Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4804

Appeal PA23-00468

Ontario Human Rights Commission

March 25, 2026

Summary: The Ontario Human Rights Commission conducted a public inquiry into racial profiling and discrimination against Black persons by the Toronto Police Service and prepared a report. Under the *Freedom of Information and Protection of Privacy Act*, a journalist requested the draft report that was shared with the Toronto Police Service and Toronto Police Services Board. The Commission denied the appellant access because it said that the draft report was subject to solicitor-client privilege, under the discretionary exemption at section 19(a) of the *Act*. The adjudicator finds the draft report exempt under section 19(a) and dismisses the appeal.

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

Orders Considered: Orders PO-2997, PO-3884, PO-4162, PO-4601, and PO-4741.

Cases Considered: *Hogan v. Ontario (Health & Long Term Care)*, 2003 HRTO 16, (CanLii); *Canada (Attorney General) v Slansky*, 2013 FCA 199; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.

OVERVIEW:

[1] A journalist requested records related to a certain version of a draft report of the Ontario Human Rights Commission (the Commission), under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The Commission had conducted a public inquiry into racial profiling and discrimination against Black persons by the Toronto Police Service

(TPS). The narrowed scope of the request was for the draft report that was shared with TPS and the Toronto Police Services Board (TPSB).

[2] The Commission denied access to the draft report, in full, under the discretionary exemption at section 19(a) (solicitor-client privilege) and other discretionary exemptions.[1]

[3] The requester (now the appellant) appealed the Commission's decision to the Information and Privacy Commissioner of Ontario (IPC). The IPC attempted to mediate the appeal. During mediation, the appellant raised the public interest override in section 23 of the *Act* and argued the draft report should be disclosed under it. A mediated resolution was not possible, and the appeal moved to adjudication.

[4] I conducted a written inquiry under the *Act* on the issues in the appeal and received representations from the parties. I shared the Commission's representations with the appellant in accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

[5] For the reasons that follow, I uphold the Commission's decision to withhold the draft report under section 19(a). As a result, I do not discuss the other exemptions claimed or the public interest override, which does not apply to section 19.[2]

RECORD:

[6] The record at issue is the version of the Commission's draft report that was shared with TPS and TPSB.

DISCUSSION:

Background information about the record at issue

[7] In November 2017, the Commission began an inquiry into TPS regarding concern about anti-Black racism in Toronto policing. The Commission released interim reports in December 2018 and August 2020, which included reports of an expert retained by the Commission containing findings and analysis from the data received during the inquiry and the consultations.[3] The Commission released its final report in December 2023, which

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[1] At sections 13 (advice or recommendations), 14 (law enforcement matter), and later, at section 22 (information soon to be published). During mediation, the appellant raised the application of the public interest override at section 23 of the *Act*. The Mediator's Report notes that the appellant understands that section 23 of the *Act* does not apply to sections 14, 19 and 22 of the *Act*.

[2] Section 19 is not one of the exemptions listed in the public interest override at section 23. Therefore, section 23 cannot be used to override a finding that section 19 applies to a record.

[3] The first interim report included a report from Dr. Scot Wortley on his findings from Special Investigations Unit (SIU) data, case-law review, a review of the SIU Director Reports, and the results of the OHRC's consultation with 130 members of Black communities across Toronto. The second interim report included two reports from Dr. Wortley analyzing TPS data related to charges, arrests and releases, and police use of force.

also included the expert's analysis of certain data.

[8] The Commission describes drafting the final report as a deliberative process. It says that its Commissioner had the final word on how the report would be worded. However, it explains that the draft versions (including the draft at issue) were prepared by the Commission's lawyers, after assessing the evidence gathered and considering the various human rights laws involved, with the purpose of determining whether the TPS had been engaging in anti-Black discrimination.

[9] To carry out the inquiry, the Commission engaged in an extensive process set out in the Terms of Reference that involved, for example:

- seeking documents and data including from the TPS, TPSB, and the Special Investigations Unit (SIU)
- conducting legal research
- retaining experts
- consulting with key stakeholders
- interviewing affected individuals, interested groups and organizations, including the TPS and TPSB,[4] and
- giving the TPS and TPSB an opportunity to respond to the inquiry's findings and recommendations before making the report public.[5]

[10] The record at issue is the draft report that was shared with TPS and TPSB, under the Terms of Reference.[6]

[11] The Commission explains that the record at issue underwent changes before the final report was released, saying:

> . . . once the TPS and TPSB provided comments, the client required further legal advice on the document. Following that review, further information gathering took place, and new legal drafting and analysis took place. The final draft was published on December 14, 2023.

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[4] The Commission cites Ontario Human Rights Commission, Inquiry into Racial Discrimination and Racial Profiling of Black persons by the Toronto Police Service Terms of Reference (30 November, 2017) online at: https://www.ohrc.on.ca/en/terms-reference-tps.

[5] *Ibid*. Term of Reference #8 says: "The OHRC [the Commission] will report publicly on the inquiry process, its findings, and recommendations. The OHRC will provide an opportunity for the TPS and TPSB to respond to the inquiry's findings and recommendations before making the report public."

[6] No version of the report is at issue or before me. I note this given the appellant's sur-reply mention of "draft report(s)" having been the subject of the request. At the close of IPC mediation, and at adjudication, the only record at issue was the draft report that was shared with TPS and TPSB.

[12] In light of this background information, I will discuss the Commission's reliance on section 19 of the *Act*.

Section 19(a) – common law privilege

[13] 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.[7] Section 19(a), which is relevant in this appeal, states:

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

[14] Section 19(a) is based on common law. At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

Common law solicitor-client communication privilege

[15] 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.[8] 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.[9] 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]

[16] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[12] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[13]

The Commission's representations

[17] The Commission submits that the draft report is subject to common law solicitor-client communication privilege under section 19(a) of the *Act* because the report was a

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[7] Paragraphs (b) and (c) of section 19 are statutory solicitor-client privileges. While the Commission argues that section 19(b) also applies to the record, I do not address that section due to my finding below that section 19(a) applies.
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[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.
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[13] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)

direct communication of a confidential nature between the Commission and its lawyers made for the purpose of giving legal advice. More specifically, the Commission states:

> The purpose of the report was to determine whether, in law, practices and activities of the TPS [have] resulted in racial profiling and discrimination against Black people. The report was based on an analysis of case law, data received from the TPS, review of TPS and TPSB policies and procedures, and interviews with the TPS, TPSB, community members, experts and other stakeholders.

[18] The Commission further states that the draft report was provided confidentially by the Commission's lawyers to the Chief Commissioner to review and approve the analysis, conclusions, and recommendations.

[19] The Commission submits that solicitor-client communication includes ascertaining or investigating facts upon which the advice will be given.[14] It cites *Canada (Attorney General) v. Slansky* (*Slansky*),[15] a Federal Court of Canada case that involved the investigative report of an external counsel hired by the Canadian Judicial Council to investigate a judge's alleged misconduct. The external counsel's engagement letter described his role as being a gatherer of facts. The Commission submits that despite this, the court held that the nature of the allegations in the complaint made it necessary for the lawyer to use his legal skills and knowledge, including his knowledge of criminal law and criminal trial procedure. The Commission also submits that the court found that the circumstances also required the lawyer to analyze the judge's decisions for indications of bias or bad faith, noting that this was "uniquely within a lawyer's competence." The Commission submits that the court found that because the investigator, in his capacity as a lawyer, was helping the Chairperson of the Canadian Judicial Council to decide on how to deal with the complaint, the report was subject to solicitor-client privilege as legal advice.[16]

[20] The Commission argues that, similar to the circumstances in *Slansky*, the draft report was written by its lawyers to determine whether the TPS is engaging in discriminatory behavior under the Ontario's *Human Rights Code*. The Commission explains that this process involved a legal review of all evidence received, including:

- interviews from individuals in Black communities, TPS officers and TPS leadership
- the expert analysis of data on TPS practices such as stops and searches[17]

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[14] The Commission cites *Hogan v. Ontario (Health & Long Term Care)*, 2003 HRTO 16, (CanLII) at para 122, which in turn cites *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner*), 2002 BCCA 665 (CanLII) at para. 40.
[15] 2013 FCA 199.
[16] R.S.O. 1990, CHAPTER H.19.
[17] Dr. Scot Wortley. See Note 3 regarding his previous reports.

- policies and procedures of the TPSB and TPS, and
- a review of legal research and case law in the area.

[21] The Commission submits that the analysis of the interviews and thousands of pages of documentation gathered during the inquiry required the expertise of human rights lawyers, with the skill and knowledge of human rights legal principles and legislation such as the *Human Rights Code*.

[22] The Commission submits that there has not been a waiver of privilege. It explains that while the draft report was disclosed to the TPS and TPSB, this was done as part of the Commission's inquiry process, set out in the Terms of Reference, to provide fair due process to all parties. The Commission also explains that "it made clear to the TPS and TPSB that the document was to remain confidential," and that it was "also made public that the report would only be released after the TPS and TPSB had an opportunity to respond to the inquiry's findings and recommendations."[18] The Commission explains that "once the TPS and TPSB provided comments, the client [the Commissioner] required further legal advice on the document," and after further review, information gathering, legal drafting and analysis, the final draft was published on December 14, 2023.

The appellant's representations

[23] The appellant argues that section 19(a) does not apply. He submits that the Commission's lawyers' writing and re-writing of the report "is simply writing." He submits that a "draft would and should not contain legal advice to the OHRC Chief Commissioner." He says that he cannot imagine that the Commission provided legal advice to the parties that it shared the record with (TPS and TPSB).

[24] The appellant also argues that the Commission waived privilege "through disclosure" because, he argues, TPS and TPSB are "fundamentally 'outsiders.'" He submits that there should be no common interest between them and the Commission in this inquiry, since the Commission is the "'watchdog" and the TPS and TPSB are the "watched." He says: "That there may be cooperation between them is something else."

Analysis and finding

[25] For the following reasons, based on my review of the draft report and the Commission's representations, I find that the record is subject to common law solicitor-client communication privilege under section 19(a) of the *Act* and that the Commission did not waive its privilege.

[26] The appellant says he cannot imagine that the Commission provided legal advice to TPS and TPSB, but there is no claim that it did. Moreover, solicitor-client privilege protects more than just legal advice. Solicitor-client communication privilege is wide-

[18] See Note 5.

reaching and protects: direct communications of a confidential nature between a lawyer and their client made for the purpose of obtaining or giving legal advice,[19] the request for advice, communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given,[20] and the lawyer's working papers directly related to seeking, formulating or giving legal advice.[21]

[27] I accept the Commission's evidence that its lawyers drafted the record for the purpose of determining whether, in law, practices and activities of the TPS have resulted in racial profiling and discrimination against Black people, after analysing the case law and evidence before them. Further, I accept the Commission's evidence that its lawyers provided this draft report confidentially to their client (the Chief Commissioner) for the purpose of providing legal advice within the meaning of section 19(a). This confidential exchange of the information in the draft report between the Commission and its lawyers qualifies as solicitor-client communication privilege because it constitutes communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.

[28] I observe that the Commission's website – containing information about its inquiry – includes copies of letters that it sent to stakeholders, inviting them to contact specific Commission legal counsel to begin the process of providing certain documentation to the Commission for the inquiry.[22] In other words, from the beginning, the process set up by the Commission involved its legal counsel, with specific legal counsel receiving evidence from stakeholders, and then conducting a legal review of that evidence to provide legal advice to its client.

[29] The Commission's lawyers prepared the draft report at issue, having analyzed extensive evidence and applied their legal expertise in human rights law and principles to do so, such that their client could later release a public record in accordance with its mandate. Therefore, in these circumstances, I disagree with the appellant's assertion that the Commission's lawyers "writing and re-writing the report 'is simply writing.'" I agree with the Commission that the reasoning in *Slansky* – that solicitor-client communication includes ascertaining or investigating facts upon which legal advice will be given – applies in this appeal and I adopt it.

[30] I disagree with the appellant's claim that the Commission waived privilege. The appellant provides no information to support his claim of waiver of privilege. There is no evidence before me to suggest that the Commission treated the draft report in a non-confidential manner or in a manner indicating an intention to waive privilege. I do not need to make a finding about any common interest to come to this conclusion in the

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[19] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] *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.
[21] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[22] This information can be accessed through the following link: Appendix 10 - Inquiry Letters | Ontario Human Rights Commission.

absence of clear evidence of waiver. Prior IPC orders have rejected waiver of solicitor-client privilege claims, like the appellant's, where the claim is made without further evidence to support it, and I similarly reject the waiver claim here.[23] Furthermore, as discussed, the Terms of Reference included the chance for TPS and TPSB to review and comment on a copy of a draft version before a final version was drafted and publicized. The fact that the Commission shared a copy of it with TPS and TPSB as a part of the process of the inquiry does not change who drafted the report, what that drafting entailed, and the purpose for which the report was drafted.

[31] In addition, I note that in Order PO-4601, where two institutions shared information pursuant to a pre-existing memorandum of understanding, the IPC held that "what is relevant is how the parties dealt with the information." I agree with that reasoning and apply it here. I give considerable weight to the Commission's evidence that it made it clear to the TPS and TPSB that the draft was to remain confidential, and that it did not waive privilege. Its inquiry was not completed, and the inquiry's terms included a publicized term that this step of the inquiry would occur (giving the TPS and TPSB an opportunity to comment).

[32] I am also not persuaded by the appellant's "watchdog" and "watched" argument, for which he provided no supporting authority. Rather, in my view, the circumstances here are similar to the provincial public auditing process, which is also confidential and covered by privilege (though a different one). When the Auditor General audits a ministry and gives the ministry a chance to comment on the draft before the Auditor General finalizes and publicly releases the report, as the IPC has noted, the Auditor is not waiving statutory privilege[24] by sharing a draft with the subject of its audit.[25]

Exercise of discretion

[33] The section 19(a) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. On appeal, 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.

[34] The IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] The IPC cannot, however, substitute its own discretion

[23] See, for example, Orders PO-3884 and PO-4741.
[24] I refer to the confidentiality provision at section 27.1(1) of the *Auditor General Act*, R.S.O. 1990, Chapter A.35.
[25] Order PO-4162, paragraphs 54 and 55.
[26] Order MO-1573.

for that of the institution.[27]

[35] Examples of relevant considerations are listed below, though not all will be relevant, and additional considerations may be relevant, too:[28]

- the purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person, and
- the historic practice of the institution with respect to similar information.

[36] The Commission states that it particularly considered the interests inherent in the solicitor-client privilege exemption at section 19(a). It adds that it also considered the relevant law and principles stated by the Supreme Court of Canada, citing Order PO-2997. It notes that Order PO-2997 cited the Supreme Court in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[29] in noting that the near absolute nature of solicitor-client privilege should be considered in the exercise of discretion under section 19 where it stated:

> . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis [Emphasis added in the original.]

[37] The appellant submits that I should not uphold the Commission's exercise of discretion. He submits that the Commission should have considered "the principle" that a draft report should be made available to the public after the final report is public, and that exemptions should be limited. He notes that he is a journalist seeking only transparency and accountability. He submits that the public does not know whether disclosure of the draft report will increase, decrease, or affirm its confidence in the Commission's operations. He sees protection of the drafting process as a "'red herring'" since the draft was shared with third parties. The appellant states that he does not know if the Commission exercised its discretion in bad faith or for an improper purpose but certainly expects and hopes it did not.

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[27] Section 54(2).
[28] Orders P-344 and MO-1573.
[29] 2010 SCC 23.

[38] In response, the Commission submits that the fact a draft report was shared with the subject parties in accordance with the inquiry's Terms of Reference does not mean that the Commission's discretion to claim section 19 was improperly exercised. The Commission reiterates that its inquiry process "transparently established rules that are fair to all parties and that promote public accountability [through] community updates."

[39] Having reviewed the parties' representations and the record itself, I uphold the Commission's exercise of discretion to claim section 19(a) of the *Act*. There is no evidence before me that the Commission exercised its discretion in bad faith or for an improper purpose. I find that the Commission exercised its discretion in good faith. I accept that it did so considering the important interests inherent in solicitor-client privilege, and that it did not have to balance this interest against others, as the Supreme Court confirmed in the *Criminal Lawyers' Association* case cited above. I give little weight to the appellant's argument that increasing public confidence in the Commission is a relevant factor to have considered regarding this draft report in light of the fact that the Commission released a final report and extensive information about the final report and the inquiry process on its public website. Therefore, I uphold the Commission's exercise of discretion under section 19(a).

ORDER:

I dismiss the appeal.

Original Signed by: March 25, 2026

Marian Sami
Adjudicator