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

ORDER PO-2929

Appeal PA07-47-3

Ministry of Education

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NATURE OF THE APPEAL:

This appeal is the third appeal arising from a request by the appellants to the Ministry of Education (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellants, a husband and wife, made a request on January 10, 2007 for access to records relating to meetings, teleconferences, letters and emails that pertain to any member of the appellants' family or Intensive Support Amount (ISA) funding for the period November 2005 to June 2006.

The Ministry initially responded to the request by stating that no responsive records exist in the custody of the Ministry. The appellants appealed this decision and appeal PA07-47 was opened to address the issue of whether the Ministry had conducted a reasonable search for records responsive to the request.

The Ministry subsequently issued a revised decision letter in which it advised the appellants that it had conducted a further search and had located responsive records. The Ministry's decision identified that access was granted in full to some of the records, and partial access was granted to other records. Access to the withheld portions of the records was denied on the basis of the exemptions in sections 13(1) (advice to government) and 21(1) (personal privacy).

The appellants also appealed the Ministry's revised decision, and appeal PA07-47-2 was opened. In addition, the appellants maintained their position that additional responsive records ought to exist, and the original appeal (PA07-47) also remained open.

Mediation did not resolve the appeals, and the issues arising in both of those appeals were addressed by Adjudicator Jennifer James in Interim Order PO-2717-I. In that order, Adjudicator James made a number of findings, one of which resulted in Order Provision 3, where Adjudicator James ordered the Ministry to conduct an additional search of physical and electronic records in the Minister's office for the time period requested.

Upon receipt of the interim order, the Ministry conducted a further search as required by Order Provision 3. As a result of this search, additional records were located. The Ministry then provided Adjudicator James with evidence in support of its position that the additional search was reasonable, and Adjudicator James addressed that issue in Final Order PO-2754-F.

Furthermore, with respect to the additional records that were located, the Ministry issued an additional decision letter to the appellants, which read, in part:

> Upon receipt of Interim Order PO-2717-I, [a further search was conducted] for responsive records in the Minister's office. As a result of this search, 4 additional records were located…. One record has been severed under section 19 (solicitor-client privilege).

The Ministry attached an index to the decision letter, which identified the record that was not being released in full, and also indicated that portions of the record were not responsive to the request.

The appellants then appealed this additional decision to this office, and the current appeal (PA07-47-3) was opened. The appellants appealed the decision on the basis that the portions of the record withheld by the Ministry should be disclosed. In addition, in their letter of appeal, the appellants raised a number of other issues.

During the mediation process, the Ministry confirmed that it was relying on the exemption in section 49(a) in conjunction with section 19 to withhold portions of the record, as the record contained the personal information of the appellants.

Also during mediation, the appellants confirmed their position that the following four issues remain to be determined in this appeal:

1) The appellants advised that they continue to seek access to the portions of the record withheld under section 49(a), in conjunction with section 19 of the *Act*.

2) The appellants advised that they continue to seek access to the portions of the record withheld as non-responsive.

3) The appellants advised that they wish to add the issue of reasonable search to the issues on appeal.

4) The appellants advised that there is a constitutional/human rights issue that should be added to the issues on appeal.

Mediation did not resolve the issues, and this file was transferred to the inquiry stage of the process.

On my review of the correspondence in this file, I noted that the appellants referred to the possible public interest in the disclosure of the records at issue in this appeal. As a result, I added the possible application of the public interest override in section 23 to the issues being addressed in this appeal.

I sent a Notice of Inquiry to the Ministry, initially, and invited it to provide representations on a number of issues. The Ministry was asked to provide representations on the possible application of the exemptions in sections 19 and 49(a) to the withheld portions of the record; on the issue of the Ministry's exercise of discretion to apply these exemptions; and on the issue of the responsiveness of portions of the record. I did not invite the Ministry to address the other issues raised in this appeal at that time. I also noted that, while the current file was being processed, Adjudicator James issued Final Order PO-2754-F, referred to above.

The Ministry provided representations in response to the Notice of Inquiry. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellants, and invited them to address the issues on which the Ministry provided representations, as well as the additional issues which they raised in the course of this appeal.

In response to the Notice of Inquiry, the appellants wrote to this office and identified that they had another appeal with this office, and that they wished to make joint submissions in these two files. This other file (PA09-240-2) was also assigned to me, and I sent the appellants a letter in which I indicated that this current file would be placed "on hold" until I was in a position to seek representations from them in Appeal PA09-240-2.

I subsequently sent a Notice of Inquiry to the appellants in Appeal PA09-240-2, and also re-activated the current appeal. The appellants provided representations in response.

The appellants' representations raise two preliminary issues which they argue apply to both of their appeals. They also provided separate representations in the two files. Because of the distinct nature of the issues raised in these two files, I have decided to issue two separate, companion orders addressing the issues raised in these two appeals.

RECORD:

The record at issue in the current appeal is identified as Record 3, and consists of the severed portions of 10 pages of email correspondence between Ministry staff.

DISCUSSION:

PRELIMINARY ISSUES

The appellants have raised a number of issues in this appeal, which I will address as preliminary issues in this order.

Preliminary Issue 1: Consideration of the "totality" of the appellants' involvement with institutions and Freedom of Information processes

The appellants request that:

> … the totality of the picture arising from our [Freedom of Information (FOI)] requests be considered, extending back to early 2004 in requests to the [Toronto District School Board (TDSB)] and Ministry, and forward to include, apart from the current appeals, the appeals and orders disposing of the [Ontario Provincial Police (OPP)] records in the custody of [the Ministry of Community Safety and Correctional Services (the MCSCS)], the Privacy Investigation into why the [OPP] handed over our FOI request and the responsive documents to a Ministry of Education lawyer.

The appellants then provide a review of the issues that have been addressed in a series of FOI requests and appeals dating back to 2004. This review includes details about the reasons why a number of the requests were made, the results of the requests and the information that was released. They also state that their involvement in the FOI processes has resulted in positive, significant changes in a number of areas.

The appellants then state that their FOI requests to the TDSB and the Ministry, made between 2004 and 2009,

> … were aimed at throwing light on what had happened in the case of our son …, to establish how it had happened, to shine some light on the institutions which should have put right the educational records not only of our son, but of thousands of other children who had been 'diagnosed' with non-existent 'disabilities', for thousands of dollars per head.

The appellants then state that those requests have been met at the TDSB and Ministry level with "evasions, significant delays, artfully phrased answers, claims of 'confidentiality of advice among public servants' and solicitor client privilege, and misdirected searches." They also state that this office has accepted Ministry and TDSB representations on their searches at face value, and rejected arguments from the appellants for disclosure, particularly on the grounds of compelling public interest, at almost every turn. They refer specifically to one order (Order PO-2640) which they believe went further, and brought into question their motives, purposes and character.

The appellants also make a number of statements regarding their motives for pursuing the information, which can be summarized as follows:

- their motives (at least since late 2005) are essentially without self interest, as their sons have not been in the provincial school system since that time, and "the damage done … by ISA 'diagnosis for dollars' has been neutralized and repaired";
- they hold no personal animus against any of the individuals involved in these matters;
- there is no financial or other material gain in pursuing this information;
- their persistence has been in the interest of the other victims of the ISA processes;
- their attempts to obtain explanations and accountability do have a personal aspect: proper resolution of this issue would make it very much easier to live where they are living;
- any citizen who sees a public interest will require some private impetus to make the effort to establish the facts and the responsibility in situations like these - this does not make their interest in these requests "private" (as PO-2640 decided).

The appellants also state that many of the people involved in inventing and implementing the ISA "scheme" between 1997 and 1998, and expanding it in 2000-2004 (both at the Ministry and the TDSB level), were also involved in responding to the appellant's initial concerns about their son's case, in responding to the FOI requests, and in deciding where to search and what to disclose in those requests. They also state that one individual falsely accused the appellants of assault; that many people were involved in having a Trespass Notice issued against the appellants; and that one individual required the OPP to turn over the appellants' FOI request with the responsive police records to the Ministry (which was the subject of a privacy complaint addressed by this office). The appellants then state:

> With that the case - and this is the bigger picture we ask the IPC to bear in mind - the job of the IPC to work as an effective and independent check on departmental and governmental self-interest is absolutely vital. Deliberations about issuing a

> Trespass Order are a matter of compelling public interest, not narrow private interest, when the identity of the accuser, of the Deputy Minister who issued the Order, and the background of issues and contact is taken [into] account together. We ask the IPC to take account of these arguments for full disclosure of all documents on [the] grounds of [a] compelling public interest, in this appeal and in earlier ones.

Analysis and Findings

The appellants have provided a detailed review of a number of the matters they have been involved with in the past, including previous FOI requests, appeals, and privacy matters with this office, the Ministry, the TDSB and/or MCSCS. They have also reviewed their motives and reasons for their continued involvement with these requests and appeals, and questioned the actions of numerous individuals at the Ministry, the TDSB and MCSCS. Furthermore, they have asked that I take all of these issues into account in reviewing the issues raised in this file which, in fact, only relate specifically to issues regarding access to the withheld portions of 10 pages of emails.

The appellants also refer specifically to a privacy report and previous orders issued by this office, and ask that all of these matters be reviewed in light of the additional information provided in this and the companion appeal. Particularly, in this appeal, the appellants raise a number of issues regarding the findings in Interim Order PO-2717-I and Final Order PO-2754-F, and, to a lesser extent in this appeal, take issue with Order PO-2640. In addition, the appellants refer to the public interest override in section 23 of the *Act*, and ask that I "take account of these arguments for full disclosure of all documents on [the] grounds of [a] compelling public interest, in this appeal and in earlier ones."

The public interest override issue is addressed as a second preliminary issue below, and I will not address it under this preliminary issue.

In conducting my review of the issues raised in this appeal, I will refer to the background information provided by the appellants. For the reasons that follow, I will not be reopening or reconsidering the privacy report or the previous orders issued by this office, involving the appellants, nor revisiting the issues addressed in those appeals. By my count, there have been at least nine orders issued by this office (by four separate adjudicators) addressing numerous issues raised by the appellants resulting from various requests made by them for information from the Ministry, the TDSB, and MSCSC.

In circumstances where a party wishes to challenge or review an order of this office, there are two recourses. The first is a request for reconsideration under Paragraph 18 of the IPC's *Code of Procedure*. That paragraph sets out the grounds upon which the Commissioner's office may reconsider an order, paragraphs 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

It is clear that the appellants are aware of this recourse, as they have requested this office to reconsider previous orders in a number of instances.

The second recourse is to bring an application to have the decision judicially reviewed by the Ontario Divisional Court.

Accordingly, I will not be reopening or reconsidering the previous decisions of this office based on the appellants' request to consider "all of these matters."

However, I note that there may be certain, limited situations where a determination made in a previous order is revisited. Two examples would be:

- where a significant change in circumstances occurs, which would result in a different decision. For example, if an order confirms that access to a document is denied on the basis that disclosure would prejudice an ongoing trial, and a later request is made for the same information when the trial is over, different considerations may apply. However, in these circumstances the original decision is not reconsidered; rather, a new request might result in a different decision.

- where a search is upheld, except for one area, and the further searches in that one area reveal documents which suggest that other, additional searches ought to be made, this would be a changed circumstance. In these circumstances, the new information may bring into question the earlier decision, and the earlier decision may be revisited.

In this decision, I will be reviewing the material provided by the appellants to determine whether it is the type of information that requires previous orders to be revisited due to changing circumstances. However, if there are no changing circumstances, and the appellants are simply providing additional arguments as to why previous decisions were, in their view, wrongly decided, I will not be reviewing those decisions. As I indicated above, concerns about previous decisions are addressed either by asking that the decision be judicially reviewed in Court on certain, limited grounds, or asking for a reconsideration of the decision by the adjudicator who made the decision.

Preliminary Issue 2: Application of the Public Interest Override in section 23 to section 19

The appellants take the position that there has been a problem with the handling of at least one, and probably all, of their FOI requests and appeals with respect to the application of section 23 (public interest override). They state that, in the course of the appeal which resulted in PO-2640, the Notice of Inquiry made no mention of the possible application of the public interest override, and no submissions were made on the issue. However, in that order (dated January 31, 2008), the adjudicator cited the case of *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal filed, File No. 32172 (S.C.C.)), which had been decided in August 2007, in which the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. The appellants take the position that they ought to have had the opportunity to address the issue of the possible application of the public interest override in that appeal, and they also question why this issue was not raised in other appeals they have had with this office.

With respect to the appellants' concerns about the processing of the appeal in Order PO-2640, I have addressed the remedies available to them above. However, because they raise this issue in this appeal as well, I will briefly review this issue.

The appellants are correct in identifying that the possible application of the public interest override in section 23 to records withheld on the basis of sections 14 and 19 was before the courts. Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In Order PO-2640, Adjudicator Cropley reviewed the state of the law at that time, when she decided to review the possible application of section 23 to records withheld under section 19. She stated:

> Although not raised by the appellant earlier in the appeals process, she now submits that there exists a public interest in the disclosure of the records at issue as contemplated by section 23 …
>
> The appellant raised the public interest override in respect of those records subject to the section 21(1) exemption claim only. However, I have considered her arguments with respect to section 19 as well, even though this section is not referred to in section 23. In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal filed, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

As is clear from the citation of the Court of Appeal decision relied on by Adjudicator Cropley, the decision was appealed to the Supreme Court of Canada. The Supreme Court of Canada heard the appeal of that decision on December 11, 2008 and issued its decision on June 17, 2010 in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815. In that decision, the Supreme Court of Canada overturned the Ontario Court of Appeal decision that section 23 could be applied to override the application of sections 14 and 19 of the *Act*, and confirmed the constitutionality of section 23 of the *Act* as enacted by the Legislature.

As a result of the decision of the Supreme Court of Canada, the wording of section 23 is confirmed, and that section has no application to records found to be exempt under sections 14 and 19. Because of this ruling, there is no purpose served in reviewing the issues raised by the appellants regarding whether the public interest override in section 23 applies to records found to be exempt under section 19.

Preliminary Issue 3: Reasonable search

The appellants take the position that the searches conducted by the Ministry for responsive records were not reasonable. They state that they "remain sure that documentation responsive to the original request remains undisclosed."

The appellants then provide lengthy submissions in which they re-iterate their submissions made to Adjudicator James in Appeals PA07-47 and PA07-47-2, and add new, updated information relating to the reasonableness of the searches.

Appeals PA07-47, PA07-47-2 and the current appeal all arise from the same request. Adjudicator James addressed the issue of whether the searches conducted for records responsive to this request were reasonable in Interim Order PO-2717-I. After reviewing the representations of the parties on this issue, she stated:

> I have carefully reviewed the Ministry's evidence set out in its affidavit and but for its search of the Minister's office, I am satisfied that the Ministry's subsequent search for responsive records was reasonable and conducted by knowledgeable employees. In this regard, I note that the Ministry's evidence describes in detail the nature of the physical and computer searches conducted by various Ministry employees in the search areas identified by the Ministry.
>
> Accordingly, the only further search I will order the Minister to conduct is a search of the Minister's office for responsive records for the time period of November 2005 to June 2006.

As a result of this finding, Order Provisions 3 and 4 of Interim Order PO-2717-I read:

> 3. I order the Ministry to conduct a search for responsive physical and electronic records in the Minister's office for the time period identified in the request. I order the Ministry to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:
>
> (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
>
> (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
>
> (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
>
> (d) the results of the search.
>
> 4. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

The Ministry provided Adjudicator James with the material as required by Interim Order PO-2717-I. After inviting and receiving representations from the appellants on the issue of the reasonableness of the searches, Adjudicator James issued Final Order PO-2754-F. On page two of that order she stated:

> This order addresses the issue of whether the Ministry's search for additional responsive records in the Minister's office that was ordered in Order PO-2717-I was reasonable.

Adjudicator James then reviewed the evidence provided to her, and on page eight of the order she states:

> Having regard to the above, I find that the Ministry conducted a reasonable search for responsive records. Accordingly, I find that there is no basis to order the Ministry to conduct further searches relating to the appellant's request for access to records relating to meetings, teleconferences, letters and emails that pertain to

> any member of the requester's family or ISA funding for the period November 2005 to June 2006.

The order provision in Final Order PO-2754-F reads:

> I find that the Ministry's further search pursuant to order provision 3 of Order PO-2717-I was reasonable and I dismiss this appeal.

Finding

I have carefully reviewed the updated material provided by the appellants. There is no suggestion that the further records located (including the three records provided to the appellants in full, and the record remaining at issue in this appeal) suggest that additional records exist. I also note that any such suggestion could have been made to Adjudicator James prior to her issuing Final Order PO-2754-F. The bulk of the additional submissions made by the appellants relates to their dissatisfaction with the processing and timing of Final Order PO-2754-F (arguing that it was issued too quickly, and did not properly consider the many arguments provided by the appellants).

It is clear from my review of Orders PO-2717-I and PO-2754-F that Adjudicator James addressed the issues regarding the reasonableness of the searches conducted by the Ministry for records responsive to the request resulting in this appeal. With respect to the appellants' concerns about the processing of the appeals resulting in those orders, I have addressed the remedies available to them above. As a result, in this order I will not review the issue of whether the searches conducted by the Ministry for records responsive to the request are reasonable.

Preliminary Issue 4: Further issue

The appellants raise what they classify as a "Constitutional - Human Rights Issue." They indicate that this issue was raised with Adjudicator James in their representations made to her prior to her issuance of Final Order PO-2754-F. That order addressed issues regarding the reasonableness of the searches conducted for responsive records. In that context, their full representations made to Adjudicator James on this point read as follows:

> The original question posed in the email to the Minister and [a named individual] dated November 2, 2005, and which had also been asked at Queens Park by the Conservative Education critic … was: whether Freedom of Information Appeals would stop the Minister or our MPP from representing us. This is a constitutional/human rights issue relating to the IPC and the Acts it enforces. As such it is the IPC's responsibility to ensure all documents relating to this issue have been included in the searches so that the IPC Commissioner can confirm that citizens' rights have not been denied in the name of Freedom of Information.

Adjudicator James addressed this issue in Final Order PO-2754-F as follows:

> Similarly, I will not address the appellant's requests that this office … order the Ministry to search for records relating to whether the filing of freedom of information appeals infringe on citizens constitutional and human rights. In any event, the relief requested by the appellant is outside the jurisdiction of this office or scope of the appeal before me.

The appellants state that they are dissatisfied with the manner in which this issue was addressed by Adjudicator James in Final Order PO-2754-F. They state that, although it is clear to them that their MPP would not be able to act on their behalf if they had commenced a legal action against the Ministry, the fact that they have filed FOI requests ought not to have this same impact on the ability of their MPP to represent them, and they refer to documentation in support of their allegation that this is how they were treated. They then state that their submission was meant to raise this problem in the event that, on the adjudicator's review of the material before her, there was evidence that the IPC and the request and appeals processes were "being used as a cover to drop controversial or difficult constituency problems."

The appellants then ask that I review this issue and all the material before me to determine whether it contains evidence that the Ministry inappropriately made certain decisions.

I note again that the appellants are asking that I revisit a previous decision of this office – namely – the manner in which Adjudicator James addressed this issue in PO-2754-F. As mentioned earlier, with respect to the appellants' concerns about the processing of the appeals resulting in that order, I have identified the remedies available to them above. Clearly, issues regarding the possible misuse of the access provisions of the *Act* resulting in prejudice to requesters and appellants are of interest to this office. In this appeal, however, except for the representations of the appellants, I have no evidence before me to support the view that I should make a different finding on this issue, and I decline to do so in this order.

RESPONSIVENESS OF RECORD

The Ministry takes the position that a portion of Record 3 is not responsive to the request. In response to my invitation to provide representations on the issue of the responsiveness of that portion of the record, the Ministry states:

> Firstly, it is important to note that the one sentence contained in Record 3 (on page 8) which has been identified as not responsive does not pertain in any way to the appellant or her interactions with the Ministry or government. The subject matter of the sentence in question is the preparation of a response to a different individual who had corresponded with the Minister's office.

The Ministry then indicates that the appellants' request was very specific, relating to specifically identified meetings, teleconferences and letters for the period November 2005 to June 2006.

The appellants simply request that I review the record to confirm whether or not it is responsive to the request.

On my review of the one line which the Ministry has identified as not responsive to the request, I am satisfied that it is not responsive. It refers to the preparation of a response to another named individual, and I confirm that it is not responsive to the request as it does not relate in any way to the appellants or the subject matter of the request.

PERSONAL INFORMATION

The personal privacy exemption in section 49(a) applies only to information that qualifies as personal information. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual, or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry takes the position that the record contains the personal information of the appellants as defined in section 2(1) of the *Act*. The Ministry states;

> The information at issue consists of undisclosed portions of a 10 page email record, known as Record 3.
>
> Record 3 is a chain of emails … The chain of emails relates to the preparation of a response to letters sent by the appellant to the office of the Minister of Education…
>
> These letters relate to the appellant's discussion with the Minister in respect to her son's school records. The letters were released to the appellant in a decision letter dated October 29, 2008 in response to Interim Order PO-2717-I. The portions of Record 3 for which an exemption has been claimed under section 19 deal with the provision of confidential legal advice regarding the drafting and handling of a response to the appellant's incoming correspondence … to the Minister's office. Both the disclosed and the undisclosed portions of Record 3 contain the personal information of the appellant and her husband and son …

On my review of the record at issue and the representations of the parties, I am satisfied that it contains the personal information of the appellants, as it contains their names as well as other information relating to them [paragraph (h)].

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, section 49 provides a number of exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a), in conjunction with section 19 to deny access to the record.

SOLICITOR-CLIENT PRIVILEGE

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.

Subsection (c) has no application in the circumstances of 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

Branch 1 of the section 19 exemption appears in section 19(a) and 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), hereafter *Blank*].

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 [Orders PO-2441, MO-2166 and MO-1925].

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 litigation, actual or reasonably contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank*].

Branch 2: statutory privileges

Branch 2 of section 19 arises from sections 19(b) and (c). Section 19(b) 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.

Furthermore, as identified in the Notice of Inquiry sent to the parties, the Ontario Court of Appeal has held that termination of litigation does not affect the application of statutory litigation privilege under branch 2 (see below) [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)].

Representations

The Ministry begins by identifying by name the three lawyers who are referred to in Record 3, and states that they are counsel in the Ministry's Legal Services Branch. The Ministry then states:

> … each of [these lawyers] was acting as a legal advisor to the Ministry. The portions of Record 3 for which an exemption is claimed comprise email communications either (i) between Ministry staff and counsel wherein confidential legal advice is sought or provided, or (ii) between Ministry staff wherein the request for legal advice or the legal advice itself is referred to.

> The record shows that the client and counsel worked closely together with respect to the preparation and handling of a response to the appellant's correspondence. The close interaction that occurs between counsel and the client in the course of preparing a response can be seen from the record in question.

Later in its representations, the Ministry states:

> … in the case of Record 3, confidential legal advice was sought from, and provided by, the Legal Services Branch in relation to the Communications Branch's preparation of a response to the appellant's communications regarding an OSR hearing and an FOI request. The seeking, and provision of, legal advice between the Ministry and its counsel is clear throughout the pages of the Record; it can be seen that counsel provided a draft response and recommended a course of action for dealing with the incoming correspondence.
>
> The undisclosed portions of pages 1, 5 and 6 of Record 3 set out Ministry staff's requests for legal advice, or references to such requests. In turn, the undisclosed portions of pages 2, 7, 9 and 10 of Record 3 contain legal advice from [named counsel] in respect to the drafting of a letter to the appellant responding to her communications with the Ministry. In the undisclosed portions of pages 3 and 4 of Record 3, Ministry staff communicates to the rest of the branch the confidential legal advice that has been received from counsel. All such communications are confidential in nature and qualify for an exemption pursuant to section 19 …

The Ministry goes on to identify that portions of the pages of Record 3 were disclosed to the appellants, and that they refer to her contact with the Minister of Education and her communications with the Ministry. It then submits that disclosing any of the remaining portions of the record would reveal the substance of the confidential legal advice requested and provided. The Ministry also refers to a number of court decisions and previous orders that have upheld the solicitor-client privilege for records similar to Record 3, and states:

> As Record 3 relates to the preparation of a response concerning the appellant's letters to the Ministry, and the seeking and providing of legal advice in respect to the preparation of the letter, the record falls within the exemption provided for in section 19 of [the *Act*]. Therefore, the Ministry submits that it has properly exercised its discretion to withhold the severed sentences in each of these 10 pages of Record 3.

Finally, the Ministry identifies that the solicitor-client privilege that exists in Record 3 has not been waived. It states that, "[except] for the portions which have already been disclosed to the appellant, no part of Record 3 has been disclosed by the Ministry to any outside party, to an opposing party in litigation, or to the appellant. The communications contained in the email chain in question were internal to the Ministry, and have remained so."

The appellants state that not all communication between in-house lawyers is privileged, and they ask that I ensure that the privilege applies to this record. The appellants also state:

> In particular some or all of these email exchanges may well have no legal content, and have been simply discussions between Ministry officers, some of whom happen to be lawyers. We ask the adjudicator to determine from the document whether this is so and whether the exemption is properly claimed in each case on the document.

Analysis and Findings

As indicated above, Record 3 consists of the severed portions of 10 pages of email correspondence between Ministry staff.

I have carefully reviewed the email messages that have been severed from Record 3. There are ten pages that form the record at issue in this appeal, all of which contain email correspondence (most of them contained in email strings). Portions of each of the ten pages have been released, and portions of them have been severed.

I begin by noting that, because some of these pages contain email strings, some of the severances are duplicates (copies of other emails included in other email strings). In these circumstances, I will not review duplicate severances, and find that the following severances are duplicates:

- the second severance on page 4 is a duplicate of the first severance on page 3;
- the first severance on page 5 is a duplicate of the second severance on page 3;
- the only severance on page 6 is a duplicate of the second severance on page 5;
- the two severances on page 10 are duplicates of the two severances on page 9.

Accordingly, the portions of Record 3 that have been severed and remain at issue are: page 1 (two brief severances), page 2 (four severances), page 3 (two severances), page 4 (one severance), page 5 (one brief severance), page 7 (two severances), page 8 (one brief severance remaining) and page 9 (two severances).

I have carefully reviewed the severances remaining at issue, and make the following findings:

- All four severances on page 2, both severances on page 7, and the second severance on page 9 consist of email communications to or from legal counsel containing either a specific request to legal counsel for legal advice, or the legal advice itself provided by legal counsel to the Ministry staff person (the client). I am satisfied that these emails contain legal advice or relate directly to the seeking or providing of legal advice, and that they qualify for exemption under the Branch 1 communication privilege aspect of section 19.

- Both severances on page 1, both severances on page 3, the remaining severances on pages 4 and 5, the brief severance remaining on page 8, and the first severance on page 9 contain email communications between staff of the Ministry (which, in some instances, are also copied to legal counsel) and which refer to legal advice. In some of these cases, the email message refers specifically to the legal advice provided by legal counsel (for example, the first severances on pages 3, 4 and 9). In other instances, the emails may not

contain the legal advice itself, but refer to information for which legal advice was sought (for example, both severances on page 1, the second severances on page 3, the remaining severances on pages 5 and 8, and the second severance on page 9). I am satisfied that these emails contain legal advice or relate directly to the seeking or providing of legal advice. Accordingly, I am satisfied that these severances also qualify for exemption under the Branch 1 communication privilege aspect of section 19.

Having found that the records qualify for exemption under section 19, I also find that they are exempt under section 49(a), subject to my review of the exercise of discretion, below.

EXERCISE OF DISCRETION

As noted, sections 19 and 49(a) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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)].

In response to the issue of whether the Ministry properly exercised its discretion in the circumstances of this appeal, the Ministry provides representations identifying why it chose to exercise its discretion to apply the exemptions, and identifies the factors it considered in deciding to exercise its discretion to withhold access. The Ministry also submits that it properly balanced the access and privacy purposes of the *Act* and properly exercised its discretion to withhold the severed sentences in Record 3. It also refers to the interests that the section 19 exemption seeks to protect, and that these interests outweigh the appellants' right of access to the severed portions of the records in this case.

The appellants ask that I assess whether or not discretion was properly exercised by the Ministry, and also ask that I consider whether the public interest in disclosure might impact this decision [I addressed the public interest override issue above].

On my review of all of the circumstances surrounding this appeal, I am satisfied that the Ministry has not erred in the exercise of its discretion to apply sections 19 and 49(a) to the withheld portions of the record. I also note that the Ministry has carefully severed the record, disclosing to the appellants large portions of the record, and withholding only those portions which I have found qualify for exemption under section 19. In the circumstances, I am satisfied that the

Ministry properly exercised its discretion to apply the section 19 and 49(a) exemptions, and I uphold the Ministry's exercise of discretion.

ORDER:

I uphold the decision of the Ministry.

Original signed by: November 22, 2010
Frank DeVries
Adjudicator