Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3372

Appeal PA12-470

Ministry of the Attorney General

July 30, 2014

Summary: The ministry received a request for access to records relating to the requester's application for a confidential change of name under the *Change of Name Act*. The ministry granted partial access to the records, but denied access to certain records, relying on the discretionary exemption at section 49(a) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), in conjunction with the advice and recommendations exemption at section 13(1), the law enforcement exemption at section 14 and the solicitor-client privilege exemption at section 19. The requester appealed the ministry's decision. The adjudicator upholds the ministry's decision to deny access to one record under the law enforcement report exemption at section 14(2)(a). However, the adjudicator finds that none of the claimed exemptions apply to the remaining records at issue and that those records should, therefore, be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 14(1)(g), 14(2)(a), 19 and 49(a); *Change of Name Act,* R.S.O. 1990, c. C-7, section 8(1)

Orders and Investigation Reports Considered: Orders P-363, P-1014, PO-1994, MO-1663-F

Cases Considered: *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); *R. v. Campbell*, [1999] 1 S.C.R. 565; *Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860

OVERVIEW:

[1] The appellant is an individual who applied for a confidential change of name under the *Change of Name Act*.[1] The ministry denied his request and the appellant then made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Any and all correspondence both internal and external, between these Attorney General of Ontario officials and employees (protection analyst [a named individual], attorney [a named individual], and [a named individual]) and each other, as well as between any or all of them and [a named detective], (and also any correspondence between any or all of them and any of the representatives of the Ontario Ombudsman's office who may have been in contact with them) regarding myself since 24 November 2011, until the date you action this request. Please include any recorded conference-calls, recorded phone calls, (if available) and all emails between them, including those in server back-ups which they may have deleted.

[2] The ministry located responsive records and issued a decision granting partial access to them. The ministry denied access to certain records or portions of records based on the discretionary exemption for advice and recommendation at sections 13(1) of the *Act*, the discretionary exemptions for law enforcement records found at sections 14(1)(g) and 14(2)(a) of the *Act*, the discretionary exemption for records subject to solicitor-client privilege at section 19 of the *Act* and the discretionary exemption for publicly available records at section 22(a) of the *Act.*

[3] The appellant appealed the ministry's decision to this office.

[4] During mediation, the ministry issued a revised access decision, releasing further records, together with an index of records identifying 11 records responsive to the appellant's request. The index of records indicates that the ministry granted access in full to Records 2, 6 and 9, and granted access in part to Record 1. The ministry then advised the mediator (and the appellant has confirmed in his representations) that pages 82 and 83 of Record 8 had been provided to the appellant, such that the portion of Record 8 remaining in issue consists of pages 77-81 and 84-89.

[5] Mediation efforts did not resolve the appeal, and the appeal was transferred to the adjudication stage of the appeal process. Since the records in the appeal appear to contain the personal information of the appellant, the mediator added section 49(a) of the *Act* as an issue in the appeal.

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[1] R.S.O. 1990, c. C-7.

[6] The adjudicator sought and received representations from the ministry and the appellant. The ministry's representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*.

[7] In its representations, the ministry clarified that it is no longer claiming the exemption at section 49(a), read in conjunction with section 13(1) of the *Act* for Records 3 and 4, although it continues to claim the application of other exemptions for those records. The ministry also raised, for the first time, the exemption at section 49(a), read in conjunction with section 19 for Record 1, and the exemption at section 49(a), read in conjunction with section 14(1)(g) for page 56 of Record 3.

[8] The appellant's representations indicate that he does not contest the ministry's position regarding Record 11; therefore, that record, and that application of section 22(a) of the *Act* to that record, are no longer in issue.

[9] The appellant's representations were withheld from the ministry in their entirety, due to confidentiality concerns; however, the adjudicator notified the ministry of an issue raised by the appellant in relation to the section 19 (solicitor-client privilege) exemption and asked for the ministry's reply representations on that issue only.

[10] Following receipt of the above representations, the file was assigned to me. I provided notice of the appeal to, and invited representations from the Ottawa Police Service pursuant to section 50(3) of the *Act*. The Ottawa Police Service advised this office that it would not be making representations.

[11] In this order, I uphold the ministry's decision to withhold Record 5, but order the disclosure of the remainder of the records at issue.

RECORDS:

[12] The records remaining at issue are the following:

- Record 1 - email correspondence between ministry officials/staff (pages 1 and 18)
- Record 3 - emails and memos to file of the ministry administrative assistant (pages 56-59)
- Record 4 - emails and notes to file of the ministry protection analyst (pages 60-71)

- Record 5 - report from the Ottawa Police Service dated January 20, 2012 (pages 72-74)
- Record 7 - protection analyst's note to file re Ombudsman's office (page 76)
- Record 8 - emails and memos to file of ministry counsel (pages 77-81 and 84-89)
- Record 10 - memo to file prepared by ministry counsel re Ombudsman investigation (pages 93-94)

ISSUES:

A. Is the ministry permitted to raise the discretionary exemption at section 49(a), in conjunction with the solicitor-client privilege exemption at section 19 for Record 1, and the discretionary exemption at section 49(a), in conjunction with the law enforcement exemption related to intelligence information at section 14(1)(g) for page 56 of Record 3?

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

C. Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) (advice and recommendations) exemption apply to Record 1?

D. Does the discretionary exemption at section 49(a) in conjunction with the exemptions at section 14(1)(g) (intelligence information) or section 14(2)(a) (law enforcement report) apply to the records for which it is claimed?

E. Does the discretionary exemption at section 49(a) in conjunction with the section 19 (solicitor-client privilege) exemption apply to any of the records at issue?

F. Did the institution exercise its discretion under sections 49(a) in conjunction with section 14? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[13] The following background information is obtained from my review of the ministry's representations as well as the records that were disclosed to the appellant and provides some useful context for this appeal.

[14] The appellant wishes to publish a book and believes that his safety will be in danger if and when the book is published. He believes that a confidential change of name will protect him, and therefore wishes to obtain a confidential name change under the *Change of Name Act (CNA).*[2]

[15] Generally, name changes are public; section 8(1) of the *CNA* sets out a number of provisions relating to the publication, registration and notice of name changes approved by the Registrar General. However, section 8(2) of the *CNA* provides for a confidential change of name in the following circumstances:

> Despite subsection (1), if the Attorney General or a person authorized by the Attorney General certifies that a change of name is intended, in his or her opinion, to prevent significant harm to the person to whose name the application relates and certifies that he or she has reviewed a police records check as described in subsection 6 (10) in respect of that person,
>
> (a) the application shall be sealed and filed in the office of the Registrar General;
>
> (b) no notice of the change of name shall be published in *The Ontario Gazette* and no notice of the application or of the change of name shall be given to the Ministry of Community Safety and Correctional Services or any person;
>
> (c) if the person's birth was registered in Ontario, the original registration shall be withdrawn from the registration files and sealed in a separate file, and a new birth registration showing the new name shall be made; and
>
> (d) the change of name shall not be entered in the change of name index or noted under section 31 of the *Vital Statistics Act*.
>
> …

[16] Pursuant to these provisions, the appellant approached the ministry to request a confidential name change. An individual employed as Crown counsel with the ministry's Crown Law Office – Criminal considered the appellant's application and in the course of his inquiries sought information and input from officers of the Ottawa Police Service. Ultimately, ministry counsel rejected the appellant's application for a confidential name change under section 8(2) of the *CNA* and communicated that decision to the appellant.

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[2] R.S.O. 1990, c. C-7.

[17] As I discuss later in this reasons, even though an individual's entitlement to a confidential name change raises a legal question, the function performed by ministry counsel under the *CNA* is not related to the provision of legal advice *per se*, but rather is carried out in his/her role as the Attorney-General's designated decision-maker. This is a critical distinction in applying section 19 of the *Act*.

A. Is the ministry permitted to raise the discretionary exemption at section 49(a), in conjunction with the solicitor-client privilege exemption at section 19 for Record 1, and the discretionary exemption at section 49(a), in conjunction with the law enforcement exemption related to intelligence information at section 14(1)(g) for page 56 of Record 3?

[18] In its representations, the ministry has claimed, for the first time, the discretionary exemption for personal privacy at section 49(a), read in conjunction with the exemption under section 19 for pages 1 and 18 of Record 1, as well as the discretionary exemption for personal privacy at section 49(a), read in conjunction with the exemption under section 14(1)(g) for page 56 of Record 3.

[19] The Information and Privacy Commissioner's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[20] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[3]

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

[21] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the ministry and to the appellant.[4] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[5]

Representations

[22] In its representations, the ministry submitted that there would be little prejudice to the appellant in extending to three additional pages the exemptions already claimed by the ministry prior to the inquiry stage of the appeals process. The ministry submitted that no delay would result and the integrity of the appeals process would not be compromised, as the appellant had not yet submitted his representations when this issue first arose.

[23] The ministry also submits that, when it partially disclosed pages 1 and 18 of Record 1, it was under the impression that the remainder of those pages was no longer in issue. Given that section 13(1) is no longer being advanced for this record, the ministry submits that it would be prejudiced in not being able to rely upon section 19.[6]

[24] The ministry submitted that, although it is already claiming an exemption under section 19 for page 56 of Record 3,[7] the section 14(1)(g) exemption should also be applied to page 56 for the sake of continuity, given that the information contained therein is similar to that contained in other documents where section 14(1)(g) is argued to be applicable.

[25] In his confidential representations, the appellant argues the ministry should not be able to rely on the additional exemptions.

Analysis and Findings

[26] This office has the power to control the manner in which the inquiry process is undertaken.[8] This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[9] Nevertheless,

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[4] Order PO-1832.
[5] Orders PO-2113 and PO-2331.
[6] The ministry's representations are somewhat unclear as to whether its claim for an exemption under section 13(1) has in fact been withdrawn for Record 1; this is addressed later in this order.
[7] The ministry refers to page 56 of Record 4. However, page 56 of the records is part of Record 3, not 4.
[8] Orders P-345 and P-537.
[9] December 21, 1995, Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.).

this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[27] I am required to weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the ministry's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be important factors.

[28] For the following reasons, I conclude that allowing the ministry to make the late exemption claims would not compromise the integrity of the appeal process or prejudice the appellant's interests.

[29] Although the ministry raised the additional discretionary exemptions after the 35-day time period, it raised them early in the adjudication stage of the process and applied them to portions of only two records, both of which the ministry had previously claimed to be exempt under other sections of the *Act*. Therefore, the appellant already knew that these records were in issue. The inclusion of the newly claimed exemptions has not resulted in any delays to the adjudication process and the appellant has been provided with an opportunity to respond to the ministry's representations and to provide full representations as to whether the information for which the new exemptions were claimed qualifies for exemption under the relevant sections. In the circumstances, I find that the late raising of the additional exemptions has not resulted in any delays that have prejudiced the position of the appellant.

[30] I am satisfied that the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the ministry to raise the application of these two additional discretionary exemptions beyond the 35-day time period. Therefore, I will consider the application of the additional exemptions for these records below.

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

[31] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester. Therefore, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Personal information is defined in section 2(1) of the *Act*, 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;

[32] 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.[10]

Representations

[33] The ministry submits that a number of the records at issue contain the appellant's personal information.

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[10] Order 11.

[34] The appellant's representations do not specifically address the issue of whether the records contain personal information as defined in section 2(1) of the *Act.*

Analysis and findings

[35] I have reviewed the records at issue and am satisfied that all of them contain the appellant's personal information. All of them contain recorded information about the appellant, and as such, fall within the definition of personal information in the introductory wording of the definition. A number of the records at issue also contain information that falls within the definition of personal information as set out in paragraphs (b), (d), (e), (f), (g) and (h) of section 2(1).

[36] Accordingly, I find that the records at issue contain the personal information of the appellant within the meaning of that term as defined at section 2(1) of the *Act.*

C. Does the discretionary exemption at section 49(a) in conjunction with the section 13(1) (advice and recommendations) exemption apply to Record 1?

[38] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[39] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[11] Thus, where the records contain the requester's own information, access to the records is addressed under Part III of the *Act* and the discretionary exemptions at section 49 may apply. Where access is denied under section 49(a), the institution must demonstrate that, in exercising its

[11] Order M-352.

discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[40] On the other hand, where the records contain the personal information of individuals other than the appellant but do not contain the personal information of the appellant, access to the records is addressed under Part II of the *Act* and the exemptions at sections 12 to 22, some of which are mandatory and some of which are discretionary, may apply.

[41] At the outset of the adjudication phase of this appeal, the ministry relied on the exemption at section 49(a) in conjunction with the section 13(1) exemption in respect of Records 1, 3, and 4. As noted previously, in its representations, the ministry indicated that it is no longer relying on section 13(1) in respect of Records 3 and 4. Although the ministry refers at one point in its representations to having also abandoned the section 13(1) claim in respect of Record 1, other portions of its representations appear to rely on this exemption for Record 1. Because it is not clear whether or not the ministry relies on the application of section 13(1) to Record 1, I will address the application of section 13(1) to that record here.

[42] 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.

[43] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[12]

[44] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[45] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [13]

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[12] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[13] *Ibid* at paras. 26 and 47.

[46] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[47] 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.[14]

[48] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[15]

[49] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[16]
- a supervisor's direction to staff on how to conduct an investigation [17]
- information prepared for public dissemination.[18]

Representations

[50] The ministry submits that section 13(1) covers advice given to anyone within government, and that it is not so much the records that are at the core of this analysis, but rather the deliberative process in which the public servants took part. It submits that disclosing records which proffer advice or recommendations can have a chilling effect on the free flow of information and analysis that is required in order to make timely and effective decisions by any institutional decision maker.

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[14] Orders PO-2084, PO-2028, 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.
[15] See footnote 12 above at para. 51.
[16] Order PO-3315.
[17] 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.).
[18] Order PO-2677.

[51] In his confidential representations, the appellant submits that the section 13(1) exemption does not apply.

Analysis and findings

[52] Pages 1 and 18 of Record 1 consist of emails passing between various ministry staff about the appellant's change of name application, wherein ministry counsel provides direction about the processing of the appellant's application. On my review, this is the same type of communication described in Order P-363, where Assistant Commissioner Tom Mitchinson stated:

> Record 5 consists of a July 18, 1980 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

[53] I agree with Assistant Commissioner Mitchinson's interpretation of section 13(1) and adopt it for the purposes of this appeal. Pages 1 and 18 of Record 1 simply reflect ministry counsel's direction to other ministry staff on how the appellant's application for a confidential change of name is to be processed. The emails do not set out a suggested course of action, or policy options, to be accepted or rejected by the recipient of the email, nor do they set out views as to a range of policy options for consideration. Further, they do not contain or reveal anything that could be described as an evaluative analysis of information.

[54] I conclude that Record 1, pages 1 and 18 do not qualify for an exemption under section 49(a) in conjunction with section 13(1) of the *Act*.

[55] The ministry has also raised the application of the exemption at section 19 to this record. I will address the application of section 49(a) in conjunction with section 19 to Record 1 below.

D. Does the discretionary exemption at section 49(a) in conjunction with the exemptions at section 14(1)(g) (intelligence information) or section 14(2)(a) (law enforcement report) apply to the records for which it is claimed?

[56] The ministry relies on the application of section 49(a), in conjunction with the law enforcement exemption relating to intelligence information at section 14(1)(g), to page 56 of Record 3, pages 60-71 of Record 4, and Record 5. It also relies on the application of section 49(a), in conjunction with the law enforcement exemption relating to law enforcement reports at section 14(2)(a), to Record 5.

[57] Sections 14(1)(g) of the *Act* states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[58] Section 14(2)(a) of the *Act* states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[59] The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

Section 14(1)(g): law enforcement intelligence information

[60] The term "intelligence information" in section 14(1)(g) has been interpreted by this office to mean:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[19]

Section 14(2)(a): law enforcement report

[61] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report;

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[20]

[62] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[21]

[63] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[22]

[64] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous.[23]

Representations

[65] The ministry submits that intelligence gathering practices regarding confidential name change requests, along with the specific types of information that are sought/produced by the police in order to facilitate and investigate such requests, require protection given the sensitive and private nature of confidential name change

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[19] Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[20] Orders 200 and P-324.
[21] Orders P-200, MO-1238, MO-1337-I.
[22] Orders MO-1238, MO-1337-I.
[23] Order MO-1238.

requests. The ministry argues that disclosure would reveal intelligence gathering practices regarding confidential name change requests. In the ministry's submission, there are justifiable reasons for withholding records which, however innocuous they may seem, reveal the manner in which these unique name change requests are considered and investigated.

[66] The ministry further submits that central to the confidential name change process is the role of the police, whose duties include, but are not limited to, background investigations or inquiries, including those required under sections 8(2) and 6(10) of the *CNA*. The ministry submits that page 56 of Record 3, and pages 62 and 67-69 of Record 4 are exempt from disclosure under section 14(1)(g), on this basis.

[67] The ministry submits that Record 5 is exempt under sections 14(1)(g), for the same reasons as set out above. It also submits that this record is exempt under section 14(2)(a), on the basis that it is a report prepared in the course of an inspection/investigation by a police officer whose role includes conducting investigations within the context of a request under section 8(2) of the *CNA*.

[68] In his confidential representations, the appellant submits that the records in issue are not exempt under sections 14(1)(g) or 14(2)(a).

Analysis and findings

Record 3, page 56: administrative assistant's memo to file
Record 4, pages 60-71: emails and notes to file of the ministry protection analyst

[69] These records pertain to the processing of the appellant's name change request and the background checks undertaken under the *CNA*.

[70] I have considered the parties' representations and reviewed the records. As noted above, this office has interpreted "intelligence" information as information that is gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.

[71] The ministry's representations do not argue that the information gathering was respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. Having reviewed the records and considered the context in which they were created, I conclude that the information was compiled by the ministry and the police as part of their processing of a specific name change request, and that the information-gathering did not reflect efforts devoted to the detection and prosecution of crime or the prevention of the possible violations of law.

[72] I am also not persuaded that the underlying information revealed during the background check reveals ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. The information in these records relates to specific occurrences involving the appellant.

[73] While this finding alone is sufficient for me to conclude that the information is not "intelligence information", I also note that the ministry has made no representations as to whether the information in the records was gathered in a covert manner, and I find that it was not.

[74] I am therefore not satisfied that the information in these records qualifies as "intelligence information" for the purposes of section 14(1)(g).

[75] I accept that one or both of the officers assigned to perform the investigation worked in the Intelligence Unit of the Ottawa Police Service. It may be that intelligence information is relied upon in the investigation of some change of name requests. However, no intelligence information would be revealed by the disclosure of the records in this case.

[76] The ministry also asserts that these records, if disclosed, would reveal intelligence gathering practices. I am not persuaded that disclosure of the records would reveal intelligence gathering practices beyond what is already known. In these circumstances, I have not been presented with any persuasive evidence or arguments to indicate how the disclosure of these records could reasonably be expected to *interfere with* the gathering of intelligence information, as required by the exemption at section 14(1)(g).

[77] Therefore, I am not satisfied that disclosure of these records could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. I find that the information in page 56 of Record 3 and pages 60-71 of Record 4 does not qualify for an exemption under section 49(a) of the *Act*, read in conjunction with section 14(1)(g) of the *Act.*

[78] The ministry has also raised the exemption found at section 19 (solicitor client privilege) for these records. The applicability of section 49(a) in conjunction with section 19 to these records is considered below.

Record 5, pages 72-74: Report from Ottawa Police Service dated January 20, 2012

[79] As noted previously, the police conducted background investigations and inquiries with respect to the appellant's change of name request. Record 5 is a memorandum from the police to the ministry which reports back to the ministry on the results of those inquiries.

[80] I have considered the parties' representations and have independently reviewed this record. I am satisfied that Record 5 is a "a formal statement or account of the results of the collation and consideration of information" and as such constitutes a report for the purposes of section 14(2)(a). The record does not merely convey the police's observations or recordings of fact. It contains evaluative material and conveys a conclusion on the results of the inquiries undertaken by the police. I conclude that Record 5 is a "report" for the purposes of section 14(2)(a).

[81] I also conclude that the report was prepared in the course of law enforcement. As noted above, the definition of law enforcement in the *Act* includes policing. In carrying out investigations at the request of ministry counsel for the purpose of providing information and advice about whether a confidential change of name was required to "prevent significant harm" to the appellant within the meaning of section 8(2) of the *CNA*, the police were engaged in a policing function.

[82] Finally, I find that the Ottawa Police Service is an agency charged with enforcing and regulating compliance with the law.

[83] Accordingly, subject to my review of the ministry's exercise of discretion, I find that the information in Record 5 qualifies for exemption from disclosure under section 49(a) in conjunction with section 14(2)(a) of the *Act*.

[84] In light of my conclusion in this regard, I do not need to consider the ministry's arguments that this record is also exempt under section 49(a) in conjunction with sections 14(1)(g) and 19 of the *Act*.

E. Does the discretionary exemption at section 49(a) in conjunction with the section 19 (solicitor client privilege) exemption apply to any of the records at issue?

[85] The ministry relies on the application of the discretionary exemption at section 49(a) in conjunction with the exemption at section 19 of the *Act*, to all of the records in issue. As I have already found that Record 5 is exempt from disclosure under section 14(2)(a), I will now consider the application of section 19 to the remainder of the records in issue, being:

- Record 1 - email correspondence between ministry officials/staff (pages 1 and 18)
- Record 3 - emails and memos to file of the ministry administrative assistant (pages 56-59)
- Record 4 - emails and notes to file of the ministry protection analyst (pages 60-71)

- Record 7 - protection analyst's note to file re Ombudsman's office (page 76)
- Record 8 - emails and memos to file of ministry counsel (pages 77-81 and 84-89)
- Record 10 - memo to file prepared by ministry counsel re Ombudsman investigation (pages 93-94)

[86] 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.

[87] 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). The institution must establish that at least one branch applies. In this appeal, the ministry argues that section 19(b) applies, but also appears to rely on section 19 more generally. In this order, I will consider the applicability of both branches of section 19 to the records for which the exemption at section 19 is claimed.

Branch 1: common law privilege

[88] 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 ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[24]

[89] The ministry has not raised the litigation head of privilege in respect of branch 1 of section 19.

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[24] 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

[90] 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.[25] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[26]

[91] 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.[27]

[92] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[28]

[93] 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.[29]

Branch 2:

[94] 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. 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." Branch 2 also applies to a record that was prepared by or for Crown counsel in contemplation of or for use in litigation.

Representations

[95] The ministry submits:

> [Section 19] exemptions were engaged because all of the documents created by [ministry counsel, the protection analyst and the administrative assistant] dealt specifically with the confidential name change request

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[25] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] Orders PO-2441, MO-2166 and MO-1925.
[27] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[28] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[29] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> and/or were created specifically for the purpose of assisting [ministry counsel] in his legal role as counsel and designate of the Attorney General. Section 19 was also applied with respect to records chronicling the Ministry's interaction/communication with, or between, Ministry employees, police detective [a named individual], officers from the Ombudsman's Office, and other counsel within the Ministry, on the basis that they, generally, form part of the continuum of communications that regularly accompany records falling under s.19 solicitor-client privilege or, specifically, because of [ministry counsel, protection analyst and administrative assistant]'s designated roles within the Crown Law Office-Criminal.

[96] The ministry submits that communications between Crown counsel and ministry employees who assist counsel, in furtherance of their legal duties are protected under Branch 2, and that the same is true of communications between ministry employees and between Crown counsel and the police so long as the communications relate to the legal advice being considered or provided. The ministry submits that the privilege applies to a "continuum of communications" between a lawyer and client and the fact that a particular communication does not set out facts and issues and legal principles does not remove it from the scope of solicitor-client privilege so long as the communication was made for the dominant purpose of obtaining legal advice.

[97] The ministry further submits:

> [Section 19] exemptions apply to all of the documents which remain in issue on the basis that they consist of correspondence, memoranda, handwritten notes, and reports that were all created, in furtherance of [ministry counsel]'s legal duties and obligations: i) by Crown counsel; ii) for Crown counsel; iii) at the request of Crown counsel by Ministry employees and/or the police; iv) shared between employees serving Crown counsel in furtherance of instructions or directions given by Crown counsel; or v) shared between Crown counsel and Ministry employees.
>
> Furthermore, all of the records that remain in issue form part of the legal file that [ministry counsel] maintained as part of the Appellant's confidential change of name request. All of those same records were reviewed, and considered, by [ministry counsel] in discharging his duty as Crown counsel and designate of the AG. Many of those documents contain opinions and evaluations regarding the confidential name change request…. It should also be stressed that [ministry counsel]'s memo to file, generated for [his] interactions with the office of the Ombudsman, is also protected by s.19 as it represents materials produced by Crown counsel and forms part of their work product in relation to the file.

[98] The appellant argues that ministry counsel was acting as a designate of the Attorney General, not as Crown counsel, when he created or received the records in issue. He also argues that as none of the other individuals identified in the records are lawyers, any communications between or among them would not fall within the solicitor-client privilege exemption at section 19 of the *Act*.

[99] The ministry was apprised of the appellant's argument and provided reply submissions. The ministry referred to section 5 of the *Ministry of the Attorney General Act* and pointed out that the Attorney General is, first and foremost, a legal advisor. The ministry submitted that when ministry counsel was performing his role as the Attorney General's designate under the *CNA*, he was doing so in his capacity as Crown counsel, and that as an agent of the Attorney General, ministry counsel cannot divest himself of his Crown counsel role. The ministry submits that when section 8(2) of the *CNA* is engaged, it takes on the form of a legal matter, and as such section 19 of the *Act* is engaged.

Analysis and findings

[100] The legislature has conferred various functions and duties on the Attorney General, as set out in section 5 of the *Ministry of the Attorney General Act*, which states:

> The Attorney General,
>
> (a) is the Law Officer of the Executive Council;
>
> (b) shall see that the administration of public affairs is in accordance with the law;
>
> (c) shall superintend all matters connected with the administration of justice in Ontario;
>
> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

> (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;
>
> (f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;
>
> (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;
>
> (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;
>
> (i) shall superintend all matters connected with judicial offices;
>
> (j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council.

[101] The ministry did not make submissions on which particular subsections of *the Ministry of the Attorney General Act* were engaged when ministry counsel acted as the Attorney General's designate under section 8(2) of the *CNA*. It is my view that the role of ministry counsel under section 8(2) of the *CNA* is a function contemplated by section 5(j) of the *Ministry of the Attorney General Act*. Ministry counsel was performing a function assigned to him by the legislature through the *CNA*.

[102] A review of the records themselves – both those in issue and those that were disclosed to the appellant – supports the conclusion that ministry counsel was acting as a decision maker under the *CNA*. As an example, after receiving and considering the appellant's request for a confidential name change, ministry counsel wrote to the appellant rejecting his request.

[103] The ministry submits that Crown counsel are, first and foremost, legal advisors, and that ministry counsel, acting as the Attorney General's designate under the *CNA*, cannot divest himself of his Crown counsel role and responsibilities. The ministry submits that by the very nature of the fact that section 8(2) of the *CNA* is a statutory provision which requires "discretionary advice/decisions" to be made, it takes on the form of a legal matter.

[104] In *Descôteaux v. Mierzwinski*,[30] the Supreme Court of Canada emphasized that not everything done by a government (or other) lawyer attracts solicitor-client privilege, and provided some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated:

> [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[105] In Order P-1014, Inquiry Officer John Higgins stated:

> The purpose of the common law solicitor-client privilege (which is the basis for Branch 1 of the section 19 exemption) is to protect the confidentiality of solicitor-client relationships. Accordingly, it is my view that, in order for Branch 1 of this exemption to apply to a record, the person acting as "solicitor" must actually be retained and functioning as such. The mere fact that an individual acting in some other capacity also happens to be a lawyer is not sufficient to raise the application of this privilege.
>
> Similar considerations apply to the question of whether a record has been prepared "by or for Crown counsel" (Branch 2). In my view, the individual by or for whom the record has been prepared must actually be retained and functioning as Crown counsel, in the context of the record in question, before Branch 2 can apply.

[106] I agree with Inquiry Officer Higgins' analysis. In the present appeal, however, the ministry argues that ministry counsel was acting as the Attorney General's designate precisely because he was Crown counsel.

[107] Assuming, without deciding, that the Attorney General's designate under section 8(2) must be a Crown counsel, this is not necessarily relevant to, and certainly not determinative of the issue of whether the communications in issue are exempt under section 19 of the *Act*. In Order PO-1994, Assistant Commissioner Tom Mitchinson held that not all advice provided by Crown counsel is necessarily legal advice, and that one must look at the nature of the advice itself and distinguish between legal advice and operational advice. Assistant Commissioner Mitchinson also cited with approval *Confederation Treasury Services Ltd. (Re)*,[31] where Justice Farley of the Ontario Court (General Division) stated as follows:

> … I would also note that [solicitor client] privilege does not automatically come into play merely because a lawyer is engaged by a client. The

[30] [1982] 1 S.C.R. 860.
[31] [1997] O.J. No. 3598.

> privilege attaches to the request for and obtaining of legal advice. It does not attach to communications between a client and his retained counsel when that counsel is either not acting as a lawyer or where it is not legal advice but rather some other form of advice or other assistance being offered.

[108] I agree with the analysis in Order PO-1994 and adopt it for the purposes of this appeal.

[109] Although the ministry submits that the records in issue were prepared by or for Crown counsel for use in giving legal advice, the ministry does not provide particulars of how ministry counsel was acting as a legal advisor. Having reviewed the parties' representations and the records in issue, and bearing in mind the circumstances surrounding the appellant's change of name application, I find that ministry counsel was acting as the Attorney General's designate under section 8(2) of the *CNA*, and not as a legal advisor. The fact that ministry counsel may have had to apply legal principles in considering the appellant's change of name request does not mean that he was required to provide legal advice; making a decision and providing advice are not one and the same.

[110] With these principles in mind, I now turn to the specific records in issue.

Record 1, pages 1 and 18: Email correspondence between ministry officials/staff

[111] The withheld portions of Record 18 consist of emails passing between the ministry's protection analyst, administrative assistant and ministry counsel. In my view, the communications reflected in these emails are administrative in nature, having to do with the processing of the appellant's change of name request. Having reviewed the records, the representations of the parties and the surrounding circumstances, I am not persuaded that the communications in the emails were for the purpose of obtaining or giving professional legal advice, or were prepared by or for Crown counsel "for use in giving legal advice". As such, neither branch of section 19 applies to this record.

[112] I conclude that the information in pages 1 and 18 of Record 1 does not qualify for an exemption under section 49(a) in conjunction with section 19 of the *Act*.

Record 3, page 56: Memo to file prepared by the ministry administrative assistant

[113] This document reflects communications among ministry counsel, ministry staff and police officers with the Ottawa Police Service.

[114] The question of whether a solicitor-client relationship exists between the ministry and a municipal police service has been previously considered by this office. In Order

MO-1663-F, Senior Adjudicator Sherry Liang reviewed *R. v. Campbell*,[32] in which the Supreme Court of Canada adopted what it described as the "functional" definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*[33] at p. 872:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

[115] In *R. v. Campbell*, the Supreme Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition of solicitor-client privilege.

[116] Senior Adjudicator Liang concluded that whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and later approved in *R. v. Campbell*.

[117] Senior Adjudicator Liang also stated:

> [T]he Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.

[118] In the appeal before her, Senior Adjudicator Liang found it not surprising for the municipal police and the Crown to be in communication in the course of a prosecution. However, she found nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before her to establish that these communications occurred as part of the seeking of legal advice by the police from the Crown.

[119] I agree with Senior Adjudicator Liang's analysis and adopt it for the purposes of this appeal. I have reviewed page 56 and have considered the nature of the relationship between the Attorney General and the police, and the circumstances of the communications reflected in page 56. In this case, the Ottawa Police were assisting the Attorney General in carrying out its mandate the *CNA*. They were gathering information

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[32] [1999] 1 S.C.R. 565.
[33] Supra at note.

in respect of, and evaluating the appellant's request for a confidential change of name, and then communicating that information and evaluation to ministry counsel. Having reviewed the communications at issue and the parties' representations, and taking into account the surrounding circumstances, I am not persuaded that these communications were made for the purpose of or in the course of obtaining or giving professional legal advice as between ministry counsel and the Ottawa Police. I am also not persuaded that the communications reflect legal advice given or sought as among any other parties or were made within that context. Consequently, the ministry's arguments based on a "continuum of communications" must also fail.

[120] Further, I am not satisfied that this memo to file was prepared for Crown counsel "for use in giving legal advice". Rather, it simply reflects the communications made for the purpose of gathering information about and evaluating the appellant's change of name request.

[121] Therefore, I find that the information in page 56 of Record 3 does not qualify for an exemption under section 49(a) of the *Act*, read in conjunction with section 19 of the *Act*.

Record 3, pages 57-59: Emails and memos of the ministry administrative assistant
Record 4, pages 60-71: Emails and notes to file of the ministry protection analyst

[122] These records reflect communications passing between ministry staff, and notes to file of ministry staff, about the appellant's confidential change of name request. Some of the records reflect communications these individuals had with the Ottawa Police Service.

[123] Having carefully reviewed these documents and the parties' representations, and bearing in mind the context in which the documents were created, I am not satisfied that these communications were for the purpose of obtaining or giving professional legal advice, nor were they prepared by or for Crown counsel for use in giving legal advice. In my view, the communications simply reflect the processing of the appellant's change of name request and the gathering of information in respect of that request.

[124] Therefore, I find that the information in these records does not qualify for an exemption under section 49(a) in conjunction with section 19 of the *Act*.

Record 7, page 76: Ministry protection analyst's note to file re: Ombudsman's office
Record 8, pages 77, 89: Emails re: Ombudsman investigation
Record 10, pages 93, 94: Memo to file prepared by ministry counsel re: Ombudsman investigation

[125] The appellant was not satisfied with the ministry's decision denying his request for a confidential name change. He complained to the Office of the Ombudsman, who

assigned an early resolution officer to investigate the complaint. As part of the Ombudsman's investigation, the early resolution officer made contact with the ministry.

[126] The ministry submits that its records relating to the Ombudsman's investigation are exempt in accordance with section 19. In particular, with respect to Record 10, the Ministry submits:

> It should also be stressed that [ministry counsel's] memo to file, generated by Crown Counsel's interactions with the office of the Ombudsman, is also protected by s. 19 as it represents materials produced by Crown counsel and forms part of their work product in relation to the file. As with any legal matter, Crown counsel have an ongoing duty to consider, and in some cases reconsider, all information which may have some legal connection or impact on the legal issue at hand; in this case, being the Appellant's confidential change of name request…If any new information arose in [ministry counsel's] interaction with the Ombudsman Office, then he would have been required to consider that information and apply it to the Appellant's request as he deemed fit and in keeping with his responsibilities and obligations as counsel and AG designate in relation to the CNA.

[127] Unfortunately, the ministry's representations do not provide details about the ministry's counsel's role in responding to the Ombudsman's investigation. However, certain inferences can be drawn from reviewing the records.

[128] I note that the Ombudsman's inquiry was referred by staff to ministry counsel, who responded to the Ombudsman's inquiries himself. In my view, the documents do not reflect the seeking of legal advice from ministry counsel or the provision of legal advice by him; rather, they demonstrate that responsibility for responding to the Ombudsman's inquiry was referred to him, on behalf of the respondent to the complaint, the ministry, as he was the staff member familiar with the matter. In light of the above, I am not satisfied that ministry counsel was acting as a legal adviser in the context of the Ombudsman's investigation.

[129] I accept the ministry's submission that ministry counsel's interaction with the Ombudsman's office could result in ministry counsel reconsidering his decision regarding the appellant's change of name request. However, the ministry's submissions appear to equate making a decision with providing legal advice. Although both may involve the application of legal principles to a matter, they are distinct from one another.

[130] I conclude that these records do not reflect communications made for the purpose of obtaining or giving professional legal advice, nor were the records prepared by or for Crown counsel for use in giving legal advice.

[131] The ministry does not argue that these records were prepared in contemplation of or for use in litigation. Therefore, I do not need to consider whether the Ombudsman's investigation constitutes "litigation" for the purposes of section 19.

[132] I conclude that the information in these records does not qualify for an exemption under section 49(a) in conjunction with section 19 of the *Act*.

Record 8, pages 77-81 & 84-89: Emails and memos to file prepared by ministry counsel

[133] In the preceding discussion of the records relating to the Ombudsman's investigation, I have found that section 19 does not apply to pages 77 and 89 of Record 8. The email on page 88 is included in Record 1, page 18, which I have also already found not to be exempt under section 19.

[134] Therefore, the pages of Record 8 that remain to be considered are pages 78-81 and 84-87.

[135] Pages 78, 79, 84, and 85 are email exchanges passing between ministry staff regarding the processing of and gathering of information for the appellant's change of name request. They are similar in nature to the documents in Record 4. Having reviewed these documents and the parties' representations, and bearing in mind the context in which the documents were created, it is my view that the communications simply reflect the processing of and gathering of information regarding the appellant's change of name request. I am not satisfied that these communications were for the purpose of obtaining or giving professional legal advice, or that the records were prepared by or for Crown counsel for use in giving legal advice.

[136] Therefore, I find that the information in pages 78, 79, 84, and 85, as well as pages 86 and 87 which are duplicates of pages 84 and 85, does not qualify for an exemption under section 49(a) in conjunction with section 19 of the *Act*.

[137] Pages 80 and 81 consist of emails passing between various ministry staff concerning an inquiry from the appellant's MPP about the status of the appellant's application for a confidential change of name. The ministry's representations do not include any specific submissions as to why these emails are exempt under section 19.

[138] I have considered the parties' representations and have carefully reviewed these pages. I am not satisfied that the communications were for the purpose of obtaining or giving professional legal advice, nor were they prepared by or for Crown counsel for use in giving legal advice. While ministry counsel was asked for input into the response to the inquiry in question, my review of the record discloses that he was asked for background information in his capacity as the person familiar with the matter and that no legal advice was sought or given.

[139] I conclude that none of the information in Record 8 qualifies for an exemption under section 49(a) of the *Act* in conjunction with section 19 of the *Act*.

F. Did the ministry exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[140] The section 49(a) 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.

[141] 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.

[142] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

[143] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[36]

- 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

[34] Order MO-1573.
[35] Section 43(2).
[36] Orders P-344 and MO-1573.

- 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

[144] The ministry submits that it exercised its discretion not to release the records in good faith, with full appreciation of the facts of the case, and on a proper application of the relevant principles of law. The ministry submits that the factors considered by it in coming to its position include, but are not limited to the following:

- The interests inherent within the section 13, 14, and 19 exemptions;
- The appellant's interests in gaining access to the records;
- The sensitive nature of the records' contents and the confidential context behind their creation;
- The ability of the police and Crown to work closely together toward administering justice in a fair, equitable, and effective manner;
- The sensitive circumstances surrounding requests for a confidential name change;
- That the appellant receive a detailed letter outlining the reasons for rejecting his request for a confidential name change; and

- That disclosure of certain records may decrease the public's confidence in the ministry's exercise of discretion under s. 8(2) of the *CNA*.

[145] The appellant has made submissions which do not speak directly to the issue of the ministry's exercise of discretion.

Analysis/Findings

[146] Based on my review of the records and the parties' representations, I find that the ministry exercised its discretion in a proper manner in denying access to Record 5 under section 49(a). In withholding Record 5 under the exemption found at section 49(a), read in conjunction with section 14(2)(a) of the *Act*, the ministry considered proper factors and did not take into account improper factors.

[147] Accordingly, I uphold the ministry's exercise of discretion under section 49(a) of the *Act*.

ORDER:

1. I uphold the ministry's decision to withhold Record 5.

2. I order the ministry to disclose the remainder of the withheld information to the appellant. This disclosure is to take place no later than **September 5, 2014 but not before August 29, 2014.**

3. In order to verify compliance with provision 2 of this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original signed by: July 30, 2014
Gillian Shaw
Adjudicator