Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3872-I

Appeal PA16-139

Ministry of Health and Long-Term Care

August 14, 2018

Summary: This interim order deals with an access request made by two requesters under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Health and Long-Term Care (the ministry) regarding an inspection conducted in response to a complaint made to the ministry concerning the treatment of one of the requesters by a Community Care Access Centre. The ministry provided the two requesters with partial access to the records, withholding some either in part, or in full, claiming the application of the discretionary exemption in section 19(a) (solicitor-client privilege). In this appeal, the two requesters appealed and raised the issue of reasonable search during the mediation of the appeal.

During the inquiry of the appeal, the adjudicator raised with the parties the possible application of the *Personal Health Information Protection Act* (*PHIPA*) to the information contained in the records.

In this interim order, the adjudicator finds that the records contain the personal health information of one of the appellants, but that the records are not dedicated primarily to her personal health information. Therefore, under *PHIPA*, any access rights are limited to only the personal health information of that appellant. The adjudicator goes on to find that the records, including the personal health information, are exempt from disclosure under sections 49(a) and 19(a) of the *Act*, whether applied directly under the *Act*, or through the flow-through provisions in section 52(1)(f)(ii)(A) of *PHIPA*. The ministry's exercise of discretion is upheld. She also concludes that the appellants have established a reasonable basis for believing that further records exist in the office of the Minister of Health and Long-Term Care, and she orders the ministry to conduct a further search for those records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19(a), 24 and 49(a); *Personal Health Information Protection Act*, S.O. 2004, c.3, sections 4(1), 52(1)(f)(ii)(A), 52(3), and 53.

Orders and Investigations Reports Considered: PHIPA Decision 17.

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an appeal of an access decision made by the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request, made by two requesters,[1] was for all records relating to one of the requesters during a specified period of time, as well as all records relating to, prepared or gathered in the course of a specified inspection. The request also listed the names of individuals the search should include. The inspection in question had been conducted by the ministry in response to a complaint it received regarding the actions of a Community Care Access Centre in relation to the admission of the requester to a long-term care facility.

[2] In response, the ministry located responsive records and issued a decision letter to the two requesters, advising that access was granted in part, to the records. The ministry explained that it identified 173 responsive records, and that due to the volume and severances involved, it would disclose the records in three batches.

[3] The ministry withheld portions of the records either in whole or in part, claiming the application of the mandatory exemption in section 21(1) (personal privacy), the discretionary exemption in section 19(a) (solicitor-client privilege) and the exclusion in section 65(6) (employment or labour relations). The ministry also advised that some information was withheld as it was not responsive to the request.

[4] The requestors, now the appellants, appealed the ministry's decision to this office. Prior to the commencement of mediation, the ministry issued a letter to the appellants, advising that it had conducted a further search for records, located two more records, and disclosed them, in full to the appellants.

[5] The appeal then moved to the mediation stage of the appeals process. During mediation, the appellants advised that they were not seeking information that was withheld under section 65(6), or identified by the ministry as not responsive to the request. The appellants confirmed that they were seeking disclosure of all records for which the ministry claimed section 19(a).

[6] Also during mediation, the appellants raised the issue of reasonable search. In

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[1] One of the requesters has the Power of Attorney for personal care, financial and legal matters of the other requester.

response, the ministry conducted another search for records identified by the appellants. In the first of two responding letters, the ministry advised that it had searched for records with its Communications and Marketing Division and the Deputy Minister's Office. The ministry identified six responsive records, which were provided to the appellants. Concerning the search of the Minister of Health's records, the ministry stated:

> I understand that you also contacted your local Member of provincial parliament's (MPP) constituency office on this matter; and that the MPP is also the current Minister of Health. Please note the Freedom of Information and Protection of Privacy Act applies only to records in the custody and control of the institution, the Ministry of Health and Long-Term Care. The Act does not provide a right of access to constituency records held by a member of the Legislative Assembly.

[7] The ministry subsequently issued a second letter to the appellants. The ministry advised that it had conducted a further search of the email account of a departed employee, and that, as a result, it identified 189 responsive records. The ministry provided an index of records as well as partial access to the records it located as a result of this search. The ministry withheld some records either in whole, or in part, claiming the exemptions in sections 19(a) and 21(1), as well as noting that some of the information in the records was not responsive to the request.

[8] The appellants informed the mediator that they were not satisfied with the ministry's response, and asserted that additional responsive records should exist. At the conclusion of mediation, the appellants confirmed that they were not seeking information that the ministry identified as not responsive to the request.

[9] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. During the inquiry, the ministry issued a supplementary decision to the appellants, disclosing six records under the *Personal Health Information Protection Act* (*PHIPA*) in whole, that had previously been disclosed in part. The ministry advised that the records, which it originally claimed contained "personal information" actually contained one of the appellants' "personal health information," and the ministry did not claim any of the exemptions in *PHIPA* to these records. As a result of the disclosure of these records in their entirety, they (for which section 21(1) had been originally claimed) and section 21(1) are no longer at issue.

[10] Initially, I sought and received representations from both parties on the possible application of section 19(a) of the *Act* to the records, the ministry's exercise of discretion, and its search for records responsive to the request. I received representations from the ministry and the appellants.

[11] I then provided the parties with the opportunity to provide representations on

new issues, namely the possible application of the *Personal Health Information Protection Act* (*PHIPA*) to the records at issue. I received further representations from the ministry and the appellants regarding the possible application of *PHIPA* to the records.

[12] For the reasons that follow, I find that the records contain the personal health information of one of the appellants, but that the records are not dedicated primarily to her personal health information. As a result, under *PHIPA*, the appellants' right of access is limited to only personal health information that can reasonably be severed. I also find that the records, including the personal health information, are exempt from disclosure under sections 49(a) and 19(a) of the *Act*, whether applied directly under the *Act* or through the flow-through provisions in section 52(1)(f)(ii)(A) of *PHIPA*. I uphold the ministry's exercise of discretion, but not the ministry's search for records. I order the ministry to conduct a further search for records held by the Minister of Health and Long-term Care.

RECORDS:

[13] There are voluminous records, consisting of emails, many with attached letters and reports.

ISSUES:

A. Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

B. If the records contain "personal health information," are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3)?

C. Do any of the legal privilege exemptions apply to the records?

D. Did the ministry exercise its discretion under section 49(a) of the *Act* and section 52(1)(f) of *PHIPA*? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Preliminary Issue

[14] Section 52 of *PHIPA* grants an individual a right of access to a record of their own personal health information that is in the custody or under the control of a health

information custodian, subject to limited exceptions and exclusions.

[15] The *Freedom of Information and Protection of Privacy Act* (the *Act*) grants an individual a right of access to records of general information under Part II and to their own personal information under Part III which is in the custody or under the control of an institution, subject to certain exemptions and exclusions. Under section 8(4) of *PHIPA*, a person may still have a right of access under the *Act* to information in a record of personal health information, if that health information can be reasonably severed from the record.

[16] There is no dispute that the ministry is an institution subject to the *Act* under section 2(1), and is also a health information custodian subject to *PHIPA* under section 3(1).

[17] In this case, the request is for information relating to one of the appellants as well as records relating to a specified inspection. In situations where both *PHIPA* and the *Act* could apply, the approach of this office is to first consider the extent of any right of access under *PHIPA*, and then consider the extent of any right of access under the *Act* to any records or portions of records for which a determination under *PHIPA* has not been made.[2]

[18] In order to determine if the appellants have a right of access under *PHIPA*, it is necessary to determine whether the records contain "personal health information" as defined in section 4(1) of *PHIPA*.

Issue A: Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

[19] "Personal health information" is defined in section 4 of *PHIPA* as follows:

> (1) In [*PHIPA*],
>
> > "personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,
> >
> > > (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
> > >
> > > (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

[2] See PHIPA Decision 73.

> (c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
>
> (d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,
>
> (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
>
> (f) is the individual's health number, or
>
> (g) identifies an individual's substitute decision-maker.
>
> (2) In this section,
>
> "identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.
>
> (3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[20] The ministry submits that the records at issue contain one appellant's personal health information because they all relate to her admission and discharge from a long-term care home, and to a complaint made by her family in respect of the Community Care Access Centre's process in admitting her to that home. This information, the ministry submits, falls within paragraphs (a) and (b) of the definition of personal health information in section 4(1).

[21] The appellants submit that all of the records contain the personal health information of one of the appellants, including details of her mental and physical health, her treatment, plan of service, substitute decision-makers, the complaint about her treatment and the ministry's inspection. The appellants further submit that the records contain personal health information, falling within the type of information set out in both sections 4(1) and 4(3) of *PHIPA*.

[22] I find that the records contain the personal health information of one of the appellants. That appellant is identified in the records along with information falling within paragraphs (a), (b) and (g) of the definition of personal health information in *PHIPA*. In particular, there is information regarding her physical health; the provision of

health care to her, including the identification of a provider of health care to her; and the identity of her substitute decision-maker.

[23] Having found that these records contain the appellant's personal health information, I will now determine the extent of the appellant's right of access, under section 52 of *PHIPA*, to the information in the records.

Issue B: If the records contain "personal health information", are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

[24] To determine the extent of the appellants' right of access to the records under *PHIPA*, I must determine whether the records are "dedicated primarily" to the personal health information of one of the appellants. This is because the right of access in *PHIPA*, subject to any applicable exemptions, applies either to a whole record under section 52(1) or only to certain portions of a record of personal health information under section 52(3).

[25] Section 52(3) of *PHIPA* states:

> Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[26] The ministry submits that the right of access under *PHIPA* does not depend on whether the records contain personal health information or whether they are dedicated primarily to personal health information because the records are exempt from disclosure, on the basis that they are solicitor-client privileged. It goes on to submit that, in any event, the records are not dedicated primarily to one of the appellant's personal health information. The ministry further submits that:

- the main purpose of the records was to address legal issues "arising but several steps removed from the health care issues that led to the creation of the records;"[3]
- the records were created after the appellant's discharge from the long-term care home;
- the records were not created to document any of the appellant's health care issues or the care provided to her at the home; and

[3] See PHIPA Decisions 17, 24 and 30.

- the records are qualitatively about other matters, namely the seeking and giving of legal advice.

[27] The appellants submit that all of the records are dedicated primarily to personal health information about the individual seeking access, within the meaning of section 52(3). In particular, the appellants submit that the information in the records was collected and prepared for the dominant purpose of responding to the complaint, focusing on the appellant's health care plan, and the treatment she received.

[28] As previously stated, the extent of the appellants' right of access under *PHIPA* depends on whether the records are "dedicated primarily" to personal health information about one of the appellants. Under section 52(3) of *PHIPA*, if a record is not "dedicated primarily" to personal health information about the individual requesting access, the requester only has a right of access to any personal health information that can reasonably be severed from the record, subject to any exemptions claimed.

[29] I have reviewed the records at issue, and I find that they are not dedicated primarily to the personal health information of the individual to whom it relates. PHIPA Decision 17 sets out this office's approach to the interpretation of section 52(3). In order to determine whether a record is "dedicated primarily" to the personal health information of a requester within the meaning of section 52(3), this office takes into consideration various factors, including:

- the quantity of personal health information of the requester in the record;
- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for the creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist "but for" the personal health information of the requester in it.[4]

[30] Applying and adopting the qualitative analysis this office established in PHIPA Decision 17, I find that the central purpose of the records was to seek and provide legal advice in conducting an inspection of the appellants' complaints to the ministry about one appellant's admission to a long-term care facility, and that the personal health information in the records is not central to the purpose of the records. I accept the

[4] This list is not exhaustive.

ministry's evidence that the records were not created to document any health care issues arising from the appellant's admission to a long-term care facility. Instead, I accept that ministry staff generated the records at a later date, for the purpose of seeking and giving legal advice as part of an inspection into a complaint. The personal health information in the records is incidental to this purpose. This is also evident from my review of the records.

[31] Having found that the records are not dedicated primarily to the personal health information of the appellant, the appellant's right of access under *PHIPA* is limited to any of her personal health information that can reasonably be severed from the record, subject to any applicable exemptions. In this case, it is unnecessary for me to determine, for each record at issue, whether the personal health information can be reasonably severed for the purpose of providing access to it under section 52(3). The result would be the same in either event. The ministry argues and I conclude, for the following reasons, that all of the information in the records is exempt under section 49(a)/19(a) of the *Act*, whether applied directly or as a "flow through exemption" available under section 52(1)(f)(ii)(A) of *PHIPA* (see below).

Issue C: Do any of the legal privilege exemptions apply to the records?

[32] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Above, I found that all the records contain the personal health information of one of the appellants, as defined in *PHIPA*. This information also qualifies as the personal information of the appellant under the *Act*.[5]

[33] Section 49 of the *Act* provides a number of exemptions from the right of access in section 47, including the solicitor-client privilege in section 19.

[34] For the portions of the records to which the appellants may have a right of access under section 52(3) of *PHIPA*, the section 49(a)/19(a) exemption in the *Act* is available by reason of section 52(1)(f)(ii)(A) of *PHIPA* (the "flow through exemption"), which states:

> Subject to [Part V of *PHIPA*, governing the right of access], an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless [. . .] the following conditions are met:
>
> > the custodian would refuse to grant access to the part of the record under clause 49(a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record [.]

[5] See the definition of "personal information" under the *Act*, which includes information relating to the "medical history" of an individual.

[35] For the remaining portions of the records, the exemption at section 49(a)/19(a) of the *Act* may apply directly.

[36] In this case, the ministry relies on the discretionary exemption at section 49(a)/19(a) of the *Act* to deny access to the records in their entirety. The ministry's position is that the records are exempt, in full, on the basis of solicitor-client privilege.

[37] In particular, the ministry is claiming the application of section 19(a) to records 1, 2, 3, 4, 5, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 35, 36, 38, 39, 44, 45, 47, 48, 49, 50, 51, 52, 55, 58, 60, 61, 62, 68, 72, 76, 77, 78, 84, 88, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109, 110, 112, 115, 117, 118, 119, 120, 121, 128, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 142, 143, 144, 147, 148, 149, 150, 153, 158, 159, 161, 164, 166, 167, 169, 171 and 173 listed in its initial Index of Records, and to records 1, 2, 3, 5, 6, 18, 19, 22, 24, 26, 27, 37, 39, 47, 48, 51, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 76, 102, 104, 105, 106, 108, 109, 111, 112, 114, 117, 120, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 169, 170, 171, 175, 177, 178, 183 and 185 listed in its second Index of Records.

[38] Section 19(a) of the *Act* states:

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

[39] 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 ministry must establish that one or the other (or both) branches apply.

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

[41] 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

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[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.[8]

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

[43] 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]

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

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[12]

[45] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[13]

[46] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[15]

Representations

[47] The ministry submits that the above-referenced records are emails that consist of, contain, reflect or refer to legal advice provided by ministry counsel, or that were prepared by or for ministry counsel for use in giving or receiving legal advice and are, therefore, subject to the solicitor-client privilege exemption in section 19(a) of the *Act*. The ministry further submits that the records fall into two types, namely communications between ministry clients and ministry counsel, and communications between clients.

[48] Concerning the emails between ministry clients and ministry counsel, the ministry argues that the records contain, reflect or refer to legal advice provided by counsel to

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[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.).
[12] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[13] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[14] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[15] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

staff. In addition, these emails form part of the continuum of communications exchanged between a lawyer and client through which "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."[16] The ministry further submits that the exemption has been applied to records in which ministry counsel requests information for the purpose of providing legal advice or ministry clients provide counsel with updates on information germane to previous or requested legal advice.

[49] Turning to the communications between ministry staff, which the ministry submits were all treated as confidential communications, it also argues that past orders of this office have upheld the application of section 19 to communications between clients, namely emails that:

- refer to, transmit or paraphrase confidential legal advice;
- comment on advice provided by legal counsel;
- were created for the purpose of obtaining legal advice; or
- refer to or contemplate a request for legal counsel's advice.

[50] The appellants advise that part of the access request was for records relating to an inspection that was conducted by the ministry. This inspection, the appellants state, was initiated by the ministry in response to a letter of complaint sent by the appellants about the mistreatment one of them experienced when she was placed in a long-term care home. According to the appellants, the ministry conducted an inspection and provided them with a report, but refused to answer questions about the inspection or provide any information to support the findings in the inspection report. The appellants subsequently filed the access request that is the subject matter of this appeal.

[51] Regarding the application of section 19 to the records at issue, the appellants state that while they accept the importance of solicitor-client privilege, they are concerned that the ministry may have exempted some information that is not actually legal advice or may have incorrectly exempted internal staff discussions which were not truly part of the continuum of communications about the received legal advice.

[52] Regarding communications between legal counsel and ministry staff, the appellants rely on past orders of this office. In Order MO-1454, Assistant Commissioner Sherry Liang found that the presumption of confidentiality is subject to the purpose of the communications. She further found that some of the communications were not subject to the municipal equivalent of section 19 because there was nothing on the face of the record that supported its characterization as a communication given for the purpose of giving or receiving legal advice. Similarly, in Order MO-3433, Adjudicator

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[16] See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), PO-1663 and PO-3270.

Justine Wai found that even though a communication was between legal counsel and a city's staff, it was administrative in nature and not related to the seeking, formulating or providing legal advice.

[53] Concerning the communications between ministry staff, the appellants submit that the ministry may have applied this exemption too broadly. They rely on two orders of this office to support their position, stating that in Order MO-1258, Assistant Commissioner David Goodis found that internal communications can form part of the continuum of communications if the records contain communications that were made for the dominant purpose of giving or receiving legal advice. Similarly, in Order M-1112, former Adjudicator Donald Hale found that the dominant purpose of the creation of a record was not for legal counsel's use in giving legal advice. The appellants further submit that many of the internal discussions about the inspector's findings were conducted by ministry staff for the purpose of exchanging expert, non-legal advice.

[54] The appellants go on to argue that the records relating to the inspection that was conducted may have been created for multiple purposes. The appellants, who have a copy of the inspection report, advise that the report states "[t]he purpose of this inspection was to conduct a Complaint inspection." The appellants state:

> It is clear that the ongoing "continuum of communications" between ministry staff served multiple purposes, including discussion of legal considerations but also including internal review of the inspector's findings and sharing of management instructions.

[55] Lastly, the appellants submit that where there is privileged and non-privileged information contained in the same record, the information that is not subject to solicitor-client privilege can be disclosed.[17]

[56] In reply, the ministry states that the appellants imply that some of the records contain factual information or other information that do not constitute legal advice, and should be severed and disclosed. The ministry goes on to argue that in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*,[18] the Ontario Court of Justice held that once solicitor-client privilege is established, a communication in its entirety is subject to that privilege. As a result, the ministry submits, section 19 applies to reports and other factual information provided to legal counsel for the purpose of receiving legal advice, and not solely the legal advice itself. This approach, it argues, has been consistently applied by this office in past orders. Lastly, the ministry submits that any potential severance to the records for which it claimed the application of section 19 would either reveal information that is exempt under section 19 or would result in the disclosure of disconnected pieces of information that would be meaningless, and devoid of context.

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[17] See, for example, Order PO-3477.
[18] [1997] OJ No. 1465.

Analysis and findings

[57] At the outset, I note that there is an astounding amount of duplication of content in these records, due to fact that they consist of email chains in which several ministry staff were the recipients of these emails. While the records are voluminous, the reason for that is due to the duplication of content. For example, many emails have an attached report or letter; it is the same report and the same letter in all of the emails. So, while it appears on its face that the ministry has withheld extensive material, in fact, it has not.

[58] Upon my review of the records, I find that most of the records at issue consist of the following information:

- the seeking of and giving of legal advice between ministry staff and legal counsel;
- the seeking of and giving of legal advice and review of a draft report and two draft letters, many with track changes;
- records specifically prepared for, or provided to, legal counsel for the purpose of seeking legal advice;
- discussions amongst ministry staff that reveal legal advice that was given; and
- internal discussions amongst ministry staff regarding the seeking of legal advice.

[59] As a result, I find that most of the records consist of privileged communications between a lawyer and her client. Most of the records are communications between the ministry's legal counsel and ministry staff, in which legal advice is sought and given, including legal advice on the drafting of certain letters and a report, as well as ongoing legal advice as to how to conduct the inspection. Further, information is provided to legal counsel to assist her in formulating the legal advice, including the information gathered by the inspector as part of the inspection process. In my view, this information amounts to either direct communications of a confidential nature exchanged in the course of giving and receiving legal advice, or falls within the type of information that can be characterized as part of a continuum of communications between lawyer and client, necessary in order to permit advice to be sought and received. I find that these records fall within the requirements of section 19(a) and are exempt from disclosure.

[60] Other records are communications amongst ministry staff. While I acknowledge that these records do not contain direct communications between ministry staff and legal counsel, I note that this office has previously applied section 19 where disclosure would reveal the content of the communications between a solicitor and client, or

where the internal communications contain instructions to seek legal advice on a particular issue.[19] On my review of the ministry's representations and the records, I find that the exchange of information in the communications is either in the context of planning to seek legal advice from legal counsel, or indirectly or directly revealing the content of communications with legal counsel. Therefore, I find that this withheld information consists of communications, which if disclosed, would reveal the content of solicitor-client communications between the ministry and its legal counsel.

[61] Additionally, the appellant has not alleged, nor have I any evidence before me that the ministry has waived its privilege. Consequently, subject to my findings regarding the ministry's exercise of discretion, I find that all of the information at issue, including the personal health information, is subject to solicitor-client privilege and is exempt from disclosure under section 49(a)/19(a) of the *Act*, applied directly (for the information that is not personal health information) or as a "flow-through" exemption under *PHIPA* (for the information that is personal health information).

Issue D: Did the ministry exercise its discretion? If so, should this office uphold the exercise of discretion?

[62] The section 52(1)(f)(ii)(A) exemption in *PHIPA* and the section 49(a) exemption in the *Act* are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[63] 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, or it fails to take into account relevant considerations.

[64] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] This office may not, however, substitute its own discretion for that of the institution.

[65] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[21]

- 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; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;

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[19] See, for example, Orders PO-2087-I, PO-1631 and MO-3326.
[20] Order MO-1573.
[21] Orders P-344 and MO-1573.

- 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;
- whether disclosure will increase public confidence in the operation of the institution;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[66] The ministry submits that the head exercised his discretion properly in applying section 19 to the records at issue, taking into account relevant considerations and not taking irrelevant considerations into account. The ministry states that it weighed the principle of the public's right of access to government information against the importance of keeping privileged communications between legal counsel and the ministry confidential.

[67] In support of its position, the ministry refers to the case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[22] in which the Supreme Court of Canada cited a line of cases which establish that the purpose of the exemption in section 19 is to protect solicitor-client privilege, "which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."[23]

[68] The ministry goes on to state:

> Accordingly, when exercising the discretion to withhold documents under s. 19, the head must consider not only the public interest in disclosure, but also the competing public interest in upholding the solicitor-client privilege, and thus *not* disclosing records that are clearly subject to the privilege. The Supreme Court of Canada in *Criminal Lawyers' Association* upheld the head's decision to not disclose the records that were subject to the s. 19 exemption.

[69] The appellants request that this office review the considerations made by the head when exercising discretion to not disclose the records under section 19.

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[22] [2010] 1 S.C.R. 815 (S.C.C.) (*Criminal Lawyers' Association*).
[23] See para. 53.

[70] On my review of the parties' representations and the records themselves, I am satisfied that the ministry properly exercised its discretion, taking into consideration the importance of solicitor-client privilege, while balancing the appellants' right of access. I note that in many instances, the ministry only withheld portions of records, and disclosed as much of the records as possible to the appellants, despite claiming the application of section 19. Consequently, I uphold the ministry's exercise of discretion.

Issue E: Did the ministry conduct a reasonable search for records?

[71] Where a requester claims that additional records exist, the issue to be decided is whether a reasonable search was conducted for records in accordance with statutory requirements.[24] 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.

[72] 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.[25] To be responsive, a record must be "reasonably related" to the request.[26]

[73] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[27]

[74] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[28]

[75] 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.[29]

[76] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[30]

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[24] See section 53 of *PHIPA* and section 24 of the *Act*. See also Orders P-85, P-221 and PO-1954-I and MO-3644
[25] Orders P-624 and PO-2559.
[26] Order PO-2554.
[27] Orders M-909, PO-2469 and PO-2592.
[28] Order MO-2185.
[29] Order MO-2246.
[30] Order MO-2213.

Representations

[77] The ministry provided its evidence on this issue by way of an affidavit sworn by a Senior Manager in the ministry's Inspections Branch of Long Term Care Homes Division, who was involved in the search for responsive records in response to the access request. The ministry advises that the records relating to the inspection were located at the Toronto Service Area Office (TSAO), and were stored in paper and electronic formats. Electronic records are stored on an internal common drive, organized by the name of the long-term care home, the year and inspection number. The paper files are stored in office filing cabinets by the name of the long-term care home, year and inspection number. The type of records include inspection reports, inspection documents obtained or collected by the inspector during the course of the inspection or submitted by licensees of long-term care homes, and general correspondence. The electronic and paper inspection file was available on-site at the time of the request.

[78] The ministry's access and privacy office received the request and forwarded it on to the program area contact in the Long Term Care Homes Division. The ministry sets out who was responsible for conducting searches including the following:

- the former acting manager of the TSAO;
- the acting manager of the TSAO at the time;
- the inspector;
- the Communications and Marketing Division; and
- the Minister of Health and Long-Term Care's office.

[79] The relevant staff members then searched their records and email accounts using specified key words (that were set out in the request). The inspector was no longer employed with the ministry, so other staff searched the inspector's electronic email files, which were retrieved from IT archives. The inspector's desk was also searched. Staff also searched the TSAO filing cabinets containing hard copy inspection files. Staff also contacted the former inspector, who confirmed that she had no notes or other documents in her possession, and that all of her notes and inspection details had been either input into the electronic inspection application or placed in the hard copy file. The ministry states that the TSAO searches yielded hundreds of records, which were disclosed to the appellants in batches.

[80] The ministry also advises that a total of six records from the Communications and Marketing Division and the Minister's office were disclosed to the appellants.

[81] The appellants submit that they believe further records exist. In particular, the appellants are of the view that three categories of records exist, but were not disclosed to them, namely:

- any letters, communications, notes and/or comments sent to and from the then Acting Minister of Health and Long-term Care (Minister Hoskins). The appellants argue that the ministry incorrectly claimed that the Minister was the appellants' local MPP and that he was contacted by the appellants as constituents. The appellants advise that the Minister was never their local MPP and they did not contact him regarding constituency issues, but that they did contact him in his capacity as Minister. The appellants cited examples of the types of records that should be in the Minister's record-holdings including letters, a petition, petition updates, and discussions regarding the individual who is the subject of the request, including the public apology provided by the Minister to the appellants.

- the inspector's internal reports and summary of facts which supported her published findings and conclusion; and

- records that are known to exist, such as letters to the inspector, the Inspector's Quality Solution, a document entitled "Draft for discussion with CCAC," and a post-inspection letter to the CCAC.

[82] In reply, the ministry continues to rely on the affidavit evidence it provided, and notes that one record responsive to the request was located in the Minister's office, which was disclosed in its entirety to the appellants.

Analysis and findings

[83] I find that the appellants have established a reasonable basis for believing that further records exist. In particular, I am persuaded that there may be further records in the record-holdings of the Minister of Health and Long-term Care, as described above by the appellants.

[84] The ministry indicated in one of the supplementary decision letters it issued to the appellants during the mediation of the appeal that the records belonging to the appellants' MPP, who was also the Minister of Health, are constituency records that are not in the ministry's custody or control.[31] The appellants argue that the Minister was not their MPP, and that any records with the Minister were not constituency records but related to his capacity as the Minister.

[85] Whether records in a Minister's office are in the custody or control of the ministry depends on a number of factors, including whether the record relates to a ministry matter or whether they are more properly characterized as constituency or political records.[32]

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[31] I note that the ministry did not advance this position in its representations.
[32] See *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306 and Orders MO-2821, Mo-3287 and MO-3281.

[86] Based on the information before me, including the fact that the ministry has identified one record in the Minister's office as responsive to the request, and in the ministry's custody or control, I am unable to accept that the remainder of the records relating to the appellants' request are necessarily outside of the ministry's custody or control.

[87] In addition, given that the Minister has provided a public apology regarding the individual who is the subject matter of the request, it is reasonable to conclude that further records may exist in the Minister's office in relation to that individual, other than the sole record that was located in the Minister's office, as described by the Ministry. I will, therefore, order the ministry to conduct a further search for all responsive records sent to and from the Minister in relation to the individual specified in the access request over the time period specified in the request, focusing the search on correspondence, emails, text messages and notes.

[88] Conversely, I find that the ministry has established that it conducted a reasonable search for all of the other records responsive to the request. The affidavit evidence provided was comprehensive and persuasive with respect to these records. I also note that some of the records the appellants have referred to were located as part of the ministry's original search, but were not disclosed to them by the ministry on the basis of section 19(a), which I have upheld.

ORDER:

1. I uphold the ministry's access decision with regard to the exemptions claimed under *PHIPA* and the *Act*, and find that the records at issue are exempt from disclosure.

2. I do not uphold the ministry's search for records responsive to the request. I order the ministry to conduct a further search for records, within 30 days of the date of this order, in the office of the Minister of Health and Long-term Care in relation to the individual specified in the request over the time period specified in the request, focusing the search on correspondence, emails, text messages and notes.

3. I order the ministry to provide representations to the appellants and this office, within 30 days of this order, detailing the further search for records responsive to the request.

4. Should the ministry locate further records responsive to the request, I order it to issue an access decision to the appellants, within 30 days of the completion of the search.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 2 and 3 of this order.

Original Signed by: August 14, 2018

Cathy Hamilton
Adjudicator