

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3566

Appeal PA13-539

Financial Services Commission of Ontario

January 7, 2016

Summary: The appellant seeks access to records relating to the resignation of his life insurance agent license and other related matters from FSCO. At issue in this order are records that FSCO withheld, either in whole or in part, under the discretionary exemption in section 49(a), read with sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), of the *Act*. The appellant also takes issue with FSCO's search for responsive records and alleges that additional responsive records exist. The adjudicator upholds FSCO's decision, in part. The adjudicator finds that the exemption in section 49(a), read with sections 13(1) and 19, applies to the majority of the records at issue and upholds FSCO's exercise of discretion to withhold those records from disclosure. In addition, the adjudicator upholds FSCO's search for responsive records. The adjudicator orders FSCO to disclose a small number of records to the appellant.

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

Orders and Investigation Reports Considered: PO-2719

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

OVERVIEW:

[1] The Financial Services Commission of Ontario (FSCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

Please send me all internal notings and transcripts pertaining to my Surrender/Resignation of Life License [specified number] with effect from 15th November 2012.

Please also send me all information pertaining to my application for Mortgage License [specified number].

The requester later clarified his request as follows:

I need all information [with effect from] 1st November 2012 to date. This pertains to my letter of resignation to FSCO, FSCO actions thereof, internal notings and actions pertaining to minutes of settlement.

The requester clarified his request further to the following:

1. Please send information sent [to Ontario Motor Vehicle Industry Council] in the last week re [requester's name] by FSCO;
2. All notings/communication re Resignation to FSCO as of 1st November 2012;
3. Communications on Minutes of Settlement.

[2] FSCO issued a fee estimate of \$120 and requested a deposit of \$60 to process the request. FSCO stated that the fee estimate was based on a representative sample of the responsive records. FSCO also advised the appellant that it anticipated that access would be provided to the majority of the responsive records with some information withheld under the exemptions in sections 14, 19, 21 and 49 of the *Act*.

[3] The requester requested a fee waiver based on financial hardship. FSCO waived a portion of the fee and requested a reduced deposit of \$50.

[4] Subsequently, FSCO issued a decision granting the requester partial access to the responsive records. FSCO advised the appellant that portions of the records were withheld, either in whole or in part, under the discretionary exemptions in section 13 (advice or recommendations), 14 (law enforcement) and 19 (solicitor-client privilege) and the mandatory personal privacy exemption in section 21 of the *Act*. FSCO also advised the requester that the final fee was \$58.60, but that it would waive the difference between the deposit and final fee.

[5] The requester, now the appellant, appealed FSCO's decision. In his appeal letter, the appellant identified additional responsive records that he believes ought to exist, thereby raising the reasonableness of FSCO's search as an issue. In particular, the appellant believes that the following records should exist:

1. Details of Surrender of Life License

2. Details of Recommendations sent to the Ontario Motor Vehicle Industry Council (OMVIC) by FSCO
3. Details of minutes of settlement actions after 15 November 2012
4. Details of the appellant's name being struck off FSCO's website

[6] During mediation, FSCO advised the mediator that it located additional responsive records. The appellant advised the mediator that he remains unsatisfied with FSCO's search and identified further records that he believes should exist, including his resignation letter, an OMVIC application, minutes of settlement and complaints made against him.

[7] FSCO advised the mediator that it would issue a supplementary decision for the additional records it located. As well, FSCO advised that it would conduct an additional search based on the appellant's search issues and the results of this additional search would be the subject of a separate decision.

[8] FSCO issued a supplementary decision granting the appellant partial access to the additional records. FSCO denied the appellant access to one record under section 14(1)(d) (confidential source of information) of the *Act*, but disclosed the remainder of the additional responsive records.

[9] FSCO also issued a revised decision relating to its initial decision and enclosed an index of records. FSCO advised the appellant that it decided to apply the exemptions in section 14(1)(d) and 21/49(b) to additional portions of the records. FSCO also clarified the following with respect to its index of records:

- It applied sections 49(a) (request for own personal information), in conjunction with sections 13, 14 and 19, and (b) to all the records at issue in the appeal
- Record LSB-33-3, which was denied in full in the supplementary decision, is a duplicate of record CEO-8-3
- Section 14(1)(d) applies to records LMCD-38 in full and section 21 applies to portions of that record
- FSCO applied sections 14(1)(a) (interfere with a law enforcement matter) and (b) (law enforcement investigation) to all of the records where section 14(1) is claimed, except Record CEO-7-1. For record CEO-7-1, it also applied section 14(1)(d) to some portions
- LCMD-57 was withheld in full under sections 13 and 14

[10] The appellant advised the mediator that he does not seek access to other individuals' names or contact information that was severed from the records. However, the appellant advised that he pursues access to the remaining information that was

denied, including any comments about him. Therefore, the portions that contain an individual's name and/or contact information that were withheld in records LMCD-38, LSB-33-3, CEO-7-1 and CEO-8-3 and all of records LSB-33-1 and CEO 8-1 are no longer at issue.

[11] Mediation did not resolve the issues in the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to this appeal sent a Notice of Inquiry to FSCO, first. FSCO submitted representations. In its representations with regard to the law enforcement exemption in section 14, FSCO states that the law enforcement activity has ceased and was concluded with the execution of the minutes of settlement. As result, "no arguments regarding this exemption are being advanced" by FSCO. Based on my review of the records, I conclude that FSCO has abandoned its claim of section 14 to the records at issue. Accordingly, I will not consider its application to the records further in this order.

[12] After submitting its representations in response to the Notice of Inquiry, FSCO issued another revised decision to the appellant, disclosing a number of records, including those that were previously subject to its section 14 claim. I reviewed FSCO's revised decision and the records it disclosed to the appellant. I conclude that the following records are no longer at issue in this appeal as they were disclosed to the appellant, in full: LMCD-23, LMCD-24, LMCD-26 and LMCD-39. I note that there are portions of records LMCD-35, LMCD-37 and LMCD-38 that were withheld from disclosure. However, as the only portions withheld from disclosure in these records constitute an individual's name and/or contact information and the appellant confirmed that he does not pursue access this information, I find that records LMCD-35, LMCD-37 and LMCD-38 are no longer at issue in this appeal.

[13] In addition, I note that portions of records LMCD-36 were withheld under section 14(1)(d). However, this record was not addressed in FSCO's revised decision letter nor was it disclosed, either in whole or in part, to the appellant. I note that there are portions of pages LMCD-36-1 and LMCD-36-2 that were severed under section 19 of the *Act*. I will consider the application of section 19 to these portions in this order. However, as FSCO advised that it no longer applies section 14 to withhold portions of the records and disclosed all other records, or portions thereof, that were originally claimed to be exempt under section 14, I will order FSCO to disclose all portions of pages LMCD-36-1 through LMCD-36-3 that were previously withheld under section 14, with the exception of the names of other individuals, which the appellant confirmed he does not seek access to. I will consider whether LMCD-36-4 contains the personal information of identifiable individuals other than the appellant later in this order.

[14] Upon review of FSCO's representations and revised decision, the adjudicator who had carriage of this appeal shared FSCO's representations with the appellant, pursuant to section 7 of this office's *Code of Procedure and Practice Direction Number 7*, and invited him to submit representations in response. The appellant submitted representations. In his representations, the appellant states that his request is "for my

own personal information, not others”, thereby confirming that he does not seek access to any personal information other than that which relates to him. In addition, the appellant refers to the *Personal Information Protection and Electronic Documents Act (PIPEDA)* and his right to access his personal information under that act. I confirm that *PIPEDA* is outside of my jurisdiction and will not consider its application in this order.

[15] After the inquiry was closed, the appeal was transferred to me. In the discussion that follows, I uphold FSCO’s decision, in part, and find its search for responsive records to be reasonable.

RECORDS:

[16] The records that remain at issue are from FSCO’s Licencing and Market Conduct Division (LMCD), Legal Services Branch (LSB) and the Office of the Chief Executive Officer (CEO), as described in FSCO’s Index of Records (index), which was shared with the appellant. According to FSCO’s index, the following records, or portions thereof, remain at issue:

- LMCD Records: 7, 12, 18, 25, 36, 40, 46, 48, 50 to 52, 56 to 58, 60, 67, 68, 70 and 72
- LSB Records: 27, 33 and 43 to 55
- CEO Records: 6 to 8

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a), in conjunction with the sections 13 and 19 exemptions apply to the information at issue?
- C. Did FSCO exercise its discretion under section 49(a), in conjunction with sections 13 and 19? If so, should this office uphold the exercise of discretion?
- D. Did FSCO conduct a reasonable search for records?

DISCUSSION:

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

[17] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it

relates. The term "personal information" is defined in section 2(1) 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;

[18] 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.¹

[19] Sections 2(3) and (4) of the *Act* also relate to the definition of personal information. These sections state:

¹ Order 11.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[20] 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.²

[21] 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.³

[22] FSCO did not make any submissions with regard to the personal information contained in the records, as the appellant advised that he does not seek access to other individuals' names or contact information.

[23] In his representations, the appellant submits that the records contain his personal information, specifically his personal information that he alleges was disclosed to American authorities, information relating to the denial of his mortgage licence, information relating to various complaints made against him to FSCO and "details of actions" taken by FSCO relating to the resignation of his license.

[24] Based on my review of the records that remain at issue, I find that they all contain recorded information about the appellant which qualifies as his personal information for the purposes of section 2(1) of the *Act*. In particular, I find the records contain information relating to his psychological, criminal or employment history (paragraph (b) of the definition of "personal information"), his address and telephone number (paragraph (d)), the views or opinions of another individual about him (paragraph (g)) and his name where it appears with other personal information relating to him or where the disclosure of his name would reveal other personal information about him (paragraph (h)).

[25] In addition, I find that three of the records at issue, LSB-33-3, its duplicate CEO-8-3, and LMCD-36-4 contain information that meets the requirements for personal information relating to two other individuals (the affected parties). Records LSB-33-3, CEO-8-3 and LMCD-36-4 contain the personal information of one affected party, specifically information relating to his race or ethnic origin (paragraph (a)), information

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

relating to his criminal or employment history (paragraph (b)), the views or opinions of another individual about the affected party (paragraph (g)) and the affected party's name where it appears with other personal information relating to him or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)). With regard to the second affected party, record LMCD-36-4 contains information relating to financial transactions he was involved with (paragraph (b)), his personal views or opinions (paragraph (e)) and his name where it appears with other personal information relating to him or where the disclosure of the name would reveal other personal information about him (paragraph (h)).

[26] In its revised decision and representations, FSCO identified that it would no longer apply section 14 to any of the records. Record LMCD-36-4 was withheld, in full, under section 14(1)(d). As such, it appears that FSCO is no longer claiming any exemptions to withhold record LMCD-36-4. However, I find that the record contains the personal information of the appellant and other identifiable individuals and so, disclosure of this record could result in an unjustified invasion of these other individuals' personal privacy under section 49(b) of the *Act*.

[27] In his representations, the appellant states that "my request has been for my own personal information, not others." As a result, any personal information of individuals other than the appellant is no longer at issue in this appeal. Based on my review of records LSB-33-3, its duplicate CEO-8-3 and LMCD-36-4, I find that they contain the personal information of the appellant and two individuals. However, I find that the appellant's personal information is inextricably intertwined with that of the two affected parties and, therefore, cannot be reasonably severed and disclosed to him. As a result, I uphold FSCO's decision to deny the appellant access to records LSB-33-3, CEO-8-3 and LMCD-36-4, in full.

[28] In addition, I note that, while FSCO did not make submissions on whether the records at issue contain personal information as defined in the *Act*, it withheld a number of file numbers from record CEO-7 from disclosure under the personal privacy exemption in section 49(b) (personal privacy). FSCO did not provide me with representations on whether these numbers relate to an identifiable individual. Based on my review of record CEO-7 and in the absence of such representations, I find that they do not contain "personal information" as contemplated by section 2(1) of the *Act*. As only "personal information" is exempt under section 49(b) of the *Act* I find that these file numbers are not exempt and will order FSCO to disclose the entire record, with the exception of the names of individuals, to the appellant.

[29] As I have found that the remaining records contain the personal information of the appellant, I will now consider the application of section 49(a) to the information that remains at issue.

Issue B: Does the discretionary exemption at section 49(a), in conjunction with the sections 13 and 19 exemptions apply to the information at issue?

[30] 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. Section 49(a) reads as follows:

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.

[31] 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 own personal information.⁴

[32] 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.

Section 13: Advice or Recommendations

[33] FSCO submits that section 13(1) of the *Act* applies to the following records: LMCD-18, LMCD-25, LMCD-57, LMCD-60, LMCD-68 and CEO-6. 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.

[34] In *John Doe v. Ontario (Finance)*⁵, the Supreme Court of Canada held that 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.⁶

[35] *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.

[36] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of actions 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

⁴ Order M-352.

⁵ 2014 SCC 36.

⁶ *Ibid.*, at para. 43.

even if they do not include a specific recommendation on which option to take.⁷

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

[38] Advice or recommendations maybe 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.⁸

[39] 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.⁹

[40] 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 13(1).¹⁰

[41] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information¹¹, a supervisor's direction to staff on how to conduct an investigation¹² and information prepared for public dissemination.¹³

[42] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. These mandatory exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.¹⁴ If the information falls into one of these categories, it cannot be withheld under section 13.

⁷ *Ibid.* at paras. 26 and 47.

⁸ 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), affirmed [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.

⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 51.

¹⁰ *Ibid.* at paras. 50-51.

¹¹ Order PO-3315.

¹² 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.).

¹³ Order PO-2667.

¹⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 30.

Representations and Findings

[43] FSCO submits that the exemption in section 13(1) applies to records LMCD-18, LMCD-25, LMCD-57, LMCD-60, LMCD-68 and CEO-6. FSCO submits that these records were created in the course of, or in response to, a regulatory proceeding which started as an investigation which led to a hearing under section 393 of the *Insurance Act* to suspend or revoke the life insurance license of the appellant. FSCO states that the records withheld under the section 13 exemption are email exchanges between FSCO staff relating to the legal proceeding to consider the appellant's life insurance agent license under section 393 of the *Insurance Act*. These exchanges include considerations to be taken into account in formulating a preferred or recommended course for the disciplinary action and its possible resolution.

[44] FSCO acknowledges that the records for which it claims the exemption in section 13 consist of email messages between public servants and are, therefore, not formal briefing documents with a specific section clearly designated as advice or recommendations. Regardless, FSCO submits that "there is nothing in section 13 that limits the scope of section 13 to any particular form of record, and advice and recommendations can be communicated as effectively by email as in a briefing document or other record."

[45] Referring to the Supreme Court of Canada decision in *John Doe v. Ontario (Finance)*¹⁵, FSCO submits that, in the context of a highly regulated sector such as life insurance and agents, it is important that FSCO can rely upon the confidential and candid advice of public servants in deciding upon what disciplinary action, if any, should be taken and how it should be resolved. FSCO submits that it is essential for public servants to be able to "make hard choices or determine what regulatory action to take based on frank recommendations".

[46] The appellant did not make submissions on whether the records at issue contain information that may be exempt under section 13(1) of the *Act*. The appellant asserts that all personal information relating to him should be released to him.

[47] On my review of the records and FSCO's representations, I uphold FSCO's decision to withhold the following records under section 13(1) of the *Act*, in conjunction with section 49(a): CEO-6, LMCD-18, LMCD-57, LMCD-60 and LMCD-68. These email records contain draft versions of correspondence and minutes of settlement and other materials circulated between FSCO staff and decision-makers for review and comment. As FSCO indicated in its submissions, these records include considerations to be taken into account in formulating a course for the disciplinary action regarding the appellant and its possible resolution. I also accept that none of the exceptions at sections 13(2) and (3) applies to the withheld information. Accordingly, I uphold FSCO's denial of access to the withheld information in these records, subject to my review of FSCO's exercise of discretion under section 49(a), in conjunction with section 13(1).

¹⁵ *Ibid.*

[48] However, I reject FSCO's section 13(1) claim for record LMCD-25. I do not accept FSCO's claim that record LMCD-25 qualifies as advice or recommendations that could ultimately be accepted or rejected by its recipients. Record LMCD-25 is a file activity system print out regarding the conduct compliance review relating to the appellant. The type of information contained in record LMCD-25 is similar to records LMCD-1 and LMCD-24 with the exception of the activity notes. Both LMCD-1 and LMCD-24 were disclosed in full.

[49] Based on my review of record LMCD-25, and in the absence of specific representations from FSCO on this record, it is unclear what information contained in the record would constitute advice or recommendations for the purposes of section 13(1) of the *Act*. As similar information was disclosed by FSCO in records LMCD-1 and LMCD-24, it appears to me that FSCO would not consider the computer generated system information or data in record LMCD-25 to be exempt under section 13(1). Rather, it appears that FSCO considers the Activity Notes portion of record LMCD-25 to be exempt under section 13(1).

[50] In any case, based on my review of the entire record, I find that record LMCD-25 does not contain policy options, advantages or disadvantages of particular options, recommended or preferred courses of action, drafts of communications or other documents or other similar types of information contemplated by the Supreme Court of Canada in *John Doe v. Ontario (Finance)*¹⁶ as constituting advice or recommendations within the meaning of section 13 of the *Act*. In my view, record LMCD-25 contains only generic computer generated system information relating to the appellant's file and notes regarding the next steps (rather than a recommended course of action) for the compliance review and a status update. I find that this information does not constitute advice or recommendations within the meaning of section 13(1) of the *Act*. As no mandatory basis for withholding record LMCD-25 applies, I order disclosure of record LMCD-25 in full.

Section 19: Solicitor Client Privilege

[51] In its representations, FSCO claims that section 19, read with section 49(a), applies to the following email records, or portions thereof: LSB-27, LSB-43 to LSB-55, LMCD-7, LMCD-12, LMCD-36, LMCD-39, LMCD-40, LMCD-48 and LMCD-50 to LMCD-52. However, in its index, FSCO identified the following records, or portions thereof, to also be exempt under section 19: LMCD 56, LMCD-58, LMCD-67, LMCD-70 and LMCD-72. Since I do not have a revised decision or any indication that FSCO abandoned its section 19 claim to LMCD 56, LMCD-58, LMCD-67, LMCD-70 and LMCD-72, I will consider whether these records were properly withheld under that exemption.

¹⁶ 2014 SCC 36 at paras. 24-27, 47 and 50-51.

[52] 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.

Section 19 contains two branches as described below. 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.

[53] FSCO claims that email records LSB-27, LSB-43 to LSB-55, LMCD-7, LMCD-12, LMCD-36, LMCD-39, LMCD-40, LMCD-48 and LMCD-50 to LMCD-52 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.¹⁷ The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁸ This 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.¹⁹

[54] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.²⁰ 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.²¹

[55] 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

¹⁷ *Decôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁸ Orders PO-2441, MO-2166 and MO-1925.

¹⁹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

²⁰ *Susan Hosiery Ltd. v. Ministry of National Revenue*, [1969] 2 Ex. C.R. 27.

²¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

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.²² Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²³ 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; or the document records a communication made in open court.²⁴

Representations and Findings

[56] In its representations, FSCO refers to Order PO-2719, in which Adjudicator Bernard Morrow considered *Ontario (Ministry of Community and Social Service) v. Ontario (Information and Privacy Commissioner)*²⁵ and applied the following reasoning to the records claimed to be exempt under section 19 in his appeal:

The type of communication that is protected “must be construed as broad in nature, including what should be done, legally and practically.” In addition, the privilege is not lost once the documents in question are created to the extent that the ultimate receivers of the communication are applying the instructions provided in the records. Finally, the records need not relate to particular proceedings or to a particular legal context in order to be exempt under section 19.

[57] Referring to this finding, FSCO claims that the records it withheld under section 19 are exempt because they are email exchanges between FSCO counsel and staff. FSCO submits that these exchanges relate to the legal proceeding to consider the revocation of the appellant’s life insurance agent license under section 393 of the *Insurance Act*.

[58] The appellant did not address whether the records contain information that could be subject to solicitor-client privilege and, therefore, exempt under section 19(1), read with section 49(a) of the *Act*. However, the appellant claims that FSCO has improperly refused him access to his personal information.

[59] In order for me to find that records LSB-27, LSB-43 to LSB-55, LMCD-7, LMCD-12, LMCD-36, LMCD-39, LMCD-40, LMCD-48, LMCD-50 to LMCD-52, LMCD-56, LMCD-58, LMCD-67, LMCD-70 and LMCD-72 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

²² *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²³ 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.).

²⁴ 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 MO2396-F; and Orders P-1551 and MO-2006-F.

²⁵ (2004), 70 O.R. (3d) 680.

seeking, formulating or giving legal advice.²⁶

[60] Based on my review of the records and FSCO's representations, I am satisfied that a solicitor-client relationship existed between the individuals who were parties to these email chains. These parties were FSCO's legal counsel and FSCO's Director, Market Conduct and a FSCO Investigator. 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 seeking or providing legal advice.

[61] Based on my review of the information withheld under the section 19 exemption, I find that the disclosure of the records would reveal the nature of the confidential legal advice sought by FSCO staff, the confidential legal advice received from FSCO's legal counsel or otherwise is a part of the "continuum of communications" between a solicitor and client. Records LMCD-7, LMCD-12, LMCD-46, LMCD-50, LMCD-51, LMCD-70, LSB-27 and LSB-43 through LSB-55 as well as the portions withheld under section 19 of records LMCD-36-1, LMCD-40-1, LMCD-52-1, LMCD-56-1, LMCD-58-1, LMCD-67-1 and LMCD-72-1 are all communications between FSCO counsel and staff and relate to seeking or providing confidential legal advice. These email records, or portions thereof, constitute confidential solicitor-client communications directly related to the provision of legal advice. Accordingly, I uphold FSCO's denial of access to records LMCD-7, LMCD-12, LMCD-46, LMCD-50, LMCD-51, LMCD-70, LSB-27 and LSB-43 through LSB-55 and portions of records LMCD-36-1, LMCD-40-1, LMCD-52-1, LMCD-56-1, LMCD-58-1, LMCD-67-1 and LMCD-72-1, subject to my review of FSCO's exercise of discretion under section 49(a), in conjunction with section 19.

Issue C: Did FSCO exercise its discretion under sections 49(a), in conjunction with sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[62] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Section 49(a), read with sections 13(1) and 19, is a discretionary exemption, which means that FSCO could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[63] In applying the exemption, FSCO 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 FSCO 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 FSCO for an exercise of discretion based on proper

²⁶ *Decôteaux v. Mierzwinski*, *supra* note 16.

considerations.²⁷ According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of FSCO.

[64] As I have upheld FSCO's decision to apply section 49(a), read with sections 13(1) and 19, I must review its exercise of discretion under that exemption.

[65] FSCO submits that the records it denied the appellant access to, in whole or in part, contain the appellant's personal information. FSCO states that the records were created in the course of, or in response to, a regulatory proceeding which started as an investigation and led to a hearing under section 393 of the *Insurance Act* to suspend or revoke the life insurance licence of the appellant.

[66] In exercising its discretion under section 49(a), read with sections 13(1) and 19, FSCO submits that it carefully considered the context in which each and every record was created and for what purpose. FSCO submits that the records were generated as part of an adversarial proceeding and constitute advice, recommendations and legal advice regarding the regulatory hearing wherein FSCO and the superintendent were in a dispute with the appellant.

[67] The appellant did not address this issue in his representations. However, he asserts that all records containing his personal information should be disclosed to him.

[68] Based on FSCO's representations and my review of the information for which I have upheld the exemptions under section 49(a), read with sections 13(1) and 19, I am satisfied that FSCO considered relevant factors in exercising its discretion, including the fact that the records contain the appellant's own personal information, the nature of the exemptions claimed and the appellant's reasons for seeking the information contained in the records. I am satisfied that FSCO exercised its discretion properly and in good faith, and I will not interfere with it on appeal. Accordingly, I uphold FSCO's claim for exemption under section 49(a), read with sections 13(1) and 19.

Issue D: Did FSCO conduct a reasonable search for records?

[69] 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 as required by section 24 of the *Act*.²⁸ 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. 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 made a reasonable effort to identify and locate responsive records.²⁹ To be responsive, a record

²⁷ Order MO-1573.

²⁸ Orders P-85 P-221 and PO-1954-I.

²⁹ Orders P-264 and PO-2559.

must be "reasonably related" to the request.³⁰

[70] 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.³¹ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.³²

[71] Although a requester will rarely be in a position to indicate precisely which records that institution did not identify, the requester still must provide a reasonable basis for concluding that such records exist.³³

Representations

[72] FSCO provided me with four affidavits with its submissions, in which four FSCO staff members outlined the steps they took in their searches for responsive records. FSCO submits that the searches were conducted by experienced employees knowledgeable in the subject area respecting the appellant's request and that these employees made reasonable searches for responsive records.

[73] In her affidavit, FSCO's FOI Coordinator identified three FSCO departments in which searches were conducted for responsive records: the Licensing and Market Conduct Division, the CEO's Office and Legal Services Branch. The FOI Coordinator for each of these departments provided their own affidavit that described their searches. The branch FOI Coordinators identified the locations they searched, such as the physical and electronic files in the legal services department, compliance and enforcement database files and all email account and correspondence files in the CEO's office. After locating responsive records, each staff member made copies of all electronic documents and created an index of records for FSCO's FOI Coordinator's review. In her affidavit, FOI Coordinator states that she reviewed the documents provided to her by the three FSCO branches that conducted the searches and submits that they conducted reasonable searches and located all responsive records.

[74] In his representations, the appellant raises a number of concerns with regard to FSCO's treatment of him, his personal information and its failure to provide him with details relating to the resignation of his license, various complaints made against an identified individual, the denial of his mortgage license and other aspects of his relationship with FSCO. In particular, the appellant submits that FSCO denied the existence of a "derogatory letter sent to OMVIC for denial" of a licence application.

[75] Although the appellant may not be in a position to indicate precisely which records the institution has not identified, previous orders of this office require that the

³⁰ Order PO-2554.

³¹ Orders M-909, PO-2469 and PO-2592.

³² Order MO-2185.

³³ Order MO-2246.

appellant must still provide a reasonable basis for concluding that such records exist.³⁴ I have reviewed the circumstances of this appeal and the parties' representations and find that the appellant has not provided a reasonable basis for his belief that additional responsive records exist. Based on my review of the appellant's representations, it appears that the appellant takes issue with the failure of FSCO to release certain details to him, rather than failing to conduct a reasonable search for records, with one exception. The exception is a letter the appellant believes that FSCO should have located which was sent to OMVIC relating to the denial of his application to be a car salesperson. However, based on my review of FSCO's representations, I am satisfied that its search was reasonable. Further, I have found that the appellant's representations do not establish a reasonable basis to believe that additional responsive records exist. While the appellant may believe that the additional records relating to his relationship with FSCO may exist, he has not provided me with a reasonable basis to find that additional responsive records exist.

[76] Further, I find that FSCO's representations and attached affidavits contain sufficient evidence to demonstrate that it conducted a reasonable search for all records responsive to the appellant's request.

[77] Therefore, I find that the appellant has not provided me with sufficient evidence to establish that FSCO's searches were not reasonable and I uphold FSCO's search as reasonable.

ORDER:

1. I find that Record LMCD-25 is not exempt from disclosure under section 49(a), read with section 13. I order FSCO to disclose this record to the appellant by **February 9, 2016**.
2. I order FSCO to disclose all portions of records LMCD-36-1 to LMCD-36-3 that were previously withheld under section 14, with the exception of the names of other individuals, by **February 9, 2016**. I uphold FSCO's decision to withhold record LMCD-36-4 in full.
3. I order FSCO to disclose record CEO-7, with the exception of the names of other individuals, to the appellant by **February 9, 2016**.
4. I uphold FSCO's search for records.

³⁴ Order MO-2246.

5. To verify compliance with this order, I reserve the right to require FSCO to send me a copy of the records disclosed pursuant to order provisions 1 through 3.

Original Signed By: _____
Justine Wai
Adjudicator

_____ January 7, 2016