

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3477

Appeal PA13-314-2

Ministry of Health and Long-Term Care

April 8, 2015

Summary: The Ministry of Health and Long-Term Care (the ministry) received a request for records relating to residents' quality of care, health and safety issues, and media strategies at the Sunnybrook Veterans' Centre. The ministry denied access to portions of the responsive records on the basis of the exemption in section 19(a) (solicitor-client privilege). This decision finds that the withheld information is exempt under section 19(a), with one exception. The decision upholds the ministry's exercise of discretion in deciding to withhold access to the records in which section 19(a) applies.

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

OVERVIEW:

[1] The Sunnybrook Veterans' Centre (SBVC) is a long-term care and complex hospital care facility that provides care to 500 veterans. Veterans Affairs Canada (VAC) funds the full cost of care for SBVC's 190 nursing home care beds. For SBVC's 310 complex continuing care beds, the province funds the cost of care, and VAC provides additional funding for enhanced services such as recreational and enhanced dining programs.¹

¹ <http://www.veterans.gc.ca/eng/about-us/reports/departmental-audit-evaluation/2013-03-sunnybrook-veterans-centre-audit/1-0>

[2] In 2012, some family members of veterans housed at SBVC raised concerns about veterans' quality of care, resulting in some reports in the media. A reporter made a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

Any and all records, including emails and PIN messages, related to the Sunnybrook Veterans Centre from Oct. 1, 2012 to present.

[3] The ministry issued an interim access decision and fee estimate in response to the request. The requester (now the appellant) appealed the ministry's fee estimate to this office, and Appeal PA13-314 was opened.

[4] The appellant subsequently provided the ministry with the following clarification of his request:

My main interest is in those records related to health and safety at the Sunnybrook Veterans Centre; any complaints/concerns about quality of care; any media strategies related to any reports about care concerns; and concerns about financial matters.

I am not interested in duplicates, routine (annual) reports/publications (manuals), or any other information already publicly available via websites.

[5] In response to the clarified request, the ministry issued a new interim access decision and fee estimate. The appellant agreed to accept the new fee estimate, and Appeal PA13-314 was closed.

[6] In the new interim access decision and fee estimate letter, the ministry advised that its interim decision was to grant partial access to the records, and that a preliminary search of records indicated that some information would likely be withheld on the basis of the exemption at section 19 (solicitor-client privilege) of the *Act*.

[7] The ministry subsequently sent the appellant a notice of extension under section 27 of the *Act*, advising that it required an additional 45 days to make its final decision on access. After the lapse of the additional 45 days, the appellant appealed the ministry's failure to issue a decision by the extended date, and Appeal PA13-314-2 was opened.

[8] The ministry subsequently issued a final decision letter granting partial access to records responsive to the appellant's clarified request. The responsive records generally consist of email chains between ministry staff, including legal counsel. The decision was to grant full access to some records and to deny access to other records, in whole or in part, pursuant to section 19 of the *Act*.

[9] The appellant advised that he wished to pursue access to the withheld records, and Appeal PA13-314-2 was transferred to the mediation stage to address the ministry's reliance on section 19 for the records withheld in whole or in part.

[10] During mediation the appellant advised that he had not yet received a copy of the partial disclosure granted in the ministry's final decision letter, and Appeal PA13-314-3 was opened to address the ministry's failure to disclose records. The ministry subsequently provided the appellant with the disclosure, along with an index of records setting out a general description and decision on access for each record, and identifying the exemption claimed where access to a record was denied in full or in part. As a result, Appeal PA13-314-3 was closed.

[11] As the appellant continues to seek access to all the records withheld on the basis of section 19, and as no further mediation was possible, Appeal PA13-314-2 was transferred to the adjudication stage of the appeal process for an inquiry.

[12] As part of the inquiry, I initially sought representations from the ministry. A copy of the ministry's representations was shared with the appellant, who was also invited to submit representations. The appellant chose not to submit representations, but indicated that he wished to have a decision on the appeal.

[13] For the reasons that follow, I partially uphold the ministry's application of section 19(a) of the *Act* to exempt the withheld portions of the records from disclosure. I order disclosure of a portion of record 59 to the appellant.

RECORDS:

[14] The records at issue in this appeal are 33 email records withheld in whole or in part on the basis of section 19(a). Generally, the records at issue consist of email chains between ministry staff, or ministry staff and ministry legal counsel.

[15] Records 69, 79-80 and 84 were entirely withheld, whereas records 1-19, 28, 35-37, 59, 67, 74, 78, 82 and 91 were partially withheld.

[16] As the records consist of email chains, a number of individual emails are duplicated.

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the withheld records?
- B. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 19 apply to the withheld records?

[17] The ministry relies on section 19(a) of the *Act* to withhold the records in whole or in part. This section reads:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege.

[18] The section 19(a) exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The ministry's submissions address solicitor-client communication privilege only.

Solicitor-client communication privilege

[19] 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.²

[20] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

[21] 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.⁴

[22] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[23] 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.⁶

Loss of privilege

Waiver

[24] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[25] 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.⁷

[26] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁸

[27] Waiver has been found to apply where, for example:

- the record is disclosed to another outside party⁹
- the communication is made to an opposing party in litigation¹⁰
- the document records a communication made in open court.¹¹

Representations

[28] The ministry submits that the 33 records at issue are solicitor-client privileged and fall under section 19(a) of the *Act*.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 S.C.).

⁸ [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.).

⁹ Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe* [1997] O.J. No. 4495 (Div. Ct.).

¹⁰ Orders MO-1514 and MO-2396-F.

¹¹ Orders P-1551 and MO-2006-F.

[29] Specifically, the ministry submits that records 1, 67, 69, 74, 78, 84 and 91 contain instructions to, or advice from, legal counsel. The ministry submits that records 6, 13, 35 and 59 contain references to legal opinions provided by ministry counsel which were shared amongst ministry staff, and therefore fall within the continuum of communications between a lawyer and client.

[30] The ministry also notes that many of the records at issue contain duplicated information imbedded in email chains. The ministry submits that, for example, record 1 is duplicated in records 2-13, record 35 is duplicated in records 36 and 37, and record 78 is duplicated in records 79 and 80.

Analysis

[31] Records 1-11, 15, 28, 67, 69, 74, 78-80, 82, 84 and 91 contain communications between legal counsel and ministry staff. Based on the information before me, I find that the withheld portions of these records contain instructions to, or advice from, legal counsel. Accordingly, I have no difficulty finding that the withheld portions of these records qualify for exemption under section 19(a).

[32] Records 35-37 contain emails between ministry staff that convey or refer to legal advice from ministry counsel. These emails are, in effect, between individuals comprising "the client", and would reveal the substance of communications between a solicitor and client, made for the purpose of obtaining or giving professional legal advice. They therefore also qualify for exemption under section 19(a).

[33] I partially uphold the ministry's decision to withhold two paragraphs contained in record 59. The second withheld paragraph conveys or refers to legal advice and falls within the solicitor-client privilege exemption. However, the first paragraph withheld by the ministry relates to ongoing discussions between the ministry and a federal department. It does not refer to or convey legal advice, and does not appear to reveal the substance of any communication between a solicitor and client, made for the purpose of obtaining or giving legal advice. I therefore find that this paragraph is not covered by solicitor-client communication privilege. No other privilege or exemption is claimed for this information and it should be disclosed to the appellant.

[34] I find that the withheld portions of records 12-14 and 16-19 contain both instructions to, or advice from, legal counsel, and communications between ministry staff that convey or refer to legal advice. Consequently, the withheld portions of these records qualify for exemption under section 19(a).

[35] As I have received no representations or evidence regarding the issue of waiver, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue.

[36] I will now turn to the ministry's exercise of discretion in deciding to withhold the portions of the records that are covered by the section 19(a) exemption.

B. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[37] The section 19 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, this office may determine whether the institution failed to exercise its discretion.

[38] In addition, this office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

Relevant considerations

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁴

- 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

¹² Order MO-1573.

¹³ Section 43(2).

¹⁴ Orders P-344, MO-1573.

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and affected person
- 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

[41] The ministry submits that it properly exercised its discretion to withhold the records at issue. It indicates that in arriving at its decision, the ministry considered the public's right of access to government information weighed against the importance of maintaining the confidentiality of privileged communications between the ministry and its counsel. The ministry also submits that it took into account relevant considerations and did not take into account irrelevant considerations when exercising its discretion.

[42] The ministry relies on *Ontario (Public Safety and Security) v. Criminal Lawyers Association*¹⁵ for the proposition that, in order to maintain public confidence and retain relevance, solicitor-client privilege is almost absolute.

¹⁵ [2010] 1 S.C.R. 815.

Analysis

[43] Having regard to the submissions before me, and the principles in the Supreme Court of Canada decision referred to above, I am satisfied that the ministry has not erred in the exercise of its discretion. I find that the ministry did not act in bad faith or for an improper purpose. I am also satisfied that the ministry did not take into account irrelevant considerations or fail to take into account relevant considerations.

[44] Accordingly, I find that the ministry properly exercised its discretion in applying the section 19(a) exemption, and I uphold its decision to withhold the records at issue pursuant to this section.

ORDER:

1. I uphold the ministry's decision to deny access to the withheld portions of records 1-19, 28, 35-37, 67, 69, 74, 78-80, 82, 84 and 91.
2. I order the ministry to disclose the first withheld paragraph of record 59 that I have found not covered by the section 19(a) exemption. I have provided the ministry a copy of this record with this order, highlighting the portions to be disclosed. I uphold the ministry's decision to withhold the other portion of this record.
3. Disclosure of the highlighted portion of record 59 is to be made no later than **April 29, 2015**.

Original Signed by: _____
Sherry Liang
Assistant Commissioner

April 8, 2015