



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER PO-2808-I**

**Appeal PA07-187**

**Ministry of Health and Long-Term Care**



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/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

...any documents, opinions or reviews regarding the Cancer Care Ontario [CCO] proposal that recommends patients be allowed to privately pay in hospital to receive IV cancer drugs not funded by the Ontario Health Insurance Plan. The proposal was formally delivered to the province in late July 2006.

The requester advised that while she already had the proposal, she was seeking any comments, reviews, and/or opinions from the government on the matter. The requester is an investigative reporter with the *Globe & Mail* newspaper.

The Ministry initially responded to the request advising that, due to the large volume of records that would have to be searched, it would be extending the time to respond to the request for an additional 30 days, pursuant to section 27 of the *Act*.

The requester (now the appellant) appealed the time extension decision to this office. Shortly after the appeal was received by our office, the Ministry issued an access decision in which it identified 19 responsive records, granting the appellant partial access to one record, complete access to two records and denying access to 16 records in their entirety. The Ministry cited the application of the exemptions in sections 12(1) (Cabinet records) and 19(a) (solicitor-client privilege) of the *Act* to the withheld information. The Ministry included an Index of Records with its decision, which I have reproduced as an Appendix to this order.

The appellant advised this office that she was appealing the Ministry's access decision. The time extension is no longer at issue.

During the mediation stage of the appeal process, the appellant indicated that she believed there existed a public interest in the requested records, and section 23 of the *Act* was added as an issue.

Mediation did not resolve the issues, and the appeal was transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began the inquiry by sending a Notice of Inquiry, setting out the background and the issues in the appeal, to the Ministry, and I received representations in response. I then sent a copy of the Notice to the appellant, along with a copy of the non-confidential portions of the Ministry's representations. Portions of the Ministry's representations were withheld due to confidentiality concerns. The appellant responded with representations, followed by supplementary representations that elaborated further on her position on the application of section 12.

I then forwarded both sets of the appellant's representations to the Ministry and invited it to comment on them by way of reply. The Ministry responded with reply representations.

Finally, I forwarded the Ministry's reply representations to the appellant and invited the appellant to respond to the Ministry's reply representations. The appellant delivered sur-reply representations.

## **SCOPE OF THIS INTERIM ORDER:**

In this interim order, I will only address the application of the section 12 and 19 exemptions. I will not deal with the application of the section 23 public interest override in this interim order for the reasons set out below.

Related judicial review litigation is likely to provide guidance on the section 23 issue that could have a bearing on the outcome of this appeal, and that aspect of the appeal will therefore be the subject of a later order or orders. This judicial review litigation relates to whether the guarantee of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms* requires that sections 14 and 19 be “read in” as exemptions that can be overridden under the “public interest override” found in section 23 of the *Act (Criminal Lawyers’ Association v. Ontario (Ministry of Public Safety and Security))*, (2007), 86 O.R. (3d) 259 (C.A.) (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)).

The Supreme Court of Canada heard argument in this judicial review on December 11, 2008, and its judgment remains under reserve. I will invite representations on the impact of that judgment once it has been issued.

Accordingly, in this interim order, I will not render a decision concerning the application of the public interest override to any records that I address under section 19.

## **RECORDS:**

There are 17 records at issue, as set out in the Index of Records, which I have appended to this order.

## **DISCUSSION:**

### **CABINET RECORDS**

The Ministry has relied on the introductory wording of section 12(1), as well as the exemptions in sections 12(1)(b) and (c) to deny access to most of the records at issue. These sections read:

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,

- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does

contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

Previous decisions of this office have established that the use of the word “including” in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [See Orders P-361, P-604, P-901, P-1678, PO-1725].

Section 12(2) provides two exceptions to the application of the exemption in section 12(1). Section 12(2) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

## **Representations**

### ***Ministry's representations***

The Ministry takes the position in its representations that the information at issue in Records 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 18 is exempt under the introductory wording of section 12(1), as disclosure would “reveal the substance of deliberations of Cabinet.” The Ministry also raises the application of section 12(1)(b) to deny access to the information at issue in these records. I note that in its Index of Records, the Ministry also relies on section 12(1)(c) to deny access to the information at issue in Record 1; however, the Ministry has not provided any representations on the application of this exemption.

The Ministry submits that Records 1, 13, 14, 15 and 16 refer to “the topic and substance of a Cabinet submission, and to the scheduling of this matter.” The subject matter of the contemplated Cabinet submission is described in the subject line of each record, all of which are emails. The Ministry states further that “[a]lthough this matter has not yet proceeded to Cabinet

or a Cabinet Committee, [...] the disclosure of these records could nevertheless permit the drawing of accurate inferences as to future Cabinet deliberations.”

The Ministry submits that Record 1 “refers to the specific content of Cabinet committee submissions that were being prepared at the time that Record 1 was created, including a reference to a specific request for Cabinet approval that was to be contained in one submission.” The Ministry states that Records 15 and 16 also “refer to the substantive content of the policy recommendation that was to be contained in this submission.” The Ministry also submits that Records 13 and 14 discuss the “timing for bringing this submission before Cabinet” and that disclosure of these records could permit the drawing of accurate inferences about the substance of Cabinet and Cabinet committee deliberations on the matters referred to in them. The Ministry argues that together with the substantive details contained in Record 1 and Records 5, 6, 7, 8, 9, 10 and 12, the disclosure of Records 1, 13, 14, 15 and 16 would “indicate the manner in which the issue referred to in those records could be brought before Cabinet, and the substance of the issues that would be presented to Cabinet.”

With regard to Records 5, 6, 7, 8, 9, 10 and 12, the Ministry states that these are emails that contain requests for legal advice in support of the proposed Cabinet submissions referred to in Records 1, 13, 14, 15 and 16. The Ministry describes Record 5 as an email chain that “culminates in an email from a Premier’s Office policy advisor, which provides direction on the content of a proposed future Cabinet submission.” The Ministry submits that given the “special role that Premier’s Office staff play in setting Cabinet priorities and their proximity to the Premier in his ‘pre-eminent deliberative role within Cabinet’, the disclosure of Record 5 would permit the drawing of accurate inferences about the deliberations of Cabinet [PO-2175].” The Ministry argues that Records 8, 9, 10 and 12 also contain “extensive legal opinions which were provided to Minister’s office staff.” The Ministry states that the contents of these records are related to the legal opinion in the briefing note excerpt that is contained in Record 5, which was provided to a Premier’s Office policy advisor for the purpose of receiving direction on the preparation of a Cabinet submission. The Ministry submits that these legal opinions are consistent with the legal advice that is contained in Record 18, a draft version of a record that was provided to Cabinet. The Ministry submits that disclosure of these records would “permit the drawing of accurate inferences about the deliberations of Cabinet and Cabinet committees on the matters referred to in the records.”

The Ministry has also claimed the application of section 12(1) to Record 18. It describes Record 18 as a “draft presentation report that was prepared for presentation to Cabinet.” The Ministry states that Record 18 contains policy options, one of which is recommended for Cabinet’s approval.” The Ministry submits that Record 18 is exempt pursuant to both the introductory wording in section 12(1) and the wording in section 12(1)(b).

Regarding the possible application of the exception in section 12(2), relating to the Ministry asking for Cabinet’s consent to disclose the records, it submits that it did not seek Cabinet approval because it determined that it would not be appropriate for the following reasons:

- the information in the records is recent and sensitive
- the records in some instances refer to or contain policy options that were put before Cabinet
- the information was prepared with an expectation of confidentiality
- the issues addressed in the records may be considered by Cabinet in the future, and similar advice, options and recommendations may be provided to Cabinet at that time

### *Appellant's representations*

The appellant draws several conclusions from the Ministry's representations, including:

- Many (if not all) of the records at issue have yet to be placed before Cabinet.
- Some of the records (for example, Record 13 and 14) relate to the scheduling of the discussions, and not the substance of the deliberations within the meaning of section 12(1).
- Portions of the records relate to "the manner in which the issue referred to in those records could be brought before Cabinet", and not the substance.
- Some of the records contain background information directed to the Premier's Office policy advisor for the purpose of receiving direction on the preparation of a Cabinet submission, and not information that is to be directly presented to Cabinet (for example, Record 18 is a draft presentation, not the actual presentation to be put before Cabinet, and Records 2 and 3 contain "directions for the preparation of a Cabinet submission" as opposed to material that was considered by or will be considered by Cabinet).

The appellant also submits that the records being sought pre-date the October 10, 2007 provincial election. Accordingly, the appellant argues that these records should not be considered for section 12 protection because they were never presented to the Cabinet for which they were allegedly intended since that Cabinet was disbanded as a result of the election.

### *Reply representations*

In response to the appellant's assertion that many of the records have yet to be placed before Cabinet, the Ministry refers to Order PO-2320, in which former Assistant Commissioner Tom Mitchinson states as follows:

A record that has never been placed before Cabinet or its committees could qualify for exemption under the introductory wording of section 12(1) where

disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry position is that while some of the records at issue have not been presented to Cabinet, disclosure of the content of these records would reveal the substance of deliberations of Cabinet or its committees or permit the drawing of accurate inferences with respect to these deliberations.

In response to the appellant's assertion that some of the records emanate from the Premier's Office and some contain "direction for the preparation of a Cabinet submission" but not material that was actually considered by Cabinet, the Ministry submits that "even if the information is not formally identified as a Cabinet submission, if it is obvious from the contents, and the surrounding circumstances, that the document formed the substance of Cabinet deliberations, the record is exempt from disclosure under section 12(1) [...] [IPC Order PO-2467]."

In response to the appellant's submission that Record 18 does not qualify for exemption because it is a draft presentation, the Ministry submits that the presentation was drafted with the "intention that it be deliberated by Cabinet" and, accordingly, section 12(1) applies to it.

The appellant submits that the Ministry's reply "does little in the way of making definitive statements as to whether or not the information in the records ever formed part of the Cabinet deliberations, much less whether these documents were ever put before Cabinet at all in the first place."

With regard to the Ministry's reliance on Order PO-2030, the appellant points out that former Assistant Commissioner Mitchinson chose to use the word "could" when addressing the possible application of the introductory wording of section 12(1) to records that have not been placed before Cabinet. The appellant interprets this to mean that there is discretion in the hands of this office to apply or not apply the exemption depending on the circumstances of each case.

In addition, the appellant submits that the Ministry has still not provided any compelling evidence that the records in question were submitted to Cabinet for deliberation or reveal actual Cabinet deliberations.

Following my review of the parties' representations, I remained unclear about which records had been submitted to Cabinet and which had not. Accordingly, I sought clarification from the Ministry regarding this issue. I was advised that the Cabinet submission referred to in Records 2, 3 and 18 was, in fact, presented to Cabinet on August 10, 2006, the date referenced in each of these records.

## **Analysis and findings**

The Ministry has claimed that the introductory wording of section 12(1) applies to Records 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 18. The Ministry has also raised the application of section 12(1)(b) to all of these records and section 12(1)(c) to Record 1, although it has not provided any representations on the application of the section 12(1)(c) exemption.

As noted above, if disclosing a record that has never been placed before Cabinet or its committees would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld under the introductory wording of section 12(1) [Orders P-226, P-293, P-331, P-361 and PO-2320].

On my careful review of the parties' representations and the records at issue, I am satisfied that portions of these records are exempt under section 12 for the reasons set out below.

In my view, the information in the records falls into the following four categories:

- information that was presented to Cabinet and deliberated at a Cabinet meeting on August 10, 2006 (Category 1)
- information that contains substantive analysis of various issues and concerns regarding a proposed submission to Cabinet (Category 2)
- information that contains policy options or recommendations that was prepared for submission to Cabinet (Category 3)
- information that would not reveal the substance of deliberations of Cabinet and contains administrative information or simply reports on the submission process in the most general terms (Category 4)

### ***Category 1 – Records 2 and 3***

The contents of Records 2 and 3 are essentially identical. These records capture an email exchange between several senior Ministry staff that addresses critical high level substantive and strategic issues relating to a Cabinet submission that was scheduled for presentation on August 10, 2006. Having received confirmation from the Ministry that a meeting of Cabinet took place on August 10, 2006, I am satisfied that portions of Records 2 and 3 contain substantive information that was both vital to the preparation of the Cabinet submission and considered during the Cabinet deliberation process. Accordingly, I am satisfied that disclosure of these portions of the records would reveal the substance of deliberations of Cabinet or its committees or permit the drawing of accurate inferences with respect to these deliberations within the meaning of the introductory wording of section 12(1). That said, due to apparent inadvertence, I note that key portions of this information have already been disclosed by the Ministry to the



appellant. In particular, while the Ministry has severed portions of Record 3, at pages 1 - 4, the identical information in Record 2 (also at pages 1 - 4) was disclosed to the appellant. Accordingly, while I find this information qualifies for exemption under the introductory wording of section 12(1), under the present circumstances, due to the Ministry's inadvertent actions, such a finding would be inconsistent with the earlier disclosure. Accordingly, I will order the Ministry to disclose those portions of pages 1 - 4 of Record 3 to the appellant.

There are two other portions of these records (at pages 5 and 6 of Records 2 and 3) that, in my view, contain substantive and strategic information that, if disclosed, would reveal the actual substance of deliberations of Cabinet at the August 10, 2006 meeting, or permit the drawing of accurate inferences with respect to those deliberations. Accordingly, I find this information exempt under the introductory wording of section 12(1).

I find that the remaining information in Records 2 and 3 falls into Category 4 and, therefore, is not exempt under section 12. This remaining information is best described as general administrative information exchanged between Ministry staff. The Ministry has failed to establish a linkage between the contents of this information and the actual substance of the deliberations of Cabinet at its August 10, 2006 meeting. Accordingly, I find that the introductory wording in section 12(1) does not apply to it. The Ministry has also claimed the application of section 12(1)(b) to the information at issue in Records 2 and 3. Again, due to the general administrative nature of this remaining information, I am satisfied that it does not contain policy options or recommendations submitted, or prepared for submission, to Cabinet, within the meaning of section 12(1)(b). The Ministry has not claimed the application of any other provisions of section 12(1) to this information and, on my review, I am satisfied that no other provisions apply to exempt this information from disclosure. Accordingly, I will order the Ministry to disclose this information in Records 2 and 3 to the appellant.

### ***Category 2 – Records 1, 4, 5, 6, 7, 15 and 16***

Record 1 is an email exchange between Ministry staff regarding a submission scheduled for a particular date before the Health Systems Social Policy Committee (HSSP), which at that time was a Cabinet Committee. During the course of the inquiry the Ministry advised that the HSSP Committee no longer exists. I am satisfied that a portion of this record (enumerated points 2 and 4 on pages 1 and 2) contains substantive information regarding issues that would be presented to Cabinet for deliberation, including a reference to a specific request for Cabinet approval that was to be contained in a submission. I find this information exempt pursuant to the introductory wording in section 12(1).

The Ministry has acknowledged that while the matter discussed in Record 1 has not yet proceeded to Cabinet or a Cabinet Committee, the disclosure of this information could permit the drawing of accurate inferences regarding future Cabinet deliberations. The appellant has argued that due to the passage of time and a change of government in October 2007 brought on by a provincial election, this information should not be considered for section 12 protection because it

has never been presented to Cabinet and, in particular, was never presented to the Cabinet for which it was allegedly intended, since that Cabinet was disbanded as a result of the election.

While I acknowledge the appellant's concerns, in my view, the fact that this information has not been presented to Cabinet is not fatal. There is no temporal limitation provided for in the introductory wording of section 12(1) and the exemption is not limited in scope to the life of a particular Cabinet. In addition, the information at issue in Record 1 is substantively linked to the information that I have found exempt in Records 2 and 3. It addresses the same issues and similar subject matter. Under these circumstances, to find the information in Records 2 and 3 exempt while holding that the information in Record 1 is not would result in an inconsistent treatment of similar information. I am satisfied that disclosure of the information at issue in Record 1 would reveal the substance of deliberations of Cabinet or its committees. Accordingly, I find this information exempt under the introductory wording of section 12(1).

However, I also find that portions of Record 1 fall into Category 4 and, therefore, should be disclosed to the appellant. This information includes the subject heading of the email exchange (Cancer Drugs in Hospitals submission), the proposed date the Ministry submission was scheduled to be presented to the Cabinet Committee and the logistical details regarding the presentation of the submission document. In my view, the subject heading of the email exchange is known to the appellant, as evidenced by the wording of her request and the Ministry's reliance on the section 12 exemption. The remaining information is administrative in nature or simply reports on the submission process in the most general terms. In my view, none of this information reveals anything of substance regarding Cabinet deliberations. I am satisfied that this remaining information is neither exempt under the introductory wording of section 12(1) nor under any other provisions of section 12(1). Accordingly, I will order the Ministry to disclose those portions of record 1 to the appellant.

Records 4, 5, 6 and 7 should be viewed together as they constitute an email exchange between Ministry staff and staff at the Premier's Office regarding issues pertaining to an anticipated submission to Cabinet. The substance of the exchange pertains to the need to reconcile a legal opinion obtained from CCO with the views of Ministry's legal counsel before presenting a submission to Cabinet on a particular date. I note that the Ministry has not claimed the application of section 12 to Record 4. However, the substance of this record is identical to that in Records 5, 6 and 7 and since section 12 is a mandatory exemption, I am required to consider its application to Record 4 to ensure consistency in my analysis.

There is no evidence that the substantive contents of the email exchange in Records 4, 5, 6 and 7 formed part of a Cabinet submission or was considered as part of a Cabinet deliberation. However, on my review, it is clear that the email exchange, taken as a whole, contains information that would be considered by Cabinet during the course of deliberations. Accordingly, for the same reasons I found portions of Record 1 exempt under the introductory wording of section 12(1), I find the contents of Records 4, 5, 6 and 7 exempt pursuant to the introductory wording in section 12(1).

Records 15 and 16 should also be viewed together as they represent an email exchange between Ministry staff regarding issues pertaining to an anticipated submission to Cabinet. Accordingly, for the same reasons I found portions of Record 1 exempt under the introductory wording of section 12(1), I find that significant portions of these records contain information that would form part of the Ministry's submission and, in turn, would reveal the substance of Cabinet deliberations. Accordingly, I find this information exempt pursuant to the introductory wording in section 12(1).

However, I find that portions of Records 15 and 16 also fall into Category 4, to the extent that they provide information that is either known to the appellant or represents general information of an administrative nature. This information includes the subject matter of the email exchange (CCO report on uninsured cancer drugs), which in light of the appellant's access to information request would be known to her, and does not on its own reveal anything of substance about the Ministry's proposed submission or the deliberative process before Cabinet. The remaining information is strictly administrative in nature and deals with the efforts of Ministry staff to acquire a copy of the CCO report. In my view, none of this information reveals anything of substance regarding Cabinet deliberations. I am satisfied that this remaining information is neither exempt under the introductory wording of section 12(1) nor under any other provisions of section 12(1) and it should be disclosed to the appellant. Accordingly, I will order the Ministry to disclose those portions of Records 15 and 16 to the appellant.

### ***Category 3 – Record 18***

Record 18 has been properly described as a draft presentation that was prepared for the August 10, 2006 Cabinet submission. While I acknowledge the appellant's view that there is no evidence that this draft comprises the actual presentation put before Cabinet, in my view, the draft label affixed to this record is irrelevant. The record sets out "recommendations" that were "prepared for submission" to Cabinet within the meaning of section 12(1)(b) and is, therefore, exempt from disclosure under that section.

### ***Category 4 – Records 1, 2, 3, 13, 14, 15 and 16***

I have addressed my findings regarding Records 1, 2, 3, 15 and 16 above.

With regard to Records 13 and 14, these records comprise an email exchange between Ministry staff regarding the proposed scheduling of a Cabinet submission. This appears to be the same submission that is discussed in Records 1, 4, 5, 6, 15 and 16. The information contained in these records is strictly administrative in nature, simply establishing that there was a plan to present a submission to a Cabinet committee in early 2007. The contents of these records do not reveal anything of significance regarding the substance of the submission or the nature of any deliberations before Cabinet, should they take place sometime in the future. Accordingly, I am satisfied that the information in Records 13 and 14 is neither exempt under the introductory wording of section 12(1) nor under any other provisions of section 12(1), and I will order the Ministry to disclose them in their entirety to the appellant.

Dealing briefly with the application of the exceptions in section 12(2), it is clear that section 12(2)(a) does not apply, owing to the age of the records, and I am satisfied that Cabinet has not consented to the disclosure of the records pursuant to section 12(2)(b).

## **SOLICITOR-CLIENT PRIVILEGE**

The Ministry has claimed the application of section 19 to Records 8, 9, 10, 12 and 19.

### **Section 19**

The discretionary exemption in section 19 contains two branches: common law privileges (branch 1) and statutory privileges (branch 2). The institution must establish that one or the other (or both) branches apply.

In this case, the Ministry is relying on the common law privilege in branch 1 that is found in section 19(a) to deny access to the information in Records 8, 9, 10, 12 and 19.

Section 19(a) states as follows:

A head may refuse to disclose a record,  
that is subject to solicitor-client privilege;

### ***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. (4<sup>th</sup>) 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.)].

## **Representations**

It is clear from the Ministry’s representations that it is relying on the common law solicitor-client communication privilege in branch 1 of section 19(a). The Ministry claims the application of this exemption to Records 8, 9, 10, 12 and 19.

The Ministry submits that Records 8, 9, 10 and 12 are emails that “contain requests for legal advice” that was being sought in support of the Cabinet submissions referred to in Records 1, 13, 14, 15 and 16. The Ministry states that the records comprise “emails between Ministry legal counsel and a Minister’s office staffer.” The Ministry submits that these records “reproduce the contents of Records 4, 5, 6 and 7, and also contain further detailed legal opinions.” The Ministry states that the opinions are authored by Ministry counsel, and are clearly identified as legal opinions and marked as being subject to solicitor-client privilege.

The Ministry describes Record 19 as a legal opinion that was prepared by two identified Ministry lawyers. The Ministry submits that the record is clearly identified as a “legal opinion that is subject to solicitor-client privilege and that was prepared at the request of the Minister’s Office” for the purpose of “giving legal advice to Ministry officials.” The Ministry states that the contents of this record are reproduced in Record 8.

The Ministry states that it has not waived privilege in any of the records to which it is claiming the section 19 exemption.

The appellant submits that it is extremely difficult to comment on the Ministry’s submissions without the ability to view the records at issue. The appellant does, however, offer a number of comments regarding the Ministry’s submissions, and has asked that

- I carefully review each record to ensure that all of the elements of privilege are in place for each record

- I sever only those portions of the records that contain a legal opinion
- the Ministry be required to identify each person with whom the legal opinions were shared with an explanation as to why the sharing of that information with each person does not amount to a waiver of the privilege

The appellant also asks that I be mindful of the following principles, as set out in previous orders, when analyzing the application of the section 19 exemption to the records at issue:

- examine the nature of the advice given to determine whether it is truly legal advice [Order P-1014]
- advice is not privileged just because it has been reviewed by a lawyer [Order P-1038]

In reply, the Ministry submits that it is not possible to sever the records at issue because disclosure of any of the information in these records would reveal confidential solicitor-client communications. Regarding waiver, the Ministry states that the legal opinions have only been shared with various people within the Ministry and that this does not amount to a waiver of privilege because of the “commonality of interest” shared by these Ministry employees.

In sur-reply, the appellant challenges the Ministry’s position on sharing, suggesting that any sharing of the records with individuals *outside* the Ministry could amount to a waiver and suggests that Ministry has not provided evidence on why there should be a finding of commonality of interest in situations where the records were shared between Ministry staff and individuals with other ministries.

### **Analysis and findings**

I have carefully examined the contents of Records 8, 9, 10, 12 and 19 and I am satisfied that they comprise solicitor-client communications that are privileged under the branch 1 exemption in section 19(a).

I find that Records 8, 9, 10 and 12 comprise part of a continuum of communications between Ministry counsel and Ministry staff regarding the substantive subject matter of proposed Cabinet submissions. Each of these records contains a legal opinion prepared by Ministry counsel for Ministry staff. There is no evidence on the face of the records that they have been shared with anyone outside the Ministry. Accordingly, I find that there is no evidence of waiver.

I am also satisfied that Record 19 is a legal opinion prepared by Ministry counsel for consideration by Ministry staff. Again, there is no evidence that this record has been shared with anyone outside the Ministry and, therefore, I am satisfied that there has been no waiver.

Accordingly, I find the information contained in these records exempt under section 19(a).

### **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 43(2)].

### **Representations**

The Ministry states that it properly exercised its discretion under section 19 and that in deciding to withhold access to the relevant records under this section it did so in good faith, taking only relevant factors into account.

In denying access, the Ministry submits that it took several factors into account, including

- the confidential nature of the legal opinions prepared
- the information in the records is very recent, addresses common and recurring legal issues faced by the Ministry and despite the passage of time remain current
- the use of the opinions, in some instances, to provide advice to Cabinet on a sensitive issue
- the records do not contain personal information relating to the appellant

The appellant challenges the Ministry's exercise of discretion on several fronts, stating among other things that

- the Ministry has never even taken the step of consulting with Cabinet and while she acknowledges that this is not mandatory, given the significance of the issues in question, she is surprised that little regard was given to the submission process
- there is significant public interest in the issues documented in the records
- prolonging the lives of cancer patients represents a “sympathetic or compelling need”
- since the appellant is a reporter with a national newspaper, she is in a position to publish the information in question so that it is available to all Ontarians who may then be in a better position to make their views known on cancer drug funding and related issues
- the information in the records is no longer very recent

### **Analysis and findings**

I am satisfied that the Ministry has exercised its discretion in these circumstances within proper parameters, having taken into account relevant factors. I acknowledge that the appellant has raised some compelling reasons for suggesting that the Ministry has not, in this case, properly exercised its discretion. However, I find that the Ministry has adequately weighed the non-disclosure of solicitor-client privileged records against the interests of disclosure in the context of a highly sensitive matter and, having done so, I will not substitute my discretion for that of the Ministry.

### **ORDER:**

1. I order the Ministry to disclose Records 13 and 14 to the appellant in their entirety by **September 1, 2009**.
2. I order the Ministry to disclose Records 1, 2, 3, 15 and 16 in part by **September 1 2009**, in accordance with the highlighted version of the records included with the copy of this order. For the sake of clarity, I have highlighted the portions of the records that are **not** to be disclosed.
3. I uphold the Ministry’s application of the section 19(a) exemption to records 8, 9, 10, 12 and 19.



4. In order to verify compliance, I order the Ministry to provide me with copies of the records as ordered disclosed in Provisions 1 and 2 of this order.

Original signed by: \_\_\_\_\_

July 30, 2009 \_\_\_\_\_

Bernard Morrow

Adjudicator

**APPENDIX**

<b>Record #</b>	<b>Description</b>	<b>Severed or Withheld in Full</b>	<b>Exemptions Claimed or Exemptions that Could Apply</b>
1	Email from Minister's Office re: information gathering (2 pages)	Withheld in full	12(1), 12(1)(c)
2	Email from Deputy's Office re: information gathering (6 pages)	Severed	12(1), 12(1)(b)
3	Email from Minister's Office re: information gathering (6 pages)	Withheld in full	12(1), 12(1)(b)
4	Email from Minister's Office re: Ministry Advice (1 page)	Withheld in full	12(1), 12(1)(b), 19(a)
5	Email from Minister's Office (1 page)	Withheld in full	12(1), 12(1)(b)
6	Email from Minister's Office (2 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
7	Email from Ministry re: Cancer Care Ontario legal opinion (2 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
8	Email from Minister's Office re: Ministry advice (6 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
9	Email from Minister's Office re: legal advice (8 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
10	Email from Ministry re: legal advice (6 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
12	Email from Ministry re: legal advice (6 pages)	Withheld in full	12(1), 12(1)(b), 19(a)
13	Email from Minister's Office re: information gathering (1 page)	Withheld in full	12(1)

14	Email from Minister's Office re: information gathering (1 page)	Withheld in full	12(1)
15	Email from Minister's Office re: information gathering (3 pages)	Withheld in full	12(1)
16	Email from Ministry re: information gathering (2 pages)	Withheld in full	12(1)
18	Presentation re: Report of Working Group (19 pages)	Withheld in full	12(1), 12(1)(b)
19	Document re: legal advice (3 pages)	Withheld in full	19(a)