

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3582

Appeal PA13-474-2

Ministry of Natural Resources and Forestry

February 29, 2016

Summary: The appellant sought access to information on the safety protocol and new precautions relating to the deer hunt in Short Hills Provincial Park. The ministry located responsive records and issued a decision granting the appellant partial access. The ministry relied on a number of discretionary and mandatory exemptions to withhold part of the records and the appellant appealed the ministry's decision. The appellant chose to pursue access to the information and records withheld under the discretionary solicitor-client privilege exemption in section 19 of the *Freedom of Information and Protection of Privacy Act*. The ministry's decision is partially upheld and the ministry is ordered to disclose information from two records that is not subject to solicitor-client privilege.

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

Orders and Investigation Reports Considered: PO-2624 and PO-3078.

Cases Considered: *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC); *Balabel v Air India*, [1988] 2 WLR 1036 (Eng CA).

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information on the safety protocol for the deer hunt in Short Hills Provincial Park with

respect to either hunters or the approximately 100 homes/homeowners that surround the park. The request included any documents pertaining to the "new precautions."

[2] The ministry issued a fee estimate and interim access decision advising the appellant that due to the large volume of responsive records, it was extending the time to process the request by an additional 90 days in accordance with section 27 of the *Act*. The ministry also advised that the estimated fee to process the request was \$1,310.00. The ministry further advised that the discretionary exemptions in sections 13 (advice or recommendations), 14 (law enforcement) and 19 (solicitor-client privilege), and the mandatory exemptions in sections 17 (third party information) and 21 (invasion of privacy) may apply to some of the information in the records.

[3] In response to the fee estimate and interim access decision, the appellant requested a fee waiver on the grounds that the requested records relate to public safety. The appellant stated her intention was to expose that measures taken by various agencies to ensure public safety during the deer hunt of January 2013, were insufficient; and as a result, hunters strayed outside of designated hunting areas while homeowners and park frequenters unwittingly put themselves in harm's way by straying into designated hunting areas. She continued that she would like to review the safety protocols to prevent this from happening again.

[4] The ministry granted the appellant's fee waiver request on the basis that the release of the information could benefit public safety.

[5] The ministry subsequently issued a decision granting the appellant complete access to some of the responsive records and partial access to others. The ministry relied on the exemptions in sections 14, 18, 19 and 21 of the *Act* to withhold portions of some records and other records in their entirety, as reflected in the index of records the ministry provided to the appellant along with its decision. The ministry also withheld some information on the basis that it was not responsive to the request. Finally, the ministry advised that in accordance with section 28 of the *Act* it had notified a third party whose interests could be affected by disclosure of the records and was awaiting the third party's views on disclosure. The ministry subsequently issued a supplementary decision disclosing the records that required third party consultation.

[6] The appellant appealed the ministry's decision to this office.

[7] During mediation of the appeal, the appellant indicated that she is not seeking access to the portions of the records that were withheld under sections 14, 18 and 21 of the *Act*, or to the portions of the records that were withheld on the basis that they are not responsive to the request. Accordingly, these withheld portions of the records, the section 14, 18 and 21 exemptions, and the issue of responsiveness are no longer at issue in this appeal. The sole issue to be determined in this appeal is the whether the remaining withheld records and withheld information are exempt under section 19.

[8] As a mediated resolution of the appeal was not possible, the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*. During my inquiry, I invited the representations of the ministry, the appellant and the affected party on the issues set out below. I received representations from all three parties and shared them in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[9] In this order, I partially uphold the ministry's decision and order it to disclose the withheld information in two records that does not qualify for exemption.

RECORDS:

[10] The records at issue are the portions of the emails at pages 34 and 165 withheld under section 19, and the emails including attachments at pages 1-10, 50-59, 120-134, 154-164 and 243-259 withheld in their entirety under section 19.

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the withheld information in the records?
- B. Did the ministry exercise its discretion properly under section 19?

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

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

[11] The discretionary solicitor-client privilege exemption in section 19 protects privileged records from disclosure under the *Act*. Section 19 contains two branches; branch 1 which arises from the common law and is reflected in section 19(a), and branch 2 which is a statutory privilege arising from section 19(b) of the *Act*. These sections read:

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[.]

[12] In order for me to uphold the application of section 19 in this appeal, the

ministry must establish that at least one branch applies to the records at issue. The ministry's position, set out in detail below, is that the records are subject to solicitor-client communication privilege under both branches and both sections 19(a) and (b).

[13] At common law, 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.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[14] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

[15] The statutory solicitor-client communications privilege under section 19(b) exists to protect direct communications of a confidential nature between an institution and its counsel, be it Crown counsel or other counsel retained or employed by it. The statutory privilege applies where the records were prepared by or for the institution's counsel for use in giving legal advice.

Representations

[16] The ministry submits that the withheld records comprise direct and indirect communications between it and its legal counsel, and work product from its legal counsel, all of which are part of a continuum of communications protected by solicitor-client privilege. To support its submission, the ministry relies on the decision in *Balabel v Air India*⁷ and on the following passage from the Supreme Court of Canada's decision in *Descôteaux v Mierzwinski*⁸:

In summary, a lawyer's client is entitled to have all communication made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to an employee and

¹ *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

² Orders PO-2441, MO-2166 and MO-1925.

³ *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA)

⁴ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27.

⁵ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

⁶ *Kitchener (City) v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div Ct)

⁷ *Supra*, note 3.

⁸ *Supra*, note 1 above at 892.

whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to that confidentiality. This confidentiality attaches to all communications that are made within the framework of the solicitor-client relationship[.]

[17] The ministry then explains how solicitor-client privilege attaches to each of the records and to all of the withheld information. It states that page 34 of the records is an email from one ministry employee to several other ministry employees, enclosing a draft Memorandum of Understanding (the MOU) and Safety Protocol (the protocol). The ministry explains that it withheld part of the subject line of the email and part of the body of the email under section 19 because the withheld portions reflect the involvement of the ministry's Legal Services Branch in the drafting of these documents.

[18] The ministry states that the emails and attachments found in pages 1-10 and 50-59, are part of the same continuum of communications between its employees and the Legal Services Branch, which was providing it legal advice on the MOU and the protocol. The ministry explains that pages 1-10 contain an email from a ministry employee to the ministry's legal counsel, attaching a document incorporating previous comments provided by the legal counsel and another employee. Pages 50-59 contain an email from one ministry employee to another, attaching a document incorporating comments received from the ministry's legal counsel.

[19] Similarly, the ministry submits that pages 120-134 are privileged because they consist of an email chain involving the ministry's legal counsel. Comments from one legal counsel are included in a copy of a document that is contained in the email chain with input from another legal counsel.

[20] The ministry asserts that pages 154-164 are also privileged because they contain an email from a ministry staff member that was sent to legal counsel and to a number of employees attaching a draft of a document and asking for review and comments.

[21] Finally, the ministry submits that pages 243-259 are privileged as well, since they consist of an email chain that includes the ministry's legal counsel. The ministry explains that the email chain is a draft document with comments from the ministry's legal counsel and one of the emails in the chain is an email from legal counsel.

[22] The appellant does not address this issue in her representations. Rather, she addresses the public interest and safety concerns that she argues weigh in favour of disclosing the records at issue.

[23] The affected party objects to any additional disclosure, however, it does not address the issue of solicitor-client privilege in its representations.

Analysis and findings

[24] In order to find that the information at issue is exempt under section 19, I must be satisfied that the records comprise confidential communications between a solicitor and client made for the purpose of obtaining or giving legal advice. All of the records and information at issue – with the exception of the information withheld from page 165 – relate to the ministry's preparation of the MOU or the protocol with the advice of its legal counsel over the course of a few weeks. Having reviewed the records and information at issue, I am satisfied that common law and statutory solicitor-client communication privilege attaches to all of them, with the exception of the information withheld from page 165 and from page 34, which I address below.

[25] Pages 1-10 contain an email from a ministry employee to legal counsel enclosing a draft version of the protocol that incorporates legal advice provided to the ministry. Similarly, pages 154-164 contain an email from a ministry employee sent to legal counsel and to other ministry employees enclosing a draft version of the protocol and inviting comment and review from the recipients. I find that pages 1-10 and 154-164 of the records are direct communications between the ministry and its legal counsel seeking legal advice that are solicitor-client privileged communications under sections 19(a) and (b) of the *Act*, subject to my review of the ministry's exercise of discretion below.

[26] Like the records that I have found exempt above, pages 120-134 and 243-259 contain emails between ministry employees and legal counsel seeking and receiving legal advice regarding the preparation of the protocol. Additionally, these pages of the records contain emails initially circulated among ministry employees only, but subsequently forwarded to legal counsel as part of an email chain. The email chains pertain to issues regarding the preparation of the protocol and include as attachments to them, draft versions of the protocol, which in turn, contain legal advice provided by legal counsel and/or seek comments from the employees that are to be conveyed to legal counsel. In this context, I accept that all of the emails in pages 120-134 and 243-259 form part of the continuum of communications between the ministry and its legal counsel aimed at keeping both the solicitor and client informed so that advice may be sought and given as required. In doing so, I note that this office has repeatedly held that email exchanges between non-legal ministry staff may qualify as solicitor-client privileged communications in certain circumstances. In Order PO-3078, the adjudicator found that email chains, including emails that were forwarded to counsel as part of an email chain, formed part of the continuum of communications aimed at keeping the solicitor informed so that advice could be sought and given as required, and on this basis, the entire email chain was exempt under section 19. The adjudicator made this finding even though some of the emails in the email chains before him were "informational, simply confirming that revisions are made to an attached document, or confirming the date or the attendees at meetings." I adopt this approach and find that all of the email communications in pages 120-134 and 243-259 qualify for exemption under sections 19(a) and (b) subject to my review of the ministry's exercise of

discretion below.

[27] Pages 50-59 consist of two emails between ministry employees reviewing the draft protocol provided by the ministry's legal counsel, and a copy of the draft protocol as an attachment. The emails in these pages do not include legal counsel as either a sender or recipient. However, they contain the advice provided by legal counsel as incorporated into the draft protocol that is attached to them. I am satisfied that these records also form part of the continuum of communications between a solicitor and client, despite the absence of legal counsel from the two emails. My conclusion is consistent with Order PO-2624 in which the adjudicator held that emails between non-legal ministry staff that clearly address the subject matter for which legal counsel had been consulted, and that refer to the legal advice provided by counsel, form part of the continuum of communications and accordingly qualify for exemption under section 19. In making her finding, the adjudicator in Order PO-2624 relied on Orders PO-2087, PO-2223 and PO-2370 which also found that emails between non-legal ministry staff that refer directly to legal advice originally provided by legal counsel to other ministry staff that would reveal solicitor-client privileged information, were exempt under section 19. I adopt the approach taken in Order PO-2624 and I find that pages 50-59 also qualify for exemption under section 19(a) and (b) subject to my review of the ministry's exercise of discretion below.

[28] Conversely, I am not satisfied that solicitor-client privilege attaches to the information withheld in pages 34 and 165 of the records. Page 34 is an email chain circulated among ministry employees that has been partially disclosed to the appellant. The ministry has withheld part of the subject line of the email that describes the MOU and protocol attached to the email and part of the body of the email. It has done so on the basis that these portions reflect the involvement of the ministry's Legal Services Branch in the drafting of the attachments and are privileged. Having reviewed page 34 and considering its partial disclosure, I am not satisfied that the information the ministry has withheld qualifies for exemption. The ministry's disclosure of most of this email, and its disclosure of the draft protocol that was attached to the email, signal to me recognition on the ministry's part that this email does not fall within the continuum of communications for the purpose of obtaining and receiving legal advice. The email does not contain legal advice, and to the extent that the draft protocol reflects legal advice received by the ministry, the ministry has already revealed this legal advice by disclosing that record. In these circumstances, I find that the withheld information in the email which describes the attachments and relates to the preparation of the attachments is not exempt under section 19.

[29] Page 165 is an email from a ministry employee to legal counsel for the affected party attaching a draft copy of the MOU and the protocol. The ministry has already partially disclosed page 165 to the appellant. The ministry has also disclosed the attached draft protocol to the appellant in its entirety. The ministry has withheld two portions of this email under the solicitor-client privilege exemption in section 19; the first is in the description of the attachments to the email, and the second is in the body

of the email. The ministry does not address this record in its representations. I am not satisfied that solicitor-client privilege attaches to this email. The email is not a communication between a solicitor and a client, and it does not contain legal advice. Accordingly, I find that the withheld portions of page 165, like the portions of the email and the attached protocol that the ministry has disclosed, do not qualify for exemption under section 19. Since the ministry has not claimed any other exemptions for the withheld information in pages 34 and 165, I will order it disclosed.

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

[30] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. The institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. 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.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant¹¹:

- 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 has a sympathetic or compelling need to receive the information

⁹ Order MO-1573.

¹⁰ Section 54(2) of the *Act*.

¹¹ Orders P-344 and MO-1573.

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

Representations and finding

[32] The ministry submits that it exercised its discretion in applying the section 19 exemption to the withheld information and records at issue in this appeal. In exercising its discretion, the ministry submits that it attempted to balance the purpose of the section 19 exemption and all other relevant interests and considerations on the basis of the facts and circumstances of this particular appeal. The ministry explains that its decision involved two steps. First, the head determined whether the exemption applied, and if it did, the head had regard to all relevant interests – including the public interest in disclosure – and concluded disclosure should not be granted. The ministry states that it considered the purposes of the *Act*, the purposes of section 19 and the circumstances of the request. It adds that it was mindful of these considerations and of the Supreme Court of Canada’s decision in *Ontario (Public Safety and Security) v Criminal Lawyers’ Association* in which the importance of solicitor-client privilege in the Canadian legal system was highlighted.

[33] The appellant does not directly address this issue in her representations. However, her representations indicate that she disagrees with the ministry’s exercise of discretion in claiming section 19 applies to the records and information at issue. The appellant focusses her representations on the importance of public safety considerations in this appeal. She submits that the deer hunt that is the subject of the protocol represents a significant public safety concern because the ministry failed to take adequate safety measures during the 2013 hunt. The appellant submits that the withheld records may pertain to public safety and that she has a right to review them so that she may disseminate information to the public. She thus implies that disclosure of the records would assist in alleviating public safety concerns by providing necessary information on the safety protocols to the public and to residents that live close to the park and may use the park during a future hunt.

[34] While the appellant does not agree with the ministry’s exercise of discretion, she does not suggest that the ministry took irrelevant factors into consideration or that it exercised its discretion in bad faith when it decided to withhold the information at issue in this appeal. I also note that the ministry specifically considered the public interest in disclosure, which is the focus of the appellant’s representations, and disclosed a

significant amount of information to the appellant. The ministry appropriately considered the importance of the solicitor-client privilege exemption in exercising its discretion, and I agree with the ministry that most of the information it withheld is exempt under section 19. For these reasons, I am satisfied that the ministry took relevant factors into account and exercised its discretion appropriately in withholding the records and information I have found to be exempt under section 19 of the *Act*.

ORDER:

1. I uphold the ministry's decision to withhold pages 1-10, 50-59, 120-134, 154-164, and 243-259 under section 19.
2. I order the ministry to disclose the information in pages 34 and 165 that it withheld under section 19 to the appellant by **April 6, 2016**, but not before **April 1, 2016**.
3. I reserve the right to require the ministry to provide me with a copy of the disclosure it provides to the appellant as a result of my order.

Original Signed by: _____
Stella Ball
Adjudicator

February 29, 2016 _____