Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3098

Appeal PA09-16-2

Ministry of the Attorney General

July 16, 2012

Summary: The appellant and his family are seeking access to records relating to them held by the ministry starting from June 5, 2000. The ministry disclosed a substantial number of records to them. However, it denied access to the remaining records and parts of records under the discretionary exemptions in sections 49(a) (in conjunction with other exemptions) and 49(b), and under the exclusion in section 65(6). In this order, the adjudicator finds that most of the records and parts of records withheld by the ministry qualify for exemption or exclusion, but a small number do not. He orders the ministry to disclose four records to the appellant. In addition, he finds that the ministry has provided the appellant with adequate indexes of records and has conducted a reasonable search for records responsive to his and his family's requests.

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"), 2(3), 13(1), 14(1)(a), 14(1)(c), 19, 22(a), 24, 49(a), 49(b) and 65(6).

Orders and Investigation Reports Considered: Orders MO-2282-I and PO-2757.

OVERVIEW:

[1] A husband and wife and their daughter filed requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) with the Ministry of the Attorney General (the ministry) for "all and any information in any format" relating to

them held by the ministry starting from June 5, 2000. The ministry assigned a separate file number for each request.[1]

[2] Subsequently, the wife removed her name as one of the requesters and provided the ministry with a signed consent form authorizing her husband (the appellant) to access any of her personal information that might be contained in the responsive records. Therefore, the husband is acting on behalf of himself, his wife and his daughter with respect to their access requests. In addition, several members of his extended family, including his father, his brother and his mother-in-law, provided signed consent forms that authorized the ministry to disclose their personal information to the appellant.

[3] The ministry located 14,179 pages of responsive records in the Trial Crown's office, Crown Law Office – Civil (CLOC), and Criminal Law Division. These records relate to various criminal investigations and proceedings brought against the appellant, and various complaints and civil proceedings that the appellant and his family have brought against the Ontario Provincial Police (OPP) and the Ontario government.

[4] The ministry then issued two decision letters that provided the appellant and his family with access to a substantial number of these records but denied access to the remaining records and parts of records under various exemptions and an exclusionary provision in the *Act*.[2]

[5] The appellant appealed the ministry's decisions to the Information and Privacy Commissioner of Ontario (IPC), which opened appeal PA09-16-2. The ministry provided the IPC with a copy of the 14,179 pages of responsive records, which are contained on a CD-ROM.

[6] The appellant advised the IPC intake analyst that he was appealing the ministry's decisions to deny access to the remaining records and parts of records under various provisions in the *Act*. In addition, he alleged that the ministry had not conducted a reasonable search for responsive records. Finally, he claimed that the ministry had not provided him with a proper index of records.

[7] This appeal was streamed directly to adjudication for an inquiry. I started my inquiry by sending a notice of inquiry, setting out the facts and issues, to the ministry. In response, the ministry submitted representations to the IPC prepared by two offices: CLOC and Criminal Law Division. The attachments to these representations included:

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[1] MAG-P-2007-00892/hk, MAG-P-2007-00893/hk and MAG-P-2007-01017/hk.
[2] The ministry's decision letters are dated May 28 and July 2, 2010.

- a copy of a revised decision letter that the ministry issued to the appellant, providing him and his family with access to a substantial number of additional records;[3]

- paper copies of the additional records that it disclosed to the appellant;

- copies of three updated indexes of records that the ministry provided to the appellant that cover the records located in the Trial Crown's office, CLOC, and Criminal Law Division; and

- four affidavits from ministry staff that provide evidence with respect to the searches that were carried out to locate records responsive to the appellant and his family's access requests.

[8] According to the three decision letters that it issued to the appellant, the ministry is relying on the following provisions of the *Act* to deny access to the records and parts of records that remain at issue:

- the discretionary exemption in section 49(a) (right of access to one's own personal information), read in conjunction with the exemptions in sections 13(1) (advice and recommendations), 14(1)(a) and (c) (law enforcement), 19 (solicitor-client privilege), and 22(a) (information currently available to the public);

- the discretionary exemption in section 49(b) (personal privacy) and the mandatory exemption in section 21(1) (personal privacy), read in conjunction with the presumption in section 21(3)(b) (investigation into violation of law); and

- the exclusion in section 65(6) (labour relations and employment records).

[9] Although the ministry's decision letters cite several exemptions and the section 65(6) exclusion, it has denied access to the vast majority of the records and parts of records remaining at issue under section 49(a), read in conjunction with the solicitor-client privilege exemption in section 19. Consequently, whether these records and parts of records are exempt from disclosure because they are subject to solicitor-client privilege is a central issue in this appeal.

[10] The ministry's revised decision letter to the appellant also raises an additional issue that has been added to this appeal. It states that the ministry "omitted to cite" the discretionary exemptions in sections 14(1)(a) and (c) and 22(a) of the *Act* in the

[3] The ministry's revised decision letter is dated March 11, 2011.

original two decision letters that it issued to him. Section 11 of the IPC's *Code of Procedure* sets out rules that apply to circumstances in which institutions seek to raise new discretionary exemption claims during an appeal. Consequently, whether the ministry should be allowed to make new discretionary claims at this stage of the appeal is a preliminary issue that will be resolved within Issue C of this order.

[11] After reviewing the ministry's representations, I issued a notice of inquiry to the appellant and shared the ministry's representations with him in accordance with the rules in IPC *Practice Direction 7.* In response, the appellant submitted one page of representations to the IPC.

[12] In this order, I find that the ministry has provided the appellant with adequate indexes of records and has conducted a reasonable search for records responsive to the access requests filed by him and his family. In addition, I find that most of the records and parts of records withheld by the ministry qualify for exemption or exclusion under the *Act*.

[13] However, I find that six records withheld by the ministry, either in full or in part, contain information that does not qualify for exemption under the *Act*. Two of these records are duplicates, so I will be ordering the ministry to disclose a total of four records to the appellant.

RECORDS:

[14] The ministry located 14,179 pages of responsive records in the Trial Crown's office (pages 1 to 226), CLOC (pages 227 to 11,247), and Criminal Law Division (pages 11,248 to 14,179).

[15] The records and parts of records that were withheld by the ministry and, therefore, remain at issue are identified in the three indexes of records that the ministry provided to the appellant and the IPC during the adjudication stage of the appeal process. These records relate to various criminal investigations and proceedings brought against the appellant, as well as a series of complaints and civil proceedings that the appellant and his family have brought against the OPP and the Ontario government.

ISSUES:

Issue A: Did the ministry provide the appellant with an adequate index of records?

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Issue C: Does the discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(a), 14(1)(c), 19 and 22(a) exemptions, apply to the information at issue?

Issue D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

Issue E: Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

Issue F: Does section 65(6) exclude any records from the *Act?*

Issue G: Did the ministry conduct a reasonable search for records?

DISCUSSION:

A. Did the ministry provide the appellant with an adequate index of records?

[16] The appellant claims that the ministry has not provided him with a proper index of records. During the intake stage of the appeal process, he stated the following:

> … [L]ooking at things from a reasonable perspective, especially given the voluminous amount of information that exists, there absolutely needs [to] be an **Index** or **List of Documents**, **a "Control Sheet"** that shows ie:
>
> 1) the Date,
> 2) the Number of Pages of that Document,
> 3) the Author,
> 4) the Recipient,
> 5) the Type of Information, ie: a Letter, a CD, Police Officer Note, etc.[4]
> (Emphasis in original.)

[17] The *Act* does not impose any statutory obligation on an institution to provide a requester with an index of records, either at the request stage or during an appeal before the IPC. However, a requester cannot participate effectively in an appeal unless he or she has some information about the specific records that the institution is withholding and its reasons for doing so. Consequently, I find that fair procedure requires that an institution provide a requester with an index of records that provides some basic information about the withheld records.

[4] Appellant's letter of May 20, 2010.

[18] Section 10.02 of the IPC's *Code of Procedure* (the *Code*) states:

> Where the IPC determines that it is required in order to process an appeal, the IPC may issue an order requiring the institution to number the records, number the pages of records, provide legible copies, provide highlighted copies, or *provide a detailed index indicating the date of creation of each record, a brief description of the record, the extent to which it was disclosed, and what exemption has been claimed*. (Emphasis added.)

[19] The IPC may exercise the authority granted by section 54(3) of the *Act* to order an institution to prepare a proper index of records.[5]

[20] During this inquiry, the ministry sent the appellant three indexes of records that identify the 14,179 records located in the Trial Crown's office (pages 1 to 226), CLOC (pages 227 to 11,247), and Criminal Law Division (pages 11,248 to 14,179).[6] I included copies of these same indexes with the notice of inquiry that I sent to the appellant.

[21] The ministry submits that it has provided the appellant with proper indexes that include a brief description of the records, the extent to which the records were disclosed and the exemptions claimed. The appellant submits that the ministry should provide him with a "full and complete list of all that exists, and what has been provided and when."

[22] I have reviewed the indexes of records that the ministry provided to both the appellant and the IPC, which cover an exceptionally large number of records. Each index sets out the page number(s) of each record, a brief description of each record, whether the record was disclosed, and the exclusion or exemptions claimed for those records withheld by the ministry. These indexes meet most of the requirements of section 10.02 of the *Code*. Although the indexes do not contain the creation dates of each record, as stipulated in section 10.02, they are, in my view, detailed enough to enable the appellant to participate effectively in this appeal. In short, I find that the ministry has provided the appellant with adequate indexes of records, and I dismiss this aspect of the appeal.

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[5] In Order MO-2282-I, Adjudicator Daphne Loukidelis found that the Commissioner may exercise the authority granted to her by section 43(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) to order an institution to prepare a proper index of records.

[6] Two indexes accompanied the ministry's revised decision letter of March 11, 2011 and a third index accompanied a letter dated March 31, 2011.

B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[23] The discretionary exemptions in sections 49(a) and (b) and the mandatory exemption in section 21(1) of the *Act* apply to "personal information." Consequently, it is necessary to determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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,
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> (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,
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> (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;

[24] 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.[7]

[25] Section 2(3) of the *Act* excludes certain information from the definition of personal information. It states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[26] In addition, previous IPC orders have found that 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.[8]

[27] However, previous orders have also found that 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.[9]

[28] The ministry submits that the records at issue contain the personal information of various individuals, including "the expression of opinions by third parties given about the requesters which were given in circumstances that they reasonably believed to be confidential communications with the Crown." The appellant's representations do not address whether the records at issue contain the personal information of any individuals.

[29] I have reviewed the records at issue and find that they contain the personal information of many individuals, including the appellant, his wife, his daughter, members of his extended family, witnesses to various incidents and other identifiable individuals. The types of personal information relating to these individuals in the records fall within paragraphs (a) to (h) of the definition in section 2(1).

[30] Many of the records at issue contain the names and job titles of various lawyers, police officers, public servants and other individuals. In my view, this information identifies these individuals in a professional or official capacity. In accordance with the exception to the definition of "personal information" in section 2(3) of the *Act*, I find that this information does not qualify as their personal information.

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[7] Order 11.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

[31] However, some information in the records about these lawyers, police officers, public servants and other individuals relates to allegations by the appellant and his family that these individuals have engaged in misconduct. In my view, any such information in the records relating to these individuals reveals something of a personal nature about them, and it therefore qualifies as their personal, rather than professional information.

[32] I will now turn to assessing whether the records and parts of records withheld by the ministry qualify for exemption or exclusion under the *Act*.

C: Does the discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(a), 14(1)(c), 19 and 22(a) exemptions, apply to the information at issue?

[33] 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.

[34] The ministry is withholding a number of records and parts of records under section 49(a), read in conjunction with the sections 13(1), 14(1)(a), 14(1)(c), 19 and 22(a) exemptions. These records contain the appellant's personal information.

[35] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. This will be addressed under Issue E (exercise of discretion) below.

[36] Based on my review of the records at issue, I have decided to examine the ministry's exemption claims in the following order: sections 19, 22(a), 13(1), 14(1)(a) and 14(1)(c). However, I will start by disposing of a preliminary issue that relates to the late raising of certain discretionary exemptions by the ministry.

Preliminary issue

[37] In its representations, the ministry states that it "omitted to cite" the discretionary exemptions in sections 14(1)(a) and (c) and 22(a) of the *Act* in the original two decision letters that it issued to him.

[38] Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of

> the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[39] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[10]

[40] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[11] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[12]

[41] The ministry's decision to claim these discretionary exemptions for a larger number of records was made at the outset of adjudication, which was beyond the 35-day timeline set out in section 11.01 of the *Code*. However, section 11.01 is discretionary and allows an adjudicator to consider a new exemption claim made after the prescribed timeline.

[42] I am mindful of the fact that the appellant and his family have requested an extremely large number of records. In some requests, an individual may seek access to 10 or 20 pages of records held by an institution. In this case, the ministry located 14,179 pages of records that are responsive to the appellant and his family's access requests. I also recognize that the ministry has devoted significant staff time and resources to locating, severing and disclosing the voluminous amount of responsive records. In my view, the ministry's failure to claim sections 14(1)(a), 14(1)(c) and 22(a) at an earlier stage was inadvertent, given the voluminous number of records at issue in this appeal.

[43] I note that the ministry raised these exemptions before the appellant was asked to submit representations. Moreover, although the notice of inquiry issued to the appellant invited him to comment on this issue, his representations do not allege that he has suffered prejudice by the late raising of these exemptions. In these

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[10] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[11] Order PO-1832.

[12] Orders PO-2113 and PO-2331.

circumstances, I find that the ministry's decision to claim the sections 14(1)(a), 14(1)(c) and 22(a) exemptions for specific records at the beginning of the adjudication stage has not resulted in prejudice to the appellant and does not compromise the integrity of the appeal process. Consequently, I have decided to allow the ministry to claim these discretionary exemptions.

Section 19: Solicitor-client privilege

[44] The records at issue in this appeal relate to various criminal investigations and proceedings brought against the appellant, as well as various complaints and civil proceedings that the appellant and his family have brought against the OPP and the Ontario government. The ministry claims that the discretionary exemption in section 49(a), in conjunction with the solicitor-client privilege exemption in section 19, applies to the vast majority of the withheld records and parts of records in this appeal.

[45] Section 19 of the *Act* states, in part:

> 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;

[46] 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). The ministry must establish that at least one branch applies.

Branch 1: common law privilege

[47] 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.[13]

Solicitor-client communication privilege

[48] 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.[14]

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[13] 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).
[14] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[49] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[15]

[50] 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.[16]

[51] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[17]

[52] 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.[18]

Litigation privilege

[53] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[19]

Branch 2: statutory privileges

[54] Branch 2 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.

[55] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.[20] However, branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.[21]

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[15] Orders PO-2441, MO-2166 and MO-1925.
[16] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[17] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[18] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[19] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).
[20] Order PO-2733.
[21] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

[56] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.[22]

[57] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[23]

[58] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[24]

[59] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the head of an institution;[25] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[26]

[60] As noted above, the ministry submitted representations from two of its offices: CLOC and Criminal Law Division. The representations of both offices address whether section 49(a), in conjunction with the solicitor-client privilege exemption in section 19, applies to the withheld records and parts of records in this appeal.

[61] In its representations, CLOC states that the majority of records that the ministry has withheld is subject to section 19 of the *Act*. It submits:

> The kinds of records for which the s. 19 exemption is claimed include:
>
> a. Solicitor-client privilege communications between Crown counsel and clients, other Crown counsel, ministry staff members, other ministries and police. These communications often enclose correspondence or other information from the requester, which form part of the privileged "continuum of communications".
>
> b. Records provided to the ministry, CLOC in particular, from other ministries or police to be used by Crown counsel in contemplation or or for use in litigation. These records include Crown brief materials,

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[22] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[23] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).
[24] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[25] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[26] *Ibid.*

> police documentation and correspondence from or information about the requester received by other ministries.
>
> c. Notes made by Crown counsel in the course of preparing for litigation or in contemplation of litigation.
>
> CLOC asserts that, for those documents subject to s. 19, privilege has not been lost through waiver nor does the common interest principle apply here. . . .

[62] Similarly, Criminal Law Division submits that records in the Crown brief for various criminal matters involving the appellant are subject to permanent exclusion from release under branch 2 of section 19.

[63] The appellant's representations do not address whether the records withheld by the ministry qualify for exemption under section 49(a), in conjunction with section 19 of the *Act*.

[64] I have reviewed the records at issue and considered the ministry's representations. I am satisfied that these records fall within branches 1 and 2 of section 19 for the following reasons. A large number of records relate to the appellant's and his family's civil lawsuits against the OPP and the Ontario government. Counsel employed by CLOC and external counsel hired by the ministry represented the OPP and the Ontario government in these lawsuits. Many of the records at issue either contain legal advice[27] or are part of a "continuum of communications" between these solicitors and their clients.[28] I find that these records are exempt under the solicitor-client communication privilege component of branch 1 of section 19.

[65] The records also include documents that were prepared for use in the mediation or settlement of actual or contemplated litigation with the appellant.[29] As stipulated in the *Magnotta* case,[30] these records qualify for exemption under branch 2 of section 19.

[66] A number of the records withheld by the ministry under section 19 relate to various criminal proceedings that the Crown brought against the appellant, including the appeals that took place. Many of these records form part of the Crown brief, including copies of materials provided to prosecutors by the OPP, and other materials

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[27] e.g., The record on pages 12,033-12,051 is a legal opinion prepared by Crown counsel on a specific issue.

[28] e.g., The records include correspondence between a CLOC lawyer and the Risk Management and Insurance Services unit at Management Board Secretariat. See pages 3,262-3,265, 3,272-3,274, 3,397, 3,618, and 3,979.

[29] e.g., The records on pages 4,324-4,366 relate to a mediation brief that was being prepared by external counsel representing the Crown with respect to the appellant's and his family's civil lawsuit.

[30] *Supra* note 24.

created by or for counsel.[31] I find that these records are also exempt under the statutory litigation privilege aspect of branch 2 of section 19.

[67] In summary, with limited exceptions, I am satisfied that the records that the ministry has withheld under the discretionary exemption in section 49(a), in conjunction with section 19, are exempt from disclosure, subject to my review of the ministry's exercise of discretion in Issue E below.

[68] The only three records or parts of records that I have found do not qualify for exemption under section 49(a), in conjunction with section 19 are the following:

Pages 1,299 and 3548 – Minister's Correspondence Routing Slip

[69] These two pages appear to be the same record. The ministry has disclosed this one-page record to the appellant but has severed the name of the CLOC counsel assigned to the file, two dates, the action required (but only on page 1,299), and a reference to another unidentified legal counsel.

[70] In my view, basic information such as the identity of Crown counsel assigned to the file and the assigned dates is not subject to solicitor-client privilege and cannot be viewed as information that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. Consequently, I find that the severed information in these two records does not qualify for exemption under section 19 and must be disclosed to the appellant.

Page 13,633 – Transcript of voicemail message

[71] This record is a transcript of a message that the appellant's newly retained legal counsel left on the voicemail of Crown counsel. The ministry has withheld this record in its entirety under s. 49(a), in conjunction with section 19.

[72] The solicitor-client communication privilege component section of 19(a) protects communications of a confidential nature between a solicitor and client. It does not extend to communications between opposing counsel, who do not share a solicitor-client relationship. In addition, this information was clearly not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation, as stipulated in section 19(b).

[73] Consequently, I find that this record does not qualify for exemption under section 19 and must be disclosed to the appellant. However, as will be explained under Issue D below, parts of this record contain personal information relating to an individual

[31] The Crown briefs relating to various criminal matters involving the appellant are found throughout the records at issue (e.g., see pages 112-188).

other than the appellant that qualifies for exemption under section 49(b). Consequently, this personal information must be severed from the record before it is disclosed to the appellant.

Section 22(a): information currently available to the public

[74] The ministry claims that a number of records are exempt from disclosure under the section 49(a), read in conjunction with section 22(a).

[75] Section 22(a) states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

[76] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.[32]

[77] To show that a "regularized system of access" exists, the institution must demonstrate that:

- a system exists;
- the record is available to everyone; and
- there is a pricing structure that is applied to all who wish to obtain the information.[33]

[78] Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.[34]

[79] Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include:

- unreported court decisions;[35]
- statutes and regulations;[36]

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[32] Orders P-327, P-1387.
[33] Order P-1316.
[34] Orders P-327, P-1114 and MO-2280.
[35] Order P-159.

- property assessment rolls;[37]
- septic records;[38]
- property sale data;[39]
- police accident reconstruction records;[40] and
- orders to comply with property standards.[41]

[80] In Order PO-2757, Adjudicator Donald Hale found that documents filed with a court and available for a fee to any member of the public qualify for exemption under section 22(a). He stated:

> I find that the ministry has established that the Statement of Facts and the Exhibit List are available to the public generally, through a regularized system of access, as is required under section 22(a). In this case, upon payment of a fee, both documents can be accessed at the local Court office where the murder trial took place, a fact that appears to be acknowledged by the appellant. This system of access is available to anyone and a pricing structure exists for any member of the public who wishes to obtain access to these documents. As a result, I find that they qualify for exemption under section 22(a).

[81] The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act*.[42] However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply.[43]

[82] The ministry states that it has claimed the section 22(a) exemption for court documents that are available to the public for a fee, including:

(a) copies of documents filed with a court or tribunal in litigation involving the requester;
(b) transcripts from that litigation; and
(c) decisions released by a court or tribunal respecting that litigation.

[83] The appellant's representations do not address whether the section 22(a) exemption applies to any of the records at issue.

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[36] Orders P-170 and P-1387.
[37] Order P-1316.
[38] Order MO-1411.
[39] Order PO-1655.
[40] Order MO-1573.
[41] Order MO-2280.
[42] Orders P-159, PO-1655, MO-1411 and MO-1573.
[43] Order MO-1573.

[84] I have reviewed the records that the ministry has withheld under section 49(a), in conjunction with section 22(a). They include records found in various court files, such as a portion of the transcript from the appellant's criminal trial[44] and documents that the Crown filed with the court in appeal proceedings, such as its summary conviction appeal factum.[45] They also include documents that CLOC filed with the court relating to the civil proceedings that the appellant and his family brought against the OPP and the Ontario government, such as its motion records and supporting documents.[46]

[85] These records, which are found in various court files, are publically available through the appropriate court office upon payment of a prescribed fee. A regularized system of access exists and there is a pricing structure that is applies to anyone who wishes to obtain such records, as required by section 22(a). Consequently, I find that the ministry has established that such records are currently available to the public and they qualify for exemption under section 49(a), in conjunction with section 22(a).

Section 13(1): Advice and recommendations

[86] The ministry claims that some information in the records is exempt from disclosure under the discretionary exemption in section 49(a), read in conjunction with section 13(1).

[87] 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.

[88] The purpose of section 13(1) 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.[47]

[89] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[48]

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[44] See pages 11,264-11,266 of the records.
[45] See pages 11,271-11,279 of the records.
[46] See pages 7,368-7,561 of the records.
[47] 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] Order PO-2681.

[90] "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.[49]

[91] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.[50]

[92] 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.[51]

[93] In addition, sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1).

[94] The ministry has provided minimal evidence to support its claim that the section 13(1) exemption applies to some of the information in the records at issue. It submits that "as the submissions are being shared with the appellant, no additional information can be provided …." The appellant's representations do not address whether the section 13(1) exemption applies to any of the information in the records at issue.

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[49] 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] 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).

[51] 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).

[95] Most of the information in the records that the ministry has withheld under section 13(1) has been properly withheld under section 49(a), in conjunction with the solicitor-client privilege exemption in section 19.[52] Consequently, I find that it is not necessary to determine whether the withheld information in these records is also exempt from disclosure under section 13(1).

[96] However, the ministry has withheld information in some records under section 49(a), only in conjunction with section 13(1). I find that there is information in the following three records which do not qualify for exemption under section 13(1):

Pages 1,736 and 3,112 – Handwritten note on email

[97] These two records are the same – an email from the appellant that was forwarded within the ministry. The ministry has disclosed this record to the appellant but has withheld a note written on it by a public servant. I find that this handwritten note contains factual information. It does not contain the advice or recommendations of a public servant, as required by section 13(1). Consequently, I find that the severed handwritten note in this record must be disclosed to the appellant.

Page 1,767 – Handwritten note on fax

[98] This record is a fax from the appellant's wife. The ministry has disclosed this record to the appellant but has severed two handwritten notes by a public servant. One part of this handwritten note provides a direction to another public servant, while the other part poses a question. Neither part contains the advice or recommendations of a public servant, as required by section 13(1). Consequently, I find that the severed handwritten note in this record must be disclosed to the appellant.

Section 14: Law enforcement

[99] The ministry claims that some information in a small number of records is exempt under the discretionary exemption in section 49(a), read in conjunction with the law enforcement exemptions in sections 14(1)(a) and (c).

[100] The information in the records that the ministry has withheld under sections 14(1)(a) and (c) has been properly withheld under section 49(a), in conjunction with the solicitor-client privilege exemption in section 19.[53] Consequently, I find that it is not necessary to determine whether the withheld information in these records is also exempt from disclosure under sections 14(1)(a) and (c).

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[52] See, for example, the records on pages 31-35, 189-204, 207-212, 2,193-2,199, 13,074-13,075 and 13,749.
[53] See, for example, the records on pages 11,904-11,906 and 13,749.

D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[101] The ministry has withheld the personal information of various individuals in the records under the mandatory exemption in section 21(1) and the discretionary exemption in section 49(b) of the *Act*. Both sections 21(1) and 49(b) are personal privacy exemptions.

[102] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[103] Under section 49(b), where a record contains 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.

[104] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. See Issue E below for a more detailed discussion of the exercise of discretion issue.

[105] Most of the records containing personal information that the ministry has withheld under section 21(1) or 49(b) have been properly withheld under section 49(a), in conjunction with the solicitor-client privilege exemption in section 19.[54] Consequently, I find that it is not necessary to determine whether the withheld personal information in these records is also exempt from disclosure under sections 21(1) or 49(b).

[106] As noted above, however, page 13,633 is a transcript of a message that the appellant's newly retained legal counsel left on the voicemail of Crown counsel. In my analysis under section 49(a) above, I found that this record does not qualify for exemption under section 19 and must be disclosed to the appellant. However, parts of this record contain personal information relating to an individual other than the appellant and it must therefore be determined whether this information qualifies for exemption under section 49(b). Although this individual is identified in a professional capacity, the content of the voicemail message raises questions about his conduct, which brings the information relating to him into the realm of personal information.

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[54] For example, there is personal information of various individuals in the Crown brief on pages 112-188 which the ministry claims is exempt under sections 21(1) and 49(b). However, I have already found these records exempt under section 49(a), in conjunction with section 19.

[107] In addition, the ministry has withheld some records under section 21(1) or 49(b) only. For example, there is correspondence from individuals other than the appellant or his family that was sent to the Attorney General that the ministry has withheld under section 49(b), because it contains the personal information of both the appellant and these other individuals.[55]

[108] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met with respect to the personal information in all of these records.

[109] Sections 21(1)(a) to (e) contain exceptions to the discretionary exemption in section 49(b) of the *Act*. If the personal information fits within any of the exceptions in paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b).

[110] Section 21(1)(a) requires an institution to disclose another individual's personal information to a requester "upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access." However, there is no evidence before me to show that any these individuals have provided a prior written request or consent that authorizes the ministry to disclose their personal information to the appellant.

[111] Section 21(3) lists the types of personal information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). I find that none of the presumptions in section 21(3) apply to the personal information of the individual identified on page 13,633 or of the individuals who provided correspondence to the Attorney General.

[112] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b).[56]

[113] I have insufficient evidence before me to support a finding that any of the factors favouring disclosure in section 21(2) would apply to the personal information of the individual identified on page 13,633 or the individuals who provided correspondence to the Attorney General. In such circumstances, I find that disclosing the personal information of these individuals to the appellant would constitute an unjustified invasion of their personal privacy. Consequently, this information qualifies for exemption under section 49(b) of the *Act*.

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[55] See, for example, pages 2,012-2,033 of the records.
[56] Order P-239.

E: Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

[114] The sections 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 IPC may determine whether the institution failed to do so.

[115] In this order, I have found that most of the records and parts of records withheld by the ministry qualify for exemption under sections 49(a) and (b). Consequently, I will assess whether the ministry exercised its discretion properly in applying these exemptions to those withheld records and parts of records.

[116] The IPC 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.

[117] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[57] The IPC may not, however, substitute its own discretion for that of the institution.[58]

[118] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- 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

[57] Order MO-1573.
[58] Section 54(2).

- 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 any 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.[59]

[119] The ministry submits that it exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b). It states, in part:

> . . . [The ministry] has limited its use of exemptions under FIPPA and used them in a manner that is consistent with the goals of the legislation. It has sought to balance the benefits flowing from the disclosure of information with the wording of the exemptions and they interests they seek to protect. To illustrate, [the ministry] has released as many responsive records as reasonably appropriate without derogating from the countervailing factors such as privilege or personal information of third parties. [The ministry] therefore submits that the exercise of discretion under s. 49(a) or (b) was reasonable, particularly since [it] has demonstrated a willingness to re-evaluate an earlier index of records and release further records.

[120] In his representations, the appellant does not directly address whether the ministry has properly exercised its discretion in withholding records and parts of records under sections 49(a) and (b). However, he asserts that the ministry must provide "strict proof" for withholding records and parts of records under the *Act*.

[121] As noted above, the ministry located 14,179 pages of records that are responsive to the appellant's and his family's requests. It disclosed a substantial number of these

[59] Orders P-344 and MO-1573.

records to him, but denied access to the remaining records under various provisions in the *Act*, including the discretionary exemptions in sections 49(a) and (b).

[122] In my view, the ministry exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b). It conducted a thorough review of the voluminous number of records that it located in response to the appellant's and his family's requests and decided to disclose a substantial number to them, while exercising its discretion to withhold some records and parts of records that fall within the purview of these exemptions. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors. Consequently, I uphold the ministry's exercise of discretion under sections 49(a) and (b).

F: Does section 65(6) exclude any records from the *Act?*

[123] The ministry has withheld a number of records under the exclusionary provision in sections 65(6) of the *Act*. These records include documents created by the OPP's Professional Standards Bureau (PSB) that relate directly to the appellant's complaints about the conduct of various officers at the OPP's Bancroft detachment.[60]

[124] Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[60] Under section 56(1) of the *Police Services Act* (the *PSA)*, any member of the public may make a complaint about specified matters, including the conduct of a police officer.

[125] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[126] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[61]

[127] The ministry states that the section 65(6) exclusion applies to the PSB's documents and decisions with respect to its investigations into allegations of police misconduct by the appellant. It further submits that none of the exceptions in section 65(7) apply to these records.

[128] The appellant's representations do not address whether the section 65(6) exclusion applies to the above records.

[129] The IPC has found in previous orders that OPP records similar to the ones at issue in this appeal are excluded from the scope of the *Act* under section 65(6)3.[62] Consequently, I will address the possible application of section 65(6)3 to the above records.

[130] Section 65(6)3 stipulates that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[131] The term "employment related matters" in section 65(6)3 refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[63] I find that the records in this appeal relating to the PSB investigation about the conduct of specific OPP officers from the Bancroft detachment are "employment related" because of the potential for disciplinary action against those officers. Moreover, given that the ministry is involved in civil proceedings that the appellant and his family have brought against the OPP in relation to the conduct of these officers, I find that it has "an interest" in the PSB's decisions with respect to the complaints filed by the appellant.

[132] In short, I find that these records were collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about employment related matters involving OPP officers in which the ministry has an interest. Consequently, these records are excluded from the scope of the *Act* under

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[61] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[62] See, for example, Orders PO-2658, PO-2531, PO-2499, PO-2426 and PO-3075.
[63] Order PO-2157.

section 65(6)3. Section 65(7) provides exceptions to the section 65(6) exclusions but none of them apply to these records.

G: Did the ministry conduct a reasonable search for records?

[133] During the intake stage of the appeal process, the appellant alleged that the ministry had not conducted a reasonable search for responsive records.

[134] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[64] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[135] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[65] To be responsive, a record must be "reasonably related" to the request.[66]

[136] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[67]

[137] The ministry submits that it conducted a reasonable search for records responsive to the appellant's and his family's requests. For example, CLOC submits the following:

> As per its representative affidavit, CLOC conducted a reasonable search for records. Through the ministry's Freedom of Information office, the ministry's offices were canvassed to search for responsive documents to all three requests. Those offices have supplied their own affidavits. The records collected for CLOC were then placed under the care and control of CLOC for the purposes of responding to the requesters' requests. CLOC also diligently searched its own files and compiled all responsive documents under its care and control. When the ministry contacted the requester for clarification of his request, the response was that the original request for all documents related to the requester or his family remained unchanged. The ministry conducted its search on the basis of that original request. The sheer volume of documents collected by the

[64] Orders P-85, P-221 and PO-1954-I.
[65] Orders P-624 and PO-2559.
[66] Order PO-2554.
[67] Orders M-909, PO-2469 and PO-2592.

ministry – over 14,000 pages – speaks for itself as to the reasonable effort made to collect all responsive documents.

[138] In addition, the ministry provided affidavits from four of its staff that provide evidence with respect to the searches that were carried out to locate records responsive to the appellant's request. These included:

- an affidavit from the acting file assignment & case management coordinator and acting freedom of information coordinator at CLOC that provides evidence with respect to the searches conducted for records located at CLOC;

- an affidavit from a legal assistant in Crown Law Office – Criminal which provides evidence with respect to the searches conducted for records located at the ministry's Criminal Law Division;

- an affidavit from an issues and communications coordinator which provides evidence with respect to the searches conducted for records located at the Ontario Victim Services Secretariat; and

- an affidavit from the ministry's manager of issues and media relations, which provides evidence with respect to the searches conducted for records located at the ministry's communications branch.

[139] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[68] However, in his representations, the appellant does not address whether the ministry conducted a reasonable search for responsive records or why he believes additional records exist.

[140] In my view, the ministry has provided sufficient evidence to show that it conducted a reasonable search for responsive records. Experienced employees knowledgeable in the subject matter of the appellant's and his family's requests expended substantial efforts to locate records held in the various offices of the ministry. In short, I find that the ministry conducted a reasonable search for records that are responsive to the appellant's and his family's requests, as required by section 24 of the *Act*.

[68] Order MO-2246.

CONCLUSION:

[141] In this order, I find that:

A. The ministry has provided the appellant with adequate indexes of records.

B. The records contain "personal information," as defined in section 2(1) of the *Act*, relating to many individuals, including the appellant, his wife, his daughter, members of his extended family, witnesses to various incidents and other identifiable individuals.

C. The discretionary exemption at section 49(a), in conjunction with the solicitor-client privilege exemption at section 19, applies to most of the records and parts of records at issue in this appeal. Other records are exempt under section 49(a), in conjunction with section 22(a). It not necessary to consider whether the sections 13(1), 14(1)(a) and 14(1)(c) exemptions apply to some records and parts of records because the information in these records has been properly withheld under section 49(a), in conjunction with section 19.

D. The mandatory exemption at section 21(1) and the discretionary exemption at section 49(b) apply to some records and parts of records.

E. The ministry exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b).

F. The ministry conducted a reasonable search for records.

[142] I have found that there is information withheld by the ministry in six records that does not qualify for exemption or exclusion under the *Act*. Consequently, I will be ordering the ministry to disclose this information to the appellant. However, two of these records are duplicates, so the ministry will be ordered to disclose a total of four records to the appellant.

ORDER:

1. I order the ministry to disclose the following three records in full to the appellant: pages 1,299 1,736 and 1,767.

2. I order the ministry to disclose the following record in part to the appellant: page 13,633. I have provided the ministry with a copy of this record and have highlighted in green the exempt parts of this record. To be clear, the ministry must not disclose the green highlighted parts of this record to the appellant.

3. I order the ministry to disclose the records identified in order provisions 1 and 2 to the appellant by **August 13, 2012**.

4. I uphold the ministry's decisions to withhold the remaining records and parts of records from the appellant.

5. In order to verify compliance with the provisions of this order, I reserve the right to require the ministry to provide me with a copy of the records that it sends to the appellant.

Original signed by: July 16, 2012
Colin Bhattacharjee
Adjudicator