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

ORDER PO-2930

Appeal PA09-240-2

Ministry of Education

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NATURE OF THE APPEAL:

The Ministry of Education (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the appellants, a husband and wife. The request was for all correspondence and other records between the Ministry and all other individuals and bodies relating to their family. Specifically, the appellants sought access to information regarding their son's school records, Intensive Support Amount (ISA) research and the Ontario School Record (OSR) Correction 2003-2009 involving a number of named Ministry personnel. The request then identified 14 individuals by name, and also attached to the request a list of "samples of email correspondence" to assist in the search.

The Ministry responded to the request by identifying that it had located 84 responsive records, and stating that access was granted to a number of the records, but denied to others on the basis of the exemptions in section 19 (solicitor-client privilege), 14(2)(a) (law enforcement) and 49(a) (discretion to refuse requester's own information) of the *Act*. The Ministry also provided an index of the responsive records and indicated that portions of three records were being withheld as they were not responsive to the request.

The appellants appealed the Ministry's decision to withhold records, and also took the position that additional records should exist. In their appeal letter, the appellants also noted that this office should consider this appeal in conjunction with a number of identified prior appeals and a privacy complaint in which they were also involved.

During mediation, the Ministry issued a revised decision letter in which it advised that it was also relying on the discretionary exemption in section 49(b) (personal privacy), and provided a revised Index of Records. Also during mediation, the Ministry confirmed that section 49(a) (discretion to refuse requester's own information) applied to those records which were being withheld under sections 19 and 14(2)(a) of the *Act*.

Upon receipt of the revised decision, the appellants indicated that they wished to continue their appeal of the decision to deny access to the records or portions of records that have been withheld by the Ministry, and also on the basis that additional responsive records exist. They again advised that they would like this appeal to be considered in conjunction with their prior appeals and the privacy complaint, as noted above.

Mediation did not resolve the appeal, and this file was transferred to the inquiry stage of the process, and assigned to me to conduct an inquiry under the *Act*. I initially decided to send a Notice of Inquiry, identifying the facts and issues in this appeal, to the Ministry, inviting it to provide representations, which it did. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellants.

I am also the adjudicator assigned to appeal PA07-47-3, which involves the Ministry and the appellants as well. The appellants requested the opportunity to provide representations on both appeal PA07-47-3 and the current appeal at the same time, and I granted that request. The appellants subsequently provided representations on the issues in both of these appeals.

The appellant's representations raise two preliminary issues which they argue apply to both of these appeals. They also provided separate representations addressing the issues 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 dealing with the issues raised in these two appeals.

PRELIMINARY ISSUES

There are a number of preliminary issues which I will address in this appeal. The first two preliminary issues are also raised in appeal PA07-47-3. I address these two issues below in a similar manner to how I addressed them in the order dealing with that appeal. The remaining preliminary issues addressed below apply only to the current appeal.

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 they have 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, and 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 their arguments 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 relates to the records responsive to the request resulting in this appeal.

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 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, and 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 appellant's 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: Record 41

The Ministry indicates that Record 41 is being addressed in the other file before me (PA07-47-3). On my review of Record 41, I find that it is identical to Record 3 in Appeal PA07-47-3. I will review the issues raised regarding access to that record in my decision that disposes of Appeal PA07-47-3, and I decline to address it in this appeal.

Preliminary Issue 4: Records 57, 60, 61, 62, 65-76 and 84

The Ministry states that the application of the section 19 and 49(a) exemptions to a number of the records at issue in this appeal have been addressed in previous decisions of this office. The Ministry states:

> The Ministry would begin by pointing out that records 57, 60, 61, 62, 64-76 and 84 were responsive to the appellant's former request [identified request number] and subsequent appeal PA07-41. These records were withheld under section 19 and section 49(a) and the application of the exemptions was reviewed and upheld by Adjudicator Laurel Cropley in Order PO-2640. In addition to the representations made above, the Ministry relies on this order to defend its application of section 19 to these records.

Except for Record 64, upon which the appellants provide substantial representations and which I address under a separate preliminary issue below, the appellants do not dispute the Ministry's position that records 57, 60, 61, 62, 65-76 and 84 were addressed in Order PO-2640. In the circumstances, I decided to review the index and the description of the records at issue in Order PO-2640. After reviewing that information, I am satisfied that, with two exceptions, all of the records identified by the Ministry as having been addressed in Order PO-2640 are, in fact, identical to those listed as addressed in that order.

In these circumstances, I will not conduct a separate, additional review of the application of sections 19 and 49(a) to Records 57, 61, 62, 66-76 and 84 in this appeal, as this issue was addressed in Order PO-2640. I will, however, review the application of these exemptions to Records 60 and 65, as I could not confirm whether they were addressed in Order PO-2640.

Preliminary Issue: Record 64

The appellants in the current appeal provide lengthy and detailed representations regarding the application of the exemptions to Record 64, and also provide extensive representations on why the decisions in Order PO-2580 and PO-2640, which also considered that record or portions of that record, ought to be reviewed by me in this appeal.

Record 64 consists of a series of documents that were faxed from MCSCS to the Ministry, and access to these documents, as well as questions regarding how and why the documents were faxed, have been addressed a number of times by this office. In light of the appellants' request that I review the totality of these matters, and the extensive representations the appellants

provided on Record 64, I will begin by reviewing the history of how this record has been addressed by this office.

Portions of Record 64 were the records at issue in Order PO-2580 issued on May 24, 2007. That order (dealing with Appeal PA06-288) resulted from a request by the appellants to MCSCS. In Order PO-2580, Adjudicator Cropley found that portions of Record 64 qualified for exemption under section 49(b), but that other portions did not. As a result of that order, portions of Record 64 were disclosed to the appellants. (I note that section 19 had not been claimed for these records in Appeal PA06-288).

Record 64 was also at issue in Order PO-2640, where it was identified as Record 23. In this order, I will continue to refer to this record as Record 64.

Order PO-2640 resulted from a request by the appellants to the Ministry of Education and, in that order, Adjudicator Cropley found that Record 64 qualified for exemption under section 49(a), in conjunction with section 19.

Both Orders PO-2580 and PO-2640 were the subject of two reconsideration requests by the appellants to this office.

The appellants' first request to reconsider these two orders was dated March 1, 2008, and was dealt with by Adjudication Team Leader Donald Hale in a letter dated March 10, 2008. In that response, Adjudicator Hale reviews the appellants' reconsideration request and states:

> I have consulted with Adjudicator Cropley and have carefully reviewed both of these decisions and the materials received from the parties in the appeals. In my view, with one exception, your reconsideration request is without merit. Adjudicator Cropley undertook a comprehensive and thorough review of the evidence presented to her, particularly with respect to the manner in which the Ministry exercised its discretion not to disclose records which were subject to the solicitor-client privilege exemption at section 19. Her decision contained an extraordinary level of detail and precision so as to ensure that both you and the Ministry were clear on the rationale for her decision.

After addressing the one minor exception, Adjudicator Hale states:

> … May I remind you that if you wish to challenge further the decisions in Orders PO-2580 or PO-2640 or this decision respecting your reconsideration request, your sole recourse is to bring an application to have the decisions judicially reviewed by the Superior Court of Ontario (Divisional Court).

The appellants' second request to reconsider these two orders was also addressed by Adjudication Team Leader Donald Hale. In a letter dated May 15, 2009, he reviews "the basis for [the] most recent reconsideration request." He identifies the grounds upon which the reconsideration was made, including that Adjudicator Cropley erred in finding that the documents comprising Record 64 qualified for exemption under section 19, and the possible

impact of the issuance of an investigation report for a privacy complaint involving the appellants. He makes certain findings regarding the appellants' arguments, and then states:

> Based on my review of the decision in Order PO-2640 and your reconsideration requests …, I am not persuaded that Adjudicator Cropley's findings regarding the application of section 19 to the records comprising [Record 64] was in any way inappropriate or incorrect. In my view, the exemption clearly applies to these documents and the reasons articulated by Adjudicator Cropley explain her rationale for finding this to be so.
>
> …
>
> Based on my review of both your April 7, 2009 letter and the May 8, 2009 e-mail addressed to [the Commissioner], I am not persuaded that either of these two Orders should be reconsidered further. As I indicated in my letter to you of March 10, 2008, if you disagree with the rationale behind the decisions in Orders PO-2580 and PO-2640, you may bring an application for judicial review to the Superior Court (Divisional Court) in order to attempt to persuade the Court to grant you the relief you are seeking.

Record 64 was also the subject of a privacy complaint involving the appellants and MCSCS. That privacy complaint addressed concerns about how the materials in Record 64 were provided by MCSCS to the Ministry of Education, and that complaint resulted in a finding by this office contained in a Privacy Investigation Report issued in March of 2009.

On April 7, 2009 the appellants requested a reconsideration of the findings made in the March, 2009 investigation report. On June 8, 2009 the investigator sent a letter to the appellants addressing the issues raised in their reconsideration request and stated:

> I confirm that I have reviewed your request for reconsideration and find no basis for changing the conclusion reached in my letter to you of March 12, 2009.

In summary, issues regarding access to many of the documents which comprise Record 64 were addressed by Adjudicator Cropley in Order PO-2580, and in two subsequent reconsideration requests of that Order addressed by Adjudicator Hale on March 10, 2008 and May 15, 2009. All of the documents which comprise Record 64 were also addressed by Adjudicator Cropley in Order PO-2640 and the two subsequent reconsideration requests of that order also addressed by Adjudicator Hale on March 10, 2008 and May 15, 2009. In addition, issues regarding the provision of the documents that comprise Record 64 from MCSCS to the Ministry were addressed by the investigator in a privacy report, and were also addressed in the subsequent reconsideration of that report dated June 8, 2009. With respect to the reconsideration requests of Orders PO-2580 and PO-2640, Adjudicator Hale specifically stated that, if the appellants were unsatisfied with the decisions on Record 64 in those orders, the remaining recourse was to bring an application to have the decisions judicially reviewed by the Ontario Divisional Court.

The current request

As identified above, in the current appeal the appellants provide lengthy and detailed representations regarding the application of the exemptions to Record 64, and also provide extensive representations on why the decisions in Order PO-2580 and PO-2640 ought to be reconsidered by me. Their lengthy representations on Record 64 contain many arguments that are similar to those made to Adjudicator Hale in the reconsideration requests before him.

Finding

On my careful review of the previous decisions of this office regarding Record 64, and based on the material set out above confirming that issues regarding access to Record 64 have been considered by this office on a number of occasions, I will not review issues regarding this record. In my view, the previous orders of this office, as well as the reconsideration decisions made, have fully addressed these issues. The remaining recourse is to bring an application to have the decisions judicially reviewed by the Ontario Divisional Court.

RECORDS:

In light of the findings made above, regarding records which have been considered in other appeals, only the following records or portions of records remain at issue in this appeal: Records 11 (in part), 13 (in part), 17, 18, 24, 38 (in part), 48, 60 and 65.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The Ministry submits that the withheld portions of Record 13 are not responsive to the request, and states:

> Because the request was so clearly and precisely written, the Ministry did not consider it necessary to contact the appellant for clarification. The particular wording of the request was phrased in such a way as to make it clear in outlining the types of records sought ("All correspondence (including emails) and other records...") and specific with respect to the subject matter ("...particularly regarding our son's school records, ISA research and the OSR Correction 2003-2009 involving [named employees]." Additionally, the appellant assisted the Ministry in its efforts to conduct a thorough search by providing a list of 14 named Ministry employees, a list of employees which the Ministry did not consider to be exhaustive or exclusive.
>
> The Ministry interpreted the scope of the request to include emails and all "other records" as they "relate" to the subject areas provided by the appellant: anything to do with "[the appellants and their family]"; "our son's school records, ISA research and the OSR Correction 2003-2009".

The Ministry then provides the following representations on the withheld portions of Record 13, which is the only record remaining at issue for which this argument is made:

> Record 13 is a twenty-two page text document which contains a series of email chains and conversations between the appellant and Ministry staff. There are two areas of severed information on the basis of the information being unresponsive: pages five, six and eleven; and pages twenty one and twenty two. Pages five, six and eleven, and pages twenty one and twenty two consist of Ministry's legal counsel discussing the particulars of a case being heard by the Superior Court with counsel at the Ministry of the Attorney General, which does not relate to the appellant and her family, ISA research, nor the Ontario Student Record (OSR) correction.

Previous orders have identified that, to be considered responsive to a request, the records must "reasonably relate" to the request [See Order P-880]. I adopt the approach taken in Order P-880 and find that the portions of Record 13 severed by the Ministry as "non-responsive" do not reasonably relate to the request. They appear to relate to other matters and proceedings, and are therefore not responsive to the appellants' 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 records remaining at issue contain the personal information of the appellants as defined in section 2(1) of the *Act*. The Ministry states:

> These records contain information that may reveal something of a personal nature about the appellant and members of her family, and could be viewed as falling under the definition of "personal information" found in subsection 2(1) of [the *Act*].

On my review of the records at issue, I am satisfied that they contain the personal information of the appellants, as they contain 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 four lawyers referred to in the records and states that they are counsel in the Ministry's Legal Services Branch. The Ministry then states:

> … each of the lawyers named above was acting as a legal advisor to the Ministry. The records or portions of records 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.

Later in its representations, the Ministry refers to the rationale for solicitor-client privilege which is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. It also refers to previous orders of this office and then states:

> Confidential legal advice was sought from, and provided by, the Legal Services Branch in relation to Ministry staff's preparation of a response to the appellant's communications. The seeking, and provision of, legal advice between the Ministry and its counsel is clear throughout the pages of the records; it can be seen that counsel provided a draft response and recommended a course of action for dealing with the incoming correspondence.

The Ministry then provides examples of such information, and states:

> Many IPC Orders cite the following excerpt of the *Descoteaux v. Mierwinski* case in order to further describe the properties of solicitor-client privilege:
>
> > ...all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship...
>
> The continuous seeking, and provision of, legal advice between the Ministry and its counsel is clear from the records at issue. It is the Ministry's submission that all of [the] records at issue ought to be looked at as a whole.

With respect to the issue of whether the privilege was waived, the Ministry states:

> But for the portions of the records which have already been disclosed to the appellant, no part of the records at issue have been disclosed by the Ministry to any outside party, to an opposing party in litigation, or to the appellant. The communications contained in the records in question were internal to the Ministry, and have remained so.
>
> There is no evidence that the records have been treated by the Ministry as anything other than confidential, nor that any action has been taken by or on behalf of the client that would negate the application of the section 19 exemption claim.

The appellants state:

> Not all communication between in-house lawyers is privileged, and we ask the adjudicator, since we have no knowledge of the contents of the other documents withheld, to ensure that privilege is due to these documents.

Analysis and Findings

I have carefully reviewed the records or portions of records remaining at issue, and make the following findings:

Record 11 (one line on page 1)

This line consists of one sentence in an email sent by a Ministry staff person to legal counsel. It refers to other emails that are contained in the remainder of Record 11 that have been disclosed. The line that is severed comments on the material contained in the emails. I have carefully considered this sentence. Although it does not contain a specific request for legal advice in the form of a question, based on the nature of the information and the reference to other material in the other emails, I am satisfied that its disclosure would reveal legal advice sought from legal counsel. Accordingly, I am satisfied that it qualifies for exemption under the communication privilege aspect of Branch 1 of section 19.

Record 17

This record consists of an email string in which an email asking certain questions is forwarded by Ministry staff to legal counsel, and legal counsel responds to the email by providing her advice. The items addressed in the advice relate to proceedings and references to conversations she had with other counsel. 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 this record qualifies for exemption under Branch 1 of section 19.

Record 18

This record is similar to Record 17, except for one additional brief email response to legal counsel. I am satisfied that this email string also qualifies for exemption under section 19 for the same reason.

Record 24

This record is a memo to file written by legal counsel, and relating to a proceeding. I am satisfied that it constitutes the legal advisor's working papers directly related to seeking, formulating or giving legal advice [see *Susan Hosiery Ltd. v. Minister of National Revenue* (cited above)]. Accordingly, I am satisfied that this record qualifies for exemption under section 19.

Record 38 (in part)

The two brief severances on page 1 of this record consist of a reference to information about which legal advice will be sought, and the brief response from the legal advisor. In the circumstances, I am satisfied that the two severances on this page contain legal advice or relate directly to the seeking or providing of legal advice. Accordingly, I am satisfied that these portions of Record 38 qualify for exemption under section 19.

There is also a brief severance of information on page 2 of Record 38. This severance relates only to the personal circumstances of a Ministry staff person, and I find that it contains the personal information of this individual, and ought not to be disclosed as to do so would result in an unjustified invasion of privacy under section 21(1) and 49(b).

Record 48

This record consists of a short email from legal counsel to Ministry staff. It relates to the timing of a proceeding, and also confirms information received from the appellants. Although this record is from legal counsel and relates to a legal matter, in my view it does not constitute communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice. Rather, this email relates simply to the timing of a matter. In the circumstances, I am not satisfied that this record qualifies for exemption under section 19 of the *Act*, and I will order that it be disclosed.

Record 60

This record is an email from legal counsel to staff referring to a meeting and legal advice that has been requested. I am satisfied that it relates directly to the seeking or providing of legal advice, and that this record qualifies for exemption under section 19.

Record 65

This record consists of a brief email from one staff person to another, relating to a meeting. Neither of these individuals appears to be a lawyer, nor does the email refer to any legal matter. In the circumstances, I am not satisfied that this record qualifies for exemption under section 19, and I will order that it be disclosed.

Summary

In summary, I have found that Records 48 and 65 do not qualify for exemption under the *Act*, but that Records 11 (in part), 17, 18, 24, 38 (in part) and 60 qualify for exemption under section 19. Having found that Records 11 (in part), 17, 18, 24, 38 (in part) and 60 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)].

The Ministry states:

> The Ministry submits that it has properly balanced the access and privacy purposes of the *Act* and has properly exercised its discretion to withhold the records at issue in whole or in part.
>
> For the reasons set out in the representations regarding the exercise of its discretion to claim the exemption under section 19, the Ministry submits that the interests that the exemption seeks to protect outweigh the appellant's right of access to these records.
>
> …
>
> The Ministry submits that it has taken only relevant factors into account when exercising its discretion and has exercised its discretion in good faith and the Information and Privacy Commission should uphold its exercise of discretion in respect of the records at issue.

The appellant's representations focus primarily on access to records which are not addressed in this order, and the public interest issues, which I address 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 records or portions of records. In addition, the Ministry has severed many of the records, and disclosed portions of them to the appellant. 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 its exercise of discretion.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

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

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he or she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this appeal, the appellants took the position that additional responsive records exist. The Ministry was asked to provide representations about the searches conducted for responsive records.

Representations

The Ministry's representations on the search issue begin by confirming that the request was clearly and precisely written, and clarification was not necessary. The Ministry also reviews the time span covered by the request, and then reviews the actions taken in response to the request as follows:

> When the appellant's [request] was received, the Ministry's Information and Privacy Office sent the request, using the appellant's exact wording to the following areas within the Ministry:
>
> The Minister's Office
> The Deputy Minister's Office
> Communications Branch
> French Language Aboriginal Learning and Research Division
> Curriculum and Learning Division

> Corporate Management and Services Division (includes Legal Services Branch and the Information and Privacy Office)
>
> In each of the program areas, the request was assigned to experienced staff, knowledgeable with regard to the subject matter and how to search for records. The Ministry's Information and Privacy Office received the records from the various program areas as outlined in [the enclosed index of records]. The Ministry's Information and Privacy Office only keeps FOI request files for the current and previous year on site, therefore the records disclosed to the appellant prior to 2008 were stored off-site at the Records Centre.

The Ministry then identifies that when it issued its decision in this appeal it had not received all of the records and files containing the appellants' previous FOI requests from the Records Centre, and did not reissue all of the records from the appellant's previous requests; rather, it relied on the new searches conducted by staff in the program areas set out above. The Ministry then states:

> The appellant however was not prejudiced by this, as she already had these records, indeed she would have received some of the same records several times over in response to similar requests she had made over the years.

The Ministry then reviews some of the details regarding the previous requests and appeals, and the findings relating to the "reasonable search" issues, that were made in a number of orders resulting from those appeals. The Ministry concludes by stating that, based on a review of the records that were responsive to previous requests and the records gathered in response to this request, the Ministry believes that all responsive records were identified.

The appellants do not address the reasonable search issue specific to this appeal. Their more general representations, set out above, focus on their concerns about the manner in which the Ministry, the TDSB and the MCSCS have generally dealt with their requests.

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the Ministry's search for responsive records was reasonable in the circumstances, the decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

The Ministry has described in detail the program areas in the Ministry where searches were conducted. It also identifies that the request was assigned to experienced staff, knowledgeable with regard to the subject matter and how to search for records, and confirms that the program areas were provided with the exact wording of the request. The appellants do not address the reasonable search issue specific to this appeal.

In the circumstances, based on the evidence provided, I am satisfied that the searches conducted by the Ministry for records responsive to the request resulting in this appeal, were reasonable.

ORDER:

1. I order the Ministry to disclose Records 48 and 65 to the appellants by **December 13, 2010**.

2. I uphold the Ministry's decision to deny access to the other records.

3. I find that the search for responsive records was reasonable.

Original signed by: November 22, 2010
Frank DeVries
Adjudicator