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

ORDER PO-2957

Appeal PA10-95

Alcohol and Gaming Commission of Ontario

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NATURE OF THE APPEAL:

The Alcohol and Gaming Commission of Ontario (the AGCO) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a matter involving a restaurant, identified by its name, license and AGCO proposal number:

> In particular, we require all internal and external e-mails, blackberry pins, briefing notes, enforcement notes, board documents, call logs, faxes received and forwarded by any member of the AGCO staff including the Commission and members of the tribunal that relate to this matter. We also request the following: copies of media briefing notes to the Registrar, CEO and Chair of the Commission, copies of media notes prepared by AGCO media relation personnel, policy manual/s outlining standards and prescribed sanction guidelines pertaining to the sanction recommended by the Registrar or his designate, list of personnel with appropriate titles/designations who handled all matters relevant to this file, including copies of their recommendations, and copies of any Board documents/minutes pertaining to sanction guidelines since 2006.

The AGCO issued a decision granting partial access to the records identified as responsive to the request. However, access to the remaining records and portions of records was denied pursuant to the discretionary exemptions in sections 19 (solicitor-client privilege), 14(1)(a), 14(2)(a) (law enforcement report) and 13(1) (advice or recommendation) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*. Included with the AGCO's access decision was an index listing the records and the corresponding exemptions claimed for each. In addition, the AGCO partially severed records where it determined that some of the information that they contained was not responsive to the request. The AGCO also charged a fee of $422.80 for processing the records.

The requester (now the appellant) appealed the AGCO's decision to deny access.

During mediation, the appellant's representative confirmed that the appellant does not take issue with the AGCO's determination that certain information contained in several records is not responsive to the request, as well as the AGCO's application of section 21(1) to other records. As a result, a large number of records were removed from the scope of the request.

No further mediation was possible and the appeal was moved to the adjudication stage of the process. I sought and received the representations of the AGCO initially, a complete copy of which was shared with the appellant, along with a Notice of Inquiry. In its representations, the AGCO clarified that:

- it is not relying on the section 13(1) exemption for Records 218-220;
- it is not relying on the section 14(1)(a) exemption for Record 67; and
- it withdrew its reliance on section 19 for Records 76-78, 88, 99, 105, 109, 115, 117, portions of Records 138 and 139, as well as Records 140, 158, 167, 168, 231, 232, 241-243 and 245-247, in their entirety.

The AGCO indicated that it would disclose these records once this order has been issued, and I will order it to do so. The appellant also submitted representations, a complete copy of which was shared with the AGCO, who then provided further submissions by way of reply.

RECORDS:

The records at issue in this appeal are more fully described in the Index of Records provided to the appellant with its March 26, 2010 decision letter.

DISCUSSION:

METHOD OF DISCLOSURE OF RECORDS/REASONABLENESS OF SEARCH

The appellant had expressed concerns both at the mediation stage and in its representations about the manner in which the AGCO severed certain information in the records. It claimed that because the severances made to the copies of Records 3 to 66, 171, 211 and 244 provided to it were indicated in white, rather than being highlighted in black, it was difficult to discern where severances had been made to the documents. In its reply representations, the AGCO provided me with descriptions of these records indicating precisely where the severances were made. I have reviewed the explanations provided to the appellant by the mediator and the description given in reply by the AGCO and I find that the appellant's concerns have been adequately addressed. The use of "whiteout" severing makes it more difficult for requesters to ascertain where severances have been made, and this method of severing ought to be avoided in the future.

In addition, the appellant took the position at mediation that additional records ought to exist as many of the records disclosed to it referred to attachments which were not provided. In response, in its representations the AGCO provided an affidavit containing a detailed explanation of this discrepancy in which it enumerated each of the attachments referred to in the records and located them in the index of records, where they were described in greater detail. The appellant appears to have accepted this explanation as it has not commented on this aspect of the appeal in its submissions. I agree that the AGCO has fully and clearly explained the location of the attachments to the records in its representations, which were shared with the appellant, and I will not address these concerns further in this order. Finally, based on the affidavit evidence provided by the AGCO and in the absence of evidence to the contrary from the appellant, I am satisfied that the searches which it conducted for records responsive to the request were adequate and reasonable.

ADVICE OR RECOMMENDATIONS

The AGCO claims the application of the discretionary exemption in section 13(1) of the *Act* to Records 1, 170 and 221. This section states:

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

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

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

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

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include: factual or background information, analytical information, evaluative information, notifications or cautions, views, draft documents and a supervisor's direction to staff on how to conduct an investigation. [Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

In Order MO-2525, Adjudicator Daphne Loukidelis reviewed a number of decisions which applied both section 13(1) and its equivalent provision section 7(1) of the municipal *Act* to a

number of records representing communications between staff of a municipal government. In that decision, she found that:

> Past orders of this office provide a helpful context for my determination of whether the information in the records at issue constitutes "advice or recommendations" for the purposes of section 7(1). To begin, previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [Orders 118, PO-2681 and PO-2668].
>
> In Order PO-2084, former Assistant Commissioner Tom Mitchinson reviewed information-sharing between government employees in the context of the application of this exemption:
>
> > A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) [the provincial equivalent to section 7(1) of the municipal *Act*] is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could [if disclosed] reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.
>
> In Order PO-2028, the former Assistant Commissioner also drew a distinction between advising on, or recommending, a course of action and simply drawing matters of potential relevance to the attention of a decision-maker.
>
> In Order P-363, former Assistant Commissioner Mitchinson considered the issue of whether a direction given by a supervisor to an investigator constituted "advice or recommendations" for the purpose of section 13(1) which is, as noted, the provincial equivalent to section 7(1):
>
> > [The record] consists of a … memo from the investigating human rights officer to her supervisor, together with the supervisor's reply. The [first] memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the [identified] response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing

> legislation. In my view, the … response also does not qualify for exemption under section 13(1).

In Order PO-2400, Adjudicator John Swaigen found that a moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice" and he highlighted the distinction between description and prescription (see also Orders PO-2355 and MO-2433).

In my view, these principles are relevant in the context of this appeal. Accordingly, I have applied them in my determination of whether the records qualify for exemption under section 7(1) of the *Act*. Based on my review of the records, I find that they mostly contain views, opinions, cautions, instructions to staff, factual and evaluative information, which does not qualify as advice or recommendations for the purposes of section 7(1).

In nearly all of the records remaining at issue under this exemption, and taking into consideration that certain records were subject to inconsistent decisions, I find that there is no suggested course of action which may be either accepted or rejected in an ongoing deliberative process. In many instances, the records for which I will not be upholding the town's claim of section 7(1), the emails are directed at individuals who are not in a position to make a decision as this term is contemplated under the exemption. Rather, there are records originating with senior parks management staff to parks staff members that contain general or factual information and instructions about a process to be followed or next steps to be taken. In other records, information is being shared between employees of a similar level within the town structure, or the outside consultants, and it consists of details describing the position taken, or actions undertaken, by the town on the issues related to the appellant's contractual obligations. In my view, which is supported by a reading of Order P-363, these directions to staff or exchanges between similarly-placed staff do not qualify as "advice or recommendations" for the purpose of section 7(1).

I adopt this line of reasoning for the purposes of the present appeal and will now apply it to the records for which the AGCO has claimed the application of section 13(1).

Record 1

Record 1 is an email chain passing between an AGCO board member and a staff person with its hearings section. The discussion between the two involves the resolution of a question that arose as a result of the appellant's pre-hearing, which the member presided over. The question being addressed relates only to the resolution of a specific issue flowing from the pre-hearing of the appellant's case before the Board member.

As was the case with many of the records at issue in Order MO-2525, the communication reflected in Record 1 takes the form of an instruction from a Board member to a member of the Board's staff to take certain action. The instructions from the Board member do not in any way

represent "a suggested course of action which may be either accepted or rejected in an ongoing deliberative process." Rather, the recipient of the communication is not in a position to accept or reject the instructions being given by the Board member. For this reason, I find that Record 1 does not qualify for exemption under section 13(1).

Record 170

Record 170 is an email string passing between the AGCO's Registrar and its Senior Manager, Corporate Communications and Media Relations, portions of which have been disclosed to the appellant. In this communication, the Senior Manager seeks and receives instructions from the Registrar about how to respond to a request for a meeting from a member of the public.

In my view, the undisclosed portions of Record 170 represent the Registrar's instructions to subordinate staff about the appropriate method of responding to the request and how this is to be communicated to the person asking for a meeting with the Registrar. I find that this communication does not represent "advice or recommendations" for the purposes of section 13(1) as, again, it represents an instruction to a staff person that is not subject to rejection or modification by the recipient. Accordingly, I find that section 13(1) has no application to the undisclosed portions of Record 170.

Record 221

The AGCO claims the application of section 13(1) to the top half of Record 221, which represents a very brief email communication to and from the Director, Corporate Policy and Communications and the Manager, Strategic Policy. The emails contain instructions from the Director to the Manager about the timing of a particular action on behalf of the AGCO. I find that this instruction is not capable of being either accepted or rejected by the Manager and that it does not, accordingly, qualify for exemption under section 13(1).

LAW ENFORCEMENT

The AGCO takes the position that Record 169 is exempt under the discretionary exemption in section 14(2)(a) of the *Act*, which reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The AGCO has withdrawn its reliance on this exemption, as well as section 14(1)(a), for Record 67. As no other exemptions were claimed for Record 67, and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders P-200 and P-324]

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Orders MO-1238, MO-1337-I].

Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

The AGCO submits that the top portion of Record 169 is a report prepared by an OPP detective "in response to a request from his Staff Sergeant. The report is a detailed accounting of the steps taken to enable an incarcerated witness to attend a hearing."

I have reviewed information in Record 169 which the AGCO claims is exempt under section 14(2)(a) and reject the AGCO's position. The information simply relates certain factual information about the process followed in obtaining a court order permitting the witness to appear at an AGCO hearing. The officer also relates how the court order is to be communicated in order to obtain the outcome sought by the AGCO. I find that the top half of Record 169 does not qualify as a "report" for the purposes of section 14(2)(a) as it does not represent "a formal statement or account of the results of the collation and consideration of information." The information is simply factual in nature, recounting the process for obtaining the release of an individual from custody to attend at the hearing. Accordingly, as no other exemptions were claimed and no mandatory exemptions apply, I will order that Record 169 be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Initially, the AGCO applied the solicitor-client privilege exemption in section 19 to a number of records. As noted above, when the AGCO provided its representations, it withdrew its reliance on this exemption for Records 76-78, 88, 99, 105, 109, 115, 117, the news release portions of Records 138 and 139, Records 140, 158, 167, 168, 231, 232, 241-243 and 245-247. As no other exemptions have been claimed for them, and no mandatory exemptions apply, I will order that all of these records be disclosed to the appellant.

In this order, I will examine the application of section 19 to Records 68, 69, 70, 71, 72, 73, 74, 75, 79-86, 87, 89, 90, 91, 92, 93, 94, 96, 97, 98, 100-101, 103, 104, 106-108, 110, 111, 112, 113, 114, 116, 117, 118-120, 121-126, 127 (in part), 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138 and 139 (in part), 142, 143-145, 147, 149, 150-152, 153, 154-156, 157, 160-165, 218, 219, 220, 221 (in part), 222-224, 225, 226, 227 (in part) 229 and 230.

Section 19 of the *Act* provides:

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

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

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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

Representations of the parties

The AGCO has provided a detailed explanation of its structure, purpose and legislative mandate in order to provide context for the circumstances surrounding the creation of the records in this appeal. The records in this appeal that are claimed to be exempt under section 19 were created as a result of a license suspension hearing involving the appellant that followed a tragic fatal motor vehicle accident involving a patron at the appellant's establishment. The records involve email communications passing between AGCO staff and its counsel, including various inspectors, staff of the AGCO's Registrar and Ontario Provincial Police (OPP) officers who serve as part of a bureau within the AGCO itself. The majority of the communications which constitute the records remaining at issue involve the Deputy Director of the AGCO's Legal Branch.

The AGCO has provided me with representations respecting the circumstances surrounding the creation of each individual record and its position on why the record falls within the ambit of the solicitor-client privilege exemption.

The appellant does not dispute that solicitor-client privilege properly attaches to communications between the Registrar and Deputy Registrar and their counsel which relate to the provision of legal advice. The appellant take issue with the application of the section 19 exemption to any records which contain communications between AGCO counsel and anyone other than the

Registrar or Deputy Registrar. As an example, it refers to Record 218 which it describes as an "email from the lawyer for the Registrar to the head of the OPP enforcement branch within the AGCO, an OPP officer." The appellant takes the position that because the officer is not a client of the lawyer, the communication is not subject to privilege under section 19. Similarly, the appellant argues that because Record 230 is an email between AGCO counsel and an "expert witness", it does not qualify as a solicitor-client communication. The appellant goes on to acknowledge that Record 230 may, however, be exempt under some other aspect of the exemption.

In its reply representations, the AGCO argues that the privilege attaches to all communications passing between counsel and staff at the AGCO, not just the Registrar and Deputy Registrar, because those staff act as the agent for and are employed by the AGCO.

Analysis and Findings

The majority of the records consist of email communications passing between the Deputy Director of the AGCO's Legal Branch and various staff with the AGCO, including the Registrar, Deputy Registrar and other individuals, such as the seconded OPP officers who supervise the work of AGCO inspectors. The communications reflect the internal discussion surrounding the progress of a high profile prosecution of the appellant. I agree with the position taken by the AGCO regarding the application of section 19 to communications passing between all AGCO staff and its counsel. The solicitor-client relationship exists between AGCO counsel and any of its staff who request or receive legal advice, not only to that sought or received by the Registrar or Assistant Registrar. Further, I find that this includes communications between legal counsel and the seconded OPP officers employed by the AGCO.

The prosecution described in the records involved a high profile matter which was the subject of much press coverage and public interest, particularly in the community where the appellant was located. It also involved complicated logistical circumstances involving the availability of witnesses and complex evidentiary problems which required the assistance of counsel throughout the process.

I have reviewed all of the records which the AGCO claims to be exempt under section 19 and make the following findings:

- Records 68, 71, 74, 79, 82, 98, 103, 104, 112, 118, 119, 120, 127, 128 (page 2 only), 132, 144, 145, 146, 153, the top half of Record 219 and 225 represent confidential communications passing between a legal advisor and his clients which address directly the giving or seeking of legal advice about a legal issue. I find that this information qualifies for exemption under the solicitor-client communication privilege aspect of section 19.

- Records 70, 72, 73, 75, 80, 81, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 100, 101, 102, 106, 107, 108, 110, 111, 113, 114, 116, 121, 122, 123, 124, 125, 126, 129, 130, 131, 133, 134, 135, 136, the top portion of Records 138 and 139, 141, 142, 143, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 159, 160, 161, 162, 163, 164,

165, 166, the top portion of Record 218, the undisclosed portion of Record 220, bottom half of page 1 of Record 221, top portion of Record 222, 223, 224, 226 and 227 represent part of the continuum of communications passing between a solicitor and his client. I find that these communications relate mainly to the logistical problems around arrangements for witnesses and other matters. The communications form part of the process of keeping solicitor and client abreast of each others' activities and progress in the prosecution of the appellant. These records qualify for exemption under section 19 as they represent privileged communications between a solicitor and his client.

- Page 1 of Record 128 does not contain any legal advice, nor does it reflect communications passing between solicitor and client. In fact, most of the page consists of an email received from counsel for the appellant. As a result, I find that this portion of Record 128 is not exempt under section 19 and I will order that it be disclosed.

EXERCISE OF DISCRETION

I have found above that certain records qualify under the discretionary exemption in section 19. Because the section 19 exemption is discretionary, it permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

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

The AGCO provided me with representations in which it set out the considerations which it took into account when exercising its discretion not to disclose the records which are subject to exemption under section 19. I find that the AGCO relied only on relevant and proper considerations in making its decision to not disclose the records that are subject to the section 19 exemption. Accordingly, I uphold the AGCO's exercise of discretion and will not disturb it on appeal.

ORDER:

1. I order the AGCO to disclose Records 1, 67, 76-78, 88, 99, 105, 109, 115, 117, page 1 of Record 128, the news release portion of Records 138 and 139, as well as Records 140, 158, 167, 168, the top portion of Record 169, 170, 221, 231, 232, 241-243 and 245-247 by providing the appellant with copies by no later than **April 5, 2011**.

2. I uphold the AGCO's decision to deny access to the remaining records, or parts of records.

3. I find that the searches conducted for responsive records were reasonable, and I dismiss this aspect of the appeal.

Original Signed By: March 15, 2011
Donald Hale
Adjudicator