Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3836

Appeal PA15-576

Ministry of Natural Resources and Forestry

April 30, 2018

Summary: The Ministry of Natural Resources and Forestry received an access request for records related to a specific Environmental Review Tribunal decision and the review of the operational mitigation plan for a wind farm project. The ministry granted partial access to the records identified as responsive. This order addresses the denial of access to records under section 19(a) (solicitor-client communication privilege). The adjudicator upholds the ministry's denial of access under section 19(a).

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

Orders and Investigation Reports Considered: Order P-1511

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

OVERVIEW:

[1] This order determines the issue of whether the solicitor-client privilege exemption in section 19 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) applies to Ministry of Natural Resources and Forestry (the MNRF or ministry) records related to an Environmental Review Tribunal (ERT) matter.

[2] The specific records sought by the access request were copies of "the final operational mitigation plan as required by the Decision and the Approval" and "any

document or correspondence from the date of the Decision to present related to the final operational mitigation plan as required by the Decision and the Approval." The reference to "Decision" in the request is to an ERT decision about a specific wind farm project in northern Ontario proposed by a joint venture partnership between a first nation and a renewable energy company. The reference to "Approval" is to the original Renewable Energy Approval (REA) given to the project. The ERT decision recommended a change to the REA's operational mitigation plan to require modification of the turbine cut-in speed to accommodate brown bat populations.[1]

[3] Following third party notification, the ministry issued a decision granting partial access to the records, relying on sections 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*. Two third parties appealed the ministry's decision.[2] The requester also appealed the ministry's decision to this office and became the appellant in this appeal. During mediation, the appellant advised that he was not seeking access to personal information and this removed section 21 from the scope of the appeal. The ministry disclosed the information that was not subject to a third party appeal to the appellant and revised its decision by withdrawing section 19 in relation to one record. However, since the appeal could not be fully resolved by further mediation, the file was transferred to the adjudication stage for an inquiry.

[4] I began my inquiry by sending a Notice of Inquiry outlining the facts and the issues to the ministry, initially, to seek representations. Once I received the ministry's representations, I shared a complete copy of them with the appellant, along with a Notice of Inquiry, to invite his representations. Representations from the parties were also exchanged in reply and sur-reply.

[5] In this order, I find that the seven withheld records fall within the ambit of solicitor-client communication privilege and that the privilege has not been waived. I find that the ministry properly exercised its discretion under section 19(a) of the *Act*, and I uphold the ministry's access decision.

RECORDS:

[6] There are seven records, consisting mainly of emails, remaining at issue. The ministry's index of records identifies them in the following manner: A0249836 (page 376),[3] A0249838 (pages 510-515), A0249839 (pages 516-523), A0249840 (pages 524-529), A0249841 (pages 530-531), A0249842 (pages 532-537) and A0249843 (pages 538-543). Most of these records are email chains and there is considerable duplication

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[1] The ministry provides this background in its initial representations and adds that the MNRF is the approving authority for the operational mitigation plan for the project.
[2] The third party appeals were later resolved through mediation.
[3] In the revised decision, the ministry withdrew its initial exemption claim of section 19 over the record attached to this email (pages 377-509).

of content.

ISSUES:

A. Does the discretionary exemption for solicitor-client privileged information apply to the withheld records?

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

DISCUSSION:

A. Does the discretionary exemption for solicitor-client privileged information apply to the withheld records?

[7] The ministry claims that the discretionary exemption for solicitor-client privilege in section 19 of *FIPPA* applies to the withheld emails. The relevant part of section 19 states:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege; …

[8] Section 19 contains two branches. The ministry relies on branch 1, which arises from the common law and section 19(a), and encompasses two heads of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Given my finding in this order, I will only address the first branch.

[9] 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.[4] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[5]

[10] The privilege applies to "a continuum of communications" between a solicitor and client:

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[4] *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (S.C.C.) (*Descôteaux*).
[5] Orders PO-2441, MO-2166 and MO-1925.

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[6]

[11] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[7] 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.[8]

[12] Under branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.[9] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[10] Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; or the document records a communication made in open court.[11]

Representations

[13] The ministry submits that section 19 was applied to direct and indirect communications between ministry staff and counsel, and to certain portions of records that reveal either the work product of counsel or the legal services provided by them. The ministry explains the content of the records, as follows:

- A0249836 (page 376) is an email from Legal Services Branch counsel to MNRF staff, which contains information passed between counsel and client aimed at keeping both informed so that legal advice on a particular issue may be sought and given;

- A0249838 (pages 510-515) are emails between MOECC[12] legal counsel, MNRF legal counsel and other MNRF staff about issues with the mitigation plan;

- A0249839 (pages 516-523) are emails from Legal Services Branch counsel to MNRF staff providing a legal opinion on the ERT decision, including a discussion between staff of the legal advice given;

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[6] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) (*Balabel*).
[7] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (*Susan Hosiery*).
[8] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) (*Chrusz*).
[9] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[10] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[11] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.
[12] Ministry of the Environment and Climate Change.

- A0249840 (pages 524-529) are emails involving MOECC legal counsel, MNRF legal counsel and other MNRF staff;

- A0249841 (pages 530-531) are emails, cc'd to Legal Services Branch counsel, between MNRF and MOECC employees discussing the mitigation plan legal advice;

- A0249842 (pages 532-537) are emails involving MNRF legal counsel and other employees about the mitigation plan issues, including references to the earlier legal opinion of Legal Services Branch counsel; and

- A0249843 (pages 538-543) are emails duplicating communications exchanged between MNRF legal counsel and staff, as described for A0249842.

[14] The ministry claims that these records clearly fall within the scope of the common law definition of solicitor-client privilege as that concept has been discussed in numerous Supreme Court of Canada cases.[13] The ministry sets out excerpts from *Descôteaux, Blood Tribe* and *Criminal Lawyers' Association* and other cases regarding the importance of maintaining the confidentiality arising from the privilege and restrictively interpreting any legislation, such as *FIPPA*, which may interfere with it. According to the ministry, these cases affirm that it is in the public interest to ensure the free flow of legal advice by protecting the integrity of the solicitor-client privilege exemption.

[15] From *Andrews v. Law Society of British Columbia*,[14] the ministry excerpts the statement that "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." Relying on *Descôteaux* and *Susan Hosiery*, *supra,* the ministry notes that either the lawyer or the client may communicate with one another through an intermediary without impairing privilege; this is because the solicitor-client privilege includes all verbal and written communications between solicitor and client related to the seeking, formulating or giving of legal advice or assistance. Further, ongoing communications about a specific issue may be considered part of the protected continuum discussed in *Balabel*, *supra,* a phenomenon that is particularly prevalent with "in house" legal counsel for government institutions. The ministry states that the privilege is permanent until it has been waived by the client.

[16] Having reviewed the ministry's representations, the appellant submits that the ministry's claim that solicitor-client privilege applies to the records is "entirely

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[13] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (*Blood Tribe*), citing *R. v. McClure*, 2001 SCC 14 and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61. Also, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Criminal Lawyers' Association*) and *Balabel v. India, supra.*

[14] [1989] 1 SCR 143 at 173.

unsupported and the records should be disclosed" because it has not met the onus of proving the application of section 19 in this appeal. The appellant notes that Interim Order MO-3253-I[15] addresses the required confidentiality component of the privilege; specifically, the requirement that the institution must demonstrate that the communication was made in confidence, either expressly or by implication.

[17] The appellant argues that the MNRF's representations make "no reasonable effort to demonstrate the applicability of section 19 … All they do is reference the names of the parties to the communication." In particular, the appellant submits that the ministry's denial of disclosure under branch 1 of section 19 cannot be justified merely be noting that the communication is from or to the institution's legal counsel. Under the test established in Order M-69, states the appellant, there must be a written or oral communication of a confidential nature between a client (or his agent) and a legal advisor and the communication must be directly related to seeking, formulating or giving legal advice. The appellant points out that past orders have distinguished situations where the solicitor is merely serving as a conduit for passing information to clients from those where legal advice is actually given.[16] Further, relying on Order 201, the appellant submits that the definition of "legal advice" does not "encompass all information given by counsel to an institution to his or client," because it must have some evaluative component based on legal considerations and knowledge, resulting in a legal opinion, recommendation or course of action.

[18] The appellant states that since a requester has no reasonable way to test a blanket denial of access to records on this basis, the institution must separately scrutinize each of the disputed records and explain how each one is properly considered part of the continuum of communications for the purpose of giving legal advice. Given the submissions provided by the ministry, the appellant claims that there is no proper explanation to establish either the ministry's intention to claim the privilege or that the records contain "legal advice" in accordance with the test established by the IPC. In his sur-reply submissions, the appellant maintains that the ministry's position improperly stretches the definition of legal advice to include correspondence on which counsel is copied. The appellant argues that simply copying lawyers does not facilitate getting legal advice, and it neither creates legal advice as the term is properly understood, nor does it create a reasonable expectation of confidentiality. The appellant concludes by stating that "the claim is nothing more than a convenient way to obstruct access to information."

[19] The ministry responds to the alleged insufficiency of its initial representations by observing that the analysis of section 19 requires a delicate balance: the records must be characterized without disclosing the very communication that section 19 seeks to protect, and this justifies a high-level description of them. The ministry maintains that it

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[15] 2015 CanLII 68019 (ON IPC), paragraphs 18 and 20.
[16] The appellant cites Order M-258.

did, in fact, separately scrutinize each of the records to determine if each is properly considered part of the continuum of communications, and

> … for greater certainty, it is the ministry's position that the records form part of a process of seeking, formulating and giving legal advice as between counsel and clients related to mitigation plan issues. As this process was ongoing, it involved a range of communications by which counsel and clients exchanged information and options relevant to the provision of legal advice.

[20] Regarding the appellant's assertion that the ministry's initial representations in no way established the confidentiality of the communications at issue, the ministry replies that ministry (Crown) counsel's intention to maintain confidentiality is evident from the fact that counsel and clients were the only participants in the communications. The ministry adds that the records were not shared with outside parties.

[21] Relying on Order P-1511, the ministry states that it is well known that there is often more than one client in the government context due to a commonality of interest amongst different departments and ministries. The ministry submits that:

> It is common for legal advice from Crown counsel to be shared among a number of clients all of whom represent different areas of expertise and responsibility within the Crown and who share a common interest in the advice. This was the case in the instant case, in which clients at two responsible ministries share a common interest in Crown counsel's advice on mitigation plan issues.

[22] The ministry maintains that an expectation of confidentiality is evident from the nature of the communications, even those emails that are not explicitly marked "solicitor-client privileged and confidential." According to the ministry, the IPC decisions cited by the appellant consistently state that the client is entitled to freely confide in their counsel on a legal matter with an understanding that these communications are confidential. In this particular situation, the emails form part of a continuum of discussions related to the seeking, formulating and giving of legal advice and, therefore, there was a reasonable expectation that confidentiality would be protected.

[23] The appellant expresses concern that the ministry did not address the possibility of redacting privileged portions of the records and disclosing non-exempt information, as section 10(2) of the *Act* requires. The appellant submits that "the failure to do so should result in an adverse inference being drawn that a severance is unnecessary and the entire record should be disclosed." In response to this statement, the ministry submits that the question of whether the records could reasonably be severed was a factor considered in the exercise of discretion. The ministry notes that in the end, the decision was that only one of the records could be severed in the circumstances.

[24] The appellant concludes by stating that there is a compelling public interest in the disclosure of the records due to the fact that the records relate to government management of a species at risk.

Analysis and findings

[25] To uphold the ministry's claim that the records are subject to solicitor-client communication privilege, I must be satisfied that the records consist of written communications of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[17] Based on my review of the records, I accept that the seven records withheld by the ministry qualify for exemption under section 19(a).

[26] Pages 516-523 (A0249839) consist of two emails conveying the review and legal opinion provided by counsel with MNRF's Legal Services Branch to ministry staff regarding the ERT decision in question. This communication is expressly confidential, and I am satisfied that its disclosure would reveal the legal advice provided by a ministry solicitor to his clients. I find that section 19(a) applies to this record.

[27] I am also satisfied that the other six records withheld by the ministry in this appeal fall within the continuum of communications between solicitor and client. These records are the emails at page 376 (A0249836), pages 510-515 (A0249838), pages 524-529 (A0249840), pages 530-531 (A0249841), pages 532-537 (A0249842) and pages 538-543 (A0249843). As the excerpt from *Balabel v. Air India*[18] quoted by the ministry suggests, determining whether a communication was sent confidentially for the purposes of legal advice requires a generous interpretation, particularly where a transaction or other matter necessitates ongoing communication "on matters great or small at various stages." In the context of the ministry's dealings on the matter of the ERT decision here, the passing of information between solicitor and client to keep both informed could reasonably be expected, and I accept this to be the case with these six records. I am satisfied that these emails were confidential communications between solicitor and client aimed at keeping all informed of relevant issues as the matter progressed.

[28] I also agree with the ministry's submission on solicitor-client communication privilege attaching to the information passed between counsel and staff of the MOECC as well as the MNRF. I accept that the staff at these two ministries each have responsibilities in the renewable energy approvals process here and that these duties include "a common interest in Crown counsel's advice on mitigation plan issues." Therefore, I find that the email records at pages 376, 510-515, 524-529, 530-531, 532-537 and 538-543 were directly related to the seeking, formulating or giving of legal advice and that they qualify for exemption under section 19(a) in their entirety.

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[17] *Descôteaux, supra.*
[18] *Supra.* See also Orders PO-1994 and PO-3328.

[29] Apart from stating that "the privilege is permanent until it has been waived by the client," the ministry does not directly address waiver. Based on my review of the records and the relevant context, however, I find no evidence that the confidential legal advice was shared or that the continuum of communications was "opened up" to individuals who would be considered "outsiders" to the communications within MNRF or between MNRF and MOECC. I am satisfied that the ministry did not waive the privilege attached to these records.

[30] The appellant argued that the records ought to be disclosed because there is a compelling public interest in the transparency of the government's management of a species at risk. This argument suggests that the appellant is raising the possible application of the public interest override in section 23. However, section 19 is not listed in section 23 as an exemption that may be overridden, and this legislative choice has been upheld by the Supreme Court of Canada.[19] In this context, even if I were persuaded that public interest considerations were established on the facts of this appeal, such considerations could not override the application of section 19 to the records.

[31] Therefore, the records are exempt from disclosure under the solicitor-client communication privilege in section 19(a), subject to my review of the ministry's exercise of discretion.

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

[32] After deciding that a record or part of it falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The solicitor-client privilege exemption in section 19 is discretionary, which means that the ministry could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[33] In applying the exemption, the ministry was required to exercise its discretion. On appeal, the Commissioner may determine whether the ministry failed to do so. In addition, the Commissioner may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.[20] According to section 54(2) of the *Act*, however, I may

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[19] Section 23 states that "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." See *Criminal Lawyers' Association, supra,* which held that consideration of the public interest is already incorporated in the discretionary language of the exemption.
[20] Order MO-1573.

not substitute my own discretion for that of the ministry.

[34] As I have upheld the ministry's decision to apply section 19 to the records, I must review its exercise of discretion in choosing to do so.

Representations

[35] The ministry submits that it considered the purpose of the exemption and the balance of the other relevant interests and factors and determined that the records should be withheld under section 19. The ministry states that it specifically considered the crucial prominence of the exemption in our legal system against the circumstances of the request.

[36] The appellant suggests that the ministry has unreasonably exercised its discretion under section 19 in deciding to withhold the records because the ministry's submissions in support of the exemption claim are so lacking in connection to the law or facts at hand that they demonstrate bad faith.

[37] In reply, the ministry submits that the appellant's concerns about the ministry's initial representations regarding the exercise of discretion do not, in themselves, establish an absence of good faith or an unreasonable exercise of discretion by the ministry at the time the decision to withhold the records was made. The ministry affirms its position that there was an appropriate exercise of discretion in its decision to withhold the records under section 19.

Analysis and findings

[38] Based on the ministry's representations and the nature and content of the records for which I have upheld the solicitor-client privilege exemption, I find that the ministry has not erred in the exercise of its discretion. I am satisfied that the ministry did not act in bad faith or for an improper purpose, and I am also satisfied that the ministry did not fail to take into account relevant considerations, including the purposes of the *Act*, the nature of the exemption, and the appellant's reasons for seeking access to the information.

[39] As I am satisfied that the ministry exercised its discretion properly, I uphold the ministry's decision to withhold the records under section 19(a).

ORDER:

I uphold the ministry's decision to deny access to the records under section 19(a), and I dismiss the appeal

Original Signed by: April 30, 2018

Daphne Loukidelis

Adjudicator