



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2509

Appeal PA-050311-1

Ministry of Training, Colleges & Universities



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NATURE OF THE APPEAL:

The Ministry of Training, Colleges & Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual for access to information related to a named University's policies and practices regarding religious holidays.

The request specifically stated:

... [I] would like to request copies of all Ministry documents and internal and external communications, including electronic, in the Ministry's possession that relate in any way to [the named University's] policies and practices in regard to religious holidays.

The Ministry identified records responsive to the request, and denied access to them, in whole or in part, relying on the exemptions in sections 17(1) (third party information) and 19 (solicitor-client privilege). In an index of records accompanying its decision letter, the Ministry described each responsive record and indicated the exemption it relied upon to withhold access to all or a part of the document. The index also indicated that certain portions of the records are not responsive to the request.

The requester (now the appellant) appealed the Ministry's decision. In his appeal letter, he asserts that the Index of Records does not list all the responsive records that the Ministry has. As a result, the adequacy of the Ministry's search for responsive records is also an issue in this appeal.

During mediation, two additional records were provided to the appellant. The appellant maintained his position that further records should exist. Also at mediation, the appellant agreed not to pursue the information that the Ministry identified as not responsive to the request. Accordingly, these portions of the records are no longer at issue in the appeal.

No further issues were resolved at mediation and the matter moved to the adjudication stage. This office sent a Notice of Inquiry to the Ministry and the named University (the affected party), initially, outlining the issues and inviting representations. The Ministry provided representations and also decided to disclose additional parts of the records to the appellant, including the only record that had been withheld under section 17(1). The affected party did not provide any submissions. As a result of this disclosure, the exemption at section 17(1) is no longer at issue.

The file was transferred to me to conclude the inquiry. I shared the Ministry's representations with the appellant, along with a Notice of Inquiry and an Affidavit provided by the Ministry detailing the nature and extent of the searches it conducted for responsive records. The appellant provided submissions in response to the Ministry's representations. In his representations, the appellant raised a number of questions regarding the issue of the adequacy of the Ministry's search for responsive records. In particular, the appellant was concerned that he had not received a copy of his letter of October 2, 2005, which he had faxed to the Minister of Training, Colleges & Universities.

I provided the appellant's representations to the Ministry and invited it to provide reply representations. The Ministry did so by sending a letter to me responding to the appellant's submissions. In this letter the Ministry stated that it had not received the appellant's October 2, 2005 letter. The Ministry also provided me with further submissions on the issue of reasonable search. The appellant has now sent a copy of the October 2, 2005 letter to the Minister of Training, Colleges & Universities and a response to him is pending from the Ministry in relation to this letter.

RECORDS:

The following chart sets out the records and parts of records remaining at issue, using the record numbers assigned in the Ministry's index of records. The sole exemption claimed is section 19.

| NO. | RECORD |
|-----|--|
| 3. | September 12, 2005, e-mail to Director of Universities Branch of Ministry (lawyer) from Manager (Mgr.) of Universities Branch, regarding Minister's Office request for info re: University Acts and regulation |
| 8. | September 13, 2005, e-mail to Senior (Sr.) Legal Counsel for the Ministry from Mgr. of Universities Branch, regarding issue notes requested –Tuesday September 13, 2005 |
| 10. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Mgr. of Universities Branch, regarding issue notes - Tuesday September 13, 2005 |
| 12. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Sr. Policy Advisor of Universities Branch, regarding issue notes requested - Tuesday September 13, 2005, containing an email to Counsel, Legal Services Branch |
| 13. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Counsel, Legal Services Branch, regarding issue notes requested - Tuesday September 13, 2005 |
| 15. | September 13, 2005, e-mail to Mgr. of Universities Branch from Sr. Policy Advisor of Universities Branch, regarding issue notes requested - Tuesday September 13, 2005 |
| 16. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Mgr. of Universities Branch, regarding issue notes requested – Tuesday September 13, 2005 |
| 17. | September 13, 2005, e-mail to Mgr. of Universities Branch from Sr. Legal Counsel for the Ministry, regarding issue notes requested – Tuesday September 13, 2005 |
| 18. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Mgr. of Universities Branch, regarding issue notes requested – Tuesday September 13, 2005 |
| 22. | October 18, 2005, email to Sr. Policy Advisor of Universities Branch from Sr. Legal Counsel for the Ministry, regarding named University letter |

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| 23. | October 19, 2005, email to Sr. Legal Counsel for the Ministry from Sr. Policy Advisor of Universities Branch, regarding named University letter |
| 26. | September 28, 2005, email to Sr. Legal Counsel for the Ministry from Issues Coordinator, Issues Management Branch, regarding Sessional dates v3ADM |
| 33. | Handwritten note of Sr. Legal Counsel of telephone conversation between Sr. Legal Counsel for the Ministry and BE (named University faculty member) |
| 34. | September 27, 2005, email to Sr. Legal Counsel for the Ministry from Sr. Issues Coordinator, Issues Management Branch, regarding update of named University note |
| 42. | September 21, 2005, e-mail to Mgr. of Universities Branch from Sr. Legal Counsel for the Ministry, regarding note to be updated |
| 43. | September 16, 2005, email to Sr. Legal Counsel for the Ministry from Executive Assistant of the Assistant Deputy Minister of the Ministry, requesting approval of attached note |
| 44. | September 15, 2005, email to Executive Assistant of the Assistant Deputy Minister of the Ministry from Sr. Legal Counsel for the Ministry, requesting approval of attached note |
| 46. | September 4, 2005, email to Sr. Legal Counsel for the Ministry from Executive Assistant of the Assistant Deputy Minister of the Ministry, regarding named University - Sessional Dates |
| 47. | September 14, 2005, email to Executive Assistant of the Assistant Deputy Minister of the Ministry from Sr. Legal Counsel for the Ministry, regarding named University - Sessional Dates |
| 50. | September 14, 2005, Handwritten note of Sr. Legal Counsel of telephone conversation between Sr. Legal Counsel for the Ministry and BE (Named University Faculty Member) |
| 51. | September 14, 2005, e-mail to Issues Coordinator, Issues Management Branch; Sr. Legal Counsel for the Ministry; and Director, Legal Services Branch from Executive Assistant of the Assistant Deputy Minister of the Ministry, regarding issue notes requested – Tuesday September 13, 2005 |
| 52. | September 13, 2005, e-mail to Executive Assistant of the Assistant Deputy Minister of the Ministry from Sr. Legal Counsel for the Ministry, regarding issue notes requested – Tuesday September 13, 2005 |
| 54. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Director, Legal Services Branch, regarding issue notes requested – Tuesday September 13, 2005 |
| 55. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Mgr. of Universities Branch, regarding issue notes requested – Tuesday September 13, 2005 |
| 56. | September 13, 2005, e-mail to Mgr. of Universities Branch from Sr. Legal Counsel for the Ministry, regarding issue notes requested – Tuesday September 13, 2005 |
| 59. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from |

| | |
|-----|---|
| | Counsel, Legal Services Branch, regarding issue notes requested – Tuesday September 13, 2005 |
| 60. | September 13, 2005, e-mail to Sr. Legal Counsel for the Ministry from Sr. Policy Advisor for the Ministry, regarding issue notes requested – Tuesday September 13, 2005 |
| 67. | September 12, 2005, e-mail to Sr. Legal Counsel for the Ministry from Director, Legal Services Branch, regarding Universities and Ministries Oversight |
| 69. | September 12, 2005, e-mail to Sr. Legal Counsel for the Ministry from EH of the Minister's Office, regarding named University |

DISCUSSION:

REASONABLE SEARCH

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

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

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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

Representations of the Ministry

The Ministry was asked to provide a written summary of all steps taken in response to the request, including details of any searches carried out to respond to the request. The Ministry provided an affidavit from the individual charged with locating the responsive records, a Senior Policy Advisor, from the Governance and Accountability Unit, Universities Branch at the Ministry. In this affidavit, she states that:

- To ensure that any and all records responsive to the request were assembled, a rigorous and exhaustive search was undertaken. Since I am familiar with the duties and responsibilities of other members of the branch and with issues concerning [named] University and the matter relating to the request, as search coordinator, I was able to ensure that all areas where potential records - electronic and/or print - might be stored were searched."
- To ensure that any responsive records outside my care and control were also captured, I requested by email and in person that the Assistant Deputy Minister of the Postsecondary Education Division (through her Executive Assistant) and her Executive Assistant, the Director of the Universities Branch (directly and through his Administrative Assistant) and his Administrative Assistant, and the Manager of the Governance and Accountability Unit (directly and through her Administrative Assistant) and her Administrative Assistant search for print and/or electronic documents responsive to the request.
- The search revealed that only myself, my Manager, and the director of the branch had materials responsive to the request. I was told, and I believe it to be true, that a search of the Assistant Deputy Minister's Office for records was conducted by her Executive Assistant at my request.

In its representations, the Ministry also stated that:

After the request was received ... Legal Services Branch gave copies of all of its responsive records to the Ministry's Information and Privacy Office. The Universities Branch was also asked to undertake a search for responsive records that may have been in the custody and control of the Ministry...

In Order PO-1744, acting Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909)...

The Ministry believes it has determined, by virtue of its extensive search efforts, that no additional records exist in the custody of the Ministry that would be responsive to the request.

Representations of the Appellant

The appellant maintains that the Ministry has not conducted a reasonable search for documents. In support of his position, he states:

I have yet to receive a copy of my original October 2, 2005 letter to [the Minister of Training, Colleges and Universities]. This document has for some reason never appeared on the Ministry list of records, despite the fact that it is referred to in both [the Minister of Training, Colleges and Universities'] January 5, 2006 response to [the University Secretary and General Counsel] and in Fact No.10 of the Ministry submission...

As Ministry records attest, the issue at hand became a topic of interest in the print media locally and as far afield as New York City and Haifa and included mention of the fact that I had taken the matter to Queen's Park. It also received attention on talk radio and television in Toronto other Canadian cities. ...Given the scope and intensity of the public interest in the issue, the lack of such records is not plausible, and suggests rather an incomplete search.

Reply Representations of the Ministry

In its reply representations, the Ministry states that it did not receive the appellant's October 2, 2005 letter but "the media interest in this issue was addressed in a briefing note that was disclosed to the correspondent, (and) the issue did not generate a series of long-term, ongoing communications relating to media coverage or correspondence on the issue".

The Ministry also responded to the appellant's claim that he "was told several times that people intended to communicate directly with the Ministry about the issue." The Ministry's Correspondence Unit did further searches, including searches for records regarding the named University and religious holidays and for correspondence about any religious holiday. Although many hits came up for the Ministry of Education, no records were found to exist for the Ministry of Training, Colleges and Universities relating to the appellant's request.

Findings

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

The Ministry has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request, as well as a detailed affidavit sworn by the individual who conducted the searches for records which supports its position. As the Ministry had not received a copy of the appellant's faxed October 2, 2005 letter, it therefore follows that this letter and any Ministry responses thereto would not be in its possession. In my view, the appellant has not provided a reasonable basis for concluding that additional records exist. Based on the submissions of the Ministry and the appellant, I am satisfied that the Ministry conducted a reasonable search for records responsive to the appellant's request.

I will now review the section 19 exemption claimed for the severed portions of the records that are responsive to the request.

SOLICITOR-CLIENT PRIVILEGE

When the request in this matter was filed, section 19 stated as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31, *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.), Orders PO-2483, PO-2484]

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or

giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Loss of privilege - Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

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

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]
- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.))]

This Office's position on waiver of branch 1 solicitor-client communication privilege is outlined in Order P-1342. In that order, former Adjudicator Holly Big Canoe states:

[C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C.)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon* (No. 8), [1991] 1 W.L.R. 73 at 87 (C.A.)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.” There is no suggestion that this form of statutory privilege applies, and I will not consider it further in this order.

Categories of Records

There are three categories of records in this appeal.

The first category comprises all of the records except Records 22, 33, 44, 55. The first category comprises e-mails to and from legal counsel and their clients, or between/among legal counsel. The following records fall into this category: Records 3, 8, 10, 12, 13, 15, 16, 17, 18, 23, 26, 34, 36, 42, 43, 46, 47, 51, 52, 54, 55, 56, 59, 60, 67, and 69.

The second category comprises Records 22 and 44. These are e-mails with draft attachments prepared for counsel.

The third category comprises Records 33 and 55. They are Legal Services Bureau counsel's notes taken during telephone calls.

All of the emails, except Records 3 and 15, reflect communication with the Senior Legal Counsel for the Ministry.

Representations of the Ministry

The Ministry maintains that all of these records were created as a result of its Legal Services Branch being asked to provide legal advice to the Minister's Office and Ministry staff on issues of law and statutory interpretation in respect of the [named] University Act, a public act for which the Minister of Training Colleges and Universities has responsibility.

The first category

The Ministry submits that these emails:

all contain either requests for legal advice or responses to such requests, containing the advice sought. Thus they form a continuum of communication and as such are protected by solicitor-client communication privilege... The records (or portions thereof) remaining at issue are, on their face, exempt under both branches of the section 19 exemption. Since they constitute a "continuum of communications" between solicitor (Legal Services Branch) and client (Universities Branch and Issues Management Branch) regarding legal issues they are subject to the common law solicitor-client privilege. In addition, as they were prepared by or for Crown counsel for use in giving legal advice, the records are also exempt under the legislative exemption in branch 2.

The individuals identified in the "From" and "To" lines of the e-mails (or portions thereof) that comprise the records at issue (with the exception of Records 33 and 50) are either director and/or counsel in the Ministry's Legal Services Branch (LSB) or manager and/or staff in client branches. All emails were either: 1) sent by a LSB (Legal Services Branch) client (Universities Branch, Minister's Office, Issues Management) to colleagues who then sent their concerns/comments to Legal Services Branch (the solicitor) for advice, or having received legal input passed it on to colleagues; or 2) Legal Services Branch director or counsel was responding to the above-mentioned clients and/or other counsel on the issues. Footers on briefing notes attached to some of the records at issue also show Legal Services Branch as the origin of the notes and Ministry counsel as the contact.

The Ministry emphasizes that the Legal Services Branch was asked to handle this matter from the outset: to provide strategic legal advice to the Minister's Office, including preparing a briefing (issues) notes. In the course of handling the matter, a continuum of communication was maintained between solicitor (Legal Services Branch) and client (Universities Branch) as well as [the Minister's Office] (client), when appropriate, and Issues Management. In addition, these records were all prepared by or for Crown counsel for use in giving legal advice....

The second category

The second category comprises Records 22 and 44. These are e-mails with draft attachments prepared for counsel for the purpose of seeking advice. In Records 22 and 44, the e-mails convey legal advice. The draft letter attached to Record 22 is solicitor-client privileged because it is attached to a request for legal advice. The e-mail reflects counsel's opinion and is therefore solicitor-client privileged. The draft briefing note attached to e-mail 44 was given to counsel for her input.

Order PO-1864 ... also finds that draft records between client and solicitor, where legal advice is being sought, are considered solicitor-client privileged.

The Ministry submits that Records 22 and 44 reflect similar kinds of communication as described in Orders PO-2432 and PO-1864, and that both the e-mail and attachment (or portions thereof) in Records 22 and 44 qualify for exemption, as did the communication discussed in Order PO-2432, under section 19.

The third category

Records 33 and 50 are handwritten notes recorded by the Ministry's Senior legal counsel in the course of phone conversations on the issues...They are Legal Services Bureau counsel's notes taken during telephone calls. The notes were prepared and used eventually by counsel for the purpose of giving legal advice to Ministry staff. These records therefore qualify for exemption under Branch 2 of section 19.

Representations of the Appellant

The appellant submits that:

Solicitor-client privilege pertains to "direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice." The majority of documents for which this exemption is claimed thus include (Senior Legal Counsel for the Ministry) as a party to the related communication. The exceptions are Records Nos. 3, 15, and 50. It is not at all apparent why this exemption should apply to these documents. Record No. 50 relates to a conversation between (named faculty member) and an unidentified person. Granting a blind exemption here would be unwarranted. Record No. 33 relates to an undated a conversation between (Sr. Legal Counsel for the Ministry) and this same (a faculty member), a non-client. Only an unreasonably broad interpretation of the exemption should have it apply to this document.

Analysis/Findings

Upon review of the records in their entirety, I agree with the Ministry's claim that the records were all created to address the appellant's position on the named University's sessional dates policy, as publicly reported in a newspaper on September 13, 2005.

I will first determine whether the records or withheld portions are subject to branch 1 solicitor-client communication privilege on the basis that they were prepared by or for Crown counsel for use in giving legal advice. In order to determine whether the records are subject to solicitor

client communication privilege, I must determine who was acting in a solicitor role and who was acting in a client role for the purposes of the records. If I find that the records reflect a written record of communication between a solicitor and his or her client, I must then determine whether each record is subject to privilege and whether that privilege has not been waived or lost. If I find that branch 1 does not apply, I will consider whether statutory solicitor-client communication privilege applies under branch 2.

A review of the records reveals that legal counsel within the Ministry's Legal Services Branch was asked to provide legal advice concerning the named University's sessional dates' policy to the Minister's Office and Ministry staff. The Ministry submits that the client or clients in this case comprise the Ministry's Universities Branch, the Issues Management Branch, as well as the Minister's Office. I agree with the Ministry's characterization of the Ministry's Universities Branch, the Issues Management Branch, as well as the Minister's Office, as being a client of the Legal Services Branch.

The Ministry describes the emails, which comprise the records in the first and second categories, as follows:

All emails were either: 1) sent by a LSB (Legal Services Branch) client (Universities Branch, Minister's Office, Issues Management) to colleagues who then sent their concerns/comments to Legal Services Branch (the solicitor) for advice, or having received legal input passed it on to colleagues; or 2) Legal Services Branch director or counsel was responding to the above-mentioned clients and/or other counsel on the issues.

I find that the first category e-mails emails (except Records 3 and 15) are direct communications of a confidential nature between the Ministry's solicitors, or the Ministry's solicitor and their client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. Order PO-1721 finds that the exemption applies not only to solicitor-client communications but also to communications between/among legal counsel. There is no evidence of waiver regarding these e-mails, and I therefore find them exempt under branch 1.

Record 3 is a September 12, 2005, e-mail to the Director of the Universities Branch of the Ministry (who is a lawyer) from the Manager of the Ministry's Universities Branch, regarding a request from the Minister's Office for information regarding the named University Act and Regulations. The Ministry has identified the University Branch, which is both the recipient and the originator of this email, as the client. In my view, this record is not subject to branch 1 solicitor-client communication privilege. Even if I had so found, the privilege in this document has been waived because it was released to the appellant at the request stage, as part of Record 4. I also find that this record is not subject to branch 2 privilege, as it was not prepared by or for Crown counsel for use in giving legal advice. I therefore am ordering the portion of Record 3 which was exempted from disclosure, to be released to the appellant.

Record 15 is a September 13, 2005 e-mail to the Manager of the Universities Branch of the Ministry from the Policy Advisor of the Ministry's Governance and Accountability Unit, Universities Branch, regarding "issue notes requested". This email includes another email message from the Senior Legal Counsel for the Ministry to its Counsel, Legal Services Branch. I find that Record 15 is therefore subject to solicitor client communication privilege, as it represents part of the "continuum of communications" between a solicitor and client.

The emails at Records 22 and 44 (the second category of records) both contain attachments. Record 22's attachment is a draft letter. As a draft, it falls under the principle set out in Order PO-2432, because it represents a confidential communication between a solicitor and his or her client in which legal advice is being sought by the client. The entire text of this draft letter and the covering email in Record 22 has not been released to the appellant. Therefore, I find that the privilege in this Record has not been waived, and it is exempt under branch 1.

The Ministry claims that the attachment to Record 44, a draft briefing note also falls under the principles in Order PO-2432. However, a review of all of the records reveals that this note was released to the appellant at the request stage. Privilege in the attachment has therefore been waived. The attachment is therefore not exempt under section 19. The email itself is subject to solicitor client privilege as it is part of a continuum of communications between the solicitor and the client (the Minister's Office).

Records 33 and 50 (the third category records) are handwritten notes taken by the Senior Legal Counsel for the Ministry of her telephone conversations with a member of the faculty of the University. I find that these records are legal advisor's working papers directly related to seeking, formulating or giving legal advice. There is no evidence that privilege in these records has been waived, and I find that they are exempt under branch 1.

Subject to my discussion of the exercise of the Ministry's discretion, I, therefore, agree with the Ministry that all of the records, except for Record 3, are subject to solicitor-client privilege and are exempt from disclosure.

EXERCISE OF DISCRETION

The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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

- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations of the Ministry

The Ministry submits:

In its original decision-making about the disclosure of records, the Ministry looked at each record to which section 19 applied and, examining the records at issue from the point of view of Branch 1 and Branch 2, determined that section 19 applies to the records at issue because they are solicitor-client privileged and were prepared by or for Crown counsel for use in giving legal advice.

Nevertheless, during the mediation stage of the appeal, the Ministry exercised its discretion to release parts of two records that had previously been withheld under section 19. Furthermore, at the adjudication stage of the appeal, the Ministry again exercised its discretion and released additional records to the appellant.

This demonstrates the Ministry's willingness to disclose records which, although solicitor-client privileged, would not prejudice the solicitor-client relationship. The Ministry submits that it did exercise discretion properly and took all relevant factors into account when determining which records should remain exempt under section 19.

With the release of the records identified in paragraph 33, the appellant now has, in whole or in part, 41 of the 69 records listed in Appendix A (the original index of records). The Ministry submits that it exercised its discretion in good faith and has done its utmost, on reconsideration, to balance public access against a limited and specific exemption by disclosing to the appellant as much as is possible while also protecting the core of the solicitor-client privilege contemplated in section 19 of the Act. ...

Representations of the Appellant

The appellant is concerned about why the Ministry was able to change its exercise of discretion to release documents during the mediation stage of the appeal with only the explanation that the new disclosures would not prejudice the solicitor-client relationship. The appellant is also concerned as to why privilege was claimed for some communications between two parties and not for other communication between the same two parties.

Findings

I find that in denying access to the records, the Ministry exercised its discretion under section 19 in a proper manner, taking into account the relevant factors and not taking into account irrelevant factors.

With respect to the appellant's submission concerning the release of previously privileged-claimed documents, I agree with the findings of Assistant Commissioner Tom Mitchinson in Order PO-2323, where he found:

In addition, the Ministry took certain actions during the course of responding to the request and participating in this appeal that demonstrate that it took into account relevant considerations in deciding how to deal with the various records.

Specifically:

It disclosed a number of records to the appellant that could have been the subject of an exemption claim under section 49(a)/19.

At the inquiry stage, the Ministry reconsidered its position with respect to records it had withheld to that point and provided some of them to the appellant. In so doing, the Ministry stated: "Although it is the Ministry's position that it has a section 19 claim with respect to [the records being disclosed], it is exercising its discretion in consenting to their release".

For all of these reasons, I find that there has been a proper exercise of discretion in this case, and all of the records that remain at issue in this appeal qualify for exemption under section 49(a), in conjunction with section 19 of the *Act*.

I agree with Assistant Commissioner Mitchinson's approach and find it applicable here. In this appeal, the Ministry's disclosure of previously privileged-claimed documents is consistent with the proper exercise of discretion. To the extent that access has been denied to records I have found to be exempt, I find that the Ministry did properly exercise its discretion.

ORDER:

1. I order the Ministry to send the appellant a copy of the undisclosed portion of Record 3 by **November 8, 2006**.
2. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, upon my request.
3. I uphold the Ministry's decision to withhold access to the remaining Records.

Original Signed By: _____

October 4, 2006

Diane Smith
Adjudicator