

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3446

Appeal PA13-433

Ministry of the Attorney General

January 8, 2015

**Summary:** An individual made a request to the Ministry of the Attorney General under the *Act* for access to records related to a petition she submitted respecting Henson Trusts, which are also known as absolute discretionary trusts. The ministry disclosed records to the appellant subject to the severance of limited information that it withheld under section 19 (solicitor-client privilege). On appeal, the adjudicator upholds the ministry's access decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

### OVERVIEW:

[1] This order addresses the issues raised by an appeal of the access decision issued by the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) in response to the following request:

I request a complete copy of [three specified] files. [T]he documents are letters correspondence and responding letters or documents from the Ministry of (i) Office of the Public Guardian & Trustee (ii) Family Responsibility Office.

[2] In a decision letter dated August 1, 2013, the ministry granted partial access to the records identified as responsive to the request, but withheld some information under the solicitor-client privilege exemption in sections 19(a) and 19(b) of the *Act*. The ministry also severed certain information because it was not related (or responsive) to the request.

[3] The requester (now the appellant) appealed the ministry's access decision and a mediator was appointed to explore resolution of the appeal. The appellant initially claimed that additional records should exist in relation to the petition that she submitted to the government about the use of Henson Trust funds for child and spousal support.<sup>1</sup> During mediation, the mediator explained to the appellant that the government's response to her petition is not within the IPC's jurisdiction and that, accordingly, this appeal will only address the issue of access to the responsive records.<sup>2</sup> In this context, the appellant advised that the existence of additional records is no longer an issue in this appeal. The appellant also confirmed that she is not pursuing access to information withheld as non-responsive. However, since the appellant wished to continue to pursue access to the portions of the records withheld under section 19, the appeal was transferred to the adjudication stage for an inquiry.

[4] I sent a Notice of Inquiry to the ministry first, seeking its representations. After I received representations from the ministry, I sent a complete copy of them to the appellant, along with a Notice of Inquiry, to seek her submissions. In response, the appellant submitted correspondence and attachments.

[5] In this order, I uphold the ministry's decision to deny access to the solicitor-client privileged information under section 19(a).

## **RECORDS:**

[6] Portions of email strings with page numbers 42, 45, 52, 55, 56 and 57 were withheld. The two paragraphs severed from page 42 are duplicated at pages 45, 52, 55 and 57. As no useful purpose would be served by duplicating the analysis related to those two paragraphs, I will only review the possible application of section 19 to them where they appear on page 42, as well as the separate email that starts on page 56 and ends at the top of page 57.

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<sup>1</sup> A Henson Trust is a discretionary trust designed for the benefit of a person in receipt of social assistance or disability benefits. It protects the assets of the person and allows for top-up of that person's income, while preserving their right to collect government benefits and entitlements.

<sup>2</sup> The appellant also expressed concern about the response of the Family Responsibility Office (FRO) to the part of this request that had been transferred to it, as well as its response to a newer request she submitted directly to FRO. The appellant's access matters with the FRO are not addressed by this appeal. Additionally, during mediation, the appellant submitted a new request to the ministry for updated information and was granted full access to those records.

## **ISSUES:**

- A. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records?
- B. Did the ministry properly exercise its discretion under section 19?

## **DISCUSSION:**

### **A. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records?**

[7] The discretionary exemption for solicitor-client privilege is found in section 19 of the *Act*. The ministry relies on sections 19(a) and 19(b), which state:

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;

[8] Section 19 contains two branches. The ministry claims that the withheld information falls under both branches. Branch 1, which arises from the common law and section 19(a), encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. 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.

[9] The ministry claims that the emails are subject to solicitor-client communication privilege. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>3</sup> The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>4</sup>

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

<sup>4</sup> Orders PO-2441, MO-2166 and MO-1925.

[10] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.<sup>5</sup>

[11] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>6</sup> 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.<sup>7</sup>

[12] 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 voluntarily evinces an intention to waive the privilege.<sup>8</sup> Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>9</sup> 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.<sup>10</sup>

### ***Representations***

[13] According to the ministry, the portions of the records for which section 19 has been claimed are subject to solicitor-client privilege at common law because they directly relate to the seeking and giving of legal advice. The ministry explains that it corresponded with the appellant on three occasions in 2012 and 2013 about steps being taken to gather more information from several other Ontario government offices about this particular Henson Trust issue. According to the ministry, these letters and email exchanges with the government offices about the matter were disclosed to the appellant, for the most part. The ministry maintains that only the portions that reflect solicitor-client privileged information were withheld, specifically, those parts of the communications initiated by the ministry to respond to the appellant’s petition to the government about the operation of Henson Trusts.

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<sup>5</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>6</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>7</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*].

<sup>8</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>9</sup> 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.).

<sup>10</sup> 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.

[14] The ministry submits that the undisclosed portions fit within the scope of solicitor-client communication privilege because they form part of the “continuum of communications” between a solicitor and client. The ministry explains that because the appellant had raised questions about the unfair operation of a very technical area of the law, its Justice Policy Development Branch sought advice on a confidential basis from the Office of the Public Guardian and Trustee (OPGT). The Branch then added to the advice received and, in turn, passed that advice on to other ministries as part of a further inquiry about the situation. The ministry identifies the other relevant ministries (in addition to OPGT) as the Ministry of Community and Social Services, which administers Ontario Works and the Ontario Disability Support Program (ODSP), and the Ontario Law Commission. The ministry submits that:

The legal content of the further inquiry – the text in which [the ministry] now claims privilege – aimed to put the issue in a legal context to promote the effective analysis of the situation by the ministries addressed.

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The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*<sup>11</sup>]. The communications at issue in this appeal are working papers developing a legally sound response to the petition.

[15] With specific reference to the withheld content of the records, the ministry submits that the two paragraphs severed from page 42 set out the ministry’s understanding of the legal operation of Henson Trusts in the form of a “legal opinion expressed by Ministry counsel in the context of receiving further comments from other areas of [the] Ontario government on a legal matter.” The second withheld portion (on pages 56 to 57) is a response from OPGT legal counsel to the questions posed by ministry counsel in seeking their legal advice. According to the ministry, these severed portions consist of the interpretation of facts and the application of legal principles to assess the questions and provide legal advice. The ministry submits that this exchange clearly represents a continuum of communications on the legal status of Henson Trusts and that there has been no waiver of the solicitor-client privilege attached to it, nor any intention to do so.

[16] The ministry provided additional representations on branch 2, the statutory privilege, but in view of my finding, below, it is not necessary to outline these submissions further.

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<sup>11</sup> [1969] 2 Ex. C.R. 27.

[17] The appellant provides some background information to explain her interest in the records at issue. She describes a petition she submitted to the federal and provincial governments in November 2012 about Henson Trust funds not being accessible to meet a beneficiary's child support obligations. She questions why children born to a disabled individual for whom a Henson Trust is in place would not be able to "obtain the essentials or needs for life." The appellant says that she seeks access to "the lawyer's notes on the law" to explain their views on Henson Trust funds and child support following divorce and, particularly, how the laws of Ontario might be changed to provide for access to Henson Trust funds by such children.

[18] With her representations, the appellant provided additional documentation, including her petition, a list of recipients to whom the petition appears to have been submitted, email correspondence disclosed to her under the *Act*, and various documents related to specific ODSP and OPGT matters.

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

[19] In order for me to find that the withheld portions of the records are subject to the common law solicitor-client privilege exemption, I must be satisfied that the records contain written communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.<sup>12</sup>

[20] I have considered the circumstances of the creation of the records and the representations provided by the ministry and I am satisfied that a solicitor-client relationship existed between the individuals who wrote the emails. These individuals were legal counsel from the ministry's Justice Policy Development Branch and the OPGT. The next part of the analysis requires a determination of whether the records reflect a written record of confidential communication between a solicitor and his client, and then whether each record is subject to privilege because they consist of the giving or seeking of legal advice.

[21] Based on my review of the withheld information, which consists of two paragraphs of one email on page 42 (duplicated on pages 45, 52, 55 and 57) and another email on pages 56 and 57, I am satisfied that they reflect written communications between General Counsel for the ministry's Justice Policy Development Branch and other legal counsel identified by the ministry in its representations, namely those working for the OPGT, the Law Commission of Ontario, and the Ministry of Community and Social Services. I find that disclosure of the two severed paragraphs on page 42 would reveal the nature of the confidential legal advice sought by Justice Policy Development Branch counsel from legal counsel in other areas and, in the case of pages 56 and 57, the confidential legal advice received from OPGT legal counsel. These

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<sup>12</sup> *Descôteaux, supra.*

emails constitute confidential solicitor-client communications directly related to the seeking or giving of legal advice.

[22] In conclusion, I find that the withheld information is subject to solicitor-client communication privilege. I have been provided with no evidence that there has been waiver of that privilege. Accordingly, section 19(a) of the *Act* applies to the withheld information, subject to my review of the ministry's exercise of discretion, below.

**B. Did the ministry properly exercise its discretion under section 19?**

[23] After deciding that a record or part thereof falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The solicitor-client privilege exemption in section 19 is discretionary, which means that the ministry could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[24] In applying the exemption, the ministry was required to exercise its discretion. On appeal, the Commissioner may determine whether the ministry failed to do so. In addition, the Commissioner may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.<sup>13</sup> According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the ministry.

[25] As I have upheld the ministry's decision to apply section 19, I must review its exercise of discretion under that exemption.

***Representations***

[26] The ministry submits that it properly exercised its discretion in deciding to not disclose the severed portions of the records. The ministry states that it took several factors into consideration in exercising its discretion, including:

- the purpose statement of the *Act*, which provides that government information should generally be available to the public, subject only to limited and specific exemptions;
- the fact that the communications about the possible legal implications of the appellant's situation and her petition about Henson Trusts were only of a preliminary nature and were not sufficiently developed to disclose to her as the ministry's final position on the issues;

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<sup>13</sup> Order MO-1573.

- the importance of protecting the privileged information under section 19 while disclosing as much of the communications as possible;
- the sympathetic fact that the appellant was requesting more information about the legal status of Henson Trusts to address her concerns about a personal matter;
- that the ministry was not in a position to offer the appellant legal advice; and
- that the section 19 exemption should be applied to these confidential communications by or between legal counsel that were directed at developing a sound legal basis for policy development in this area.

[27] The appellant did not address this issue in her representations.

***Analysis and findings***

[28] Based on the ministry's representations and my review of the information for which I have upheld the solicitor-client privilege exemption, I am satisfied that the ministry considered relevant factors in exercising its discretion, including the purposes of the *Act*, the nature of the exemption and the appellant's reasons for seeking access to the information. I am satisfied that the ministry exercised its discretion properly and in good faith, and I will not interfere with it on appeal. Accordingly, I uphold the ministry's claim for exemption under section 19(a).

**ORDER:**

I uphold the ministry's claim under section 19(a), and I dismiss this appeal.

Original signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

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January 8, 2015