

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3147

Appeal PA11-573-2

Hydro One

December 14, 2012

**Summary:** The appellants made a request to Hydro One for records relating to their property. Hydro One granted access to a number of records, but denied access to certain email strings and a File Progression Log Sheet under section 49(a) (discretion to refuse requester's own information) in conjunction with section 19(a) (solicitor-client privilege). The withheld information qualifies for exemption under these sections, and Hydro One's decision is upheld.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 19(a), and 49(a).

**Cases Considered:** *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)

### OVERVIEW:

[1] Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an identified property. The request was clarified to be for the following:

- records with regard to the spill incident that occurred on [a specified date]; and
- records with regard to [a] forestry visit to [the property] in August 2007 or August 2008.

[2] Hydro One located a number of responsive records and, after notifying an affected party who may have an interest in the records, issued an access decision in which it granted partial access to the responsive records. Hydro One granted full access to 274 pages of records, and denied access to other records on the basis of the exemption in section 19 (solicitor-client privilege) of the *Act*.

[3] The appellants, who are the owners of the property, appealed Hydro One's decision to this office.

[4] During mediation, Hydro One located an additional responsive record (a File Progression Log Sheet), and also denied access to it on the basis of the exemption in section 19. In addition, the appellants indicated that they were satisfied that a reasonable search had been conducted for responsive records.

[5] Also during mediation, the possible application of the discretionary exemption in section 49(a) (discretion to deny requester's own information) was raised, because the records appeared to contain the personal information of the appellants.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. During the inquiry into this appeal, representations were sought from the appellants and Hydro One. Representations were shared in accordance with *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*.

[7] This file was subsequently transferred to me to complete the inquiry.

[8] In this order, I uphold Hydro One's decision that the records qualify for exemption under sections 49(a) and 19.

***Preliminary Issue re: records at issue***

[9] Hydro One originally identified 31 responsive emails or email strings. In its representations it indicates that 6 of the email strings (E2, E3, E4, E5, E6 and G1) are duplicates of other records. On my review of these records I find that, except for the name on the top of these email strings, they are duplicate copies of other records at issue (D5, D13, D15, D18, D20 and D21). I also note that record E1 is similarly a duplicate of record D12. In this order, I will not review the duplicate copies of these records.

**RECORDS:**

[10] The records remaining at issue consist of 24 email strings exchanged between Hydro One staff, and a three-page File Progression Log Sheet.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(a) in conjunction with section 19 apply to the remaining information?

## **DISCUSSION:**

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

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

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] 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.<sup>1</sup>

[13] 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.<sup>2</sup> However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>3</sup>

[14] Hydro One takes the position that all of the records contain the personal information of the appellants, as their names are included in every record, together with the municipal address of their property.

[15] Upon my review of the records, I agree with Hydro One that the records contain the personal information of the appellants as they include information relating to their address [paragraph (d) of the definition] and/or their names where they appear with other personal information relating to them or where the disclosure of their names would reveal other personal information about them [paragraph (h)].

**Issue B. Does the discretionary exemption at section 49(a) in conjunction with section 19 apply to the remaining information?**

**Section 49(a)**

[16] While section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, section 49 provides a number of exceptions to this general right of access.

[17] 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.

---

<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225.

[18] In this case, Hydro One relies on section 49(a), in conjunction with section 19, to deny access to the records remaining at issue, and which also contain the personal information of the appellants. I will now review the application of section 19 to the records.

### **Solicitor-client privilege**

[19] Hydro One takes the position that all of the records or portions of records remaining at issue qualify for exemption under the solicitor-client privilege exemption in section 19 of the *Act*, which reads 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.

[20] Section 19 contains two branches. 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.

[21] Hydro One takes the position that the records qualify for exemption under branch 1, found in section 19(a).

### **Branch 1: common law privilege**

[22] Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>4</sup>

---

<sup>4</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

### ***Solicitor-client communication privilege***

[23] 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.<sup>5</sup>

[24] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>6</sup>

[25] 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.<sup>7</sup>

[26] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>8</sup>

[27] Confidentiality is an essential component of the privilege. Therefore, Hydro One must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>9</sup>

### ***Litigation privilege***

[28] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.<sup>10</sup>

[29] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the

---

<sup>5</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>6</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>7</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>8</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>9</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>10</sup> 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).

person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both. ...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[30] Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief.<sup>11</sup>

### ***Representations***

[31] Hydro One provides specific representations on the application of section 19 to the records at issue. In particular, it takes the position that the email communications constitute documents that fall within solicitor-client communication privilege, and that the File Progression Log Sheet falls within litigation privilege.

[32] With respect to the email communications, Hydro One states:

[A named individual (counsel A)] is an Assistant General Counsel employed by Hydro One Networks Inc. in its Law Department. [Counsel A] was called to the Ontario Bar in 1979. ...

On August 4, 2011, an employee of Hydro One expressly sought legal advice from Hydro One’s Law Department, as [one of the appellants] had informed that employee in a telephone conversation “that he would be speaking to his lawyer and would see me in Small Claims Court” (as set out in Record D40 which was released to the appellant ...).

[33] Hydro One then reviews each of the email communications at issue, and states:

Record D39 is the original e-mail from the employee (whom the appellant stated he would see in Small Claims Court) to [another lawyer in Hydro

---

<sup>11</sup> Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.).

One's Law Department (counsel B)], requesting legal advice in respect of the company's dealings with the appellant.

Records D38 and D24 are e-mails sent to and by [counsel B's] assistant forwarding the client's original e-mail requesting legal advice (D39) to [counsel A] so that [counsel A] could provide the legal advice being sought, as [counsel B] was out of the office. The matter was referred to [counsel A] and records D23, D22, D21, D20, D19, D18, D17, D16, D14, D15, D13, D12, D11, D37, D10, D36, D9, D5, F6, F3 and D2, which are all e-mail communications, all include information being passed by [counsel A] or by his clients "to the other as part of the continuum aimed at keeping [all] informed so that advice may be sought and given as required". [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. CA.)].

All of the e-mail communications made between [counsel A] and his clients in this matter were made via our internal e-mail system, which is in a secure environment, and all of [counsel A] and his clients had a full expectation that the communications were made in confidence, either expressly or by implication, as the clients expressly sought legal advice from Hydro One's Law Department as the appellant was threatening legal action against Hydro One. [*General Accident Assurance Co. v. Chrusz* (1999), 45 OR. (3d) 321 (C.A.)].

As such, the [documents] represent "a continuum of communications" between [counsel A] and his clients, all of whom are Hydro One employees who were involved with the spill incident and/or the forestry visit and as such, are subject to common-law communication privilege.

[34] In support of its position that the File Progression Log Sheet fits within the litigation privilege aspect of section 19(a), Hydro One states:

The File Progression Log sheet documents the dealings of the claims adjustment firm (that Hydro One retains to process damage claims) with the appellant. The file progression log was created or bought into existence with the dominant purpose for it to be used in order to obtain legal advice in the conduct of litigation, which, owing to the appellant's claim for property damage, meant that there was a reasonable prospect of litigation at the time the file progression log sheet was created. As such, the file progression log sheet clearly meets the dominant purpose test and litigation privilege applies to protect this record.



[35] Hydro One also refers to the appellant's statement that "he would be speaking to his lawyer and would see [Hydro One] in Small Claims Court" in support of its position that the prospect of litigation was more than a vague or general apprehension of litigation in the circumstances.

[36] With respect to the issue of whether or not the solicitor-client privilege has been lost, Hydro One states:

Privilege has not been lost. Hydro One has not waived its common law solicitor-client privilege. The records have not been disclosed to an outside party, no communication has been made to an opposing party in litigation and none of the documents record a communication made in court.

[37] The appellants provided a brief letter in response to the Notice of Inquiry. Although they do not directly address the application of the section 19 exemption in that letter, the appellants take the position that they ought to have access to all records and that they are "the only clients listed in their records." In their initial appeal letter, the appellants referred to the solicitor-client privilege relied on by Hydro One, and stated:

What is referred to as solicitor-client privilege is simply a discussion about my wife and myself and/or our cottage property between Hydro One employees. We are the only clients in this incident.

### ***Analysis and findings***

[38] As a preliminary point, with respect to the appellants' position that they are the "only clients" in this incident, I note that the solicitor-client privilege applies to records between the solicitor and client, or their agents or employees.<sup>12</sup> In that respect, previous orders have clearly established that, in circumstances such as those giving rise to this appeal, Hydro One's legal counsel is the "solicitor", and his "client" is the institution (Hydro One and its agents or employees).<sup>13</sup> Accordingly, records between Hydro One employees can qualify for exemption under the solicitor-client privilege if the requirements set out above are met.

### ***Email strings***

[39] On my review of the email strings at issue in this appeal, I note that many of them are similar to each other, and incorporate many of the same emails. In particular, D37 is an email string duplicated within D10, record F6 is incorporated into F3, records D37 and D11 are incorporated into D10, record D13 is incorporated into D12, and

---

<sup>12</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>13</sup> See, for example, P-501.

records D17, D18, D19, D20, D21, D22, D23, D38 and D39 are incorporated into D16. Furthermore, of the remaining 11 email strings, a number of them are very similar to each other, with only one or two different emails at the end of the string, or with an attachment included.

[40] I have carefully examined these email strings, some of which have documents attached to them. All of these emails were sent to or from legal counsel for Hydro One. Hydro One has stated that the records represent an exchange of confidential communications between Hydro One's legal counsel and Hydro One employees for the purpose of seeking and providing legal advice.

[41] I am satisfied that the email strings at issue, which were sent to or from Hydro One's legal counsel (either as the primary recipient or sender, or copied to him) qualify for exemption under section 19 of the *Act*. Based on my review of the records and Hydro One's representations, I am satisfied that these records constitute confidential communications between a solicitor (Hydro One's counsel) and his client (Hydro One employees or agents), made for the purpose of obtaining or giving professional legal advice. Although some of the emails contained in these strings were not initially sent directly to or from counsel for Hydro One, they were all provided to counsel, and I am satisfied that they also qualify for exemption under section 19, as they form part of the "continuum of communications" between a solicitor and client.<sup>14</sup> Accordingly, I find that all of the email strings qualify for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 19 of the *Act*.

#### *File Progression Log Sheet*

[42] With respect to the File Progression Log Sheet, as noted by Hydro One, this sheet records the interactions between the appellants and a representative of the claims adjustment firm retained by Hydro One (the adjuster). It includes details about specific dates and the actions that occurred during the time the claim was being processed, including notes of conversations the adjuster had with various parties, including the appellant.

[43] Hydro One takes the position that, because this document was created as a result of the appellant's claim for property damage against Hydro One, there was a reasonable prospect of litigation at the time the File Progression Log Sheet was created. It also states:

... The file progression log was created or brought into existence with the dominant purpose for it to be used in order to obtain legal advice in the conduct of litigation, which, owing to the appellant's claim for property

---

<sup>14</sup> See *Balabel v. Air India*, *supra*.

damage, meant that there was a reasonable prospect of litigation at the time the file progression log sheet was created.

[44] Hydro One also refers to the appellant's subsequent statement to a Hydro One employee that he would be initiating a Small Claims Court action to support its position that there was more than a vague or general apprehension of litigation in the circumstances at hand when the record was created.

[45] In the circumstances, I am satisfied that this File Progression Log Sheet qualifies for exemption under the litigation privilege in section 19(a) of the *Act*. Based on my review of this record and the representations of Hydro One, it is clear that the information contained on this sheet was created as a result of the appellant's claim against Hydro One for property damage. Accordingly, I am satisfied that the dominant purpose for its creation was for use in the conduct of litigation, which was a reasonable prospect at the time it was created. Accordingly, I find that this record falls within the common law litigation privilege aspect of section 19(a) of the *Act*.

[46] In summary, I find that the records remaining at issue qualify for exemption under sections 49(a) and 19, subject to my review of Hydro One's exercise of discretion, below.

### **Exercise of discretion**

[47] The section 19 and 49(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[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.<sup>15</sup> This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

---

<sup>15</sup> Order MO-1573.

### ***Relevant considerations***

[50] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>16</sup>

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

---

<sup>16</sup> Orders P-344, MO-1573.

***Representations and findings***

[51] In Hydro One's representations in support of its position that it properly exercised its discretion to apply the section 49(a) and 19 exemptions in this case, it states that it properly exercised its discretion and did not err in doing so. It also lists a number of matters it considered in making this decision, which include:

- the purposes of the *Act*,
- the wording of the exemption and the interests it seeks to protect (the importance of maintaining the confidentiality of the solicitor-client relationship when legal advice is being sought),
- the fact that the records deal with issues concerning property damage to the appellants' cottage property, and
- that disclosure would not increase public confidence in the institution and the nature of the information.

[52] Hydro One closes by stating that it did not exercise its discretion in bad faith or for an improper purpose.

[53] On my review of all the circumstances in this appeal, I am satisfied that Hydro One has not erred in exercising its discretion not to disclose the records at issue, as it has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. I note that Hydro One granted access to many pages, and chose to deny access only to these remaining records based on sections 49(a) and 19. In the circumstances, I find that Hydro One properly exercised its discretion to apply the exemptions in sections 49(a) and 19 to the records.

**ORDER:**

I uphold the decision of Hydro One and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ December 14, 2012