Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3058

Appeal PA11-302

Ministry of the Attorney General

February 29, 2012

Summary: The appellant made a request to the Ministry of the Attorney General for access to records relating to him including records concerning a specific legal action. Access was granted to certain records, and access to other records was denied on the basis of the exemptions in section 19 (solicitor-client privilege), section 13(1) (advice or recommendations) and section 49(b) (personal privacy). In this order, the withheld records or portions of records are found to be exempt on the basis of the exemptions claimed. The ministry's search for responsive records is upheld as reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(2)(h), 13(1), 19(1), 49(a) and 49(b).

Orders and Investigation Reports Considered: Order P-994.

Cases Considered: *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172.

OVERVIEW:

[1] The appellant submitted a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). With the request, the appellant reviewed a number of actions and incidents that had occurred, and then stated:

> I believe [the ministry] has a file on me. At this time, I am requesting … a copy of all documents and information that [the ministry] is holding containing my name or which concerns me and which is not included in a court file. I am also requesting call logs and emails of any matter in which my name was included in the communication, as well as any recordings. …

[2] In the request, the appellant also asked the ministry for explanations as to why certain actions had taken place.

[3] In response to the request, the ministry sent the appellant a letter asking for more details in order to locate responsive records. The appellant then sent a more detailed request in which he indicated that he was requesting:

1) a copy of all documents associated with a referenced file number,
2) a copy of all ministry records pertaining to a specific legal action, and
3) copies of all emails or documents that refer to him, with specific keyword searches in the subject or message, sent to or received by any ministry staff, and specifically four named ministry staff.

[4] After issuing an interim decision letter and a fee estimate, the ministry located responsive records and issued a decision in which it granted access to certain records, and denied access to other records, or portions of records, on the basis of the discretionary exemptions in sections 13(1) (advice or recommendations) and 19(a) (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[5] The appellant appealed the ministry's decision.

[6] During mediation, the ministry provided the appellant with an index of records containing a brief description of the responsive records and identifying which exemptions applied to which records or portions of records. The appellant confirmed that he was interested in obtaining all of the withheld records, and also that he believed additional records exist. This raised the issue of whether the ministry's search for records was reasonable.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process.

[8] I sent a Notice of Inquiry to the ministry, initially. I also noted that, based on the wording of the request and the records at issue, some of the records may contain the personal information of the appellant, thereby raising the possible application of the discretionary exemptions in sections 49(a) and/or (b). As a result, I invited the ministry to also address the possible application of these exemptions.

[9] The ministry provided representations in response. In addition, the ministry indicated that it was revisiting its earlier decision, and released 24 additional records to the appellant. The ministry provided this office with a copy of the new decision letter it sent to the appellant, identifying that access to 24 additional records was now being granted. The ministry also provided this office with a revised index (indicating which records were disclosed and which records now remained at issue), as well as representations on the application of the exemptions to the records remaining at issue.

[10] I then sent the Notice of Inquiry, along with the ministry's representations and the revised index, to the appellant. The appellant provided representations in response.

RECORDS:

[11] There are approximately 70 pages of records remaining at issue, consisting of emails, correspondence and draft correspondence, notes and other documents. The pages or portions of pages remaining at issue are numbered pages 8-9, 16-18, 67-70, 76-77, 79, 95-97, 100-147, 152-153, 156-162, 164 and 166.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 49(b) apply to the withheld portions of pages 95 and 96?

C. Does the discretionary exemption at section 49(a) in conjunction with section 19(a) apply to the withheld information on pages 9 and 100-147?

D. Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the remaining records at issue?

E. Did the ministry properly exercise its discretion under sections 13(1), 19 and/or 49?

F. Was the ministry's search for responsive records reasonable?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[12] Under section 2(1) of the *Act*, "personal information" is defined as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) 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;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[14] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

[15] The ministry takes the position that all of the records contain the personal information of the appellant as defined in section 2(1)(f) and (h). I agree. The request clearly seeks information relating to legal matters involving the appellant, and I find that he is involved in these matters in his personal capacity. The responsive records also relate to letters sent by the appellant to the ministry identifying his concerns, and the responses to those letters. On my review of the records, I am satisfied that they contain the personal information of the appellant.

[16] The ministry also takes the position that the severed portions of pages 95 and 96 contain the personal information of another identifiable individual. The ministry states that, in routine dealings with correspondence, multiple pieces of correspondence are often referenced together in procedural emails between staff. The ministry then states:

> In [pages 95 and 96], the surname and correspondence number of another individual who wrote to the Ministry on an unrelated matter appear in an email along with the Appellant's name…. The records at issue here consist of emails requesting and providing correspondence drafted by ministry lawyers.

[17] On my review of the severed portion of pages 95 and 96, I am satisfied that these brief excerpts contain the name and correspondence number of an individual other than the appellant, and that it constitutes this person's personal information under section 2(1)(h) of the definition of that term in the *Act*.

B. Does the discretionary exemption at section 49(b) apply to the withheld portions of pages 95 and 96?

[18] The ministry takes the position that the withheld portions of pages 95 and 96 qualify for exemption under section 49(b) of the *Act*.

[19] 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 exemptions from disclosure that limit this general right.

[20] Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. If the information

falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester.

[21] Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

[22] Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[23] The ministry relies on section 49(b), in conjunction with the factor in section 21(2)(h), to support its denial of access to the withheld portions of pages 95 and 96. Section 21(2)(h) reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information has been supplied by the individual to whom the information relates in confidence;

[24] The ministry also takes the position that there are no factors favouring disclosure of this information to the appellant. The appellant does not address this issue in his representations.

[25] On my review of the brief severances to pages 95 and 96, I am satisfied that they contain information relating solely to an individual other than the appellant. This information happens to be on the same page as information relating to the appellant. All of the information on these pages relating to the appellant has been disclosed to him and, in absence of any factors favouring the disclosure of this other individual's personal information, I am satisfied that it qualifies for exemption under section 49(b) of the *Act*, subject to my review of the ministry's exercise of discretion, below.

C. Does the discretionary exemption at section 49(a) in conjunction with section 19(a) apply to the withheld information on pages 9 and 100-147?

Section 49(a)

[26] 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.

[27] 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.

[28] In this case, the ministry relies on section 49(a) in conjunction with the solicitor-client privilege in section 19 to deny access to the withheld information on pages 9 and 100-147. Section 19 reads:

> 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.

[29] Section 19 contains two branches. The institution must establish that one or the other (or both) branches apply. The ministry takes the position that the solicitor-client communication privilege in branch 1 of section 19 applies to the withheld information.

Branch 1: common law privilege

[30] 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)].

Solicitor-client communication privilege

[31] 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.)].

[32] 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].

[33] 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.)].

[34] 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].

[35] Confidentiality is an essential component of the privilege. Therefore, the ministry 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 and findings

[36] In support of its position that the solicitor-client communication privilege aspect of branch 1 of section 19 applies, the ministry states:

> The discretionary exemption at section 19, which allows a head to withhold solicitor-client records, is being applied to withhold all correspondence between [Court Services Division (CSD)] staff and [Crown Law Office - Civil (CLOC)] lawyers and two exchanges between CSD staff and CSD counsel.
>
> Branch 1 of the solicitor-client exemption in the *Act* codifies the common law of solicitor-client privilege. It includes both a communication privilege and a litigation privilege. The communication privilege is being relied upon here. 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 legal advice [*Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. The underlying purpose of this exemption is to ensure that all clients, including those governed by access to information legislation, are

> entitled to speak freely and frankly with their counsel without fear that the advice will be disclosed.

[37] The ministry provides specific representations on the application of section 19 to four distinct portions of the records. It states:

> There are four portions of the records being excluded pursuant to section 49(a) in conjunction with section 19.
>
> (1) The first solicitor-client exchange being withheld under section 19 is an exchange between CSD staff and CSD counsel in response to the Appellant's January 8, 2009 letter. It involves legal advice as to whether the Attorney General should intervene in the Appellant's family law matter as requested [Record 9].
>
> (2) The second solicitor-client exchange being withheld under section 19 is between CSD staff and CSD counsel with respect to legal advice from CLOC [Records 100-108].
>
> (3) The third solicitor-client exchange being withheld under section 19 is an exchange between CSD staff, CSD counsel and CLOC counsel, discussing the Appellant's April 13, 2009 letter. The legal advice obtained in this exchange pertains to the proper formulation of the law being communicated in response to the Appellant's request [Records 109-142].
>
> (4) The final solicitor-client exchange being withheld under section 19 pertains to the request for legal advice from CLOC on the proper formulation of the law being communicated in response to the Appellant's May 26, 2009 letter [Records 143-147]

[38] The appellant does not directly address the application of section 19 to the records.

Findings

[39] I have carefully reviewed the records for which the section 19 claim is made.

[40] Page 9 of the records consists of a written request from CSD staff to CSD counsel, asking counsel to provide advice on a particular matter. It includes a brief hand-written response from counsel identifying the advice given. I am satisfied that this record reveals 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, and that it qualifies for exemption under branch 1 of section 19.

[41] Pages 100-108 all consist of email messages or message strings. Many of the emails are repeated in these records in the email strings. All of these email messages are between CSD staff and CSD counsel, and relate to legal advice either sought or received from CSD counsel. I find these records consist of direct communications of a confidential nature between a solicitor and client, or their agents or employees, and form part of a "continuum of communications" between a solicitor and client made for the purpose of obtaining or giving professional legal advice. Accordingly, I find that pages 100-108 qualify for exemption under branch 1 of section 19.

[42] Pages 109-142 consist of emails or email chains (including two attachments – pages 116 and 133-134) between CSD staff, CSD counsel and CLOC counsel. These exchanges relate to the appellant's letter of April 13, 2009. The ministry has stated that these records concern the legal advice pertaining to the proper formulation of the law being communicated in response to the appellant's letter. On my review of these pages of records, I am satisfied that they consist of direct communications of a confidential nature between a solicitor and client, or their agents or employees, and form part of a "continuum of communications" between a solicitor and client made for the purpose of obtaining or giving professional legal advice. The suggested legal advice is also included in some of these records, and I find that pages 109-142 qualify for exemption under branch 1 of section 19.

[43] Pages 143-147 also consist of emails or email strings along with one attachment (page 144). These emails are between CSD staff and CLOC counsel and, as identified by the ministry, relate to a request for legal advice from CLOC on the proper formulation of the law being communicated in response to the appellant's letter of May 26, 2009. I find that these records also consist of direct communications of a confidential nature between a solicitor and client, or their agents or employees, and form part of a "continuum of communications" between a solicitor and client made for the purpose of obtaining or giving professional legal advice.

[44] In summary, I find that pages 9 and 100-147 all qualify for exemption under the solicitor-client privilege in section 19(1) and, accordingly, are exempt under section 49(a) of the *Act*, subject to my review of the ministry's exercise of discretion, below.

D. Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the remaining records at issue?

[45] The ministry takes the position that the discretionary exemption at section 13(1), in conjunction with section 49(a), applies to the remaining records, namely, pages 8, 16-18, 67-70, 76-77, 79, 97, 152, 153, 156-162, 164 and 166.

[46] Section 13(1) states:

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

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

[48] 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].

[49] "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].

[50] 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)]

Representations

[51] The ministry states that the records for which the section 13(1) claim is made all contain the advice or recommendations of ministry staff concerning the manner in which the ministry decision-makers ought to respond to letters sent by the appellant.

[52] The ministry identifies that the appellant wrote to the ministry three times during 2009 and that, given the subject matter of the correspondence, they were assigned to the Family Policy and Programs Branch of the CSD of the ministry for response. The ministry states that staff drafted recommended responses to each of the letters, which were then either approved by counsel or recommended by counsel for the approval of a specific signatory. The ministry states that the drafts constitute the employee's advice as to the appropriate response, and that this advice is either accepted or rejected by the signatory. The ministry also states that this process can often generate multiple drafts as the staff, counsel and signatory refine the information or decision and how it will be communicated.

[53] The ministry then identifies that the signatories to the three response letters are the Director, Family Policy and Programs Branch, CSD (responding to two of the letters) and the then Attorney General (responding to the third letter). The ministry then states that, in this case, the release of the draft correspondence would reveal specific recommendations of staff to the signatories of the responses. The ministry also refers to previous orders which confirm that drafts of documents may be considered "advice or recommendations" where the drafts reveal a recommended course of action, or where an inference of such may be made.

[54] The ministry adds that none of the exceptions found in section 13(2) apply, and that the records therefore qualify under the section 13(1) exemption.

[55] The appellant does not address the section 13(1) issue in his representations.

Analysis and findings

[56] I carefully reviewed the records for which the section 13 claim is made.

[57] To begin, I note that the substantive content of a number of the records for which the section 13(1) claim is made are duplicates of other records. Specifically, pages 17 and 97 are duplicates of page 16, page 70 is a duplicate of page 69, pages 76-77, 158-159, 161-162 and 164 are duplicates of page 69, pages 153 and 156 are duplicates of page 79, and page 166 is a duplicate of page 67. I will not be separately reviewing the duplicate copies of the draft letters.

[58] With respect to the remaining records for which the section 13(1) claim is made, I make the following findings:

- Page 8 is a brief email message and includes two handwritten responses to the message. I find that the email message and handwritten responses relate specifically to a suggested course of action by staff, and contain the recommended course of action. Accordingly, I find that this record qualifies under section 13(1) of the *Act*.

- Page 18 is an early draft of a letter sent in response to the appellant's April 13, 2009 correspondence. It includes handwritten notations, recommending certain changes to the letter. A revised copy of this draft letter is contained on page 16, and this recommended draft was provided to the decision-maker. I find that the disclosure of these two records, which are drafts of a different, final letter which was sent by the decision-maker, would reveal a recommended course of action, and that these records qualify under section 13(1) of the *Act*.

- Pages 67, 68, 69 and 79 are all similar copies of early drafts of a letter to be sent by the Attorney General, but contain slight modifications reflecting recommendations which were incorporated (pages 67 and 70), or include the recommended modifications as handwritten notations (pages 68 and 69). Pages 152, 157 and 160 consist of emails or email strings which identify specific recommended modifications, which either identify the recommendations incorporated in the drafts, or comment on them. On my review of these draft letters and the email messages, I am satisfied that, because the final letter sent by the Attorney General was disclosed to the appellant, disclosure of these emails and drafts would reveal staff's recommended course of action, and that these records qualify under section 13(1) of the *Act*.

[59] In summary, I find that records or portions of records for which the section 13(1) claim is made all qualify for exemption under that section and, accordingly, are exempt under section 49(a) of the *Act*, subject to my review of the ministry's exercise of discretion, below.

E. Did the ministry properly exercise its discretion under sections 13(1), 19 and/or 49?

[60] The section 13, 19, 49(a) and (b) exemptions are discretionary, and permit 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.

[61] 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.

[62] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

Relevant considerations

[63] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

- the historic practice of the institution with respect to similar information.

Representations and findings

[64] In the ministry's representations in support of its position that it properly exercised its discretion to apply the exemptions in this case, it states:

> The Ministry exercised discretion under sections 13(1), 19, and 49 to withhold multiple records. The specific logic of each exercise of discretion is set out in the reasoning above. The Ministry exercised its discretion taking into consideration the purposes of the *Act*, including the principles that: (1) information should be available to the public; (2) individuals should have a right of access to their own personal information, (3) exemptions from the right of access should be limited and specific; and (4) the privacy of individuals should be protected.
>
> The Ministry also considered the Appellant's belief that the Ministry has retained a file on him separate from the correspondence file. To make evident that no such file was located, every effort was made to disclose as many pages of the records as is reasonable without invading the personal privacy of others, inhibiting the free flow of advice or recommendation to the government, or revealing the legal advice of Ministry lawyers. As such, the Ministry's exercise of discretion should be upheld.

[65] The appellant takes the position that the ministry did not properly exercise its discretion. He refers to the requirements for a proper exercise of discretion, as set out above, and asks that I request further submissions in order to determine whether the institution has failed to take into account relevant considerations, and whether it has taken into account irrelevant considerations. The reasons he gives for this request are:

> The [ministry] has not acknowledged whether the rules governing the administration of justice in Ontario were contravened by it or with its involvement, as discussed. The [ministry] has also not indicated a substantive position on two apparently incorrect statements it made about me, namely, that I was a vexatious litigant and that I had requested document service on myself. The [ministry] has also not substantively addressed my concerns about the potential repercussions of its actions, including any ongoing effect on my right to a fair trial.
>
> I would invite the Commissioner to request submissions from the [ministry] on any or all of these points prior to making a decision. I am willing to provide submissions and to give testimony in this regard.

> The decision to refuse to provide the information to the requester is not in keeping with the public interest, the protection of the right to a fair trial, or with democratic values. There is an appearance that the [ministry] is not allowing for proper scrutiny of irregularities and errors, particularly by its refusal under sections 13(1) and 19. The requester reasserts his request for the continuum of legal, staff, and other opinions within the [ministry].

Findings

[66] I note that the ministry identified 170 pages of responsive records, and that access was granted to many of these pages. In addition, as identified above, during the inquiry stage of the process, the ministry disclosed an additional 24 pages of records. Furthermore, although the appellant is clearly unhappy with the actions of the ministry relating to his specific concerns (identified in the correspondence letters he sent to the ministry, and the responses which he received from the ministry), I am not satisfied that the appellant's concerns about the ministry's actions impact the decision to apply the exemptions in this appeal. In that regard, the ministry's responses to the appellant's concerns are clearly expressed in the letter responses, which were provided to him.

[67] As a result, on my review of all the circumstances in this appeal, I am satisfied that the ministry has not erred in exercising its discretion not to disclose the portions of the records at issue, as it has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. Accordingly, I find that the ministry properly exercised its discretion to apply the exemptions in sections 13(1), 19, 49(a) and (b) to the information at issue in this appeal.

F. Was the ministry's search for responsive records reasonable?

[68] In appeals involving a claim that 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.

[69] A number of previous orders have identified the requirements in reasonable search appeals (see 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 statement 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).

[70] I agree with acting-Adjudicator Jiwan's statement.

[71] Where a requester provides sufficient detail about the records that he/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.

[72] 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.

Representations

[73] In its representations the ministry reviews the steps taken to respond to the clarified three–part request, which was for:

> 1. A copy of all documents associated with [a referenced file number] as indicated in the January 14, 2009 communication from [a named individual].
>
> 2. A copy of all Ministry records pertaining to [a specific legal action] from the Oshawa Superior Court of Justice, Family Court Division, in Oshawa, Ontario, the Divisional Court at 50 Eagle Street in Newmarket, Ontario, and the Court of Appeal for Ontario in Toronto, Ontario from 2003 to the present time.
>
> 3. Copies of all emails or documents that make direct or indirect reference to [the appellant], searched under [two specific names referenced in the specified court action] in the subject or message, sent to or received by any Ministry staff and specifically: [four named staff members]

[74] As identified above, the ministry located 170 pages of responsive records. It states that all of these records relate to four sets of correspondence between the

ministry and the appellant. The ministry identifies the dates of the four exchanges, all of which occurred in 2009, and that they all relate to the referenced file number.

[75] The ministry then states:

> No additional records were located by the search for "all Ministry records pertaining to [a specific legal action] from the Oshawa Superior Court of Justice, Family Court Division, in Oshawa, Ontario, the Divisional Court at 50 Eagle Street in Newmarket, Ontario, and the Court of Appeal for Ontario in Toronto, Ontario from 2003 to the present time."
>
> No additional records were located by the search for all emails or documents that make direct or indirect reference to [the appellant], searched under [the two specific names] in the subject or message, sent to or received by any Ministry staff and specifically: [the four named staff members].

[76] The ministry also provides specific representations concerning the nature of the searches that were conducted for the clarified three-part request. It states that, upon receiving the clarified request, two named counsel for the CSD of the ministry worked with the CSD Freedom of Information Coordinator to contact ministry employees experienced and knowledgeable in the subject matter of the three aspects of the request.

[77] With respect to the first part of the request, the ministry states that the Freedom of Information Coordinator contacted CSD staff who process the Branch's correspondence, and asked them to compile all records related to the correspondence identified by the internal tracking number which it assigned to the referenced file number. The ministry states that a search of both the correspondence tracking system and the emails of all staff involved in responding to the appellant's correspondence was conducted, and that all of the responsive records were included in the index of records.

[78] With respect to the second part of the request, the ministry states that a named CSD lawyer contacted the Directors of Court Operations in charge of the courthouses identified in this second part of the appellant's request. The ministry states that these Directors delegated the searches to individuals with knowledge of records of this nature, specifically, the identified Manager of Court Operations for York Region and the identified Regional Manager for the Central East Region. The ministry states that, as a result of these searches, no responsive records were located. It also indicates that, in accord with the decision in Order P-994[1] which determined that the ministry did not

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[1] This order was recently referred to favourably by the Divisional Court in *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172.

have custody or control of a record in a court file, the searches did not include any records located in a court file.

[79] Lastly, with respect to the third part of the request, the ministry identifies that this part of the request specifically sought communications of four named staff members.

[80] With respect to the communications of the first named staff member, the ministry states that her communications, including her emails, were searched as part of the request for all documents associated with the referenced file number (in part one of the request). The ministry states that all of the records located as a result of this search are included in the records identified as responsive to the request.

[81] With respect to the second and third named staff members, these two staff members were identified as CSD Enforcement Office employees. The ministry states that counsel for CSD contacted the Enforcement Unit's Consulting Manager at the CSD Head Office. Counsel was advised that the only files maintained by enforcement offices are those associated with writs of execution, and that a search of the Writ System was conducted for the three courthouse locations identified by the appellant (Newmarket, Toronto and Durham), and that no responsive records were located as a result of these searches.

[82] Lastly, with respect to the fourth named staff member, the ministry identifies that this individual is a judicial staff person in the Office of the Chief Justice. The ministry again states that, as a result of the findings contained in the decision in Order P-994 (referenced above), any responsive records relating to the identified court action would not be subject to the *Act*.

[83] The ministry summarizes its position by stating:

> Although the Appellant asserts as part of this appeal that additional records exist, the Ministry has accounted for all the records that were discoverable by experienced employees with knowledgeable in the subject matter of each aspect of the Appellant's request. As such, the Ministry maintains that a reasonable search was conducted.

[84] The appellant's representations on the reasonableness of the ministry's searches focus on certain specific concerns. I note that some of these concerns do not specifically address the reasonableness of the searches, but rather address the appellant's view of the ministry's actions concerning his legal action, and questions about their response to his concerns.

[85] The appellant begins by identifying that many of his concerns arose as a result of a letter and fax cover sheet which he states was located in a court file. He indicates

that he is concerned that the information in these two one-page documents is false, and was relied on by the court to his detriment in specific private actions he is involved in. The appellant provided me with a copy of these documents, which are between the Newmarket Court Office and the Enforcement Office of the ministry, and relate to the service of a document in a private legal matter involving the appellant and another litigant.

[86] The appellant takes the position that, absent a court order, it "would appear to be irregular for [the ministry] to be involved in service of documents between private parties…." The appellant then reviews why he is interested in information relating to this letter, and his concerns about how the information has prejudiced him. He also identifies how he has brought these concerns to the attention of the Premier of Ontario, the Attorney General of Ontario, and the Ombudsman of Ontario, and provides his letters and the responses he has received from these offices.

[87] I note that the records at issue in this appeal relate to the ministry's response to a number of the appellant's complaint letters relating to the issues identified by him.

[88] The appellant also identifies his concerns that the letter and fax cover sheet were in the court file, and may have been reviewed by a judicial panel deciding an appeal.

[89] With respect to the specific issues concerning the adequacy of the searches conducted by the ministry, the appellant states that the letter and fax cover sheet were not identified as records responsive to his request. He also states that the existence of these records in the court file ought to have resulted in internal communications about the appellant's concerns about the irregularities evidenced in these two documents, and that the ministry has not located records which reflect a review or discussion of these inconsistencies. The appellant also states:

> I am also concerned that the … search apparently did not yield what could reasonably be expected if [the ministry] had investigated apparent irregularities in the administration of justice and the apparent contravention of the Ontario *Rules of Civil Procedure*, which I would expect under the circumstances.

[90] The appellant also raises questions about what material from a Divisional Court file is actually before the panel of judges in an appeal, and whether the records he is concerned about were presented to an appeal panel, or otherwise made available to that panel. He also provides correspondence which he received from the Assistant Deputy Attorney General, Court Services Division, that addresses this issue.

[91] Lastly, the appellant identifies his concerns about the discrepancy in the number of possible responsive records initially identified in the interim fee decision he received

earlier in the process, and the actual number of pages located. He asks that the ministry be asked to provide further representations on this discrepancy.

Analysis and Findings

[92] As set out above, in appeals involving a claim that 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 ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[93] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[94] I adopt the approach taken in the above orders for the purposes of the present appeal.

[95] The ministry has provided evidence regarding the nature of the searches conducted for records responsive to the appellant's clarified three-part request. This evidence is contained in its representations as summarized above, and reviews in detail the nature of the searches conducted for responsive records, the individuals involved in conducting the searches, and the results of those searches. The ministry has also explained that, as a result of the findings in Order P-994, it did not search court files, nor did it ask a staff member of the Office of the Chief Justice to search for a record relating to the specified court action.

[96] Based on the information provided by the ministry respecting the nature and extent of the searches conducted by it for responsive records, I am satisfied that the ministry's search for records responsive to the request was reasonable in the circumstances. The ministry has clearly identified the nature of the searches conducted, and the results of those searches. I also note that, in Order P-994, Adjudicator Cropley accepted that, generally speaking, court records consist of "records which relate to a court action and which are found in a court file" and found that these

records are not subject to the *Act*. More recently, the Divisional Court confirmed that one of the components of judicial independence is administrative independence, which requires "judicial control with respect to matters of administration bearing directly and immediately on the exercise of the judicial function."[2] The court confirmed that, generally, administrative records maintained by the Chief Justice of Ontario were also excluded from the scope of the *Act*. In this case, absent additional evidence, I am satisfied that the ministry's decision not to search for the records relating to a specific court action (either contained in the court file or held by staff of the Office of the Chief Justice) was reasonable, given the nature of the request and the referenced court matter.

[97] Although the appellant has provided representations in support of his position that additional records ought to exist with the ministry, or should have been created in the course of further investigations, I do not find that this evidence is sufficient to support a finding that the searches conducted by the ministry were not reasonable.

[98] As a result, I find that the ministry's search for responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the ministry's decision to apply the identified exemptions to the records at issue.

2. I find that the ministry's search for responsive records was reasonable, and dismiss the appeal.

Original Signed by: ____________________ February 29, 2012
Frank DeVries
Adjudicator

[2] *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 .