Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3270

Appeal PA11-309

Ministry of Health and Long-Term Care

October 28, 2013

Summary: The Ministry of Health and Long-Term Care (the ministry) received a request for access to records related to the classification of hospitals under the *Public Hospitals Act* as "Group A" hospitals. The ministry granted partial access to the records, denying access pursuant to section 13(1) (advice or recommendations) and 19(a) (solicitor-client privilege) of the *Act*. The requester appealed the ministry's decision to deny access to portions of the records pursuant to sections 13(1) and 19(a). In this order, the adjudicator upholds the ministry's decision to deny access to portions of the records as they contain advice or recommendations as contemplated by the exemption at section 13(1) as well as the information that is subject to solicitor-client privilege, as contemplated by the exemption at section 19(a). The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), and 19(a).

Orders Considered: Orders MO-1454, MO-1475, PO-1677 and PO-1721.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

records related to the classification of hospitals under the *Public Hospitals Act* as "Group A" hospitals. Specifically, both requests were for the following information, within two different time frames:

> All records in the custody or under the control of the Ministry of Health and Long-Term Care, including all documents, correspondence, notes (handwritten and/or typed), emails, computer printouts, memos and any other types of documents and/or communications, including all of the foregoing which is in electronic form, pertaining to, arising from, related to, discussing or commenting upon, the classification of hospitals in Ontario as "Group A hospitals", as understood in paragraph 1(1)(a) of the Regulation known as *Classification of Hospitals,* R.R.O. 1990, Reg. 964 made under the *Public Hospitals Act*, R.S.O. 1990, c. P40, including any request for classification as a "Group A hospital" and any analysis, consideration, recommendation and/or decision in connection therewith.

[2] The first request was for the time period from January 1, 2000 to December 31, 2006 and the second request was for the time period from December 31, 2006 to June 17, 2010.

[3] The ministry issued a single interim decision and fee estimate for both requests advising that based on a review of a representative sample of records, partial access would be granted.

[4] Subsequently, the ministry advised that pursuant to section 27 of the *Act*, due to the large volume of responsive records, the time to respond to the requests was extended.

[5] Once the time extension expired, the ministry issued a final decision granting partial access to the requested information. Specifically, the ministry claimed the application of the exemptions at sections 19 (solicitor-client privilege) and 13(1) (advice and recommendations) of the *Act* to deny access to some of the requested information. The ministry provided the appellant with an index of records setting out the exemptions that were applied to those portions of records that were being withheld. In addition, the ministry noted that some information in the records was severed because it was not responsive to the request.

[6] The requester appealed the ministry's decision.

[7] Following discussions with the mediator, the appellant agreed that he is not seeking access to the severed information on record 25. As a result, record 25 is no longer at issue in this appeal. He also advised that he is not seeking access to pages 3 and 6 of record 32 and page 5 of record 33, but he continues to seek access to the remaining information that has been withheld from these records.

[8] With respect to record 15, portions of which were initially identified as being not responsive to the request, the ministry conceded that that information may, in fact, be responsive to the request. As a result, the ministry advised that it was applying section 19 to record 15, in its entirety, and that it was no longer claiming that portions are non-responsive.

[9] Also during mediation, the ministry issued a revised decision letter and disclosed some additional information to the appellant.

[10] Subsequently, the appellant was unable to locate the original records that were disclosed to him and the ministry agreed to resend this information to the appellant. At that time, the ministry conducted an additional search and advised that eleven additional records were located. The ministry granted partial access to these records, denying access to the withheld portions pursuant to sections 13(1) and 19 of the *Act*.

[11] As the appellant took the position that additional records must exist, the ministry provided the appellant with further details regarding the historical nature of the records at issue and information regarding the nature of the search. After further consideration, the appellant advised that he is not pursuing the issue of the reasonableness of the ministry's search.

[12] The appellant confirmed that he wishes to pursue access to all of the remaining information that has been withheld.

[13] As a mediated settlement could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[14] I began my inquiry into this appeal by sending a Notice of Inquiry outlining the facts and issues to the ministry, initially. The ministry provided representations in response and its representations were shared with the appellant pursuant to *Practice Direction 7*. At that time I sought, and subsequently received, representations from the appellant.

[15] For the reasons that follow, in this order I make the following findings:

- the discretionary exemption at section 13(1) of the *Act* applies to portions of the records at issue;
- the discretionary exemption at section 19(a) of the *Act* applies to portions of the records at issue; and
- the ministry appropriately exercised its discretion under sections 13(1) and 19(a).

RECORDS:

[16] The records remaining at issue in this appeal consist of records 1, 3-11, 13, 15-24, and 26-35 as set out in the original index of records and records 1, 2, and 4-11 as set out in the supplementary index of records.

ISSUES:

A. Does the discretionary exemption at section 13(1) of the *Act* apply to the records?

B. Does the discretionary exemption at section 19 of the *Act* apply to the records?

C. Did the ministry exercise its discretion under sections 13(1) and/or 19(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 13(1) of the *Act* apply to the records?

[17] 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.

[18] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take action and make decisions without unfair pressure.[1]

[19] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[2]

[20] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient.[3]

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[1] 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.).
[2] Order PO-2681.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4]

[22] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines*[5] that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[6]

[23] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[7]

[24] 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
- a supervisor's direction to staff on how to conduct an investigation.[8]

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[3] 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.

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

[5] *Supra,* note 3.

[6] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[7] *Ibid.*

[8] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *supra,* note 3; 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)*, *supra*, note 3.

[25] The ministry submits that the following records or portions of records contain advice and/or recommendations and are therefore exempt pursuant to section 13(1):

- listed in the original index – record 24, in its entirety, and portions of records 23, 26, and 27; and

- listed the supplementary index – portions of records 1, 2, 5, 7, 9, and 10.

Records 23 and 24 – original index

Ministry's representations

[26] The ministry submits that both of these records were developed in the course of the deliberative policy making process as part of ongoing policy advice to a senior official on the subject at issue in the records. It submits:

> Although the records appear to be final documents, they are in fact working drafts that were prepared specifically to describe a potential course of action being considered by a senior official with decision-making authority regarding hospital designation issues.

[27] It explains:

> The Minister of Health and Long Term Care has delegated to the Assistant Deputy Minister (ADM), Health System Accountability and Performance Division, the power to assign hospitals to classification and grades under section 32.1 of the *Public Hospitals Act*. In this context, the ADM is a decision-maker regarding hospital classification, and the Health Human Resources Police Branch (HHRPB) provides advice and recommendations to the ADM on this issue. In particular, HHRPB provides advice and recommendations on the discretionary decision to designate a hospital as an Academic Health Science Center, pursuant to the *Public Hospitals Act.*

[28] The ministry submits that the information in records 23 and 24 reflect HHRPB's advice regarding designation decisions: "they describe a proposed plan for the decision-maker's consideration – not a plan that was already implemented, or a decision that was already taken." It submits that although it may not be apparent on the face of the records, they describe a "suggested course of action" and not an action that has already occurred. It submits that therefore, the information falls squarely in the Court of Appeal's definition of "advice" or "recommendations" in its decisions in *Ministry of Transportation* and *Ministry of Northern Development and Mines.*[9]

[9] *Supra,* note 3.

[29] Specifically, the ministry submits that record 24 is a description of a suggested course of action and the whole record is exempt as it "sets out the various aspects of the proposed course of action" which is referred to in the record as the "planned approach."

[30] The ministry describes record 24 as "a memorandum that was prepared by HHRPB at the ADM's request" and while it was never finalized or signed, "it was nevertheless communicated to the ADM who, as noted above, was the decision maker in this context."

[31] The ministry states that record 24 constitutes advice in and of itself. It submits that:

> It lays out a suggested course of action that the ADM, as decision maker, could accept by signing and sending the memo, or refuse to adopt by not sending it. Moreover, the contents of the memo suggest a course of action through the phrase "we plan on …" in the second paragraph. Furthermore, the last sentence in paragraph 3 is a recommendation that the Ministry consider a particular course of action, descried in the previous two sentences of that paragraph. Finally, paragraph 4 describes a proposed (ie recommended) approach. Although it reads as factual information, it is just a proposal, given the draft nature of the memo.

[32] With respect to Record 23, the ministry describes this document as "a briefing note that was also prepared by HHRPB in the course of the deliberative policy process surrounding he issue of hospital designation." It submits that it "was prepared for the purpose of providing advice on a hospital designation issue" and that the severed portions "describe a recommended policy option in respect of this issue."

[33] The ministry addresses the specific portions of Record 23 that it has severed pursuant to section 13(1) individually. I have summarized its submissions on these portions as follows:

- Page 1 – key messages

  > The severed portions set out the recommended course of action of a proposed, recommended plan that was never implemented. Although the paragraphs read like "facts" the ministry submits that this is proposed language that would be used if the recommendation was accepted by the decision-maker.
  >
  > The ministry refers to Order PO-1677 where this office accepted that a draft "key message" document was exempt because it would reveal the advice or recommendations of a public servant.

- Page 3 – bullets 3 and 4

> The severed portions reflect the reasons for a particular designation recommendation. Disclosure of this information would reveal the actual recommendation as the information supports that recommendation and leads to that conclusion.

- Page 5-6 – proposed plan of action

> The severed portions set out a proposed plan. They reflect detailed recommendations as well as a recommended course of action for implementing them which is to be accepted or rejected by the decision-maker.

- Page 7 – confidential advice to the Minister

> The severed portions amount to recommendations that are supplementary to and flow from the central policy option being recommended. They present a proposed plan and then proposed implementation strategies for that plan. Disclosure of this information could reasonable result in the inference of the recommended course of action.

Appellant's representations

[34] Addressing record 24 first, the appellant submits that based on the ministry's representations which state that the record "reads as factual information…" portions of record 24 "may set out mere information of the factual component of options available to the decision maker." The appellant submits that in accordance with the standard set in *Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, factual information should be disclosed.

[35] With respect to record 23, the appellant submits that the ministry concedes that the key messages on page 1 "read like facts." The appellant submits that these key messages should be disclosed. He submits:

> Facts that would be relied upon in the eventuality that a recommendation is adopted by the decision-maker do not necessarily reveal that decision. These facts should be reviewed by the Commissioner and, in the event that they do not reveal the ultimate recommendations or advice, they should be disclosed.

[36] With respect to page 3, bullet points 3 and 4 of record 23, the appellant submits:

> Paragraphs 3 and 4 contain factual information about whether Montfort meets the criteria for a Group A designation. The criteria are specific and fact-based and do not change based on the ultimate recommendation. Montfort either meets the criteria or it does not. For example, the fact that there is a written agreement between Montfort and the University of Ottawa that was disclosed to the ministry is a subjective fact, similar to "mere information" as described in the case law. In light of the foregoing, it is the position of the appellant that these facts must be disclosed.

Analysis and findings

[37] As previously stated, in order for information to qualify as "advice or recommendations," it must suggest a course of action that will ultimately be accepted or rejected by the person or decision maker being advised. To qualify for the exemption, the information must either amount to "advice or recommendations" itself or, if disclosed, would permit the drawing of accurate inference as to the nature of the actual advice or recommendations.

[38] On my review of the information at issue in records 23 and 24, I conclude that the ministry has properly applied section 13(1) to the information that it has claimed as exempt. Record 23, as described by the ministry, is a briefing document. I accept the ministry's submission that it was prepared by ministry staff during the deliberative process for the purpose of providing the decision maker with advice on how to address a hospital designation issue. My review of the severed portions reveals that the information at issue is drafted in such a manner that would permit the reader to draw accurate inferences as to the nature of the suggested courses of action presented to the decision maker.

[39] Although the appellant submits that paragraphs 3 and 4 of page 1 of record 23 contain factual information as to whether the Montfort hospital meets the criteria for a "Group A" designation, I find that this is not the case. Having reviewed that specific information closely, in my view, the disclosure of these paragraphs will, as noted above, permit accurate inferences to be drawn with respect to the nature of the advice and recommendation put to the decision maker by the ministry staff who prepared the document.

[40] As explained by the ministry, record 24, which has been withheld in its entirety, is an internal memorandum prepared for the Assistant Deputy Minister by ministry staff. From my review, it appears to have been drafted based on some of the advice outlined in record 23 in the eventuality that the recommended course of action was ultimately accepted. Based on the ministry's representations, and my consideration of the information that record 24 contains, I accept that its disclosure would reveal a suggested course of action that is being presented to the ultimate decision maker, the Assistant Deputy Minister. While the ministry states that this information "reads as

factual information", none of the information in this record amounts to facts that would be relied upon in the eventuality that a recommendation is adopted by the decision maker. Rather, the information would only be considered factual were the recommendation accepted and the suggested course of action put into play. Therefore, I find that its disclosure would reveal the suggested course of action or permit the reader to accurately infer the actual recommendation ministry staff put to the decision maker, who is the Assistant Deputy Ministry.

[41] Accordingly, I find that the information at issue in records 23 and 24 amount to "advice or recommendations" as contemplated by the exemption at section 13(1).

Records 26 and 27 – original index

Ministry's representations

[42] The ministry submits that portions of records 26 and 27 are exempt pursuant to section 13(1). It explains that the portion of record 26 for which it has claimed section 13(1) is a duplicate of the information found on page 2 of record 27 for which it has also claimed section 13(1). It submits that this information consists of advice that falls squarely within section 13(1), particularly given that it begins with the phrase: "my advice with respect to this issue is…." Therefore, the ministry submits, that the information is, on its face, "advice."

Appellant's representations

[43] The appellant submits that although the ministry refers to a severed portion of each of these records, both have been redacted in full. The appellant takes the position that the portions of the records which are not referred to in the ministry's argument should be disclosed.

Analysis and findings

[44] Records 26 and 27 are both email chains that involve communications between ministry staff, including legal counsel. The ministry has claimed that section 13(1) applies to some of the information in both of these records. The portion of information for which section 13(1) has been claimed is identical in both records.

[45] Having reviewed these identical portions in records 26 and 27, I agree with the ministry and find that it clearly amounts to "advice or recommendations" as contemplated by the exemption at section 13(1). The portion at issue clearly sets out a ministry employee's advice with respect to a suggested course of action to be taken with respect to an issue dealing with hospital designation. The information is presented in specific advisory language, outlining the employee's recommendation as to how the ministry should proceed. In my view, it is evident from the wording that this advice was

prepared and communicated to form part of the ministry's deliberative process and to ultimately be accepted or rejected by a decision maker. Accordingly, I find that the exemption at section 13(1) has been properly applied to the portions of records 26 and 27 to which it has been claimed.

[46] With respect to the remainder of the information in both records, the ministry claims that it qualifies for exemption pursuant to the solicitor-client privilege exemption at section 19(a). Accordingly, I will examine whether the remaining portions of records 26 and 27 are exempt pursuant under that section, below.

Records 1, 2, 5, 7, 9, and 10 – supplementary index

Ministry's representations

[47] The ministry submits that all of these records are exempt in part as they all contain portions of text that convey advice or recommendations of ministry staff to senior officials. I have summarized their submissions on the relevant portions of those records below:

- Record 1 – Advice or recommendations about how to proceed on an issue discussed in the record and set out a suggested course of action, as well as the basis for that suggestion.

- Record 2 – A recommendation and advice supporting that recommendation.

- Record 5 – A statement of advice by the program area, and the rationale for that advice, set out for the decision maker's consideration.

- Record 7 – A discussion of a recommendation that is being considered by the decision maker. The severed portion articulates the recommendation and its implications which will inform the decision maker's decision to accept or reject the recommendation.

  The ministry submits that a description of the implications of a decision is also subject to the exemption where its disclosure would reveal the underlying recommendation.

- Record 9 – The exempt potions set out a suggested course of action that, were it disclosed, would reveal the underlying recommendation at issue.

- Record 10 – The severed portions include a recommendation and a discussion of that recommendation which, due to the way in which it is phrased, would allow one to infer the recommendation.

Appellant's representations

[48] The appellant only responds to the ministry's submissions on the relevant portions of records 5 and 10 listed on the supplementary index.

[49] The appellant states that page 3 of record 5 has been severed in its entirety. He submits:

> In the event that any of page three reflects mere factual information, or a factual list of pros and cons as described by the Court in *Ontario (Ministry of Northern Development & Mines) v. Ontario (Assistant Information & Privacy Commissioner)*[10] it is the appellant's position that those portions must be disclosed.

[50] With respect to record 10, the appellant submits that the severed portion is entitled "Montfort Hospital – AHSC AFP Costing Analysis" and that based on this title it is "reasonable to infer that this document is a cost estimate and/or budgetary estimate and therefore ought to be disclosed pursuant to [the exceptions to the exemption at section 13(1) listed in sections] 13(2)(g) and/or section 13(2)(i)."

[51] Those sections read:

> 13(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
> >
> > …
> >
> > (i) a formal plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees.

[10] *Supra,* note 3.

Analysis and findings

[52] Records 1, 2, 5, 7, 9 and 10 on the supplementary index have all been disclosed in part. I have carefully reviewed the severed portions and conclude that the ministry has properly applied section 13(1) to exempt the severed information from disclosure.

[53] Record 1 is an internal ministry email with an attached document. On my review, I accept that all of the severed portions either reveal advice formulated by a ministry employee that is to be put to a decision maker or provide background to support that advice which, were it disclosed, would allow a reader to infer the advice given.

[54] Record 2 is an email that describes a recommendation made by a ministry employee using clear and specific advisory language. The information provides a suggested course of action for the decision maker's consideration.

[55] Record 5 is briefing document. On review, I accept that the severances amount to advice provided by a ministry employee to a decision maker. The severance on page 3 clearly sets out the advice put to the decision maker to accept or to reject, and the one made on page 1 is a summary of that advice. In my view, the page 1 severance is worded in a manner that would permit one to accurately infer the advice set out on page 3. Page 3 does not contain any factual information that can be disclosed without revealing the advice put to the decision maker.

[56] Record 7 is an internal ministry email chain setting out the reasons supporting a particular suggested course of action, as well as the implications of that decision. In my view, disclosure would permit one to infer the advice or recommendation that was ultimately put to the decision maker by ministry employees.

[57] Record 9 is a briefing document and the severed portions outline the implications of following a specific suggested course of action. Having considered the severances made to this record, I accept that the disclosure of this information would permit one to infer advice or recommendations given by a ministry employee to a decision maker.

[58] Finally, record 10 is an internal ministry email chain with an attached document entitled "Montfort Hospital – AHSC AFP Costing Analysis." The email chain, in its entirety, as well as the majority of the document has been disclosed. I accept the ministry's position that the severances made to the document amounts to "advice or recommendations" made by a ministry employee. I agree that were the severed information disclosed, it would reveal the specific course of action recommended by ministry staff.

[59] It should be noted that the appellant submits given that the document attached to record 10 is entitled "Montfort Hospital – AHSC AFP costing Analysis," one could infer that it is a cost estimate and/or a budgetary estimate which ought to be disclosed

pursuant to the exceptions to the section 13(1) exemption listed at sections 13(2)(g) and/or 13(2)(i), which are set out above. From my review of the document in its entirety, considering the information contained in the severed portions closely, I find that it does not qualify as either a cost estimate or a budgetary estimate as contemplated by the exceptions to the section 13(1) exemption raised by the appellant. Accordingly, I find that neither sections 13(2)(g) or (i) have any application in the present appeal.

Summary – application of section 13(1)

[60] I have considered record 24, in its entirety, and the severed portions of records 23, 26 and 27 on the original index, as well as the severed portions of records 1, 2, 5, 7 9, and 10 on the supplementary index and I find that the ministry has properly applied section 13(1) to exempt this information.

[61] Specifically, I accept that the disclosure of the severances would either reveal the advice or recommendations of a ministry employee, or would permit one to accurately infer that advice or those recommendations. Based on the language of the information for which the exemption has been claimed, it is clear that the suggested courses of action that it either describes or reveals, formed part of the ministry's deliberative process surrounding the issue of hospital designation and was prepared to be put before a decision maker for them to ultimately accept or reject. Accordingly, subject to my review of the ministry's exercise of discretion, I find that the exemption for advice or recommendations found at section 13(1) of the *Act* applies to all of the information for which it has been claimed.

B. Does the discretionary exemption at section 19 of the *Act* apply to the records?

[62] The exemption at section 19 of the *Act* applies to information that is subject to solicitor-client privilege. That section reads:

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

[63] The ministry submits that section 19(a) is applicable in this appeal.

[64] 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 ministry must establish that at least one branch applies. In this appeal, it submits only that section 19(a) applies. Therefore, it is only necessary for me to review branch 1.

[65] 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.

[66] 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.[11] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[12]

[67] 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.[13]

[68] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[14] 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.[15]

[69] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[16]

[70] Under branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and

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[11] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[12] Orders PO-2441, MO-2166 and MO-1925.
[13] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[14] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[15] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*].
[16] 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)* [2006] S.C.J. No. 39.

voluntarily evinces an intention to waive the privilege.[17] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[18]

[71] Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; and the document records a communication made in open court.[19] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example, the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties.[20]

Representations

[72] The ministry submits that records 1, 3-11, 13, 15-22, 26-31, 34, and 35, as set out on the original index and records 4, 6, 8 and 11, as set out on the supplementary index all qualify for exemption under section 19(a).

[73] The ministry submits that all the records to which the exemption at section 19(a) applies are "email strings, either between legal counsel and their ministry clients, or between and among legal counsel." The ministry submits that these emails:

> … either contain confidential legal advice and/or requests for such advice that falls within the "continuum of communications" between counsel and their ministry clients, or, consist of discussions between and among legal counsel for the purpose of preparing advice to provide to ministry clients."

[74] The ministry notes that in Order MO-1454 Adjudicator Sherry Liang stated that it is "reasonable to assume that internal communications to and from an institution's legal department are confidential" and therefore fall within the exemption. The ministry also points to Order PO-1721, issued by former Assistant Commissioner Tom Mitchinson. It submits:

> [I]n [Order] PO-1721, the IPC held that communications between counsel which set out the issues considered by counsel, form part of the "continuum of communication" between solicitor and client – even though they do not represent a direct communication between a solicitor and a client. Moreoever, the disclosure of such a record would reveal confidential legal advice.

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[17] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)
[18] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[19] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.
[20] *Chrusz, supra;* see also Order PO-3154.

[75] Specifically with respect to the records on the original index for which it claims the exemption, the ministry submits that record 1 is a list of questions posed by ministry counsel and the responses prepared by ministry staff. It submits that it is solicitor-client privileged communication between counsel and client for the purpose of seeking and providing legal advice. It submits that records 3-10 consist of email strings which form a conversation between ministry counsel and staff about legal questions, and records 26-28 consist of emails to and from legal counsel about a particular issue and that they contain information that was prepared for the purpose of seeking legal advice from ministry counsel. It submits that records 11, 13, 15-22, 29, 31, 34 and 35 consist of requests for legal advice by ministry staff and contain background information or materials provided to assist counsel in providing advice in response to those requests. Record 29, specifically, contains counsel's handwritten notes that, according to the ministry, are solicitor client privileged. The ministry explains that record 30 is an email from a ministry client to legal counsel expressly requesting advice on an attached document and that in keeping with Order MO-1475, the information contained in the letter constitutes direct communications of a confidential nature between a solicitor and client for the purpose of obtaining legal advice.

[76] Regarding records 4, 6, 8, and 11 on the supplementary index, the ministry submits that they form part of the continuum of confidential communications between ministry counsel and clients. It explains that record 4 is a duplicate of record 21 on the original index and record 6 is a partial duplicate of record 18 on the original index. The ministry goes on to submit that these records are exempt as they are requests for legal advice. The ministry submits that records 8 and 11 also form part of the continuum of communications between counsel and client and state that record 11, in particular, is a legal opinion.

[77] The appellant submits that with the exception of record 34 on the original index, the records are all "email strings that have been redacted in their entirety," but that the indices identify the parties to these emails either by name (not title), or by a general description explaining that the emails are communications between legal counsel and ministry staff and, as such, it is impossible to determine whether:

> (a) legal counsel was a party to these emails in accordance with the requirement that the emails be direct communication of a confidential nature between a solicitor and client; and
>
> (b) whether the communication was confidential or whether anyone outside of the institution was a party to these emails.

[78] He requests that the name and the title of the parties to the email chains be disclosed and that any email chain be disclosed that:

> (a) do not involve counsel;

(b) are not confidential as between the institution and counsel; or

(c) are not prepared for counsel for use in giving legal advice pursuant to section 19(b).

Analysis and findings

[79] For a record to be subject to the common law solicitor-client privilege exemption, it must be established that the record is a written or oral communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[21]

[80] Having reviewed the records at issue in this appeal, I agree with the ministry that all of them qualify as solicitor-client privileged communications that are subject to the exemption at section 19(a). I agree that all of the records for which section 19(a) has been claimed, with the exception of record 1 on the original index, are internal email chains to and from legal counsel. These emails either request specific legal advice, contain information provided to counsel for the purpose of seeking advice, contain information sought by counsel for use in giving legal advice, or provide specific legal advice itself. In my view, these are all either direct communications of a confidential nature between a solicitor and a client, or records that fall within the continuum of communications aimed at keeping both informed so that advice may be sought and given as required. Accordingly, in keeping with the reasoning of previous orders including Orders MO-1454 and PO-1721 cited above, I find their disclosure would reveal the nature of the legal advice sought by the ministry from its legal counsel.

[81] Record 1, as described by the ministry, is an internal document that sets out questions posed by legal counsel and provides the responses prepared by the client, ministry staff. In my view, this record was specifically prepared for the purpose of seeking, formulating, and giving legal advice. As with the other records for which section 19(a) has been found to apply, I find that record 1 forms part of the confidential continuum of communications between solicitor and client and its disclosure would reveal the nature of legal advice sought by the ministry from its legal counsel.

[82] Therefore, I find that records 1, 3-11, 13, 15-22, 26-31, 34, and 35, on the original index, and records 4, 6, 8, and 11, on the supplementary index, represent confidential solicitor-client privileged communication. Additionally, I find that there is no evidence that there has been an intentional waiver of the privilege that attaches to any of these records. Accordingly, subject to my review of the ministry's exercise of discretion, I find section 19(a) applies to exempt all of the records for which it has been claimed, from disclosure.

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[21] *Descôteaux, supra.*

C. Did the ministry exercise its discretion under sections 13(1) and/or 19? If so, should this office uphold the exercise of discretion?

[83] The exemptions at sections 13(1) and 19 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, this office may determine whether the institution failed to do so.

[84] In this order, I have found that some parts of records qualify for exemption under the discretionary exemption at section 13(1) while others qualify for exemption pursuant to the discretionary exemption at section 19(a). Consequently, I will assess whether the ministry exercised its discretion properly in applying the exemption to the portions of records that have been withheld.

[85] This office 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, or
- it fails to take into account relevant considerations.

[86] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution.[23]

[87] 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

[22] Order MO-1573.
[23] Section 43(2) of the *Act*.

    - 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 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.

Representations

[88] The ministry submits that with respect to its application of the exemption at section 13(1) to the records, it took into account the public's right of access to government information and the principle that exemptions from that right should be limited and specific. It submits that it disclosed as much information as it reasonably could and applied this exemption to just eight records, only one of which was withheld in its entirety. It submits:

> The ministry is concerned that the disclosure of the record will encourage public servants to self-censor their advice, thereby preventing them from communicating effectively within government in a frank and open manner. The ministry wants to preserve that ability of public servants to provide candid policy advice and recommendations to senior officials, without fear that their advice, which may be 'unpopular', will be disclosed. If the ministry does not exercise its discretion to exempt this type of information, it may undermine the integrity and value of further advice of this sensitive nature.

[89] Addressing its application of the exemption at section 19(a), the ministry submits that it weighed the public's right of access to government information against the

importance of keeping privileged communications between legal counsel and the ministry confidential. The ministry submits that the Supreme Court of Canada has repeatedly affirmed:

> [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. *As such, it will only yield in certain clearly define circumstances, and does not involve a balancing of interests on a case-by-case basis.* [emphasis added][24]

[90] The ministry submits:

> In *Criminal Lawyers' Association,* the Supreme Court cites a long line of case authorities which establish that the purpose of the section 19 exemption "is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the *high public interest in maintaining the confidentiality of the solicitor-client relationship.*[25]" Accordingly, when exercising the discretion to withhold documents under section 19, the head must consider not only the public interest in disclosure, but also the competing public interest in upholding the solicitor-client privilege, and thus *not* disclosing records that are clearly subject to that privilege.

[91] The ministry submits that with respect to the application of section 19 to the records at issue in this appeal:

> … it took the law and principles as stated by the Supreme Court of Canada into consideration when exercising its discretion not to disclose the records in this appeal that are clearly solicitor-client privileged. Specifically, it determined that the public interest in maintaining the integrity of the privilege, and thus not disclosing the records, should be protected.

[92] The appellant does not specifically address the ministry's exercise of discretion but states that he:

> seeks further disclosure of the [information at issue] in accordance with the purpose of the *Act*, which states that information should be available to the public, and necessary exemptions from the right of access should be limited and specific.

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[24] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010[] 1 S.C.R. 815, para 75; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* [2008] 2 S.C.R. 574, paras. 9 and 10; *Goodis v Ontario (Ministry of Correctional Services),* [2006] 2 S.C.R. 32, paras. 16 and 17.
[25] *Criminal Lawyers' Association, supra* note 24, para. 53.

Analysis and findings

[93] As stated above, this office cannot substitute its exercise of discretion for that of the institution. Based on my review of the representations and the records at issue in this appeal I am satisfied that the ministry properly exercised its discretion to withhold the information at issue in the records under the discretionary exemptions at sections 13(1) and 19(a) of the *Act*. I find that the ministry has considered the nature of the information that it has withheld, its sensitivity and importance, the appellant's interest in this information, as well as the purposes of the *Act*, including the purposes of the exemptions that it applied.

[94] Specifically with respect to its application of the exemption at section 13(1), I accept that the ministry has considered the importance of protecting the deliberative process of government decision-making and policy-making to ensure that people employed in the public service are able to make recommendations freely and frankly and to preserve decision makers' ability to make decisions without unfair pressure.

[95] With respect to the application of section 19(a), I accept that the ministry gave significant weight to the preservation of solicitor-client privilege, as considered in *Criminal Lawyers' Association.*[26]

[96] In my view, these are all proper and relevant considerations. Moreover, there is no evidence before me to establish that the ministry considered irrelevant factors in exercising its discretion or that it acted in bad faith by withholding the information which I have found to be properly exempt pursuant to sections 13(1) and 19(a) of the *Act.*

[97] Therefore, I find that, in the circumstances of this appeal, the ministry's exercise of discretion was appropriate. Accordingly, I will uphold it.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: October 28, 2013
Catherine Corban
Adjudicator

[26] *Supra,* note 24.