Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3317

Appeal PA12-506-2

Ministry of Natural Resources

March 10, 2014

Summary: The appellant sought access to a wide range of records relating to her cottage property from the Ministry of Natural Resources about the granting of a "release of reservation". The ministry located responsive records and denied access to them under sections 19 and 21(1). This order finds that many of the responsive records contain the appellant's personal information, along with that of other identifiable individuals. This order upholds the ministry's decision to deny access to some of these records, as well as others containing only the personal information of individuals other than the appellant. The absurd result principle was applied to order disclosure of other records which originated with or were copies to the appellant. Three records were found to be exempt under section 19 and the privilege that exists in two of those was found to have been waived by ministry employees who disclosed their contents to the appellant.

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

Orders and Investigation Reports Considered: M-444, MO-2945-I.

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

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Natural Resources (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> From July 1, 2011 to date:
>
> 1a) All records that the MNR Bracebridge Office, on my property legally described as: [legal description of the appellant's property] as well as the contents of an identified MNR file "regarding the MNR Release of Crown reservations on my property."
>
> 1b) Including the letter written on or about July 20, 2012 by [a named ministry employee], MNR Lands & Waters Technical Specialist, Bracebridge Office - telephone (705) 646-5510 - her letter to Springsyde Cottagers' Association (letter might be sent c/o [named individual], who is the President - Springsyde Cottagers' Association), regarding MNR Release of Crown Reservations on my property.

[2] The ministry located a number of responsive records and, following third party notification under section 28 of the *Act*, granted the appellant partial access to them, with certain information withheld pursuant to the exemptions in sections 19 (solicitor-client privilege) and 21(1) (invasion of privacy) of the *Act*.

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

[4] During the course of mediation, the appellant advised the mediator that she is pursuing access to all of the withheld records. In addition, the appellant indicated that she is not satisfied with the ministry's search for responsive records and is of the view that additional records exist. Specifically, she submits that the ministry did not produce the records that describe the administrative process and procedure of reviewing her application to release reservations on her property. She also contends that she has not been granted access to records relating to processing the Routing and Requisition form(s) for signatures and subsequent official correspondence with legal documents, including correspondence within the ministry and with other government bodies.

[5] The appellant also takes the position that her appeal covers the period not only up to the date of her request, but beyond that date to October 1, 2012. The ministry indicates that any records covering the period after the date the request was transferred to its program area (July 25, 2012) and fall outside the scope of the request. The appellant asks that I also address this as an issue in this inquiry.

[6] The appellant indicated that some attachments to e-mails and other documents were not disclosed. For example, the appellant advised that attachments to e-mails contained in TIFF A0172550, A0172564, and A0172609 were not disclosed to her. As well, not all of the attachments referenced in TIFF A0172615 - page 171 were produced and A0172594 is incomplete in that it is missing three pages of an e-mail chain.

[7] The ministry explained that the attachment to the e-mail in TIFF A0172550 - page 5 consists of the photographs in TIFF A0172550 - pages 7 to 12. The appellant accepted this explanation and this is no longer at issue in this appeal. The ministry also explained that the attachments to TIFF A0172564 - page 30 are pages 31 to 36 within A0172564 and that pages 120 and 121 in A0172594 were submitted by a third party in hard copy form and only consisted of two pages.

[8] The ministry went on to explain that it had previously clarified the request with the appellant and that it was agreed that records that the appellant submitted to the ministry and records addressed to her would be excluded. Accordingly, the ministry identified these records as not relevant in TIFF A0172564 - pages 35 and 36 and did not produce the attachments referenced in TIFF A0172609 as they represent records already disclosed to the appellant, who insists that she had not agreed to exclude them from the request.

[9] The appellant is also of the view that e-mails in TIFFs A0172579 and A0172609 are incomplete and she seeks access to the missing pages. As well, the appellant claims that e-mails contained within TIFFs A0172554, A0172555, A0172556, A0172557 and A0172558 appear to have been edited and is seeking access to the original copies. The appellant also advised the mediator that she had requested to view the original records. The ministry disclosed copies of records to the appellant and advised that it would not grant the appellant's request to view the original records. Accordingly, this issue has been added to the appeal.

[10] The appellant also questioned why TIFF A0172564 - page 30, which is identified as a duplicate, was withheld. The ministry advised that this record contains an e-mail that was already partially disclosed in TIFFs A0172554, A0172555 and A0172558. The appellant asked the mediator to confirm that this was indeed the case. The mediator advised the appellant that the e-mail in TIFF A0172564 - page 30 is a slight variation to the ones that were partially disclosed. The appellant advised the mediator that she is pursuing access to the duplicate record.

[11] The appellant also pointed out that there are gaps in the TIFF numbers assigned to records and as such questioned the existence of additional records. For example, there are no records assigned to TIFF numbers A0172551, A0172552, A0172565, A0172588, A0172590 - A0172592, A0172598, and A0172610 to A0172614. In response, the ministry explained that the TIFF numbers do not run consecutively or have gaps because all potentially responsive records are scanned into the system and

are assigned TIFF numbers. The records are then reviewed for any duplicates or not relevant to the request and are set aside from further consideration. The appellant advised the mediator that she would like to pursue access to these records.

[12] The appellant advised the mediator that the ministry had not disclosed records that were subject to third party consultations. The ministry subsequently disclosed these records to the appellant.

[13] Finally, the ministry advised the mediator that it conducted a comprehensive search for responsive records and is not prepared to undertake any further searches. The ministry also advised the mediator that it would not disclose any of the withheld records.

[14] Because some of the records appear to contain the personal information of the appellant, the mediator raised the possible application of the discretionary personal privacy exemption in section 49(b) of the *Act* with respect to some of the records at issue in this appeal.

[15] I sought and have now received the representations of the ministry initially, a complete copy of which were shared with the appellant, who also provided me with representations. In this order, I uphold the ministry's decisions to deny access to the withheld portions of the records on the basis that they are exempt under sections 19 or 21(1)/49(b). I also dismiss a number of preliminary issues raised by the appellant during the mediation of this appeal.

RECORDS:

[16] The following records, in whole or in part, remain at issue in this appeal:

TIFF A0172548 - pages 1 & 2;
TIFF A0172549 - pages 3 & 4;

TIFF A0172550 - pages 5 & 10 in part;
TIFF A0172553 - pages 13 & 14 in part;
TIFF A0172554 - pages 16 & 17 in part;
TIFF A0172555 - pages 18 & 19 in part;
TIFF A0172556 - page 20 in part;
TIFF A0172557 - page 21 in part;
TIFF A0172558 - page 23 in part;
TIFF A0172559 - page 24 in part;

TIFF A0172560 - page 25 in part;
TIFF A0172561 - page 26 in part;
TIFF A0172562 - pages 27 & 28 in part;

TIFF A0172563 - page 29 in part;
TIFF A0172564 - pages 30, 35 & 36;
TIFF A0172567 - pages 39 & 40;
TIFF A0172568 - page 42 in part;
TIFF A0172572 - pages 54 & 55 in part;
TIFF A0172574 - pages 58 & 60 to 63 in part;
TIFF A0172575 - page 64 in part;
TIFF A0172576 - page 65 in part;
TIFF A0172577 - page 66 in part;
TIFF A0172578 - pages 67 & 68 in full;
TIFF A0172579 - pages 69 & 70 in part;

TIFF A0172580 - pages 71 to 74 in part;
TIFF A0172582 in full;
TIFF A0172583 - page 76 in part;
TIFF A0172584 - pages 81 & 82 in part;
TIFF A0172585 - pages 84 & 85 in part;
TIFF A0172586 - pages 86 & 87 in part;
TIFF A0172589 - pages 90 to 92, 94 to 107 and 109 to 116 in part;
TIFF A0172594 - pages 120 to 121 in part;
TIFF A0172595 - pages 122 & 123 in part;
TIFF A0172596 - pages 125 & 127 to 134 in full & page 126 in part;
TIFF A0172599 - page 137 in part;

TIFF A0172606 - page 166 in part;
TIFF A0172607 - page 167 in full;

Preliminary Issues:

[17] The appellant raised a number of preliminary issues during the mediation stage of the appeal. I did not seek the representations of the parties with respect to these issues during my inquiry because they can be adequately addressed through a review of the records and the correspondence passing between the parties at the mediation stage of the appeals process.

Adequacy of search

[18] The appellant takes the position that the ministry's search for responsive records was inadequate because the ministry did not:

> produce the records that describe the administrative process and procedure of reviewing her application to release reservations on her property. She also contends that she has not been granted access to records relating to processing the Routing and Requisition form(s) for

> signatures and subsequent official correspondence with legal documents, including correspondence within the ministry and with other government bodies.

[19] I have carefully reviewed the records identified by the ministry and have determined that records 137 to 174 address precisely the process which resulted in the release of the ministry's reservations on her property. The appellant was granted access to the majority of these records, with some severances made under sections 19 and 21(1). Based on my review of the records, I find that the appellant's position is unfounded and I dismiss that part of her appeal.

Scope of the request

[20] The appellant submits that the request covers the period ending October 1, 2012 but provides no basis for this position or why this date is significant. I note that her request is dated July 22, 2012 and was transferred to the ministry's appropriate program area on July 25, 2012. As a result, the ministry referred to that date and used it as the end date for the purposes of determining the time period covered by the request. I accept that the appropriate date for the ministry's searches to terminate is the date the request was received or, in this case, the date the program area within the ministry received the request.

[21] To find otherwise would render it impossible for the ministry to identify and render a decision respecting access to the responsive records. The ministry is responsible for identifying records and rendering a decision within 30 days of the date of its receipt of the request, pursuant to section 26 of the *Act*. If the end date of the period of time for which records were to be searched was October 1, 2012, as put forward by the appellant, this would render it impossible for the ministry to comply with its obligations to make a decision within the time period mandated by section 26. Accordingly, I find that this argument is without merit.

Viewing the records in person

[22] The appellant also indicated to the mediator that she wished to have the opportunity to view the original versions of the responsive records in person, pursuant to section 30(2) of the *Act* which states:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

[23] The ministry instead provided the appellant with copies of those records which it decided to disclose to her, in whole or in part. I find that, for those records which have

been withheld, in whole or in part, because they contain exempt information, it is not reasonably practicable for the ministry to allow the appellant to view the original copies in person. To do so would result in the disclosure of information that is exempt under sections 19 or 21(1). Accordingly, I uphold the ministry's decision to deny the appellant the right to view the original, responsive records.

Gaps in the numbering of the records

[24] The appellant raises concerns about the fact that the numbering of the records is not consecutive in some cases and that there are gaps in the numbering of the records that the ministry has identified as responsive. In response to those concerns, the ministry advised her that the numbers identified by the ministry with the prefix TIFF:

> . . . do not run consecutively or have gaps because all potentially responsive records are scanned into the system and are assigned TIFF numbers. The records are then reviewed for any duplicates or [documents which are] not relevant to the request and are set aside for further consideration.

[25] I am satisfied, based on my review of the records and the explanation provided by the ministry, that any gaps or other apparent discrepancies in the numbering of the records by the ministry are the result of duplicate copies of already-identified records or otherwise non-responsive records being removed from the compiled records after having been scanned by ministry staff. As a result, I find that the records identified by the ministry represent all of the responsive records.

[26] The appellant also indicates that she is pursuing access to Records 30, 35 and 36 which the ministry claims the appellant removed from the scope of the request. In this order, I will address these records and, if they are not exempt, I will order them to be disclosed to the appellant.

ISSUES:

A. Do the records contain "personal information" as that term is defined in section 2(1) of the *Act* and if so, to whom does the personal information relate?

B. Are the records exempt from disclosure under the mandatory personal privacy exemption in section 21(1) or the discretionary personal privacy exemption in section 49(b) of the *Act*?

C. Are records 3-4, 16 and 167 exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Act*?

D. Did the ministry properly exercise its discretion to deny access to the records found to be exempt under sections 19 and 49(b)?

DISCUSSION:

Issue A: Do the records contain "personal information" as that term is defined in section 2(1) of the *Act* and if so, to whom does the personal information relate?

[27] 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. That term 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;

[28] 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 [Order 11].

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

> (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.

[30] 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[1].

[31] The appellant argues that the president of the cottagers association was acting in a professional, rather than a personal, capacity when he was communicating with the ministry or other members of the association and that the references to him do not qualify as his personal information and cannot be exempt under either section 21(1) or 49(b). I do not accept this position, however. The individual identified as the president of the association was doing so in an unpaid, volunteer capacity and not as part of his professional or employment responsibilities. I find that the references to this person were in his personal, rather than in some professional capacity and they constitute, therefore, his personal information under the definition of that term in section 2(1).

[32] 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[2].

[33] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed[3].

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.

[34] The ministry takes the position that most of the remaining records, in whole or in part, contain information that qualifies as "personal information". I have reviewed each of these records and make the following findings with respect to them.

- Record 1-2 contains the personal information of another cottager, as well as that of the appellant, as it describes his views and opinions (paragraph (e)) and his family history (paragraphs (a) and (h)).
- The undisclosed portion of record 5 and parts of records 17-19, 20-21, 23 and 25-26 consist of email addresses and telephone numbers of other cottagers. I find that the email addresses and phone numbers in Records 5, 17-18, 20-21, 23 and 25-26 constitute the personal information of these individuals within the meaning of that term in section 2(1).
- Record 10 consists of several photographs of a dock owned by the cottager's association, a publicly displayed plaque and a photograph taken at its 2010 AGM which shows the appellant and a number of other identifiable individuals. I find that the photograph of the appellant and others qualifies as their personal information. However, one of the photographs in Record 10 is a publicly displayed plaque showing the names of various members of the cottagers association, past and present. I find that it does not qualify as the personal information of these individuals as it is publicly available to any user of the dock.
- Record 13-14 is an email exchange between two cottagers describing information of a personal nature which qualifies as their personal information.
- Record 17 also contains information which qualifies as the personal information of the ministry employee identified therein.
- The undisclosed portion of records 24, 25, 26, 27, 28 and 29 consist of a recitation by other cottagers of their family's involvement in the cottage community, often over the past 100 years. I find that this information qualifies as their personal information under paragraphs (a) and (h) of the definition in section 2(1).
- Record 30 is an email sent by a cottager to staff at the ministry which contains information that qualifies as this individual's personal information. The appellant is also referred to in this document and it also qualifies as her personal information.
- Records 39 and 40 are lists of the membership of the cottagers association which provides their names, mailing address, home and cottage telephone numbers, cottage location and email addresses. This information qualifies as the personal information of each of the individuals listed therein.
- Record 42 is a list of the Cottages Association Executive Board of Directors, indicating their contact information. In addition, there is a handwritten note made by the appellant which indicates a telephone number which may be a

[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

home number. I find that all of this information qualifies as "personal information" within the meaning of that term in section 2(1) of the *Act*.

- Record 54-55 is a two-page email sent to members of the cottagers association in 2009 indicating their email addresses. This email was also sent to the appellant. I find that this information qualifies as their personal information.
- Records 58, 50 to 63, 90 to 92, 94 to 107, 109 to 116 and 166 are maps of various parcels of land along with notes indicating the names of their current owners. I find that the names of the individuals constitute their personal information within the meaning of that term in section 2(1).
- Records 64, 65 and 66 are emails sent by cottagers to the local municipality. I find that these emails contain the sender's email address and other personal information about them, including their views and opinions. I note that the appellant was copied on record 64.
- Record 67-68 consists of certain professional information relating to an individual which has been included on the website of the law firm where he is employed. I find that this information does not qualify as personal information as it relates solely to this individual in his professional capacity and is included on the law firm's website for promotional purposes.
- Records 69-70, 71-72 and 74 are emails sent by cottagers to other members of the cottagers association, including the appellant. They contain the email addresses of these individuals, as well as the views and opinions of the senders. All of this information qualifies as the personal information of these individuals, including the appellant. Record 73 is a response received by the sender of the email in record 74 from the local municipality. The only information severed from this record is the name and address of the sender.
- Record TIFF AO172582, which has not been ascribed a record number, is a one-page email, along with a return email and a letter answering certain questions posed by the sender, who happens to be the appellant's husband. The letter contains the appellant's husband's email address, which qualifies as his personal information. I will address the application of section 21(1) to this information below.
- Record 76 is an email sent to members of the cottagers association, including the appellant. It includes their email addresses and qualifies, therefore, as their personal information.
- Records 81, 82, 84, 85, 86 and 87 are email communications between members of the cottagers association, including the appellant. For the reasons set out above, I find that this information qualifies as the personal information of these individuals.
- Record 120-121 is a series of emails passing between cottagers. It constitutes their personal information as it refers to their email addresses and their views and opinions.
- Records 122-123, 125, 126, 127 to 134 are personal family histories relating to the cottagers. I find that this constitutes their personal information within the

meaning of that term in paragraph (a), (b), (e) and (h) of the definition in section 2(1).

- Record 137 contains a reference to a personal appointment of a ministry employee which happened to be included in an email that has been disclosed to the appellant. I find that it constitutes this individual's personal information under paragraph (g) of the definition.

[35] To summarize, I find that records 1-2, 39-40, 54, 69-70, 71-74, 76, 81, 84, 85, 86 and 87 contain the personal information of both the appellant and other identifiable individuals. Records 5, 13, 14, 17, 18-19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 42, 55, 58, 60-63, 64, 65, 66, TIFF A0172582 (otherwise unnumbered), 90-92, 94-107, 109-116, 120-121, 122-123, 125-134, 137 and 166 contain the personal information of identifiable individuals other than the appellant.

[36] Finally, records 3-4, 10, 16, 67-68 and 167 do not contain any personal information. I will address the possible application of section 19 to records 3-4, 16 and 167 below. As no other exemptions have been claimed for records 10 and 67-68, and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

Issue B: Are the records exempt from disclosure under the mandatory personal privacy exemption in section 21(1) or the discretionary personal privacy exemption in section 49(b) of the *Act*?

[37] 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.

[38] 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.

[39] 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)].

Section 21(1)(f)

[40] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

Sections 21(2) and (3)

[41] 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. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. Based on my review of the records, the circumstances contemplated by section 21(4) are not present in the current appeal and I will not address this section further.

[42] For records claimed to be exempt under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies[4].

[43] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure [Order P-239].

[44] For records claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy [Order MO-2954].

Representations of the parties

[45] The appellant points out that she provided copies of many of the records identified as exempt under sections 21(1) or 49(b). Specifically, she indicates that she was the source of records 39-40, 42, 54-55, 58, 60-63, 64, 65, 66, 69-70, 71-74, 76, 81-82, 84-85 and 86-87. Accordingly, she argues that disclosure of these records would not result in an unjustified invasion of the personal privacy of the individuals whose personal information is contained in them. Since she was the source of the records provided to the ministry, there can be no unjustified invasion. In support of this contention, the appellant refers to certain notations which she herself made to records 42, 58 and 60-63.

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[4] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[46] The appellant also points out that she was copied on many of the email communications passing between members of the cottagers association as she was a member at the time these emails were sent and received. In addition, the appellant indicates that she is included in the membership lists of the cottagers association and was provided with copies of these documents when she continued to be a member, including the list for 2011, which appears as record 39. She also states that she received the information that appears on record 40, the contact information for the association's executive, when she was a member of this organization and beyond to 2013. As a result, the appellant argues that the individuals who have included their personal information in these widely-circulated documents have waived their rights to privacy, in the circumstances.

[47] The ministry's representations explain that it severed information what it considered to be personal information about identifiable individuals other than the appellant from the records on the basis that it is subject to the exemptions in sections 21(1) and 49(b). It argues that record 67-68 is subject to the presumption against disclosure contained in section 21(3)(d) as it relates to this individual's employment or educational history. I have found in my discussion of the definition of personal information that this information did not qualify as "personal information" for the purposes of the *Act*. Accordingly, I find that it cannot be exempt under section 21(1), which only applies to exempt information that is found to qualify as "personal information."

[48] The ministry also argues that information severed at the top of page 17 qualifies as "employment history" under section 21(3)(b) and its disclosure is presumed to constitute an unjustified invasion of personal privacy. Based on my review of this excerpt, I agree that it qualifies as the employment history of the individual referred to and that its disclosure is presumed to result in an unjustified invasion of personal privacy under section 21(3)(d). As a result, I find that this information is exempt under section 21(1).

[49] The ministry goes on to argue that, with respect to the other information severed from the records under sections 21(1) and 49(b), it balanced the competing interests set forth in section 21(2) favouring privacy protection against the appellant's access rights. It states that it concluded that the privacy protection considerations in section 21(2) outweighed those favouring access and decided not to disclose the personal information of other individuals to her.

Findings

[50] I have carefully reviewed the information withheld under sections 21(1) and 49(b) and, subject to my findings below regarding the application of the absurd result principle, I uphold the ministry's decision to deny access to the personal information of identifiable individuals other than the appellant.

[51] The background to the creation of the records at issue in the appeal is lengthy and filled with acrimony. The records arise from a dispute between members of a cottagers association respecting the ongoing existence of a much-beloved path used by the cottagers and their guests for over 100 years. Many of the records speak of the attachment that these individuals have for their summer homes and the traditions that go along with it. The emotions generated by the dispute over the path were heartfelt and sincere, on both sides of the dispute, and left behind bitterness and animosity between former neighbours and friends. The records reflect those emotional reactions and are deeply personal, in many cases.

[52] I find that the factors in sections 21(2)(f) and (h) are relevant considerations in determining whether the disclosure of the personal information of the other individuals identified in the records would constitute an unjustified invasion of their personal privacy. These factors state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[53] The appellant has not referred to any of the considerations listed in section 21(2), or to any unlisted factors that may favour a finding that the disclosure of the remaining personal information will not constitute an unjustified invasion of personal privacy. Based on my review of the remaining undisclosed information in the records, I find that none of the considerations favouring disclosure from section 21(2) or any unlisted considerations are present in these circumstances.

- Accordingly, with respect to those records which contain only the personal information of individuals other than the appellant, records 5, 13, 14, 17, 18-19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 42, 55, 58, 60-63, 64, 65, 66, 90-92, 94-107, 109-116, 120-121, 122-123, 125-134, 137 and 166, are exempt under section 21(1).

- I find that although record TIFF A0172582 contains the sender's (the appellant's husband) personal information, consisting of his email address, its disclosure to the appellant would not result in an unjustified invasion of his personal privacy, given the circumstances and subject matter of the email. This document is not, therefore, exempt from disclosure under section 21(1).

[54] In addition, I find that the disclosure of the severed portions of those records which also contain the appellant's personal information, records 1-2, 39-40, 54, 69-70, 71-74, 76, 81, 84, 85, 86 and 87 would result in an unjustified invasion of personal privacy. As a result, I find that this severed personal information, which relates only to individuals other than the appellant, is exempt from disclosure under section 49(b).

Absurd result

[55] The appellant raises two issues in her representations which reflect long-established principles in the interpretation of the personal privacy exemptions. The appellant points out, and has provided evidence to substantiate, that she was the source of many of the records which have been withheld by the ministry under sections 21(1) and 49(b). Specifically, the appellant refers to records 39-40, 42, 54-55, 58, 60-63, 64, 65, 66, 69-70, 71-74, 76, 81-82, 84-85 and 86-87 and has provided me with evidence to demonstrate that she added notations to some of these documents that are reflected in the copies of them that are at issue in this appeal.

[56] In addition, the appellant points out that she was copied on many of the records which are subject to exemption under sections 21(1) and 49(b), which were circulated amongst her neighbours, many of whom belonged to the cottagers association. The appellant was also a member of this organization for many years and continued to receive various circulated material until recently. I note that many of the lists of recipients of various emails and other circulated publications indicate on their face that the appellant was provided with a copy.

[57] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 21(1) or 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and MO-1323].

[58] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444 and P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and MO-1755]

[59] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the

requester or is within the requester's knowledge [Orders M-757, MO-1323 and MO-1378].

[60] Accordingly, I have carefully reviewed each of the exempt records with a view to determining whether the appellant was the individual who provided the record to the ministry or whether the appellant was clearly copied on the individual documents that comprise the records which I have found to be exempt under sections 21(1) and 49(b). Based on my review, I find that records 39-40, 42, 54-55, 58, 60-63, 64, 65, 66, 69-70, 71-74, 76, 81-82, 84-85 and 86-87 were provided to the ministry by the appellant as she was copied on each document or otherwise received it as member of the association. As a result, their disclosure to her would not give rise to an unjustified invasion of the personal privacy of the individuals identified in these records, as the appellant is already aware of the information which they contain. These records are not, accordingly, exempt under sections 21(1) or 49(b). As no other exemptions have been claimed to apply to them, and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

Issue C. Are records 3-4, 16 and 167 exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Act*?

[61] I note that record 167 is a copy of record 3 and is identical to it in its content. The ministry takes the position that these records are exempt under the solicitor-client communication aspect of Branch 1 of section 19 of the *Act*, which reads:

> 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[62] 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), or in the case of an educational institution or hospital, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[63] 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[5].

Solicitor-client communication privilege

[64] 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[6].

[65] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[66] 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[7].

[67] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice[8].

[68] 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[9].

[69] The appellant posits her own theories about the identity of the counsel giving the advice and their motives for providing an opinion to ministry staff. None of these theories are borne out by the facts and I will not refer to them further in this order.

[70] The ministry submits that records 3-4 (and 167) are an email communication between a solicitor with the ministry and a ministry employee in response to a request for legal advice about a legal issue. I find that this communication is privileged as it

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[5] 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).
[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[8] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

represents a communication between a solicitor and her client in which legal advice is given about an issue with legal implications. Record 16 is an email passing between two ministry staff in which one communicates the legal advice he received from a solicitor with the ministry's Legal Services Department. Again, this represents the communication of legal advice received by the client, a ministry employee from a ministry solicitor about a legal issue.

[71] Both of these communications are, accordingly, exempt from disclosure under the solicitor-client communication privilege component of Branch 1 of section 19. I will now go on to address the appellant's contention that the privilege in records 3-4 and 167 has been waived.

Loss of privilege

[72] The appellant submits that the ministry waived any privilege that may exist in records 3-4 and 167 because ministry staff told her the contents of the email advice they had received from the ministry lawyer on January 11, 2012. In addition, she submit that the ministry's staff also allowed her to read a letter written about the subject matter of the legal advice provided by counsel, also dated January 11, 2012. The appellant has not provided any further information about the circumstances surrounding the information provided by ministry staff, the advice given by the solicitor or any further evidence as to the contents of the letter she refers to.

[73] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.[10]

[74] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege[11].

[75] In the present appeal, I am not satisfied that the ministry voluntarily evinced an intention to waive the privilege that exists in the communication that is reflected in record 3-4 and 167. While the appellant indicates that the ministry's staff told her the "bottom line" of the legal advice provided and described the content of the email in which it was communicated, they did not provide her with a copy.

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

[11] 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.).

[76] In Order MO-2945-I, Senior Adjudicator Sherry Liang addressed a situation where an institution made public an executive summary of a legal opinion for which it claimed the application of the solicitor-client privilege exemption under the equivalent provision to section 19 in the municipal *Act*. After finding that the institution did not voluntarily evince an intention to waive the privilege, Senior Adjudicator Liang went on to examine how this office has treated the disclosure of "bottom line" information contained in privileged documents and its relationship to transparency in its discharge of responsibilities to the public.

[77] She then went on to set forth the next step in the analysis as follows:

> The question remains whether there has been a waiver of privilege other than by express intention. In *S & K Processors,* the decision setting out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."[12] The court referred to the proposition that "double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived."[13]
>
> Thus where there is no evidence of an express intention to waive, the question is whether "fairness and consistency" requires a finding of implied, or implicit, waiver.

[78] In the present case, I accept the appellant's evidence that ministry staff "told me about, read and showed me" an email containing the legal advice provided by counsel for the ministry. The advice relates to a legal question arising from the appellant's application for the release of a reservation concerning her property. In my view, because of this disclosure to the appellant by ministry staff, fairness and consistency require that I make a finding of implicit waiver of the privilege that exists in records 3-4 and 167. I find that it would be unfair and would give rise to an inconsistent result if I were to find that the privilege in records 3-4 and 167 was not implicitly waived by the ministry when the information was shown and read to her by members of its staff.

[79] Accordingly, I conclude that record 16 is exempt from disclosure under section 19 while the exemption does not apply to records 3-4 and 167.

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[12] *S & K Processors*, above, at para. 6
[13] Set out in Wigmore on Evidence, cited in *S & K Processors* at para. 10

EXERCISE OF DISCRETION

Issue D. Did the ministry properly exercise its discretion to deny access to the records found to be exempt under sections 19 and 49(b)?

General principles

[80] The section 19 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.

[81] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[82] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

[83] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[84] With respect to the manner in which it exercised its discretion not to disclose certain information that is subject to the section 19 and 49(b) exemptions, the ministry states the following:

> In considering whether to exercise its discretion to exempt the records under the above exemptions [sections 19 and 49(b)], the ministry attempted to balance the purpose of the exemptions at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular case. The decision involved two steps. First, the head determined whether the exemption applies. If it did, the head had regard to all relevant interests, including the public interest in disclosure, and concluded that disclosure should not be made. In this case, the interest in disclosure was of a private nature, i.e. related to the appellant's property interests, rather than a broader public interest of holding the ministry to greater scrutiny on [a] public issue. To the extent possible, the ministry severed records in order to allow or whatever public interest there was in disclosure.

[85] The appellant does not address this aspect of the ministry's representations.

[86] Based on my review of the records themselves and the representations of the ministry on this issue, I am satisfied that the ministry only considered relevant factors in making its determination to disclose or not disclose information that may have been

subject to a discretionary exemption. Accordingly, I will not disturb that exercise of discretion on appeal.

ORDER:

1. I order the ministry to disclose records 3-4, 10, 39-40, 42, 54-55, 58, 60-63, 64, 65, 66, 67-68, 69-70, 71-74, 76, 81-82, 84-85, 86-87, 167 and TIFF A0172582 to the appellant by providing her with copies by **April 14, 2014** but not before **April 9, 2014.**

2. I uphold the ministry's decision to deny access to the remaining records.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the ministry to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: March 10, 2014
Donald Hale
Adjudicator