

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3771

Appeal PA13-370-6

Ministry of Transportation

September 25, 2017

Summary: In response to a request for records relating to the sourcing of a contract with PRESTO, the ministry issued a decision granting partial access to the records, withholding some information under section 19 (solicitor-client privilege) and section 21(1) (personal privacy). In this order, the adjudicator upholds the ministry's decision to withhold the information pursuant to sections 19 and 21(1), in part. However, she orders that the ministry disclose the withheld information contained in one record as it does not qualify for exemption under section 19.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 21.

Orders and Investigation Reports Considered: Orders PO-3728, PO-3063 and PO-3656.

BACKGROUND:

[1] The Ministry of Transportation (the ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the sourcing of a contract with PRESTO. In particular, the request asks for the following:

All communications with the words [named requester], Coalition 0.5 from 2012 to 2013.

[2] After having notified the affected parties, the ministry issued a decision advising

that partial access has been granted to the records. In its letter, the ministry further advised that access to some of the information contained in the records was denied, pursuant to the solicitor-client privilege at section 19, the economic and other interests exemption at section 18, and the personal privacy exemption at section 21(1) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to this office.

[4] During mediation, the ministry provided an index of the records to the appellant. Upon reviewing the index, the appellant narrowed the records at issue to the records indexed as #28, 29, 30, 31 and 41, disputing the application of the exemptions in sections 19 and 21(1) of the *Act*, and the removal of the non-responsive information from record #41.

[5] As mediation was unable to resolve the remaining issues, the appellant advised that he would like the appeal to move to the next stage, where an adjudicator conducts an inquiry under the *Act*.

[6] During the adjudication stage, I sought and received representations from the ministry and the appellant. Pursuant to this office's *Code of Procedure and Practice Direction Number 7*, a non-confidential copy of the ministry's representations was shared with the appellant.

[7] I also received a revised decision from the ministry. In this decision, the ministry grants access to Records #29, #30, page 13 of record #28, and page 3 of Record #41. However, the ministry now claims the exemption provided under section 21(1) for the portion at the beginning of Record #41, which was previously severed as not responsive.

[8] In this order, the adjudicator upholds the ministry's decision to withhold the information contained in Records #28 and #41 pursuant to section 19, and Records #31 and #41 pursuant to section 21(1). However, she orders that the ministry disclose the withheld information contained in Record #31 as it does not qualify for exemption under section 19.

RECORDS:

[9] The records remaining at issue in this appeal consist of the severed portions of certain emails contained in Records #28, #31 and #41.

ISSUES:

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

- B. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?
- C. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 21(1) apply to the information at issue?

DISCUSSION:

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

[10] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

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

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[12] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[13] 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

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

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

[14] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[15] 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

Litigation privilege

[16] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.⁷ Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.⁸ It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.⁹ The litigation must be ongoing or reasonably contemplated.¹⁰

Parties' representations

[17] In its representations, the ministry states that solicitor-client privilege applies to the withheld information contained in Records #28, #31 and #41. It asserts that the first page of Record #28, and the first and second pages of Record #41 contain confidential communications between ministry counsel and ministry program area concerning correspondence with the appellant. The ministry asserts that the information was communicated for the clear purpose of obtaining and providing legal advice. It does not provide any representations with respect to the withheld information contained in Record #31. It also points out that there is no indication that the

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

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

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

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

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

⁷ *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).

⁸ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

information was shared in a manner that would constitute waiver.

[18] Although the appellant submitted representations, they are not relevant to the issues on appeal. His representations consist of excerpts from various case law and legislation, along with some articles relating to citizen's arrest or defending oneself against a criminal act. I note that there was no context given to the case law and legislation excerpts.

Analysis and findings

[19] Record #28 is an email chain between a number of different ministry staff. In particular, the emails at issue, at page 1, are two email communications between ministry staff and ministry counsel, and an email communication from ministry staff to another ministry staff forwarding the earlier email from ministry counsel with respect to a draft correspondence addressed to the appellant.

[20] I am satisfied that solicitor-client privilege attaches to the withheld information contained on page 1 of Record #28. The withheld information consists of direct communication of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. I am also satisfied that the withheld information contained in the email communications between ministry staff (at the top of page 1) forms part of the continuum of communications aimed at keeping ministry staff informed of ministry counsel's opinion.

[21] Record #31 is an email chain between a number of different ministry staff. In particular, the email at issue, at the bottom of page 1, is an email communication between ministry staff. I find that the withheld information here does not contain direct communication of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice as it speaks to whether a document has been reviewed or not. Accordingly, I find that the withheld information in Record #31 does not qualify for exemption under section 19.

[22] With respect to Record #41, the withheld information are email communications between ministry staff and ministry counsel. I find that the withheld information here consists of direct communication of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice as it speaks to the status of the draft correspondence addressed to the appellant. Accordingly, I find that the withheld information in Record #41 qualifies for exemption under section 19.

[23] I also find that there has not been a waiver of solicitor-client privilege in relation to Records #28 and #41, and that the solicitor-client privilege in Branch 1 of section 19 applies to these records, subject to my consideration on the exercise of discretion below.

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

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

[25] 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.

[26] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

[27] Having regard to the circumstances of this appeal, I am satisfied that the ministry considered a number of relevant factors when determining whether to disclose the records to the appellant, that it did not take into account irrelevant considerations or fail to take into account relevant considerations. I note that the ministry withheld only portions of the records and disclosed a number of records responsive to the appellant's request. In particular, I note that the ministry issued a revised access decision at the inquiry stage granting full access to two of the records at issue and partial access to other records (specifically page 13 of Record #28 and page 3 of Record #41) at issue.

[28] As a result, I am satisfied that the ministry properly exercised its discretion to apply section 19 to Records #28 and #41, and I uphold the ministry's decision that these records at issue qualify for exemption under section 19 of the *Act*.

C: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[29] In order to determine whether section 21(1) of the *Act* applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[30] "Personal information" is defined in section 2(1) as follows:

¹¹ Order MO-1573.

¹² Section 43(2).

“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;

[31] 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.¹³

[32] 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.

¹³ Order 11.

(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.

[33] 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.¹⁴

[34] 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.¹⁵

[35] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁶

Parties' representations

[36] In its representations, the ministry submits that Records #31 and #41 contain personal information. It points out that the withheld information in these records are its employees' personal views and opinions and as such, it qualifies as their personal information under paragraph (e) of the definition of that term in section 2(1). The ministry also submits that although the opinions were rendered in the professional context, their disclosure would reveal something of a personal nature about the individuals who expressed them. It further submits that these individuals involved are expressing their own opinions and feelings about matters.

[37] As mentioned above, the appellant provided representations, but they are not relevant to the issues on appeal.

Analysis and findings

[38] Past orders of this office state that 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.¹⁷

[39] Even if the information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals

¹⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

¹⁷ Orders P-257, P-427, P-2142, P-1621, R-980015, MO-1550-F and PO-2225.

something of a personal nature about the individual.¹⁸

[40] In order to determine whether the withheld information in the records is personal information, I must consider whether the withheld information relates to the named individuals in a professional rather than personal capacity. Only information about individuals in a personal capacity can qualify as personal information for the purposes of the *Act*.

[41] The current approach of this office in determining whether information relates to an individual in a personal or professional capacity was set out by former Assistant Commissioner Tom Mitchinson in Order PO-2225. This approach has been followed in numerous decisions and essentially involves the consideration of the following two questions:

...the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

....

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*" Even if the information appears in a business context, would its disclosure reveal something inherently personal in nature?¹⁹

[42] I adopt this approach for the purposes of this appeal.

[43] In Order P-270, former Commissioner Tom Wright found that opinions given by a person in their professional capacity are not "personal information". Further, Adjudicator Donald Hale stated in Reconsideration Order R-980015 that "the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message."²⁰

[44] After carefully reviewing the records at issue, I find that the employees in these email communications were expressing their personal opinions. Considering step one, their opinions appear in a professional context – in an email communication with a

¹⁸ Orders-1409, R-980015, PO-2225 and MO-2344.

¹⁹ PO-2225, page 7-8.

²⁰ Order R-980015, page 17.

colleague. Considering step two, even if the information appears in a professional context, the question is whether its disclosure would reveal something that is inherently personal in nature. In my view, the opinions expressed would reveal something of a personal nature about these employees. Unlike in Order R-980015, these employees are not expressing the position of the ministry but their personal opinions. I am unable to divulge more details without revealing the contents of the withheld information.

[45] Therefore, I find that the withheld information contained in Records #31 and #41 is considered to be personal information as that term is defined in section 2(1) of the *Act*.

[46] I will now consider whether the personal information in these records is exempt from disclosure pursuant to the personal privacy exemption at section 21(1) of the *Act*.

D: Does the mandatory exemption at section 21(1) apply to the information at issue?

[47] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[48] In the circumstances of this appeal, the one exception with possible application is section 21(1)(f), which read as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[49] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1).

[50] 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 under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.²¹ Section 21(4) does not apply in the circumstances of this appeal and the appellant has not raised the application of section 23. Further, I do not have evidence that any of the presumptions in section 21(3) applies.

[51] If no section 21(3) presumption applies and the exception in section 21(4) does not apply, section 21(2) lists various factors that may be relevant in determining

²¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

whether disclosure of personal information would constitute an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.²²

[52] In order to find that disclosure does not constitute an unjustified invasion of personal privacy under section 21(1), one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.²³

[53] In this appeal, none of the parties have provided any evidence with respect to the factors and/or circumstances favouring or not favouring disclosure. Moreover, there is no evidence that any of the factors favouring disclosure in section 21(2) apply. Accordingly, I find that the mandatory exemption in section 21(1) applies to exempt the personal information contained in Records #31 and #41.

ORDER:

1. I uphold the ministry's decision to withhold the information contained in Records #28 and #41 under section 19 of the *Act*.
2. I also uphold the ministry's decision to withhold the personal information contained in Records #31 and #41 under 21(1) of the *Act*.
3. I order the ministry to disclose the withheld information contained in Record #31 as it does not qualify for exemption under section 19 by **October 31, 2017** but not before **October 25, 2017**. To be clear, the personal information contained in Record #31 should **not** be disclosed.
4. I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original Signed by: _____

Lan An
Adjudicator

September 25, 2017 _____

²² Order P-239.

²³ Orders PO-2267 and PO-2733.