Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3858-I

Appeal PA15-266

Ministry of the Attorney General

June 18, 2018

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* for access to records concerning the removal of certain correspondence from the court file of a matter in which he was involved. The ministry denied access to portions of records on the basis of section 19 (solicitor-client privilege) or because they are not responsive to the request. The appellant appealed the ministry's severances to the records, and claimed that additional records ought to exist. In this order, the adjudicator upholds the ministry's denial of access on both grounds. She upholds the ministry's exercise of discretion under section 49(a) (refusal of requester's own information), in conjunction with section 19. She finds, however, that the appellant has raised reasonable grounds for concluding that additional records may exist, and she orders the ministry to conduct further searches.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 19, 24 and 49(a).

OVERVIEW:

[1] The appellant is a litigant in a private legal matter. The request giving rise to this appeal relates to the appellant's discovery of ministry correspondence in the court file of a proceeding before the Ontario Divisional Court in which he was involved. The appellant had a number of concerns about the inclusion of this correspondence in the court file, including because (he alleges) the correspondence contains inaccuracies, and may have been put before a panel of judges hearing an appeal.

[2] The appellant reports that he raised these concerns with the Court of Appeal, the

Ministry of the Attorney General (the ministry), the Ombudsman of Ontario, and the Ontario Premier, among others. In February 2011, an Assistant Deputy Attorney General wrote to the appellant, stating, among other things, that the type of correspondence described by the appellant would not be put before an appeal panel. In April 2014, the appellant received a letter from a different Assistant Deputy Attorney General, advising that the correspondence identified by the appellant had been "immediately removed from the file in January of 2011" after the appellant brought this matter to the ministry's attention.

[3] The appellant then made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> All documentation, including records of telephone conversations and emails concerning the removal of documents from [an identified Divisional Court file], in January of 2011.
>
> The scope of the search is all departments and personnel within the [ministry]. ...
>
> This is not a request for information from a court file. This request concerns information about the removal of documents from a court file.

[4] The ministry located 38 pages of records responsive to the request, and granted the appellant partial access to them. Specifically, the ministry disclosed 27 pages in full and portions of an additional six pages. The ministry denied access to the remaining pages, in full or in part. Of these, four pages were withheld in full and two pages were partially withheld on the basis of the discretionary exemption for solicitor-client privilege at section 19 of the *Act*. Portions of six pages were withheld on the basis they are not responsive to the request.

[5] The appellant was dissatisfied with the ministry's decision on access. He also believed that additional records must exist. On these bases, he appealed the ministry's decision to the Office of the Information and Privacy Commissioner/Ontario (this office, or the IPC).

[6] As the appeal could not be resolved through mediation, it was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. At this stage, the parties provided representations, which were shared in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[7] The file was transferred to me during the inquiry stage.

[8] In this order, I uphold the ministry's decision to withhold portions of the records on the basis they are solicitor-client privileged or are not responsive to the request. However, I do not uphold the ministry's search for records. As a result, I order the ministry to conduct further searches.

RECORDS:

[9] At issue in this appeal are portions of pages 3, 5, 6, 31, 32 and 36, which have been withheld on the basis they are not responsive to the request.

[10] Also at issue are portions of pages 32 and 33, and pages 34, 35, 37 and 38 in their entirety. All this information has been withheld under section 19.

[11] The appellant also believes that there exist additional records responsive to his request.

ISSUES:

A. What is the scope of the request? Are the withheld portions of pages 3, 5, 6, 31, 32 and 36 not responsive to the request?

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

C. Does the discretionary exemption at section 49(a), in conjunction with section 19, apply to the withheld information in pages 32, 33, 34, 35, 37 and 38? If so, did the ministry exercise its discretion under section 19?

D. Did the ministry conduct a reasonable search for records?

DISCUSSION:

A. What is the scope of the request? Are the withheld portions of pages 3, 5, 6, 31, 32 and 36 not responsive to the request?

[12] The ministry withheld portions of the records on the basis they are not responsive to the appellant's request.

[13] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. The version of section 24 that was in force at the time of the appellant's request states, in part:[1]

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;

[1] Section 24(1)(a) of the *Act* has since been amended to include the requirement that a requester specify that the request is being made under the *Act*. The amendment has no bearing on my findings in this order.

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> ...
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[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]

[15] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[16] The ministry submits that the appellant's request was sufficiently detailed to enable it to identify responsive records, and that it applied a liberal interpretation of the request in deciding that certain portions of the records are not responsive.

[17] The appellant proposes that, on a liberal interpretation of his request, responsive records need not directly refer to the removal of documents from a court file, as long as they identify this matter in some ancillary way.

[18] The appellant's request clearly identifies the records of interest to the appellant. They are those records "concerning the removal of documents" from the specified court file in January 2011, and do not include records that are part of the court file. I have reviewed the portions of the records at issue under this heading, and I agree that they are not reasonably related to the appellant's request. The withheld note on page 3 and the withheld portions of email strings on pages 5, 6, 31, 32 and 36 do not concern the removal of documents from the court file, but instead address administrative and other matters relating to the ministry's responses to the appellant. I confirm for the appellant's benefit that these matters are not ancillary matters captured within the scope of his request, interpreted in a liberal manner.

[19] I therefore uphold the ministry's decision to withhold these portions of the records on the basis they are not responsive to the request.

[20] I observe that the withheld note on page 3 appears to be reproduced on page 29, which the ministry has disclosed to the appellant in full.

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

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

[21] 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 at section 2(1) of the *Act*, which reads, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the 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,
> >
> > (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[.]

[22] 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.[4]

[23] There is no dispute that the records at issue contain the personal information of the appellant. Among other things, the records contain a file number associated with the appellant, his address, and other personal information about the appellant in combination with his name. These qualify as the appellant's personal information within the meaning of paragraphs (c), (d) and (h) of the definition. The records also contain correspondence to and from the appellant that qualifies as his personal information within the meaning of paragraph (f).

[24] Because the records contain the appellant's personal information, the ministry's denial of access to this information is made through the discretionary exemption at section 49(a).

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[4] Order 11.

C. Does the discretionary exemption at section 49(a), in conjunction with section 19, apply to the withheld information in pages 32, 33, 34, 35, 37 and 38? If so, did the ministry exercise its discretion under section 19?

[25] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.[5]

[26] 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.[6]

[27] 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. I discuss the ministry's exercise of discretion separately, below.

[28] In this case, the ministry relies on section 49(a) in conjunction with section 19. Section 19 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[.]

[29] Section 19 contains two branches. In this case, the ministry relies on the common law solicitor-client communication privilege at section 19(a), and the statutory solicitor-client communication privilege at section 19(b). The statutory and common law privileges, although not identical, exist for similar reasons.

[30] I will begin by addressing the common law privilege at section 19(a).

[31] Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[7] The rationale for this privilege is to ensure that a client may freely confide in his or her

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[5] I have reproduced an amended version of section 49(a). The version of section 49(a) that was in force at the time of the appellant's request did not include reference to section 15.1. This has no bearing on my findings in this order.
[6] Order M-352.
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

lawyer on a legal matter.[8] 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.[9]

[32] The withheld information consists of portions of a covering email from ministry legal counsel to a ministry staff person, and attached documents in draft form. I accept that these records were prepared by legal counsel for the purpose of giving legal advice. I also accept, based on the content of the records and the context in which they were prepared, that these communications were intended to be made in confidence. There is no evidence that privilege in these records has been waived.

[33] I accept, therefore, that common law solicitor-client privilege applies to these records and parts of records, subject to my review of the ministry's exercise of discretion. Given my finding, it is unnecessary for me to address whether the statutory privilege also applies.

[34] The appellant does not appear to dispute that the withheld information may be subject to solicitor-client privilege. He argues, instead, that the ministry's exercise of discretion under section 19 should not stand. I will consider these arguments next.

Exercise of discretion

[35] Sections 49(a) and 19 are discretionary exemptions, and permit an institution to disclose information, despite the fact that it could withhold it.

[36] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to exercise its discretion. In addition, the Commissioner may find that the institution erred in its exercise of discretion—for example, by doing so in bad faith or for an improper purpose, by taking into account irrelevant considerations, or by failing to take into account relevant considerations.

[37] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[10] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[11]

- the purposes of the *Act*, including the principles that:
    - information should be available to the public;

[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[10] Order MO-1573.
[11] Orders P-344 and MO-1573.

  - individuals should have a right of access to their own personal information;
  - exemptions from the right of access should be limited and specific;
  - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester 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.

[39] The ministry describes a number of factors that it took into consideration in its exercise of discretion. These include the purposes of the *Act*, including the right of individuals to access their own personal information and the principle that exemptions from the right of access should be limited and specific. The ministry also considered the purposes of the section 19 exemption, including particularly the need to protect a client's willingness and ability to confide in his or her lawyer on legal matters without reservation. The ministry reports that, after careful consideration of all relevant factors, it exercised its discretion to withhold only those limited portions of the records that clearly fall within the section 19 exemption.

[40] The appellant makes a number of arguments in support of his view that the ministry's exercise of discretion was flawed. While I will not repeat them all here, the appellant can be assured that I have considered all his submissions on this topic (including his letter of appeal, which he specifically asked that I consider) in arriving at my finding.

[41] The issue for determination under this heading is whether the ministry exercised its discretion under sections 49(a) and 19, and did so properly. On this topic, the appellant submits that the ministry considered only the general principles of solicitor-client privilege, and failed to provide any other compelling rationale for not releasing

the records. Solicitor-client privilege is the only discretionary basis upon which the ministry denied access. The ministry was not required to provide alternative bases for withholding information from the appellant. I find no flaw in the ministry's exercise of discretion on this ground.

[42] Next, the appellant takes issue with the following passage in the ministry's representations on the issue of discretion:

> 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, that the information was the appellant's own personal information. The ministry submits that, in support of the redactions and taking into account these factors, the ministry clearly responded to the concerns raised by the appellant in his correspondence.

[43] The appellant suggests that "the fact that none of the records would exist" but for his complaints to the ministry is an irrelevant consideration in the ministry's exercise of discretion. I read this part of the sentence together with the part that follows, and understand the ministry to mean that it took into consideration the fact that the records contain the appellant's personal information. This was a relevant factor for consideration by the ministry. The appellant agrees, as he describes several ways in which his need for his personal information qualifies as sympathetic or compelling.

[44] The appellant next objects to the ministry's assertion that it "clearly responded to the concerns raised by the appellant in his correspondence." He denies that the ministry has adequately responded to his concerns about the underlying issue (the inclusion of identified correspondence in the court file). In support of his position, he describes a number of deficiencies in the letter responses that he has received on this issue to date from two different Assistant Deputy Attorneys General.

[45] In reply, the ministry clarifies that its position is that the information withheld under section 19 would not further address the particular concerns raised by the appellant. I agree this was a relevant factor in the ministry's exercise of discretion. This relates to the question of whether disclosure would increase public confidence in the operations of the ministry. While the appellant proposes that disclosure is necessary to address public policy concerns, I find reasonable the ministry's conclusion that the particular information withheld under section 19 would not address these types of concerns. I see no basis for interfering with the ministry's exercise of discretion in this regard.

[46] Finally, the appellant proposes that, as the records relate to events from 2009 to 2011, the age of the information is a factor. He does not explain the impact that this factor ought to have on the ministry's exercise of discretion, and its relevance in these circumstances is not evident to me.

[47] I conclude that the ministry exercised its discretion in applying sections 49(a) and 19, and did so in a proper manner, taking into account relevant considerations and

not taking into account irrelevant considerations. I accordingly uphold its exercise of discretion.

[48] As a result, I uphold the ministry's decision to withhold the information at issue under section 49(a), in conjunction with section 19.

D. Did the ministry conduct a reasonable search for records?

[49] The appellant challenges the ministry's search for responsive records. He devotes a considerable part of his representations under this heading to matters that are outside the scope of this inquiry, and that I will not address here.

[50] The relevant argument made by the appellant has to do with the April 2014 response he received from an Assistant Deputy Attorney General further to his complaints about the discovery of certain correspondence in the court file of the matter in which he was involved. Her response to the appellant indicates that this correspondence was removed from the court file in January 2011.

[51] The appellant observes that the disclosure provided by the ministry to date does not include any records directly addressing the removal of the correspondence, such as records instructing its removal from the court file, or documenting any purpose or authorization for the removal. He submits that any such records should be separate from those for which the ministry claims solicitor-client privilege (and so would not be among the records withheld from him on that basis). The appellant also observes that some of the records disclosed to him include emails from April 2014, in which ministry staff refer to having dealt with this matter in 2011. The appellant speculates that ministry action was taken in response to a letter he sent to the then-Attorney General in January 2011, to which he received a reply (from an Assistant Deputy Attorney General) in February 2011. The appellant submits that there should exist records from this time period addressing the removal of correspondence from the court file in January 2011, or correlating that action to senior ministry staff's awareness of his concerns in January and February 2011.

[52] While I invited the ministry to address the appellant's representations on this issue, the ministry merely reiterated its reliance on its earlier representations, in which it asserts that it took all reasonable steps to search for responsive records. With these representations, the ministry provided an affidavit of the Issues Coordinator for the ministry's Court Services Division, who had coordinated the search for records in response to the appellant's request. The Issues Coordinator explained that because the request was for documentation regarding a court file in Newmarket, he emailed the Court Services Division Regional Office for the Central East Region (of which Newmarket is a part) to ask that all email recipients identify and provide records responsive to the appellant's request. He reports that he asked the email recipients to ensure that all court staff had searched for responsive records.

[53] After reviewing the documents received as a result of this search, the Issues Coordinator determined that legal counsel had been consulted on matters involving the

appellant. He accordingly emailed legal counsel in the Family Policy and Programs Branch and the Civil Policy and Programs Branch to request that all staff in these branches search for the requested records. The Issues Coordinator reports that 38 pages of documents were located as a result of these searches.

[54] The ministry states that it is not aware of the destruction of any records responsive to the request. It reports that court files are sent to a record storage facility and can be retrieved by court staff as required.

[55] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[12] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[56] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[13]

[57] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[14]

[58] In this case, I find the appellant has raised a reasonable basis for concluding that additional records may exist. The appellant has provided evidence that senior levels of the ministry were aware of, and attempted to address, his concerns about the contents of his court file in early 2011. In these circumstances, I find it reasonable to expect the ministry to have generated records on this topic during this time period. However, the searches conducted by the ministry to date have not identified any responsive records from this time period, and none that directly addresses the decision to remove the identified correspondence from the court file. This raises questions about the reasonableness of the ministry's search.

[59] The searches conducted by the ministry involved Newmarket court staff, and legal counsel and staff from two branches of the ministry. The searches did not include the office of the Minister (the Attorney General), who received the appellant's correspondence in January 2011, or of the Assistant Deputy who responded to the appellant on the Attorney General's behalf in February 2011, or of the Assistant Deputy who first informed the appellant, in 2014, that the correspondence had been removed from the court file in 2011. Given their involvement in this matter, I find the failure to include these offices to be a defect in the ministry's searches. I acknowledge the possibility that responsive records may no longer exist in these offices, given the passage of time or for other reasons. This does not relieve the ministry of its obligation

[12] Orders P-85, P-221 and PO-1954-I.
[13] Orders P-624 and PO-2559.
[14] Order MO-2246.

to conduct searches in all places where responsive records could reasonably be expected to exist (or to have existed).

[60] I will therefore order the ministry to conduct a search for responsive records in the offices of the Attorney General and the Assistant Deputy Attorney General. If the ministry determines that responsive records may have existed in these offices, but no longer exist, it must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as relevant retention schedules. While the ministry asserts that it is not aware of the destruction of responsive records, it refers to the retention and storage of court files, which are not the subject of the appellant's request.

[61] Finally, I also find persuasive the appellant's observation that records located by the ministry include emails from 2014 in which ministry legal counsel and staff refer to having dealt with the appellant's matter in 2011, but do not include any responsive records from these same individuals from that time period. The affidavit provided by the ministry's Issues Coordinator offers little detail about the nature of the searches conducted in the two branches of the ministry that resulted in the identification of responsive email records from 2014—including, for example, whether any restrictions were applied on the time period covered by the searches. I have decided, therefore, to order further searches of the Family Policy and Programs Branch and the Civil Policy and Programs Branch of the ministry. If the ministry determines that responsive records from 2011 (or other years) may have existed in those branches, but no longer exist, it must provide details about the destruction of records, as set out above.

[62] If the ministry locates additional records as a result of these searches, it must provide the appellant with an access decision in accordance with the requirements of the *Act*.

ORDER:

1. I uphold the ministry's decision to withhold portions of the records on the basis they are not responsive to the appellant's request.

2. I uphold the ministry's decision to withhold records and portions of records on the basis of section 49(a), in conjunction with section 19.

3. I order the ministry to conduct further searches in response to the appellant's request. These searches must include the offices of the Attorney General and the Assistant Deputy Attorney General, and the Family Policy and Programs Branch and the Civil Policy and Programs Branch of the ministry.

4. I order the ministry to provide me with representations on the searches described in order provision 3. I ask the ministry to provide these representations to me, in writing, by **July 11, 2018**.

The ministry's representations should include an affidavit signed and sworn or affirmed by each person who conducts the searches, which describes, at a minimum:

a. the name and position of the person who conducted the search;

b. details of the searches carried out, including: the dates of the searches; what places were searched; who was contacted in the course of the search; and what types of files were searched;

c. the results of the searches; and

d. whether it is possible that responsive records existed but no longer exist. If so, the ministry must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules.

The ministry's representations may be shared with the appellant, unless there is an overriding confidentiality concern.

5. If the ministry locates additional records as a result of its further searches, it must provide a decision letter to the appellant regarding access to those records, in accordance with the *Act*.

   The ministry must provide a copy of this decision letter to me.

6. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 3 and 4.

Original signed by: June 18, 2018

Jenny Ryu
Adjudicator