] While I acknowledge that the AGCO provided limited representations on what it relied on when exercising its discretion, I do not agree with the appellant's submission that the AGCO's representations show that it considered irrelevant factors. The appellant's submissions show that she does not agree with the AGCO's access decision, but she has not demonstrated that the AGCO considered irrelevant factors. Considering the AGCO's overall representations, I find that it sought to balance the access rights of the appellant with the interests of the affected parties and the interests protected by the law enforcement, solicitor-client, and personal privacy exemptions, discussed above. Based on this, I uphold the AGCO's exercise of discretion.

Issue F: Does the mandatory exemption at section 17(1) for third party information apply to the records?

[83] The AGCO withheld one record, an attachment to email correspondence, under section 17(1). This page was also withheld under section 19, but as I have found that it is not exempt from disclosure under section 19, I will consider the application of section 17(1). The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,⁴³ where specific harms can reasonably be expected to result from its disclosure.⁴⁴ In its representations, the AGCO claimed the application of sections 17(1)(a), (b), and (c):

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied

⁴³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁴⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(c) result in undue loss or gain to any person, group, committee or financial institution or agency

[84] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Representations, analysis, and finding

[85] For the first part of the test, the AGCO submits that the record contains information principally of a commercial nature, which the appellant generally disputes.

[86] Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁴⁵ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁴⁶ I agree that the record, which relates to a restaurant involved in the AGCO investigation, contains commercial information. However, as discussed below I find that neither the AGCO nor the affected party have established that part three of the test has been met.

[87] The AGCO submits that disclosure of the information would significantly prejudice the affected party's competitive position, stating that the affected party's industry is highly competitive and revealing the information in the record would put the licensee at a disadvantage if its commercial information was revealed to competitors. It further states that if the information is disclosed, licensees will be less likely to be as forthcoming in cooperating and providing the information at issue, and it is in the public interest for such cooperation to be maintained. Last, the AGCO submits that disclosure of the information would result in an undue loss to the affected party, as it would result in its competitors having confidential commercial information.

[88] The affected party did not provide substantive representations, but generally objects to the disclosure of the information.

⁴⁵ Order PO-2010.

⁴⁶ Order P-1621.

[89] The appellant submits that the information would not significantly prejudice the affected party's competitive position or result in undue harm. She also states that organizations under investigation by the AGCO are required to comply with AGCO investigators or risk losing their liquor license, and this incentive alone is sufficient to ensure compliance with AGCO investigations.

[90] Having considered the parties' representations and the information at issue, I find that the AGCO has not demonstrated that any of the harms outlined in sections 17(1)(a), (b), or (c) can be reasonably expected to occur following disclosure. Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁴⁷

[91] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁴⁸ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁴⁹

[92] Here, the AGCO has generally just repeated the description of harms in the *Act*. Considering the contents of the record, which relates to how the affected party participated in the AGCO investigation, it is not obvious that any harm would occur following disclosure, and this has not been shown by either the AGCO or the affected party. Aside from a bare assertion, it has not been shown that disclosure of the information would prejudice the affected party's competitive position or result in an undue loss, and therefore I find that the information is not exempt from disclosure under section 17(1)(a) or (c). For 17(1)(b), I agree with the appellant's submission that licensees are already compelled to produce this type of information during AGCO investigations, and I do not find that to disclose it would result in similar information not being supplied to the AGCO in the future.

[93] Having found that part three of the test has not been met, I do not need to consider if the information was supplied in confidence, and I will order this record disclosed.

⁴⁷ Orders MO-2363 and PO-2435.

⁴⁸ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁴⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

ORDER:

1. I order the AGCO to disclose the following records to the appellant by **May 1, 2025, but not before April 25, 2025**:
 - a. The Inspection Report on pages 3-4, except for the portions highlighted in blue. To be clear, only the non-highlighted information is to be disclosed to the appellant. I have provided the AGCO with a highlighted copy of these pages.
 - b. The document on pages 42-43, in its entirety.
 - c. The email correspondence and attachment on pages 51-55, except for the portions highlighted in blue. To be clear, only the non-highlighted information is to be disclosed to the appellant. I have provided the AGCO with a highlighted copy of these pages.
2. I uphold the remainder of the AGCO's decision.
3. In order to verify compliance with Order provision 1, I reserve the right to require the AGCO to provide me with a copy of the disclosed records.

Original Signed by: _____
Chris Anzenberger
Adjudicator

March 26, 2025 _____