Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3167

Appeal PA11-168

Ministry of Community Safety and Correctional Services

February 26, 2013

Summary: The requester sought access to a memorandum prepared by counsel with the Ministry of the Attorney General following a decision issued by the Ontario Superior Court of Justice. The memorandum was provided originally to Ontario's Crown Attorneys, and under separate cover, to the Ministry of Community Safety and Correctional Services, who then shared it with the Commissioner of the O.P.P. and all Ontario Chiefs of Police. The ministry denied access to the memorandum on the basis that it was exempt under section 19. The ministry's decision is upheld on the basis that the memorandum represents a confidential communication between a solicitor and client made for the purpose of communicating legal advice. Further, disclosure to the Commissioner did not constitute waiver of that privilege. In addition, despite the disclosure of the memorandum to the Chiefs of Police, the common interest privilege exception to waiver applies to the memorandum because it originated in privilege and the Chiefs have a common interest with the ministry in its confidential subject matter. The undisclosed portions of a cover memorandum were found not exempt under section 19 and were ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19; *Police Services Act,* R.S.O. 1990, c.P.15, as amended, sections 3(2)(g) and (i).

Cases Considered: *R. v. Campbell,* [1999] 1 S.C.R. 565.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for any briefing notes or correspondence prepared for or received by the Minister, Deputy Minister or Assistant Deputy Minister regarding a decision of the Ontario Superior Court of Justice that was issued on September 28, 2010. The ministry located two responsive records, a one-page cover memorandum dated October 18, 2010 from the ministry's Assistant Deputy Minister, Public Safety Division, addressed to All Chiefs of Police and the Commissioner of the Ontario Provincial Police (the O.P.P.), to which was attached a three-page memorandum from the Ministry of the Attorney General's (MAG) Assistant Deputy Attorney General, Criminal Law Division. The ministry denied access to both documents, claiming the application of the discretionary solicitor-client privilege information exemption at section 19 of the *Act*.

[2] The appellant appealed the ministry's decision to this office. Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to conduct the inquiry began by seeking the representations of the ministry on the application of the section 19 exemption to the record. In response to a Notice of Inquiry from this office, the ministry provided representations and decided to disclose the majority of the information contained in the one-page cover memorandum dated October 18, 2010. It continued to deny access to the undisclosed portions of this record, as well as the three-page memorandum, on the basis that they were exempt under section 19. A complete copy of the ministry's representations was then shared with the appellant, who also provided submissions.

[3] In this decision, I uphold the ministry's denial of access to the three-page memorandum on the basis that it is exempt from disclosure under section 19. The one-page cover memorandum is not, however, exempt under section 19.

RECORDS:

[4] The records at issue in this appeal consist of the withheld portions of a one-page cover memorandum from the Assistant Deputy Minister, Public Safety Division, dated October 18, 2010 and addressed to All Chiefs of Police and the O.P.P. Commissioner and an undated three-page memorandum from the Assistant Deputy Attorney General, Criminal Law Division of the Ministry of the Attorney General. The latter document is described on its face with the words "Privileged and Confidential" and "Interim Advice to Crowns."

ISSUES:

A. Does the discretionary exemption at section 19 apply to the records?

B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 19 apply to the records?

[5] Section 19 of the *Act* states as follows:

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

[6] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies. The ministry argues that the records qualify for exemption under the solicitor-client communication privilege aspect of both branches of section 19.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[8] 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.)].

[9] 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].

[10] 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.)].

[11] 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].

[12] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privileges

[13] 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.

Statutory solicitor-client communication privilege

[14] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Factual information and findings

[15] As noted above, the principal record at issue is a three-page memorandum marked "Privileged and Confidential" that was prepared by the Assistant Deputy Attorney General, Criminal Law Division (the ADAG). It is described in the cover memorandum which comprises the second record at issue in the appeal and in the body

of the document itself as "Interim Advice to Crowns" and as an "interim direction" from the ADAG to Ontario Crown Attorneys [emphasis in the original document].

[16] The memorandum describes the outcome of a criminal case heard in the Ontario Superior Court in which certain provisions of the *Criminal Code* were found to be constitutionally invalid by the court. The memorandum goes on to address the status of pending appeals from the decision, sets out advice to Crown Attorneys in this respect, including in relation to advice they may give to police and also indicates that the contents of the memorandum may be shared with the police.

[17] On its face, the memorandum is not addressed to any officials with the ministry, the OPP or to the chiefs of police. Although there is no cover memorandum indicating when the 3-page memorandum was shared with the ministry's Assistant Deputy Minister (Public Safety Division) (the ADM), the ADM's cover memorandum dated October 18, 2010 to the Chiefs of Police and the OPP Commissioner states that it "has been provided" to Crown Attorneys. Based on the foregoing and the ministry's representations, I accept that it was passed to the ADM at approximately the same time that it was distributed to the Crown Attorneys.

Representations of the parties

[18] The ministry submits that the records qualify for exemption under the solicitor-client communication privilege aspect of both branch 1 and 2 of the section 19 exemption. With respect to the application of Branch 1 of the exemption to the three-page memorandum, it states that:

> . . . the memorandum in question satisfies all of the requisite conditions necessary for the record to fall under common law solicitor-client privilege: 1) the record clearly represents a written communication; 2) the record was marked as, and was always intended to be, 'privileged and confidential' given the sensitive information contained therein; 3) the communication was between a client and a legal advisor . . . and; 4) the communication was directly related to the seeking/giving of legal advice.

[19] With respect to Branch 2, the ministry submits that:

> . . . the memorandum is subject to the statutory solicitor-client communication privilege given that it was sought from, and prepared by, Crown counsel for use in giving legal advice/instruction to members of Ontario police forces, including the O.P.P.

[20] Addressing the question of who is the client, the ministry has provided extensive submissions on the role it plays in advising and providing information to a broad range of participants in the justice community, including the O.P.P., other ministry staff and

"various police Chiefs who fell under the MSCSC legal advice/information distribution umbrella." It states that these memoranda which are distributed to police chiefs throughout Ontario, such as the record at issue in this appeal, "typically communicate advice/information of interest to all police chiefs" and that these memoranda "are issued by the ADM [Assistant Deputy Minister] of Public Safety Division" of the ministry.

[21] The ministry submits that the three-page memorandum in question was prepared by the Assistant Deputy Attorney General of the Criminal Law Division of MAG and was distributed to Crown Attorneys employed by MAG throughout the province. The ministry goes on to submit that its Assistant Deputy Minister, Public Safety Division, was also provided with a copy of the three-page memorandum, which he then circulated to "All Chiefs of Police" and the Commissioner of the O.P.P., by way of the one-page memorandum dated October 18, 2010.

[22] With respect to the application of section 19 to the records, the ministry states that, in addition to its role as a provider of information and advice to Ontario's Chiefs of Police, there exists a solicitor-client relationship between the Chiefs and the provincial Crown. It relies on the decision of the Supreme Court of Canada in *R. Campbell,* [1999] 1 S.C.R. 565 where the relationship between the RCMP and lawyers employed by the federal Department of Justice is discussed. At paragraph 49 of the decision, Justice Binnie wrote:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

[23] The ministry also addresses the possibility that the principle of waiver may apply to the memorandum as a result of it having been shared by the ministry with Ontario's Chiefs of Police and the Commissioner of the O.P.P. It explains that the ministry has a statutory duty to provide guidance to local police services and refers to sections 3(2)(g) and (i) of the *Police Services Act* which outline the duties and powers of the Solicitor General in relation to police services throughout Ontario. These sections state:

> The Solicitor General shall:
>
> (g) consult with and advise boards, community policing advisory committees, municipal chiefs of police, employers of special constables and associations on matters relating to police and police services;
>
> . . .

> (i) provide to boards, community policing advisory committees and municipal chiefs of police information and advice respecting the management and operation of police forces, techniques in handling special problems and other information circulated to assist

[24] The ministry provides further submissions explaining that the three-page memorandum is one of many communications that are shared in order to fulfill the ministry's obligation to provide local police services with "advice/information of interest" and are issued regularly by the Assistant Deputy Minister of the ministry's Public Safety Division. The ministry takes the position that because the legal advice contained in the memorandum was shared with the Chiefs and the Commissioner of the O.P.P. in the context of this statutory obligation to provide information, the disclosure to them did not constitute a waiver of the solicitor-client privilege that exists in the memorandum.

[25] The ministry has also provided extensive representations in support of its position that the privilege that exists in the record at issue was not waived as a result of its disclosure to the Chiefs of Police because they and the ministry share a "common interest" in the legal advice proffered in the memorandum. It argues that the ministry shares a common interest with the other recipients of the memorandum in "ensuring that all of Ontario's police services are able to perform their duties and enforce the provisions of the *Criminal Code* in a manner that is efficient, reputable and harmonious with any legal advice provided by MAG counsel." It goes on to add that these common interests shared by the ministry and Ontario's police services are "essential to the effective delivery of police services and proper administration of justice as viewed by members of the public."

[26] The ministry concludes this portion of its representations with the following statement:

> As such, any legal advice provided by MAG counsel, to the police or those with 'police interests', via the original client/recipient (the Public Safety Division of MCSCS), should properly be considered privileged and confidential given the common interests that exist between MAG, the original client/recipient, and the third party police in administering the legal recommendations highlighted in the record in question.

[27] The appellant does not directly address the application of the solicitor-client privilege exemption to the records. However, she argues that the issue being considered in the memorandum at issue is now being addressed by the federal government "and is no longer in the province's hands." She also indicates that there is no longer any "pending judgments to be made in this case by an Ontario court." Accordingly, the appellant takes the position that the information is "no longer sensitive in nature or information that could jeopardize the province's position in a case that is currently before the courts."

[28] The appellant also submits that the public has a right to know "how their government planned to deal with a court ruling that could have a profound effect on public safety." This argument appears to allude to the possible application of the "public interest override" provision in section 23 of the *Act* which reads:

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

[29] I note that the exemption claimed for this record by the ministry, the solicitor-client privilege exemption at section 19 is not included as one of the exemptions whose application can be overridden by section 23. As a result, I am unable to consider whether section 23 has any application to the record which is the subject of this appeal.

Analysis and findings

[30] With respect to the one-page cover memorandum dated October 18, 2010, I note that nearly all of it was disclosed to the appellant by the ministry at the inquiry stage of the appeals process. I find that the remaining, undisclosed portions do not contain information that qualifies for exemption under the solicitor-client communication privilege aspect of either branch of section 19. The undisclosed portions of this memorandum do not represent a direct communication of a confidential nature between a solicitor and his or her client made for the purpose of obtaining or giving legal advice. Rather, the October 18, 2010 memorandum simply serves as a cover memo conveying factual information relating to the document which is attached to it, the primary, undated, three-page memorandum that is also at issue in this appeal. As no other exemptions have been claimed for the information in the October 18, 2010 memorandum and no mandatory exemptions apply to it, I will order that the one-page memorandum dated October 18, 2010 be disclosed to the appellant, in its entirety.

[31] The primary record at issue in this appeal is the three-page memorandum provided to the Assistant Deputy Minister of the ministry's Public Safety Division by the Assistant Deputy Attorney General of the Ministry of the Attorney General's (MAG) Criminal Law Division. I have reviewed the content of the record and conclude that it represents a privileged, confidential, internal communication setting out legal advice and instructions from the Assistant Deputy Attorney General to Ontario Crown Attorneys. As such, the record originated as a document that was subject to solicitor-client communication privilege.

[32] I find that there existed a solicitor-client relationship between the Assistant Deputy Attorney General and the ministry's Assistant Deputy Minister in connection with the communication of the memorandum to the ADM and that it is privileged in this context. I also find that the privilege that existed in this document extends to the ministry personnel it was shared with, including the Commissioner of the OPP. As a

result, I conclude that the dissemination of the legal opinion at issue to the ministry's Assistant Deputy Minister and through him to ministry staff, is encompassed within the privilege.

[33] The ministry submits that the Chiefs of Police are also "clients" of MAG. It argues that the memorandum itself states that it may be shared with the police "but is otherwise privileged and confidential". The ministry argues that this statement conveys the intention of both its author and recipient, the Assistant Deputy Minister, that privilege in the communication extends not only to the Crown Attorneys and Assistant Deputy Minister to whom the memorandum was explicitly directed or shared, but also to the police organizations who were also the ultimate recipients of it.

[34] I reach a different conclusion with respect to the existence of a solicitor-client relationship between MAG and the municipal Chiefs of Police. I do not agree that there is a pre-existing or inherent solicitor-client relationship between these agencies. Sections 3(2)(g) and (i) of the *Police Services Act* (the *PSA*) do not operate to create a general solicitor-client relationship between either MAG or the ministry and the Chiefs of Police. Rather, these provisions establish an advisory relationship between the Minister of the Solicitor General, though not MAG, and the various policing agencies listed in paragraphs (g) and (i). In my view, the type of advice and guidance described in these provisions of the *PSA* can clearly encompass much more than advice on legal matters and the ministry's own representations suggest a regular flow of information that is not legal in nature. Accordingly, I find that it is not possible to presuppose that any communication from the ADM of the ministry's Public Safety Division to local police services is going to constitute legal advice. This does not preclude the possibility that a particular communication may represent legal advice sought or given, but that will be a determination made in the context of particular facts.

[35] On its face, the memorandum does not provide evidence that it was given in the context of a solicitor-client relationship between MAG or the ministry and the police. Its substance indicates that the advice and instructions it contains are intended for and directed to Crown Attorneys, even though some of its contents or the memorandum itself may ultimately be passed to the police. Further, there is no evidence that the legal opinion which comprises the record was solicited by the Chiefs.

[36] In the latter respect, the circumstances of this case are distinguishable from those facing the courts in the cases cited by the ministry. In *R. v. Campbell*, [1999] 1 S.C.R. 565 and *R. v. Zhang*, 2002 ABPC 35, it was held that a solicitor-client relationship existed between the RCMP and a municipal police service, respectively, and solicitors employed by the federal Department of Justice (Justice) and that communications between them were privileged and need not be disclosed to an accused. In those cases, the RCMP and the local municipal police service specifically sought legal advice from counsel employed by Justice with respect to specific policing matters. It was held that these communications were properly subject to solicitor-client privilege owing to

the fact that they were prepared to meet the "functional needs of the administration of justice" and the importance of ensuring that police services be able to obtain professional expertise when it is required from legal advisors. In the present case, there is nothing in the representations suggesting that the opinion shared with the Chiefs was in response to a specific request for legal advice.

[37] Further, I find that municipal police services are not "internal to government", part of the executive branch of the provincial government or an agency of the province, as was the case in *Stevens v. Canada,* [1997] 2 F.C. 759 (F.C.T.D.) affirmed at [1998] F.C. 89 (F.C.A.), *Weiler v. Canada* and *Canada*, [1991] 3 F.C. 617 (F.C.T.D.) *v. Central Cartage*, (1987), 10 F.C.R. 225 (F.C.T.D.), respectively. In those cases, agencies of the federal government were found to be "clients" for the purposes of establishing the existence of a solicitor-client relationship and the resulting privilege in communications passing between them.

[38] I conclude that the municipal police chiefs were not "clients" of MAG and, as a result, there did not exist a solicitor-client relationship between them. Accordingly, communications passing from MAG via the ministry to the police are not subject to solicitor-client communication privilege, and the section 19 exemption does not apply for that reason.

[39] I will now examine whether there existed a "common interest" between the police chiefs and MAG/the ministry which would operate to negate any waiver in privilege that may have occurred in relation to the record that was shared with the chiefs.

Common interest exception to waiver

[40] In a recent decision, Order PO-3154, Adjudicator Steven Faughnan reviewed the case law pertaining to a determination of whether the common interest exception to waiver of privilege exists in the context of a commercial transaction. At paragraph 179 of that decision, he articulated the following test:

> . . . the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[41] In Order PO-3154, Adjudicator Faughnan adopted the underlying rationale for common interest privilege articulated by the British Columbia Superior court in *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue),* 2002 BCSC 1344, where Lowry J. stated (in part):

> It is a privilege that is justifiable on the basis of preserving the confidentiality of documents containing legal advice, or documents prepared for the purpose of obtaining legal advice, that are disclosed to third parties in the kind of circumstances where the courts of other Canadian jurisdictions have held that the privilege has not been waived.

[42] Many of the authorities addressing claims of common interest privilege have arisen in the context of active litigation in a specific proceeding or in the context of a commercial transaction. The leading authorities on this subject at the time were reviewed in my Order MO-1618, from which Adjudicator Faughnan quotes extensively in Order PO-3154. They indicate that the parties claiming a "common interest" need not be co-parties to existing litigation and, in addition, may bring somewhat different interests to the matter at hand, provided they share a common interest in relying on the legal advice provided and in maintaining its confidentiality. The following passages from my Order MO-1618, which I have extracted from a much longer discussion, illustrate these points (emphasis added where indicated):

> One such authority is the majority judgment of Carthy J.A. in *General Accident Assurance Co.* (cited above). Mr. Justice Carthy quoted the above passage from *Buttes* with approval, but his later quote (also with approval, at 337-8) from *United States of America v. American Telephone and Telegraph Company,* 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300) indicates that in the context of litigation, "common interest" does not require that those claiming it must be co-parties:
>
> > … The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. *So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts*. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.
> >
> > …

In *Archean Energy Ltd. v. Canada* (1997), 202 A.R. 198 (Q.B.), common interest privilege was claimed by a group of companies some of whom were shareholders of others, and some of whom were joint venturists with others, in connection with tax advice they had received from a single law firm. The court found that common interest privilege could exist in those circumstances. It stated its finding in this regard as follows:

> A substantial number of these documents are communications between the law firm which provided the tax advice and other law firms acting for the various clients in their corporate capacities. Such communication does not constitute waiver of privilege in the circumstances of this case. *The communication was apparently made for the purpose of obtaining instructions and giving common advice to a common client or group of clients...*

And in *Pitney Bowes of Canada Ltd. v. Canada,* [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties needed legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):

> As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost -- through waiver, disclosure or otherwise. *This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure*. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations and, in that sense, *the opinions are for the benefit of multiple parties, even though they may have been prepared for a single client*. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.

[43] In my view, these general principles apply equally in the circumstances of this appeal. The interests of Crown Attorneys, the ministry, the OPP Commissioner and municipal chiefs of police are not identical, and they each play different roles in the administration of criminal justice as it pertains to the subject matter of the

memorandum. However, they all share a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration as evidenced by the content of the memorandum itself. The words "privileged and confidential" appearing on the face of the memorandum indicate that it is to remain confidential as against others who are not its intended recipients or beneficiaries. The common interest shared by the recipients of the memorandum thus negates any waiver of the privilege that would otherwise have occurred by its disclosure to persons or entities outside the solicitor-client relationship.

[44] In summary, I find that the memorandum had its origin as a privileged communication passing from the Assistant Deputy Attorney General on the one hand, to MAG Crown Attorneys and the ministry's Assistant Deputy Minister on the other. As such, it was a document which was subject to solicitor-client communication privilege for the purposes of section 19(a) from its inception.

[45] Further, based on the context in which the document was provided to the Chiefs of Police by the ministry's Assistant Deputy Minister, there existed a common interest in the confidential subject matter of the memorandum. I find that they share a common interest in matters relating to law enforcement and in the administration of justice generally. The memorandum at issue in this appeal describes a confidential opinion which was only shared with the Chiefs because of their common interest with MAG and the ministry in law enforcement concerns. I find further support for this finding in the fact that the memorandum itself states that it may be shared with the police, but is otherwise privileged and confidential, although this alone would not be determinative.

[46] As a result of this finding of a common interest in the subject matter of the record, I find that its disclosure to the Chiefs did not constitute a waiver of the privilege that existed in the document. Accordingly, I conclude that it remains subject to solicitor-client communication privilege and is exempt from disclosure under section 19(a), on that basis.

B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

General principles

[47] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[48] 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.

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

[50] The ministry submits that it exercised its discretion to not disclose the memorandum to the appellant because of the "interests inherent within the s. 19 exemption", taking into account:

> . . . the appellant's interests in obtaining access to the record; the sensitive nature of the record's contents and the confidential context behind its creation; the ability of the police and Crown to work closely together towards administering justice in a fair, equitable, and efficient manner; and the public interest in fostering an ongoing relationship of confidence between various Ministries, law enforcement agencies and the justice system in general.

[51] The appellant's representations do not address this aspect of the appeal. However, she argues that because the federal government has assumed a lead role in the subject matter of the memorandum, the government of Ontario has a lessened interest in it.

[52] In my view, the ministry has adequately addressed the question of the manner in which it exercised its discretion not to disclose the record. I find that the decision to do so was made taking into account relevant, and not irrelevant or improper, considerations. Accordingly, I uphold the ministry's exercise of discretion in this case.

ORDER:

1. I uphold the ministry's decision and dismiss the appeal with respect to the ministry's decision to deny access to the three-page memorandum.

2. I order the ministry to disclose the one-page memorandum to the appellant by providing her with a copy by **March 28, 2013**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the ministry to provide me with a copy of the record ordered disclosed.

Original signed by: February 26, 2013
Donald Hale
Adjudicator