Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2803

Appeal PA07-373-2

Ministry of Training, Colleges and Universities

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> . . . records created, amended, received or distributed since June 1, 2007 (including electronic mail, paper and electronic documents and voicemail messages) regarding "ancillary fees", "supplemental fees", "incidental fees" and/or "auxiliary fees" charged by publicly funded colleges and/or universities in Ontario, including, but not limited to, those regarding such fees that are called or charged with the purpose of funding information technology, labs, libraries, library services, the mandatory lease of laptop computers, administration and student registration or admission.

During the time period covered by the request, the Ministry was involved in the preparation of a defense to a lawsuit brought on behalf of two students against an Ontario community college challenging the college's ability to charge the type of fees described in the request. During this period, it appeared possible that the Ministry may be joined as a party to the lawsuit.

The Ministry issued a fee estimate in the amount of $505, and a decision under section 27 of the *Act* extending the time for it to make an access decision for an additional 60 days, to December 13, 2007. The requester appealed the time extension decision and the office opened Appeal Number PA07-373. That appeal was resolved on the understanding that the Ministry would issue its decision in response to the request on or before November 23, 2007. As a result, that appeal was closed.

The Ministry issued a decision in which it provided partial access to the records, applying the exemptions in sections 13(1) (advice or recommendations), 18(1) (valuable government information), 19 (solicitor-client privilege), 21(1) (personal privacy) and 22 (information published or otherwise available) of the *Act*. The requester, now the appellant, appealed the decision, and this office opened Appeal PA07-373-2.

During mediation, the appellant removed from the scope of the appeal the records or parts of records exempted under sections 21(1) and 22, and all the records identified by the Ministry as non-responsive, with the exception of Records 2, 54, 58, 61 and 62. The appellant raised the issue of "scope of the request" relating to these five records identified as non-responsive. The Ministry confirmed that it was applying section 12 to Record 44, as noted in its index.

Further mediation was not possible, and this file was moved to the adjudication stage of the process, in which an adjudicator conducts an inquiry under the *Act*. I began the inquiry by sending a Notice of Inquiry setting out background and issues in the appeal to the Ministry and inviting its representations. I received representations from the Ministry in response. The Ministry agreed to disclose additional records and portions of records in its submissions and withdrew its reliance on section 18(1). It also determined that it would no longer pursue the application of section 13(1) to Record 15. I will address the application of section 19 to Record 15 below.

I disclosed the representations of the Ministry to the appellant, with the exception of one sentence on page 6, along with an amended version of the Notice of Inquiry. The appellant also made representations in response to the Notice. The appellant indicated that he accepts that the undisclosed portions of Records 54 and 58 are unrelated to the subject matter of his request and these records are no longer at issue in this appeal, accordingly.

RECORDS:

The records at issue in this appeal and the exemptions claimed for each are outlined in the Index of Records dated November 2007.

DISCUSSION:

RESPONSIVENESS OF RECORDS/SCOPE OF THE APPEAL

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; and
>
> . . . . .
>
> (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).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As a general guiding principle, it is well-established in the jurisprudence of this office that in order to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Ministry takes the position that the undisclosed information contained in Records 2, 60, 61 and 62 is not responsive to the request as the subject matter of this information relates to matters that fall outside the scope of the request, as framed. The appellant takes the position that the

request is broadly framed and encompasses a wide range of subjects, including those outlined in the undisclosed portions of Records 2, 60, 61 and 62.

I have reviewed the contents of Record 2 and conclude that the sole information in it that pertains to the ancillary fees issue which forms the basis for the request has been disclosed to the appellant. The other information in this email pertains to other, unrelated subjects and is not responsive.

Record 60 is a Briefing Book prepared for the Minister outlining a large number of issues of interest to the Ministry. The portion of this document that relates to the issue of ancillary fees has been disclosed to the appellant. Based on my careful review of the record, none of the other information relates to the subject matter of the request.

Records 61 and 62 are two lengthy stakeholder lists prepared by the Ministry which identify individuals, organizations and institutions who have an interest in a multitude of matters involving the Ministry. The appellant has been provided with all of the references contained in these documents which relate to the ancillary fees issue, as well as any other references to the organization which the appellant represents. I have reviewed these documents and conclude that all of the relevant, responsive information contained therein has been disclosed to the appellant. The remaining portions of Records 61 and 62 are not, therefore, responsive to his request.

CABINET RECORDS

The Ministry takes the position that Record 44, entitled Issues Forecast Calendar, is exempt from disclosure under the mandatory exemption in section 12(1); specifically relying on the introductory wording of the section and section 12(1)(d), which reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

The Ministry indicates that this document is included in a binder which is distributed to Cabinet members for each of its meetings. It argues that the disclosure of this document would reveal the substance of the deliberations of Cabinet as it would disclose "the subject of discussion and deliberations by Cabinet." The Ministry goes on to submit that Record 44 "was used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy."

Based on my review of the record, I find that its disclosure would reveal the substance of deliberations of Cabinet, as contemplated by the introductory wording of section 12(1). Based on the Ministry's representations, I am satisfied that Record 44 was placed before Cabinet and

formed part of its deliberations about the subject matter set forth in the document. Accordingly, I find that it is exempt from disclosure under the introductory wording of section 12(1).

ADVICE OR RECOMMENDATIONS

The Ministry claims the application of the discretionary exemption in section 13(1) to Records 12, 13, 14, and the undisclosed portion of Record 18. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* cited above]

The Ministry indicates that "Records 12, 13 and 14 are different drafts of an Issues Management Plan relating to the ancillary fees lawsuit commenced on June 5, 2007 against [a community college] . . .". Portions of these documents were disclosed to the appellant at the inquiry stage of this appeal, specifically the:

- preamble to the 'Ministry Action Plan' in all three records;

- the "Strategy/Tactical Plan" in Record 12;
- the first bullet point under "Strategy/Tactical Plan" in Records 13 and 14; and
- portions of all of the records that describe the lawsuit, the appellant's position on the ancillary fee policy, the context of the ancillary fee policy and the Ministry's review of the policy.

The Ministry states that the remaining portions of Records 12, 13 and 14 "set out the recommended course of action to be accepted or rejected under the headings 'Communications Objective', 'Ministry Action Plan', 'Key Messages' and 'Strategy/Tactical Plan'." The Ministry goes on to indicate that "the 'Communications Objective' is a high level summary of, and is inextricably linked to, the recommended course of action that is more particularly described in the 'Ministry Action Plan', 'Key Messages' and 'Strategy/Tactical Plan'."

With respect to Records 12, 13 and 14, the Ministry submits that:

> The advice or recommendations on 'issues management' or 'communications' matters in this context must be maintained in confidence because the intended outcome of the advice or recommendations is some form of public communication. The Ministry maintains its news releases and other public communications on its public website. Indeed, the news releases from October 2003 to date are still publicly available at: [a specified website]. The Ministry submits that disclosing the advice or recommendations in these records would permit the appellant to use the Ministry's public website to learn whether the advice or recommendations had been accepted or rejected.

The Ministry describes Record 18 as an email chain between staff at the Ministry and others in the Minister's office. It argues that the two sentences that have been withheld "consist of a recommended course of action."

The appellant seeks access to all of the undisclosed information in these records and argues that they do not contain exclusively information that falls within the ambit of the exemption in section 13(1).

I have carefully reviewed the records. I note that the undisclosed portions of Records 12, 13 and 14 consist of four distinct sections, described as "Communications Objective," "Ministry Action Plan," "Key Messages" and "Strategy/Tactical Plan." In each of these segments of the records, specific courses of action are laid out for the recipients of the documents. Records 13 and 14 appear to be earlier drafts of Record 12 and they contain similar, though not identical information.

In my view, the undisclosed information, including the remaining portion of Record 18, seeks to provide advice to the recipients of the Issue Management Plan about how to manage communications with the media and the public on the issue addressed in the document. The records describe a recommended course of action and also advice as to the message to be

communicated, along with the way in which the Ministry's position is to be portrayed. In my view, this information qualifies as "advice or recommendations" within the meaning of the section 13(1) exemption. I further find that none of the information remaining at issue falls within any of the exceptions to the exemption delineated in section 13(2).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims the application of section 19 of the *Act* for Records 4, 5, 6, 15, 20, 30, 31, 32, 35, 41, 42, 43, 47, 49, 50, 52 and 58. Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *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)].

Solicitor-client communication privilege

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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (cited above); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

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, or counsel for an educational institution, "for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

Representations of the parties

The Ministry submits that throughout the period covered by this request, its' staff was in constant touch with its own legal counsel, as well as those employed by the Ministry of the Attorney General, seeking and receiving legal advice. It further argues that legal advice was also sought and received regarding the preparation of briefing notes and other materials relating to the Ministry's involvement in the legal action against the community college. It indicates that draft documents prepared by counsel form part of the solicitor's working papers and are, accordingly, exempt from disclosure under the communication privilege aspect of Branch 1 of section 19.

The appellant disputes the application of section 19 to those records which were "prepared by the public service and/or political staff to brief the new Minister on a programme/policy initiative," particularly referring to the contents of Record 59. The appellant also disputes the application of the exemption to internal communications within the Ministry and to the briefing notes and other advice made to senior Ministry officials and the Minister.

Analysis and Findings

I will review individually each of the records to which section 19 has been applied to determine whether it is properly exempt under either Branch 1 or Branch 2 of the exemption. It must be noted that at the time of the creation of these records by Ministry counsel and its staff, there was a distinct likelihood that the Ministry would become involved in the litigation then underway between the plaintiffs in the action and the community college named in the lawsuit. I specifically find that while the Ministry was not, at that time, involved directly in the litigation as

a party, it was reasonably likely that it would be added at some point as a party to it, particularly as the plaintiffs had given notice of their intent to join the Ministry in the action.

Records 4, 5 and 6

These records represent two email communications and an attached draft letter which passed between two Ministry counsel respecting the Ministry's possible participation in the ancillary fees litigation. I find that these records represent a communication made within the framework of the solicitor-client relationship between counsel and Ministry staff. I further find that they were prepared in the context of the provision of legal advice by Crown counsel. Accordingly, I conclude that these records fall within the solicitor-client communication aspect of Branch 1 of section 19 and are exempt from disclosure on that basis. I further find that the privilege existing in these records has not been lost through waiver *Descôteaux* (cited above).

Record 15

Record 15 is an email chain between the Acting Manager of the Ministry's Colleges Branch Finance Unit and a Ministry lawyer in which legal advice on a legal issue is sought. Clearly, this document qualifies for exemption under the solicitor-client communication aspect of Branch 1. The record is of a confidential nature involving the seeking of legal advice, thereby falling within the ambit of the exemption at section 19. Again, the privilege in this document has not been waived by the Ministry.

Record 20

Record 20 is a series of emails and a draft letter addressed to Ministry legal counsel from a Ministry staff person. The subject matter of these communications closely resembles those in Records 4, 5 and 6 except that they are passing between legal counsel and a staff person, rather than another legal counsel. I find that Record 20 is exempt from disclosure under the solicitor-client communication aspect of Branch 1 of section 19. The document represents a confidential communication between a solicitor and client in which the client seeks counsel's legal advice about a legal issue and the privilege in it has not been lost through waiver.

The undisclosed portion of Record 30

The portion of Record 30 that remains at issue consists of an email communication from one legal counsel to another in which the significance of a recent court decision is evaluated. In my view, this document forms part of a communication made within the framework of the solicitor-client relationship. I also find that it was made in the context of the provision of legal services to the Ministry by Crown counsel. I conclude that the undisclosed portion of Record 30 is exempt under the solicitor-client communication privilege aspect of Branch 1 of section 19 and that the privilege has not been waived.

Records 31 and 32

Records 31 and 32 are email communications passing from Crown counsel to their clients, who are Ministry staff involved in preparing the Ministry's case in the ancillary fees lawsuit. I find that the emails are subject to solicitor-client communication privilege under Branch 1 of section 19 as they represent a confidential communication between a solicitor and client about the provision of legal advice. In addition, I find that the privilege in them has not been waived.

Attached to the emails in both records is a letter written by the solicitor for the plaintiffs in the ancillary fees action to the Ministry of the Attorney General's Crown Law Office – Civil. Clearly no privilege can exist in such a communication and I find that it is not subject to exemption under either branch of section 19. As no other exemptions have been claimed for this part of Records 31 and 32, and no mandatory exemptions apply, I will order that the letter be disclosed to the appellant.

Record 35

Record 35 is a lengthy email chain passing from one Crown counsel to another on the subject of the conduct of the ancillary fees litigation. Again, I find that this record is subject to solicitor-client communication privilege under Branch 1 of section 19 as this record forms part of an ongoing line of communications made in the context of the solicitor-client relationship and involving the provision of legal advice about the Ministry's position in the ancillary fees lawsuit. Again, I conclude that the privilege in this document has not been waived.

Records 41, 42, 43 and 58

The Ministry has disclosed certain email chains in Records 41 and 43 that are attached to a briefing note that forms part of Records 41, 42 and 43. It appears that the email chain accompanying the briefing note in Record 42 was also disclosed. The Ministry argues that this email and the briefing note itself qualify for solicitor-client communication privilege because, as the note was updated and refined, input was sought and received from legal counsel as to its form and content. I note, however, that there is nothing on the face of any of these records to indicate the extent of counsel's involvement in the drafting or updating of the note; nor does it reveal any legal advice or a confidential solicitor-client communication. In my view, the Ministry has not provided sufficient evidence to substantiate a finding that legal counsel had more than a cursory involvement in the drafting of the briefing note which is included in all three of these records and which forms the basis for the accompanying email exchanges. As a result, I find that section 19 has no application to these records. As no other exemptions have been claimed and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

Record 58 is a two-page briefing note entitled "Format for Program/Policy Initiative" which is attached to an 11-page note entitled "Ancillary Fee Policy: Colleges and Universities" dated August 2007. While the Ministry argues that these records were prepared with input from legal counsel, it has not provided me with any specific evidence which would demonstrate where that

input was received or its source. Accordingly, I find that I cannot conclude that these notes qualify for exemption under the solicitor-client privilege exemption in section 19 as they do not reveal legal advice or a confidential solicitor-client communication. Again, because no other exemptions have been claimed and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

Records 47, 49 and 50

These records are email communications and a FAX cover page passing between Ministry counsel and counsel at the Ministry of the Attorney General's Crown Law Office – Civil.

In addition, there are attachments to Records 49 and 50. The attachments to Record 49 consist of a number of documents which the Ministry indicates on the face of the record were "shared with ministry ancillary fee consultation group which included the CFS." I note that the CFS, the Canadian Federation of Students, is the organization represented by the appellant. As a result of this information, I find that section 19 can have no application to these attachments. Because they have been disclosed to the members of the consultation group, including the appellant's organization, any privilege that may have existed in them has been waived. The attachment to Record 50 is a 2004 memorandum from the Acting Assistant Deputy Minister to Ontario's College Presidents outlining the Ministry's Ancillary Fees Policy. I find there is no solicitor-client privilege in this document and it is not, accordingly, exempt under section 19. No other exemptions apply to these documents. Accordingly, I will order that they be disclosed to the appellant.

Insofar as the email communications and FAX cover page are concerned, I find that they represent confidential communications between counsel which fall within the ambit of the continuum of communications relating to the seeking, giving and preparation of legal advice. These records are, accordingly, exempt from disclosure under the solicitor-client privilege aspect of Branch 1 of section 19, and that the privilege in them has not been waived.

Record 52

Record 52 is an email communication from a Ministry staff person to a number of other staff. The text of the message contains a statement referring directly to certain legal advice that had been provided by counsel. I find that this record is, accordingly, exempt from disclosure as it would reveal the actual legal advice provided by counsel to her client. This information qualifies under the solicitor-client communication aspect of Branch 1 of section 19 and that the privilege in them has not been waived.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 4, 5, 6, the undisclosed portions of Records 12, 13 and 14, Records 15 and 20, the undisclosed portions of Records 18 and 30, Records 31 and 32 (but not the attachment thereto), 35, 44, the email

portions of Records 47 and 49 (but not the attachments to Record 49), the FAX cover page at Record 50 (but not the attachments) and Record 52.

2. I order the Ministry to disclose the attachment to Records 31 and 32, the undisclosed portions of Records 41, 42 and 43, the attachments to Records 49 and 50 and the undisclosed portions of Record 58 to the appellant by providing him with a copy by **July 29, 2009.**

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records ordered disclosed.

Original signed by: July 8, 2009
Donald Hale
Adjudicator