



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

FINAL ORDER PO-2024-F

Appeal PA-010349-1

Ministry of the Attorney General



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BACKGROUND AND NATURE OF THE APPEAL:

This is my final order dealing with the outstanding issues in Order PO-2022-I.

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain information about the requester held by the Ministry. After conducting an inquiry and receiving representations from the Ministry, I found that the one responsive record it had identified fell within the scope of solicitor-client communication privilege. However, I also found that the Ministry had not properly exercised discretion in determining whether the record should be disclosed to the appellant, and I included the following order provision.

I order the Ministry to consider the exercise of discretion under section 49(a) of the *Act* with respect to the record at issue in this appeal, and to provide me with representations as to the factors considered in doing so by **June 20, 2002**. The representations concerning the exercise of discretion should be forward to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor St., West, Suite 1700, Toronto, Ontario, M5S 2V1.

I have received representations from the Ministry in compliance with this provision.

Also in Interim Order PO-2022-I, I found that the Ministry had not conducted an adequate search for all responsive records, and included two order provisions dealing with additional search activities. Specifically, the order provided:

I order the Ministry to conduct a further search for records created in the context of the appellant's 1999 meeting with the named Ministry employee and, if no records are located, to provide the appellant with a decision letter outlining the results of this search by **June 20, 2002**. A copy of this decision letter should be provided to me at the address noted in Provision 1.

If additional responsive records are located, I order the Ministry to provide the appellant with a decision letter regarding access to these records in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension. A copy of any such decision letter should be provided to me at the address noted in Provision 1.

The Ministry's representations also address the search issues.

DISCUSSION:

EXERCISE OF DISCRETION

Section 49(a) of the *Act* requires the Ministry to properly exercise discretion in deciding whether to provide the appellant with access to the record, despite the fact that the requirements of the solicitor-client communication privilege exemption are present.

In Interim Order PO-2022-I, I made the following statements regarding the exercise of discretion:

In Order MO-1277-I, I outlined in some detail the steps required by an institution in properly exercising discretion. I stated:

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

...

... the representations of the Ministry clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the record itself were taken into account by the Ministry in reaching its section 49(a) decision. The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Ministry in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding

whether or not it will disclose the record despite the fact that it qualifies for exemption.

The Ministry submits:

... Given the specific nature of the [solicitor-client communication] privilege attached to this document, the Ministry has chosen to exercise its discretion and not disclose the document. In the Ministry's view, it has carefully considered and properly exercised this discretion.

...

At no time has the Ministry waived this important [solicitor-client communication] privilege in respect to the protected document at issue. The fact that the document relates to the Appellant's own personal information does not negate the solicitor-client privilege attaching to it. The document was prepared solely for use in giving legal advice. To perform their job effectively, Crown counsel must be able to advise the Ministry and recommend particular courses of action with the knowledge that their advice will remain confidential. In the circumstances of this case, the exemption is specific and has been limited to one document. In response to the Requestor's higher right of access to her own personal information, the Ministry has disclosed all possible information to the Requestor that it can without releasing the protected document. The Appellant was advised of the Ministry's position in regards to her complaint to the Law Society and was copied on a letter from ... the Assistant Deputy Attorney General to Counsel at the Law Society of Upper Canada. The circumstances of the request, the contents of the records and the information already provided to the Appellant were all factors considered by the Ministry in the exercise of discretion to not release the document. In the Ministry's view, the discretion afforded under section 49(a) has been properly exercised.

Based on the representations provided by the Ministry, I find nothing improper about the manner in which it has exercised discretion in deciding whether or not to disclose the record to the appellant, despite the fact that it falls within the scope of the solicitor-client communication privilege exemption. The Ministry makes it clear that it has taken into account the particular circumstances of the appellant's request and the contents of the record in reaching its decision. It points out that a number of records have been provided to the appellant by the Ministry outside the context of this particular appeal, and that the Ministry's position with respect to the appellant's complaint to the Law Society of Upper Canada, which is the subject matter of the record at issue in this appeal, has already been communicated to the appellant through the copy of the Assistant Deputy Attorney General's letter to the appellant in this regard.

Accordingly, I find that the record at issue in this appeal qualifies for exemption under section 49(a) of the *Act*.

ADEQUACY OF SEARCH

The Ministry's representations state:

... In regards to the search for documentation, a second search has located additional responsive documents. The Ministry's decision regarding the release of these documents will be made in the near future.

...

A second search for records was conducted by [a named employee], Administrative Assistant to the Director of Crown Operations. [The named employee], who was out of the office at the time of the original search because of a labour disruption, has located additional responsive documents. The Ministry's decision regarding the release of these documents will be made in the near future and according to the time line set out by the [Assistant] Commissioner in the interim [order].

As long as the Ministry's decision letter is issued to the appellant by **July 6, 2002**, and a copy is provided to me, the Ministry will be in compliance with the relevant provisions of Interim Order PO-2022-I. If the appellant is not satisfied with the Ministry's decision, she has the right of appeal to this office.

ORDER:

1. I uphold the Ministry's decision to deny access to the one identified record.
2. I remain seized of this appeal in order to deal with any outstanding issues relating to the adequacy of search.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

June 25, 2002 _____