Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3448

Appeal PA12-55-2

Ministry of Municipal Affairs and Housing

January 15, 2015

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act (the Act)* to the Ministry of Municipal Affairs and Housing (the ministry) for all information relating to two files in the ministry's Rural and Native Housing Program (the program). The files relate to two particular properties. The ministry granted access, in part, claiming the application of the mandatory exemption in section 21 (personal privacy), and the discretionary exemptions in sections 13 (advice or recommendations), 18 (economic and other interests), and 19 (solicitor-client privilege) of the *Act* to some of the records. It also claimed that some records, or portions thereof, were not responsive to the request. During the mediation of the appeal, the appellant raised the issue of reasonable search. In this order, the adjudicator upholds the ministry's decision, its exercise of discretion and search and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 13, 18, 19, 21(1), 24, 49(a) and 49(b).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of a decision made in response to the appellant's access request under the *Freedom of Information*

and Protection of Privacy Act (the Act). The request was made to the Ministry of Municipal Affairs and Housing (the ministry) for all information relating to two files in the ministry's Rural and Native Housing Program (the program). The files relate to two particular properties.

[2] The ministry located responsive records and issued a decision to the appellant granting partial access. The ministry denied access to other records, claiming the application of the mandatory exemption in section 21 (personal privacy) and the discretionary exemptions in sections 13 (advice or recommendations), 18 (economic and other interests) and 19 (solicitor-client privilege) of the *Act*.

[3] The appellant appealed the ministry's access decision to this office. During the mediation of the appeal, the appellant stated that more records ought to exist and identified particular records she believes have been identified. As a result, the ministry conducted another search for responsive records and indicated that it did not locate any additional records. The appellant advised the mediator that she still believes more records exist. Accordingly, the adequacy of the ministry's search was added as an issue in this appeal.

[4] The appeal was then moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I note that the ministry provided this office with an Index of Records, which was shared with the appellant during mediation. In the index, some records are noted to be non-responsive. Consequently, responsiveness of some of the records has also been added as an issue in this appeal.

[5] I provided the ministry, initially, with the opportunity to make representations. I received representations from the ministry, who advised that it issued a supplementary decision letter, granting further access to records that it no longer claimed contain personal information. Consequently those records are no longer at issue. I sought representations from the appellant, but she declined to do so.

[6] For the reasons that follow, I uphold the ministry's decision, its exercise of discretion and search and I dismiss the appeal.

RECORDS:

[7] The records consist of e-mails, letters, statements, agreements and memoranda. I note only as an observation that there is extensive duplication of the content of the records at issue.

ISSUES:

A: What records are not responsive to the request?

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

C: Do the discretionary exemptions at section 19 and/or section 49(a) in conjunction with section 19 apply to the records?

D: Do the discretionary exemptions at section 13(1) and/or section 49(a) in conjunction with section 13(1) apply to the records?

E: Do the discretionary exemptions at section 18(1) and/or section 49(a) in conjunction with section 18(1) apply to the records?

F: Does the mandatory exemption at section 21(1) or the discretionary exemption in section 49(b) in conjunction with section 21(1) apply to the information at issue?

G: Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

H: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What records are not responsive to the request?

[8] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

> assistance in reformulating the request so as to comply with subsection (1).

[9] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[10] The ministry submits that portions of some records are non-responsive to the appellant's request. In particular, the non-responsive records, or portions thereof, contain:

- Information about other clients of the program who are living on different properties;
- A map of a municipality other than that where the subject properties are located;
- Information about the overall administration of the program not relating to the identified files or properties;
- Information about the weather forecast and a ministry's employee's travel to the workplace;
- A personal greeting;
- A newspaper article about a political candidate unrelated to the program or the properties;
- A general document about the freedom of information process;
- Records belonging to the Ontario Mortgage and Housing Corporation, which has no involvement in the program;
- Information about a previous freedom of information request;
- General business correspondence relating to other matters;
- Background information about a mediator;
- A general inquiry about garnishments; and
- Portions of an agenda of a meeting, which set out unrelated matters.

[11] I have reviewed the records and I agree with the ministry that the records or portions thereof that it withheld as being non-responsive to the request are indeed, not responsive to the request. Most of the information that the ministry withheld as non-responsive was contained in other responsive records that were already disclosed to the appellant, with the non-responsive information severed from it. As described by the ministry above, I find that this withheld information is unrelated to the appellant and to the properties that are the subject matter of the request. Consequently, I find that the information withheld by the ministry is not responsive to the request and need not be disclosed to the appellant on that basis.

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

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

[12] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (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.

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[15] The ministry submits that several records contain the personal information of identifiable individuals other than the appellant, including: names; addresses; telephone numbers; cell numbers; the personal opinions of an individual; the personal opinion of an individual about another individual; and financial information about individuals. In addition, the ministry submits that some of the information relates to ministry staff and that although it relates to them in their business capacity, the information at issue would reveal something of a personal nature about them. In particular, there is information relating to a staff member's health, the personal opinion of a staff member about another staff member and the educational and employment background of a staff member.

[16] I have reviewed the records and I find that some of them contain information that qualifies as the personal information of identifiable individuals other than the appellant, as defined in section 2(1) of the *Act*, including: paragraph (a) (sex); paragraph (b) (educational or employment history); paragraph (d) (address and telephone number); paragraph (e) (personal opinions); and (f) (views of another individual about the individual).

[17] Similarly, I find that many of the records contain information about the appellant that also qualifies as her personal information, as defined in section 2(1) of the *Act*, including information relating to her sex and family status (paragraph (a)), financial transactions she has been involved in (paragraph (b)) and the appellant's name where it appears with other personal information relating to her (paragraph (h)).

[18] Lastly, I find that some of the information at issue contains information about individuals in their business capacity, but that its disclosure would reveal something of a personal nature about them. In sum, I find that many of the records contain the personal information of the appellant, various ministry employees and other identifiable individuals. As I have found that the records contain the personal information of the appellant mixed with that of other individuals, the consideration of the exemptions in

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

sections 13, 18 and 19 should be properly considered in conjunction with section 49(a) of the *Act*.

Issue C: Do the discretionary exemptions at section 19 and/or section 49(a) in conjunction with section 19 apply to the records?

[19] 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.

[20] 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.

[21] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. The ministry has claimed the application of section 19 to the majority of the records at issue. As previously stated, because many of the records contain the personal information of the appellant, this exemption should be properly considered under section 49(a), in conjunction with section 19 of the *Act*, which states in part:

> 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

[22] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

[23] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must

establish that one or the other, or both, of these heads of privilege apply to the records at issue.[6]

[24] 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.[7] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

[25] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[9]

[26] 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.[10]

[27] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[11] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the

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[6] 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).
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[11] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (see note 3).

> time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

. . . . .

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

[28] 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 "in contemplation of or for use in litigation." Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[12] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[13]

[29] By way of background, the ministry advises that the appellant threatened to take, and ultimately commenced, legal action against the ministry. As a result, the ministry submits that many of the records are solicitor-client communication privileged, where others are subject to the litigation privilege aspect of branch 2 of section 19.

[30] With respect to solicitor-client communication privilege, the ministry argues that many of the records consist of:

- Requests for the provision of legal advice from Crown counsel on how to respond to correspondence from the appellant;
- Communications with Crown counsel in which instructions are given regarding a draft affidavit;
- Requests for and the provision of legal options by Crown counsel with respect to a settlement offer;
- Communications between the ministry and Crown counsel discussing the legal status of, and advice in relation to mediation matters;
- Communications to and from Crown counsel seeking and receiving legal advice about a potential foreclosure;
- Communications to and from Crown counsel seeking and receiving legal advice about potential property inspections and remediation;
- Communications to Crown counsel regarding the Housing Office's payment history;

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[12] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*.
[13] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (*Magnotta*).

- Legal advice given by Crown counsel regarding a chronological report;
- Information relating to a letter that was prepared by Crown counsel and sent to the appellant;
- Legal advice given by Crown counsel regarding limitation periods;
- Legal opinions provided by Crown counsel on the potential liability of the ministry as a landlord;
- A document between a policy advisor and a director which sets out confidential legal advice given by Crown counsel;
- Legal advice given by Crown counsel relating to obtaining a settlement;
- Legal advice given by Crown counsel regarding the potential effects of the appellant's media conference on mediation sessions;
- Communications between the ministry and Crown counsel requesting counsel to review a draft letter;
- Legal advice given regarding document disclosure;
- Legal advice given to an MPP's office;
- Communications with Crown counsel relating to the administration of the program;
- Communications with Crown counsel relating to the legal status of the appellant's application for a particular program;
- Communications about obtaining legal advice from Crown counsel regarding an agreement;
- Communications between the ministry and Crown counsel in which the ministry provides information to counsel as part of seeking legal advice on a particular issue; and
- A legal opinion provided by Crown counsel on the effects of a foreclosure proceeding or eviction on a potential civil suit.

[31] With respect to the litigation privilege in branch 2, the ministry submits that the remaining records for which it claimed section 19 were prepared for use in contemplated litigation and consist of:

- Email communications between ministry staff and Crown counsel relating to providing the appellant with independent legal counsel;
- Email communications between a mediator and Crown counsel regarding scheduling a meeting;
- Crown counsel's instructions relating to appraisals;
- Correspondence and conversations between Crown counsel and the appellant's lawyer;
- A statement of claim that was sent to Crown counsel by the appellant's lawyer;
- Email communications between ministry staff and Crown counsel relating to a phone conversation with the appellant; and
- An email from Crown counsel to ministry staff regarding photographs taken of the homeowner's unit.

[32] I have reviewed the records for which the ministry has claimed the application of branch 1 of the solicitor-client privilege exemption in section 19, and I find that they qualify for exemption under branch 1 of the section 19 exemption. The records contain ongoing communications between ministry staff and its legal counsel,[14] regarding its ongoing dispute and litigation with the appellant. In particular, disclosure of the records would reveal information pertaining to:

- Staff seeking legal advice from legal counsel on particular subjects;
- Instructions given by staff to legal counsel;
- Legal advice and opinions given by legal counsel to staff;
- Legal counsel's review of draft materials;
- Legal counsel's working papers; and
- Discussions between staff and legal counsel of steps to be taken to proceed in terms of the litigation and possible settlement negotiations.

[33] It is clear from my review of the records that there was a solicitor-client relationship between the ministry and the legal counsel with whom the communications take place. I am also satisfied that these records constitute direct communications of a confidential nature between ministry staff and its legal counsel for the purpose of seeking and giving professional legal advice, as well as providing instructions to legal counsel on the issues arising as a result of the ongoing dispute with the appellant. The records were either prepared by legal counsel or by ministry staff for legal counsel and form part of the "continuum of communications" between a solicitor and client. In addition, based on my review of the ministry's representations, it has not waived its solicitor-client privilege. Other records consist of communications between ministry staff, the disclosure of which would reveal the legal advice that was provided by legal counsel.

[34] I have also reviewed the records for which the ministry has claimed the application of branch 2 of the solicitor-client privilege exemption in section 19, and I find that these records also qualify for exemption on that basis. It is clear from my review of the records that they were created either in contemplation of or during litigation. The appellant threatened to, and did launch a civil action against the ministry. I find that the disclosure of these records would reveal:

[14] The content of several of the records for which this exemption was claimed are duplicated in other records. This duplication does not affect my finding. I raise it as an observation only.

- the content of the actual settlement discussions between the parties;

- discussions of the strategies formulated by the ministry's legal counsel and staff with respect to the approach to be taken in the settlement discussions and/or litigation;

- discussions regarding the structural approach to be taken in the settlement discussions and/or litigation; and/or

- information about the properties and related matters provided by the ministry to legal counsel to assist in the litigation.

[35] In addition to finding that records created for the purposes of litigation were exempt, the Ontario Court of Appeal's decision in *Magnotta*[15] found that records prepared for use in the mediation or settlement of litigation are also exempt under the statutory litigation privilege aspect of branch 2 contained in section 19. More particularly, the Court of Appeal found that the word "litigation" in the second branch encompasses mediation and settlement discussions.

[36] In the specific circumstances of this appeal, I am satisfied that litigation existed or was contemplated at the time the records were prepared and/or compiled for the purpose of my analysis under branch 2 of section 19. I am also satisfied that some of the records at issue were used for the purpose of possible settlement of this litigation, and were prepared by, or delivered to, legal counsel by the ministry to deal with the litigation. Furthermore, I am satisfied that the privilege has not been lost through waiver. Consequently, I find that the records at issue for which the ministry claimed the application of branch 2 of section 19 are exempt from disclosure under the statutory litigation privilege exemption, as they were prepared by or for the ministry's legal counsel "in contemplation of or for use in litigation," in the sense that they were prepared for use in both the settlement of actual litigation, and in the ongoing litigation itself.

[37] Under section 10(2) of the *Act*, an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Many of the records were severed by the ministry and disclosed to the appellant, in part. Other records were withheld, in full. I find that these records represent communications containing legal advice and related information, and do not contain communications for other purposes which are unrelated to legal advice. Consequently, I find that the withheld information is exempt on the basis that it falls within the ambit of solicitor-client privilege and, subject to my review of the ministry's exercise of discretion, is exempt from disclosure under branches 1 and 2 of section 19.

[15] See note 13.

Issue D: Do the discretionary exemptions at section 13(1) and/or section 49(a)[16] in conjunction with section 13(1) apply to the records?

[38] The ministry has claimed the application of the discretionary exemption in section 13(1) to some of the records, or portions thereof. 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.

[39] 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.[17]

[40] "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.

[41] "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. [18]

[42] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material. Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[19]

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[16] Section 49(a) is reproduced in Issue C.
[17] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[18] See above at paras. 26 and 47.
[19] 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.

[43] 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.[20]

[44] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).[21] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information.[22]

[45] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. Sections 13(2) states, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;

[46] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[23] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[24]

[47] The ministry submits that the records for which it claims section 13(1) consist of advice or recommendations made by public servants, the disclosure of which would disclose or permit the drawing of inferences as to the nature of the recommendations. The ministry argues that the records contain recommendations regarding:

- a structural engineer's recommendations of a course of action in response to a housing unit's technical conditions and whether it qualified for correction funding;

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[20] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[21] *Ibid* at paras. 50-51.
[22] Order PO-3315.
[23] Order 24.
[24] Order PO-2097.

- entering into settlement negotiations with the appellant to resolve issues dealing with her unit; and
- options and recommendations from the Social Housing Branch to the ministry for resolving structural problems with the appellant's housing unit in a cost efficient and equitable manner.

[48] The ministry goes on to argue that two of the records at issue contain advice to ministry staff on how to approach mediation with the appellant and on how to provide the appellant with a copy of an appraisal.

[49] Recently, the Supreme Court of Canada re-visited the exemption in section 13 of the *Act* in the case of *John Doe v. Ontario (Finance)*.[25] The appeal arose from an access request made to the Ministry of Finance for records relating to the issue of retroactivity of amendments made to the *Corporations Tax Act*.[26] The ministry denied access to the records which consisted of undated drafts of a policy options paper, claiming the application of the exemption in section 13(1). The requester subsequently appealed the ministry's decision to this office. In its representations made during the inquiry, the ministry argued that the records were versions of a paper that formed part of the briefings of the Minister and others at the ministry. One of the options was eventually enacted, resulting in the amendments that imposed partially retroactive tax liability.

[50] In Order PO-2872, Adjudicator Diane Smith ordered the ministry to disclose the records. She found that to qualify for exemption under section 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised." She concluded that only the portions of the records indicating which option was not preferred were exempt from disclosure. The remaining information, she held, had to be disclosed as it did not reveal a preferred course of action either expressly or by inference. In addition, Adjudicator Smith found that there was no clear evidence that the information in the records was communicated to any other person. Adjudicator Smith's order was upheld on judicial review[27] by the Divisional Court, but overturned on appeal by the Court of Appeal.[28]

[51] The Court of Appeal allowed the appeal and ordered the matter remitted to this office, finding that: the ministry is not required to prove that the record at issue went to the ultimate decision maker; and that section 13(1) applies to advice on a range of different options, even if it does not include a specific recommendation on which option to take.

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[25] 2014 SCC 36.
[26] R.S.O. 1990.
[27] 2011 ONSC 2030 (CanLII).
[28] See note 31.

[52] On appeal to the Supreme Court of Canada (the Court), the Court, found that "advice" and "recommendations" have distinct meanings for the purposes of section 13(1). It accepted that material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of "recommendations." However, it held that it must have been the legislative intent to give "advice" a broader meaning than a "recommendation." The Court went on to apply this interpretation to the records at issue in that appeal and found that "advice" would include a public servant's view of policy options to be considered by the decision maker. In addition, the Court held that section 13(1) applies to exempt earlier drafts of material containing advice or recommendations even if the content of the draft is not included in the final version. The Court also held that evidence that the advice or recommendations were communicated is not a requirement of section 13(1).

[53] I have conducted a record-by-record review and considered the representations of the ministry. I note that only portions of the majority of the records for which this exemption was claimed were withheld from the appellant; the remaining portions of these records were disclosed to her. I agree with the ministry that all of the remaining information at issue consists of advice, or options and recommendations made by public servants to be considered by the decision maker. Further, I find that the withheld information is not merely factual information. Consequently, subject to my finding regarding the ministry's exercise of discretion, I find that these records, or portions thereof, are exempt under section 13(1).

Issue E: Do the discretionary exemptions at section 18(1) and/or section 49(a)[29] in conjunction with section 18(1) apply to the records?

[54] The ministry is relying on the application of the exemption in section 18(1)(e) to exempt portions of three records from disclosure. Section 18(1)(e) states:

> A head may refuse to disclose a record that contains,
>
> > positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[55] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

[29] Section 49(a) is reproduced in Issue C.

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[56] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act.*[30]

[57] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions;

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;

3. the negotiations are being carried on currently, or will be carried on in the future; and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[31]

[58] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.[32] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[33] The term "plans" is used in sections 18(1)(e). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[34] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[35]

[59] The ministry submits that the records deal largely with an ongoing dispute between the appellant and the ministry regarding the condition of the appellant's

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[30] Order MO-2363.
[31] Order PO-2064.
[32] Orders PO-2064 and PO-2536.
[33] Orders PO-2034 and PO-2598.
[34] Orders P-348 and PO-2536.
[35] Order PO-2034.

housing. Negotiations and mediation, the ministry states, were undertaken with a view to resolving the dispute. The ministry states:

> Although the requester initiated legal proceedings against the Government of Ontario, negotiations continue with a view to resolving the dispute. . . [T]her records redacted under section 18 would reveal positions, criteria or instructions to be applied to these negotiations. If such records were revealed, they would prejudice the Ministry's position in the continuing negotiations.

[60] As previously stated, the remaining information at issue for which this exemption was claimed consists of portions of three records. The remaining portions of these records have already been disclosed to the appellant. Having reviewed the records and the ministry's representations, I am satisfied that the information at issue sets out the ministry's pre-determined course of action or way of proceeding with respect to the ongoing negotiations with the appellant in regard to her housing situation. The withheld portions of records 26, 62 and 96 do not contain information about a past event, such as a failed negotiation, nor do they simply set out the identification of issues to be considered. Rather, they set out the pre-determined course of action to be taken in future negotiations. Consequently, I find that this information is exempt from disclosure under section 18(1)(e) of the *Act*, subject to my review of the ministry's exercise of discretion.

Issue F: Does the mandatory exemption at section 21(1) or the discretionary exemption in section 49(b), in conjunction with section 21(1) apply to the information at issue?

[61] As I have found that the records contain the personal information of the appellant mixed with that of other individuals, the consideration of the exemption in section 21(1) should be properly considered in conjunction with section 49(b) of the *Act*.

[62] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[63] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or

unless disclosure would not be an unjustified invasion of personal privacy [section 21(1)(f)].

[64] The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21. In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

[65] The factors and presumptions in sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[66] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[36]

[67] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).[37] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[38] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[39]

[68] The ministry submits that the mandatory exemption in section 21(1) applies to the personal information contained in the records, and that none of the exceptions in section 21(1)(a) to (f) apply. The ministry also argues that the factors in sections 21(2)(f) (highly sensitive), 21(2)(h) (supplied in confidence) and 21(2)(i) (unfairly damage one's reputation) weighing in favour of non-disclosure apply in this instance. The appellant did not address this issue.

[69] I have reviewed the records for which the ministry claimed this exemption, and note that the majority of these records have been partially disclosed to the appellant. The portions that have been withheld contain either solely the personal information of individuals other than the appellant, or her personal information mixed with that of

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[36] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[37] *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above.
[38] Order P-239.
[39] Orders PO-2267 and PO-2733.

other identifiable individuals. I have considered the factors in section 21(2) and find that there are no factors either favouring the disclosure or non-disclosure of the individuals' personal information to the appellant. I also find that where the withheld portions contain the appellant's personal information, it is so intertwined with the personal information of others that severing the appellant's personal information would not be possible.

[70] Therefore, I uphold the exemption and the ministry's decision with respect to the personal information contained in the records. Consequently, those portions of records that were withheld under section 21(1) or section 49(b) need not be disclosed to the appellant.

Issue G: Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

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

[72] 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; or it fails to take into account relevant considerations.

[73] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[40] This office may not, however, substitute its own discretion for that of the institution.[41]

[74] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[42]

- 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, and the privacy of individuals should be protected;

- the wording of the exemption and the interests it seeks to protect;

[40] Order MO-1573.
[41] Section 54(2) of the *Act*.
[42] Orders P-344, MO-1573.

- 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;
- 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; and
- the historic practice of the institution with respect to similar information.

[75] The ministry submits that it was appropriate for the head or her delegate to exercise discretion to withhold records, or portions thereof, that fall squarely within the scope of the exemptions in sections 13, 18 and 19. The ministry goes on to state that it weighed the relevant considerations and did not exercise its discretion in bad faith or for an improper purpose. As these records relate directly to litigation matters, the ministry argues that to the extent the appellant may have a right to access for litigation purposes information that is exempt from disclosure under the *Act*, the appropriate process for accessing such information is through the courts and the *Rules of Civil Procedure*, not through the *Act.*

[76] I have carefully considered the representations of the ministry. While I note that access to documents under the *Rules of Civil Procedure* is a separate mechanism from the regime under the *Act*, with its own set of rules around disclosure, I find that the ministry took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that they considered the appellant's position and circumstances and balanced it against: the importance of solicitor-client privilege; the ability of staff to provide free and frank advice to decision makers; the economic interests of the ministry; and the protection of individuals' personal privacy in exercising its discretion not to disclose the information at issue. I am also mindful that the ministry has disclosed most of the responsive records to the appellant, either in whole or in part, and has severed only that information which I have found to be exempt from disclosure under the *Act*.

[77] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion and I uphold the ministry's exercise of discretion

to apply the exemptions in section 49(a), in conjunction with sections 13, 18 and 19 as well as section 49(b), in conjunction with 21(1), to the withheld information.

Issue H: Did the institution conduct a reasonable search for records?

[78] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[43] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[79] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[44] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[45]

[80] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[46]

[81] The ministry provided its evidence by way of an affidavit sworn by an Information Management and Privacy Advisor (the Advisor) in the Corporate Policy and Programs Branch of the ministry. The ministry advises that after it received the request, the Advisor sent an email notifying the Housing Funding and Risk Management Branch and the Legal Services Branch of the request, and asked them to search for responsive records. These branches were notified, the ministry submits, because these are the only two branches that would have records related to the request. The ministry also argues that it was not necessary to seek clarification from the requester, as there were staff members from both branches that were familiar with the subject matter of the request. The ministry further advises that it did not unilaterally narrow the scope of the request, but rather interpreted the request broadly so as to search for the named files and all related matters.

[82] The Advisor states that she subsequently met with representatives from both branches to develop a coordinated approach to the search. The searches were then conducted by experienced staff of both branches, who were knowledgeable and familiar with the relevant files. The ministry also advises that as the request relates to an active

[43] Orders P-85, P-221 and PO-1954-I.
[44] Orders P-624 and PO-2559.
[45] Orders M-909, PO-2469 and PO-2592.
[46] Order MO-2246.

matter, its retentions practices have ensured that none of the responsive records had been destroyed.

[83] Lastly, the ministry submits that the appellant has concluded that it conducted an improper search because it did not produce three specific records, which were searched for during the mediation of the appeal, but not located. The ministry advises that in each case, the appellant has assumed that such records were created in the first place and that they continue to be in the custody or control of the ministry.

[84] On my review of the representations provided by the ministry, I am satisfied that it has conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. A reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request.[47] The ministry has provided extensive affidavit evidence explaining the nature and extent of the searches conducted in response to the request, and also the additional search conducted during the mediation of this appeal. These searches (for records which are a number of years old), included searches by individuals at two branches of the ministry in locations where these records ought to be located. Although the second search did not uncover additional information, I am satisfied that these searches were reasonable in the circumstances. In addition, the appellant has not provided sufficient evidence of a reasonable basis for concluding that the ministry's search was inadequate, or that further records exist.

ORDER:

I uphold the ministry's access decision, it exercise of discretion and its search, and dismiss the appeal.

Original signed by: January 15, 2015
Cathy Hamilton
Adjudicator

[47] Order M-909.