Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3654

Appeal PA09-304

Ministry of Finance

September 28, 2016

Summary: The appellant sought access to records relating to the change in the definition of "tax benefit" in Ontario's General Anti-Avoidance Rule. The Ministry of Finance denied access to 32 responsive records under sections 12(1), 13(1), 15(a), 18(1)(d), 19(a) and 22(a) of the *Freedom of Information and Protection of Privacy Act*. Later in the processing of the appeal, the ministry took the position that certain records were not responsive to the appellant's access request. In this order, the adjudicator finds that some records are not responsive to the appellant's access request. In addition, he finds that all of the remaining records at issue are exempt from disclosure under either section 15(a) (relations with other governments) or section 19(a) (solicitor-client privilege) of the *Act*. He upholds the ministry's decision to deny access to these records and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 15(a) and 19(a).

Orders Considered: Order PO-2999

OVERVIEW:

[1] The appellant submitted an access request to the Ministry of Finance (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to section 110 of the *Taxation Act, 2007.* After discussions with the ministry, the appellant submitted an amended request which read as follows:

> We formally request copies of all records or parts of records in the Ministry of Finance which consider the amendment of the definition of "tax benefit" in Ontario's General Anti-Avoidance Rule ("GAAR") as a result of the replacement of subsection 5(1) of the *Corporations Tax Act* with subsection 110(1) of the *Taxation Act, 2007* (the "Ontario GAAR Provisions") including all records which provide reasons, explanations, policy analysis, consideration, alternatives ("Reasons") for making the change.
>
> In particular, we are interested in: (i) why the words "Act of a province of Canada that imposes a tax similar to a tax imposed under this Act" was added to the definition of "tax benefit" in subsection 110(1) of the *Taxation Act, 2007* and (ii) records which discuss integration, harmonization, co-ordination, or comparisons of the Ontario GAAR Provisions and the GAAR provisions in all other Canadian Federal, provincial, and territorial taxation legislation including and without limiting the generality of the foregoing:
>
> > (a) the following Federal GAAR provisions; section 245 of the *Income Tax Act* (Canada), sections 68.2, 121.1 and 274 of the *Excise Tax Act* (Canada), and
> >
> > (b) the following provincial and territorial GAAR provisions: the *British Columbia Income Tax Act* section 68.1, the *Alberta Corporate Tax Act* sections 72.1 and 72.11, the *Income Tax Act* (Saskatchewan) section 139, the *Tax Administration and Miscellaneous Taxes Act* (Manitoba) section 51, the *Taxation Act* (Quebec) sections 1079.9 to 1079.16, the *New Brunswick Income Tax Act* section 123, the *Income Tax Act* (Nova Scotia) section 80A and the *Revenue Act* (Nova Scotia) section 84, the *Income Tax Act* (Prince Edward Island) section 83, the *Income Tax Act* (Newfoundland and Labrador) section 88.1 and the *Income Tax Act* (Yukon Territory) section 61.
>
> To clarify, we are not requesting draft legislation or draft regulations. However, we are seeking explanatory notes, reports, agendas, minutes, memos and policy documents that may be in respect of the draft legislation or draft regulations.

[2] In response to the revised request, the ministry issued an access decision to the appellant in which it identified 32 responsive records and denied access to them in full under the exemptions in sections 12(1)(b) and (c) (cabinet records), 13(1) (advice or recommendations), 15(a) (relations with other governments), 18(1)(d) (economic and other interests), 19(a) (solicitor-client privilege) and 22(a) (information published or available) of the *Act*.

[3] The appellant appealed the ministry's access decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[4] During mediation, the ministry provided the appellant with an index of records. In addition, the appellant confirmed that he was not pursuing access to the parts of records identified by the ministry as "non-responsive" to his access request.

[5] This appeal was not resolved during mediation, and it was moved to adjudication for an inquiry. An adjudicator sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry, initially, and the ministry provided representations in response.

[6] In its representations, the ministry states that the records at issue in this appeal are related to another appeal with the IPC (PA09-164). It also states that one record (record 29) was disclosed to the appellant and is no longer at issue. In addition, the ministry takes the position that, upon further review, three records (records 1, 2 and 32) are not responsive to the access request because they either contain only draft legislation or do not refer in any way to tax avoidance or the Ontario GAAR.

[7] Because record 29 was the only record for which the exemption in section 22(a) was raised, that section is no longer at issue in this appeal.

[8] The adjudicator then sent the Notice of Inquiry, along with the ministry's non-confidential representations, to the appellant, inviting the appellant to address the issues.

[9] The appellant asked that this appeal be placed "on hold" for a number of reasons. One reason was that the Ontario Court of Appeal and, subsequently, the Supreme Court of Canada, were asked to determine issues regarding the application of section 13(1) of the *Act*. As a result, the adjudicator placed this appeal "on hold" pending the outcome of the decision of the Supreme Court of Canada.

[10] The Supreme Court of Canada issued its decision in *John Doe v. Ontario (Finance)*.[1] After that decision was issued, the appellant confirmed that he wished to proceed with the appeal, but declined to submit representations. This appeal was then transferred to me for a decision.

[11] In this order, I find that some records are not responsive to the appellant's access request. In addition, I find that all of the remaining records at issue are exempt from disclosure under sections 15(a) and 19(a) of the *Act*, and I dismiss the appeal.

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[1] 2014 SCC 36.

RECORDS:

[12] The 31 records remaining at issue in this appeal include emails, letters, charts, discussion documents and briefing notes.

ISSUES:

A. Are records 1, 2 and 32 responsive to the appellant's access request?

B. Does the discretionary exemption at section 15(a) apply to the records?

C. Does the mandatory exemption at section 12 apply to the records?

D. Does the discretionary exemption at section 13(1) apply to the records?

E. Does the discretionary exemption at section 18(1)(d) apply to the records?

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

G. Did the ministry exercise its discretion under sections 13(1), 15(a), 18(1)(d) and 19? If so, should the IPC uphold the ministry's exercise of discretion?

DISCUSSION:

RESPONSIVENESS OF RECORDS

A. Are records 1, 2 and 32 responsive to the appellant's access request?

[13] During the mediation stage of the appeal process, the appellant stated that he was not pursuing access to the parts of records identified by the ministry as "non-responsive" to his access request. However, during adjudication, the ministry claimed in its representations that three additional records in their entirety (records 1, 2 and 32) are also non-responsive. Given that these three records were not part of the group containing parts that the appellant agreed not to pursue access to, it must be determined whether these records are responsive to his access request.

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2] To be considered responsive to the request, records must "reasonably relate" to the request.[3] It must be determined, therefore, whether records 1, 2 and 32 "reasonably relate" to the appellant's access request.

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

[15] The ministry states that the appellant's revised access request specifies that he is not seeking access to "draft legislation". However, it claims that the "substantive parts" of both records 1 and 2 contain draft tax legislation. Consequently, it submits that these records are not responsive to the appellant's access request.

[16] I have examined records 1 and 2, which both contain a cover email between an employee of the ministry's Corporate and Commodity Tax Branch and the ministry's legal counsel, and attached draft tax legislation. I agree with the ministry that the attachments that contain draft legislation do not reasonably relate to the appellant's access request and can be removed from the scope of this appeal because they are non-responsive.

[17] However, I am not persuaded that the cover emails of records 1 and 2 are non-responsive. The part of the appellant's access request that excluded "draft legislation" stated:

> To clarify, we are not requesting draft legislation or draft regulations. *However, we are seeking explanatory notes, reports, agendas, minutes, memos and policy documents that may be in respect of the draft legislation or draft regulations.*
>
> [Emphasis added.]

[18] In my view, the cover emails for both records 1 and 2 fall within "explanatory notes, reports, agendas, minutes, memos and policy documents" to draft legislation. As a result, I find that these cover emails reasonably relate to the appellant's access request. Because these emails are responsive records, they remain at issue in this appeal.

[19] The ministry further states that record 32 is also non-responsive because it only refers to interpretive rules contained in the *Taxation Act, 2007* and does not refer in any way to tax avoidance, let alone Ontario's GAAR, which is the subject of the appellant's access request.

[20] Record 32 is a chart that compares various provisions in Ontario's tax legislation with analogous provisions in other provinces. I have reviewed this record and agree with the ministry that these provisions are not related to the amendment of the definition of "tax benefit" in the parts of Ontario's tax legislation that contain a GAAR, which is the focus of the appellant's access request. Consequently, I find that this record does not reasonably relate to that request, and it must be removed from the scope of this appeal because it is non-responsive.

RELATIONS WITH OTHER GOVERNMENTS

B. Does the discretionary exemption at section 15(a) apply to the records?

[21] The ministry submits that records 5 to 28, 30 and 31 are exempt from disclosure under the discretionary exemption in section 15(a) of the *Act*. This exemption states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
> >
> > . . .
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[22] The exemptions in section 15 recognize that the Ontario government will create and receive records in the course of its relations with other governments. In particular, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.[4]

[23] In order for a record to qualify for exemption under section 15(a), an institution must establish that:

> 1. the record relates to intergovernmental relations, that is relations between an institution and another government or its agencies; and
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> 2. disclosure of the record could reasonably be expected to prejudice the conduct of intergovernmental relations.[5]

Part 1 - Intergovernmental relations

[24] In assessing whether the records relate to "intergovernmental relations" it is useful to examine both the context underlying the records and the substance of the records themselves.

[25] In 2007, a new piece of tax legislation – the *Taxation Act, 2007*, came into effect in Ontario. This new Act generally replaced the provincial *Corporations Tax Act* and the *Income Tax Act* for the taxation years ending after December 31, 2008. Amongst other things, the legislation included a new Ontario GAAR. The new Act also authorized the

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[4] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[5] Reconsideration Order R-970003.

Minister of Finance to enter into a tax collection agreement on behalf of the Government of Ontario with the Government of Canada under which the Government of Canada would collect the taxes payable under the new Act on behalf of Ontario and make payments to Ontario in respect of those taxes.[6]

[26] In terms of substance, records 5 to 28, 30 and 31 are ministry records from 2005 and 2006 relating to the development of Ontario's new tax legislation. They include emails, letters, charts, discussion documents and briefing notes. In its representations, the ministry states that the records that it claims are exempt under section 15(a) relate to the design and implementation of an Ontario GAAR for inclusion in the *Taxation Act, 2007* for the taxation years ending after 2008. Underpinning all of these records are discussions about amending the Tax Collection Agreement between the federal government and the Ontario government to permit the federal government to collect and administer Ontario corporate tax.

[27] For example, record 5 includes a letter from the ministry's Assistant Deputy Minister to his counterpart at Finance Canada about the Ontario GAAR. Similarly, record 18 is a chart prepared by a ministry official that lists issues to discuss with the federal government, including the Ontario GAAR. Record 30 is a chart that lists differences between federal and Ontario measures used in determining taxable income and examines the Ontario GAAR. The substance of the other records at issue touch on similar matters.

[28] In my view, it is evident that these records all relate to "intergovernmental relations." In particular, they relate, either directly or indirectly, to discussions and consultations between the Ontario government and the federal government with respect to the new Ontario GAAR and the amended Tax Collection Agreement between the two governments to permit the federal government to collect and administer Ontario corporate tax for the taxation years after December 31, 2008.

Part 2 – Prejudice the conduct of intergovernmental relations

[29] I will now assess whether disclosing records 5 to 28, 30 and 31 could reasonably be expected to prejudice the conduct of intergovernmental relations of the Ontario government or an institution, as stipulated in the section 15(a) exemption.

[30] To establish that section 15(a) applies to the records, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness

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[6] Explanatory note to Bill 174, An Act to enact the Taxation Act, 2007 and make complementary and other amendments to other Acts, at www.ontla.on.ca/bills/bills-files/38_Parliament/Session2/b174ra.pdf.

of the consequences.[7]

[31] The ministry submits that many of the records reveal confidential discussions with respect to the federal government's administration of the Ontario GAAR. It further states that disclosing information publicly about the development and implementation of such tax anti-avoidance rules could assist those businesses that seek to avoid the application of those rules and illegitimately reduce their taxes. It submits that because the federal government is responsible for the administration of the GAAR for Ontario, the disclosure of records that address the design and implementation of that GAAR could reasonably be expected to prejudice the conduct of intergovernmental relations between the Ontario government and the federal government, as contemplated in section 15(a).

[32] The ministry then refers to its representations to the IPC on section 15(a) in a related appeal (PA09-164), which led to Order PO-2999. These representations stated, in part:

> The ministry submits that disclosure of the records would be prejudicial to government relations since there is a reasonable expectation of confidentiality between governments . . . when discussing the sensitive subject matter of tax avoidance and the [GAAR]. Disclosure of these discussions would prejudice the carefully cultivated relations between Ontario and the other taxing authorities who are continuing anti-avoidance negotiations.
>
> The harm to government relations is compounded by the hundreds of millions of tax dollars at stake for Ontario and other governments in tax avoidance, making the sensitive subject matter of these discussions all the more important to the different provincial and federal governments involved. The ministry submits in this overview that harm to frank and open communications with other governments is prejudicial to governmental relations (Order PO-1927-I).

[33] The ministry further states that as part of its representations to the IPC in appeal PA09-164, it included copies of letters that it received from other governments attesting to the importance of maintaining the confidentiality of inter-governmental discussions regarding tax avoidance matters. It submits that the concerns raised in those letters apply equally to the current appeal.

[34] The appellant did not submit representations in this appeal and I do not, therefore, have any arguments to rebut the evidence submitted by the ministry as to whether disclosing the records could reasonably be expected to prejudice the conduct

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[7] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

of intergovernmental relations of the Ontario government or an institution, as stipulated in section 15(a).

[35] For the reasons that follow, I am satisfied that the ministry has provided the detailed and convincing evidence required to show that disclosing records 5 to 28, 30 and 31 could reasonably be expected to prejudice the conduct of intergovernmental relations between the Ontario government and the federal government.

[36] The Ontario and the federal governments have an ongoing working relationship with respect to provincial taxes because the federal government now collects Ontario corporate tax and administers the Ontario GAAR. The purpose of a GAAR is to deter corporations from taking illegitimate avoidance measures to reduce their taxes, which can cost governments considerable revenue. In my view, given that the federal government is now responsible for administering Ontario's GAAR, it has a reasonable expectation that the Ontario government will not disclose records that could assist corporations in adopting measures that circumvent that GAAR.

[37] Records 5 to 28, 30 and 31 include emails, letters, charts, discussion documents and briefing notes that relate to the design and implementation of an Ontario GAAR. Based on my review of each of these records, I find that disclosing them could assist corporations in adopting measures that circumvent the Ontario GAAR, which, in turn, could reasonably be expected to harm the ongoing working relationship between the Ontario and federal governments with respect to the collection of corporate taxes. In short, I find that records 5 to 28, 30 and 31 are exempt from disclosure under section 15(a) because disclosing them could reasonably be expected to prejudice the conduct of intergovernmental relations by the Ontario government.

[38] Given that I have found that these records are all exempt under section 15(a), it is not necessary to determine whether they are also exempt under sections 12, 13(1) or 18(1)(d) (Issues C, D and E).

SOLICITOR-CLIENT PRIVILEGE

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

[39] The ministry claims that records 1 to 4 are exempt from disclosure under the discretionary exemption in section 19 of the *Act*. This provision states, in part:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;
>
> . . .

[40] Section 19 contains two branches. Branch 1 (section 19(a) – "subject to solicitor-client privilege") is based on the common law. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 (section 19(b) – prepared by or for Crown counsel) is a statutory privilege.

[41] The common law and statutory exemption privileges, although not necessarily identical, exist for similar reasons. The ministry must establish that one or the other (or both) branches apply.

[42] Records 1 to 3 contain emails between an employee in the ministry's Corporate & Commodity Taxation Branch (CCTB) and a lawyer in the ministry's Legal Services Branch regarding draft tax legislation.[8] Record 4 contains emails from the same ministry employee to a lawyer at the Office of Legislative Counsel.

[43] The ministry submits that these emails are exempt under section 19(a) of the *Act* because they were made for the purpose of obtaining or giving legal advice with respect to draft legislation to implement a GAAR for the taxation years ending after 2008. It submits that the ministry has taken no actions that would constitute a waiver of solicitor-client privilege with respect to these emails.

[44] I will start by assessing whether these records fall within the common-law privilege at section 19(a) and particularly solicitor-client communication privilege. This type of 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.[9]

[45] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[10] 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.[11]

[46] 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.[12]

[47] In my view, the emails in records 1 to 4 constitute direct communications of a confidential nature between a ministry employee and legal counsel both within the

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[8] Under Issue A above, I found that the cover emails of records 1 and 2 are responsive to the appellant's access request but not the attachments.
[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

ministry's own legal branch (records 1 to 3) and at the Office of Legislative Counsel (record 4) that were made for the purpose of giving professional legal advice. Consequently, these records fall squarely within the ambit of solicitor-client communication privilege.

[48] In order for branch 1 of section 19 to apply, the ministry must establish that one or the other, or both, of the two heads of privilege apply to records. Given that I have found that the first type of privilege encompassed by branch 1 (solicitor-client communication privilege) applies to the records, it is not necessary for me to consider whether the second head of branch 1 (litigation privilege) also applies.

[49] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[13]

[50] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[14]

[51] There is no evidence before me to suggest that the privilege with respect to records 1 to 4 has been waived, either expressly or implicitly.

[52] In short, I find that records 1 to 4 are exempt under section 19(a) because they are subject to solicitor-client privilege.

EXERCISE OF DISCRETION

G. Did the ministry exercise its discretion under sections 13(1), 15(a), 18(1)(d) and 19? If so, should the IPC uphold the ministry's exercise of discretion?

[53] I have found that all the records at issue are exempt from disclosure under either section 15(a) or 19(a). Consequently, it is only necessary to determine whether the ministry exercised its discretion under those particular exemptions and, if so, whether I should uphold that exercise of discretion.

[54] The sections 15(a) and 19(a) 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 IPC may determine whether the institution failed to do so.

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[13] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[14] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

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

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

[56] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] The IPC may not, however, substitute its own discretion for that of the institution.[16]

[57] The ministry states that it exercised its discretion regarding the records at issue in good faith, taking into account only relevant considerations and no irrelevant considerations. It submits that the IPC should uphold its exercise of discretion.

[58] I am satisfied that the ministry exercised its discretion in denying access to the records under sections 15(a) and 19(a) and did so appropriately. The appellant did not submit representations in this appeal and I do not have any evidence before me to suggest that the ministry exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. In short, I uphold the ministry's exercise of discretion under sections 15(a) and 19(a).

ORDER:

I uphold the ministry's decision to deny access to the records at issue. The appeal is dismissed.

Original Signed by: September 28, 2016

Colin Bhattacharjee
Adjudicator

[15] Order MO-1573.
[16] Section 54(2).