

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3807

Appeal PA17-50

Ministry of the Attorney General

January 22, 2018

Summary: The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specific file number. The ministry withheld some of the responsive emails pursuant to section 49(a) (discretion to refuse requester's own information), in conjunction with sections 19(a) and 19(b) (solicitor-client privilege) of the *Act*. This order upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a), 19(a) and (b).

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for records related to a specific file number.

[2] The ministry identified 25 pages of responsive records and issued a decision granting partial access. The ministry withheld some records pursuant to section 49(a) (discretion to refuse requester's own information), in conjunction with sections 19(a) and 19(b) (solicitor-client privilege) of the *Act*.

[3] The ministry also withheld records that it identified as not responsive.

[4] The requester (now the appellant) appealed the ministry's decision.

[5] During the course of mediation, the ministry agreed to review its access decision and, subsequently, issued a revised decision, granting access to more records, including the records that it had withheld as not responsive.

[6] The ministry continued to withhold some records pursuant to section 49(a), in conjunction with sections 19(a) and 19(b) of the *Act*.

[7] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sought and received representations from the ministry and the appellant in accordance with the IPC's *Practice Direction 7*.

[8] In its representations, the ministry states that it has decided to disclose two additional records (the short email found on page 3 and sent on November 3, 2014 at 5:31 PM; and, the short email found on page 5 and sent on October 30, 2014 at 2:50 PM). I will direct that this information be disclosed to the appellant and it will not be considered further in this order.

[9] In this order, I uphold the ministry's decision to deny access to the remaining information at issue in the records.

RECORDS:

[10] At issue are the withheld portions of emails found at pages 3, 4, 5, 6, 8, 9 and 10 of the records.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a) (right of access to one's own personal information), in conjunction with the section 19 solicitor-client privilege exemption, apply to the information at issue?
- C. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[11] 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;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.¹

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.²

[14] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[16] The ministry states that the records contain the personal information of the appellant as defined in paragraphs (c) and (h) in his personal capacity. It also states that the records relate to letters sent by the appellant to the ministry identifying his concerns and the responses to those letters.

[17] The appellant did not address this issue directly in his representations.

Analysis/Findings

[18] I agree with the ministry that the records contain the personal information of the appellant in his personal capacity, as described by the ministry, and as defined in paragraphs (c) and (h) of the definition of that term in section 2(1). In particular, they contain an identifying number associated with the appellant and the appellant’s name where it appears with other personal information relating to him.

B. Does the discretionary exemption at section 49(a) (right of access to one’s own personal information), in conjunction with the section 19 solicitor-client privilege exemption, apply to the information at issue?

[19] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

¹ Order 11.

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

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

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[20] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁵

[21] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[22] In this case, the institution relies on section 49(a) in conjunction with section 19(a) and (b). These sections read 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;

[23] The ministry submits that the common law solicitor-client communication privilege applies in this case. It states that pages 3, 4, 5 and 6 of the responsive documents contain four separate and related direct communications between a solicitor and his clients, made for the purpose of giving legal advice. It states:

In the two emails prepared and sent by the solicitor to his clients, it is clear that the email was meant to remain confidential. At the end of both emails the solicitor includes a statement advising that the correspondence contains confidential information. Further, the text of the two emails clearly indicates that it is an exchange of information meant only for the recipients of the email. It is also clear from the text of the emails that the solicitor is providing the recipients with advice on a next step and that the advice is legal in nature. It is the ministry's position that disclosure of this email may discourage the client from confiding in their lawyer on future legal matters. For these reasons, the ministry's position is that the content of these emails is subject to a common law solicitor-client communication privilege.

[24] The ministry also submits that the records on pages 3, 4, 5 and 6, were prepared by Crown counsel in order to provide the client with legal advice. As such, it is the ministry's position that these records are also subject to the statutory solicitor-client communication privilege.

⁵ Order M-352.

[25] The ministry relies on the same submissions for pages 8, 9 and 10 as these pages contain a duplicate copy of the email on pages 5 and 6 of the responsive documents.

[26] The appellant did not address this issue directly in his representations.

Analysis/Findings

[27] 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.

[28] Branch 1 common law solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[29] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital “for use in giving legal advice or in contemplation of or for use in litigation.” The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[30] 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 The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁷ 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.⁸

[31] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁹

[32] 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.¹⁰ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹¹

[33] I agree with the ministry that the records at issue, which are internal ministry

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ Orders PO-2441, MO-2166 and MO-1925.

⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁰ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹¹ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

emails, contain legal advice from a ministry solicitor, who is a Crown counsel employed by the ministry, to ministry staff. Therefore, as the records were prepared for use in giving legal advice, the information at issue in the records is subject to both the statutory and common law communication privilege under sections 19(a) and (b).

[34] Finally, I have no evidence that this solicitor-client communication privilege has not been waived or lost.

[35] Accordingly, subject to my review of the ministry's exercise of discretion, the information at issue in the records is exempt under section 49(a), in conjunction with the section 19.

C. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[36] The section 49(a) 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.

[37] 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.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁴

- 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

¹² Order MO-1573.

¹³ Section 54(2).

¹⁴ Orders P-344 and MO-1573.

- 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.

[40] The ministry submits that it exercised its discretion taking into consideration the purposes of the *Act*, including the principles that:

1. information should be available to the public;
2. individuals should have a right of access to their own personal information;
3. exemptions from the right of access should be limited and specific; and
4. the privacy of individuals should be protected.

[41] The ministry states that it redacted only information that clearly fell within the section 19 exemption and carefully considered the interests the exemption seeks to protect, namely, the importance of a client's willingness and ability to confide in his or her lawyer on a legal matter without reservation, and that it withheld the information only after concluding that release of the information would likely negatively affect this important protection.

[42] In addition, the ministry considered the fact that none of the records would exist were it not for the appellant's letters to the ministry, and that the information was the appellant's own personal information.

[43] The appellant did not address this issue directly in his representations.

Analysis/Findings

[44] I find that the ministry exercised its discretion in a proper manner taking into account proper considerations and not taking into account improper considerations. Accordingly, I uphold the ministry's exercise of discretion and find that the information at issue is exempt under section 49(a), in conjunction with section 19.

ORDER:

1. I order the ministry to disclose the email found on page 3 and sent on November 3, 2014 at 5:31 PM; and, the email found on page 5 and sent on October 30, 2014 at 2:50 PM of the records by **February 12, 2018**.
2. I uphold the ministry's decision to deny access to the remaining information at issue in the records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 22, 2018