Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3932

Appeal PA17-19

Ministry of Health and Long-Term Care

February 26, 2019

Summary: The Ministry of Health and Long-Term Care (the ministry) received an access request for briefing materials generated by the ministry and provided to other ministries pertaining to the Ontario government's reimbursement of Ontario physician medical liability insurance. The ministry denied access to the responsive records, citing the employment or labour relations exclusion in section 65(6)3 for all of the records. In the alternative, it claimed the application of the exemptions in sections 12(1) or 19.

The adjudicator upholds the ministry's decision that one record is excluded under section 65(6)3. She finds that the remaining records are exempt by reason of the introductory wording in the mandatory Cabinet records exemption in section 12(1) or under the discretionary solicitor-client exemption in section 19(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(6)3, 12(1), 19(b).

Orders and Investigation Reports Considered: Order PO-2497.

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2003] O.J. No. 4123 (C.A.); *Canadian Medical Protective Assn. v. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.).

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (MOHLTC or the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act*

(*FIPPA* or the *Act*) as follows:

> I am seeking access to general records (non-personal information) to all briefing materials generated by the ministry and provided to other Government of Ontario ministries pertaining to medical liability insurance or medical malpractice liability for health care professionals in Ontario.
>
> I am seeking records ranging from April 1, 2014 and April 1, 2016.

[2] The ministry issued a decision indicating that it located eleven records responsive to the request, two from its Corporate Services Division (CSD) and nine from its Legal Services Branch (LSB).

[3] The ministry denied access to the requested records pursuant to the exemptions in sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 19(a) and (b) (solicitor-client privilege) and the exclusion in section 65(6)3 (employment or labour relations) of the *Act*.

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

[5] As mediation did not resolve the issues in this appeal, it was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[6] Representations were then sought from the ministry and provided to the appellant. In its representations, the ministry withdrew its section 13(1) claim and expanded its section 65(6)3[1] claim to all of the records at issue. The appellant did not provide representations in response.

[7] In this order, I uphold the ministry's decision that Record LSB-8 is excluded from the application of the *Act* under section 65(6)3. I also uphold its decision that Records CSD-1 and CSD-2 are exempt under section 12(1) and that Records LSB-1 to LSB-7 and LSB-9 are exempt under section 19. Given this finding, all of the records at issue are either excluded or exempt and, therefore, I dismiss the appeal.

RECORDS:

[8] The ministry has claimed the application of section 65(6)3 for all 11 records at issue. As well, it has claimed exemptions in the alternative to the section 65(6)3 exclusion, as set out in the following chart:

Record #	Description	# of pages	Exemptions claimed

[1] The ministry initially claimed section 65(6)3 for only one record, Record LSB-8.

			in the alternative to the section 65(6)3 exclusion
CSD-1	Treasury Board Record	9	12(1), 12(1)(b), 13(1)
CSD-2	Report to Treasury Board	4	12(1), 12(1)(a)
LSB-1	Email dated September 12, 2014 with three attachments between MOHLTC and Ministry of Attorney General (MAG) counsel.	23	19(a) and (b)
LSB-2	Email dated October 15, 2014, with one attachment, between and among MOHLTC counsel and various counsel at MAG, Ministry of Government Services (MGS) and Ministry of Citizenship and Immigration (MCI)	4	19(a) and (b)
LSB-3	Email dated October 15, 2014, with one attachment, between MOHLTC counsel and Assistant Deputy Attorney General	3	19(a) and (b)
LSB-4	Email dated October 16, 2014, with three attachments, from MOHLTC counsel to various MAG counsel	7	19(a) and (b)
LSB-5	Email dated January 8, 2016, with attachment, between MOHLTC and MAG counsel	5	19(a) and (b)
LSB-6	Email dated October 29, 2014, between MOHLTC and MAG counsel	2	19(a) and (b)
LSB-7	Email dated October 1, 2014, between MOHLTC and MAG counsel	1	19(a) and (b)
LSB-8	Email dated September 19, 2014, with attachments,	31	19(a) and (b)

	between MOHLTC and MAG counsel		
LSB-9	Email dated September 12, 2014, with attachment, between MOHLTC and MAG counsel	17	19(a) and (b)

ISSUES:

A. Does the employment or labour relations exclusion in section 65(6)3 exclude the records from the *Act*?

B. Does the mandatory Cabinet records exemption at section 12(1) apply to Records 1 and 2 from the CSD Index?

C. Does the discretionary solicitor-client privilege exemption at sections 19(a) or (b) apply to the records in the LSB Index (other than Record LSB-8)?

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

DISCUSSION:

Issue A: Does the employment or labour relations exclusion in section 65(6)3 exclude the records from the *Act*?

[9] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[10] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[11] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[2]

[12] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[3]

[13] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[4]

[14] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[5]

[15] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[6]

[16] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[7]

[17] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[3] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[4] Order PO-2157.
[5] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[6] Orders P-1560 and PO-2106.
[7] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[18] By way of background, the ministry states that it bargains collectively with physicians through their representative, the Ontario Medical Association (OMA), regarding physician compensation and other issues including liability coverage. It states that since the ministry and Ontario physicians are not in an employer/employee relationship, the term "collective bargaining" in this context must be understood in its broadest sense, to include negotiations with representatives of persons who are not employees.

[19] The ministry states that it partially reimburses all physicians practicing in Ontario for the cost of their medical malpractice coverage by paying an annual subsidy towards their yearly liability insurance dues paid to the Canadian Medical Protective Association (CMPA). It submits that the reimbursement of these fees is a form of compensation that the ministry provides to physicians and is an issue that forms part of the ministry's negotiations with the OMA.

[20] The ministry submits that the characterization of the ministry-OMA relationship as a "labour" relationship, and their negotiations as similar to "labour" negotiations, is generally accepted and, therefore, these constitute negotiations about "labour relations matters in which the ministry has an interest", as this phrase is used in the *Act*. The ministry relies on the Ontario Court of Appeal decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*.[8]

[21] The ministry states that the negotiations it has with the OMA about the amount of reimbursement of the liability insurance take place through a number of joint committees, with the primary, umbrella joint committee being the Physician Services Committee (PSC). It states:

> The Medical Malpractice Coverage Committee (now called the Medical Professional Liability Committee – the "MPLC") is a subcommittee of the PSC and, like the PSC, is composed of representatives appointed by each of the interested parties – the ministry, the OMA and the CMPA[9] – and a neutral facilitator. The MPLC works with the ministry, the OMA and the CMPA to determine, amongst other medical malpractice issues, the cost of medical malpractice fees for physicians, and the amount of the ministry subsidy.

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[8] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.), (the "2003 Court of Appeal decision").

[9] The ministry states that the CMPA provides medical malpractice coverage to physicians throughout Canada, including the vast majority of Ontario.

> The MPLC's … mandate includes reviewing and making recommendations regarding the reimbursement of medical malpractice fees.
>
> A tripartite MOU [Memorandum of Understanding] entered into by the ministry, the OMA and the CMPA expired on March 31, 2014. Following the expiry of the MOU on March 31, 2014, the ministry entered into negotiations with the OMA and the CMPA for the purpose of coming to a new agreement. [The records at issue] relate to those negotiations.

[22] I will now consider each part of the three-part test for exclusion under section 65(6)3.

Part 1: collected, prepared, maintained or used

[23] Concerning this part, the ministry states that the records were collected, prepared, maintained and/or used by it in the context of its negotiations with the OMA and the CMPA.

Analysis/Findings re: part 1

[24] I find that part 1 of the test has been met. It is clear that all of the records at issue were collected, prepared, maintained and/or used by the ministry.

Part 2: meetings, consultations, discussions or communications

[25] The ministry submits that all 11 records were prepared, maintained and used in preparation for its negotiations with the OMA and the CMPA.

Analysis/Findings re: part 2

[26] I agree with the ministry that the records were specifically prepared, maintained and used by it in relation to its meetings, consultations and communications with the OMA and the CMPA, and I find that this satisfies part two of the test.

Part 3: labour relations or employment-related matters in which the institution has an interest

[27] The ministry submits that the meetings, consultations and communications to which the records relate are about labour relations matters. It states that its work with the OMA and the CMPA to negotiate an agreement with respect to medical liability coverage qualifies as "negotiations" that fall within the parameters of "meetings, consultations, discussions and communications" in section 65(6)3.

[28] The ministry relies on the 2003 Ontario Court of Appeal decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above, where the Court concluded that:

> [the] relationship between the government and physicians, and the work of the [PSC] in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase 'labour relations', and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in section 65(6)3.

[29] The ministry also refers to Order PO-2497, which relied on the 2003 Court of Appeal decision in finding that section 65(6)3 applied to exclude records related to the ministry's reimbursement of physicians' CMPA fees and the subsidy of the professional liability insurance plan. It states that in that order, the IPC concluded that the reimbursement of CMPA fees is a form of compensation and constitutes a labour relations matter and found that the committee's meeting schedule, minutes and interim report were about labour relations matters, in which the ministry had an interest and were therefore excluded under section 65(6)3.

[30] The ministry states that the liability subsidy is a form of remuneration that the ministry provides to physicians in addition to fee-for-service and other forms of compensation provided for under the *Health Insurance Act*. It states:

> Given the ministry's history of subsidizing medical liability protection costs for physicians in Ontario since 1987 and the financial implications associated with these negotiations, the ministry's interest in the records is well-established. As such, the ministry respectfully submits that its interest in any and all records relating to physician compensation is far more significant than "mere curiosity or concern."

Analysis/Findings re: part 3

[31] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[10]
- an employee's dismissal[11]
- a grievance under a collective agreement[12]
- disciplinary proceedings under the *Police Services Act*[13]

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[10] Orders M-830 and PO-2123.
[11] Order MO-1654-I.
[12] Orders M-832 and PO-1769.

- a "voluntary exit program"[14]
- a review of "workload and working relationships"[15]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act.*[16]

[32] The phrase "labour relations or employment-related matters" has been found not to apply in the context of:

- an organizational or operational review[17]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[18]

[33] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[19]

[34] Records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[20]

[35] The records concern the cost of medical malpractice fees for physicians and the amount of the ministry subsidy for these fees.

[36] I agree with the ministry that the findings in the 2003 decision of the Ontario Court of Appeal in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* and Order PO-2497 apply in this appeal.

[37] In Order PO-2497, the adjudicator found that records of a subcommittee of the Physician Services Committee charged with determining medical malpractice issues,

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[13] Order MO-1433-F.
[14] Order M-1074.
[15] Order PO-2057.
[16] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).
[17] Orders M-941 and P-1369.
[18] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[19] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[20] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

including the reimbursement of medical malpractice fees, were about labour relations matters. On judicial review of Order PO-2497, the Divisional Court upheld the adjudicator's finding that the subcommittee records were excluded under section 65(6)3.[21] In doing so, the court applied the definition of "labour relations" articulated by the Court of Appeal in the 2003 decision.[22]

[38] In this appeal, I agree with the ministry that the subsidy of CMPA fees is a labour relations matter because it is negotiated by the ministry and the OMA in the context of the ongoing labour relationship between the ministry and physicians across Ontario. Specifically, I am satisfied that the negotiation of the remuneration of physicians, including the subsidy of physicians' liability insurance payments, qualifies as "labour relations" fitting within the phrase meetings, consultations, discussions and communications" in section 65(6)3.

[39] Initially the ministry only claimed the exclusion in section 65(6)3 to Record LSB-8. I find that this record meets part 3 of the test. This record states that it is to be used in the negotiations for the subsidy of physicians' CMPA fees. This record, which was used by the ministry in relation to the negotiation of the medical liability insurance subsidy for physicians in Ontario has some connection to the reimbursement of physician liability insurance payments.

[40] As Record LSB-8 concerns the negotiations between the ministry, the OMA and the CMPA for the purpose of coming to a new agreement (MOU) about the cost of medical malpractice fees for physicians and the amount of the ministry subsidy for these fees, I find that Record LSB-8 is about labour relations matters in which the ministry has an interest. All three parts of the test under section 65(6)3 have been met for Record LSB-8. Accordingly, this record is excluded from the application of the *Act*.

[41] In making this finding, I have considered whether Record LSB-8 fits within any of the exceptions in section 65(7), which reads:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

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[21] *Canadian Medical Protective Assn. v. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.).
[22] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[42] Based on my review of Record LSB-8, I find that it does not fall within any of the exceptions listed in section 65(7). This record, therefore, is excluded from the scope of the *Act*.

[43] I will now consider the application of section 65(6)3 to the remaining records. I note that the ministry did not provide representations regarding how section 65(6)3 would apply to each record specifically.

[44] I have reviewed the remaining records. The ministry describes the records for which it has claimed section 65(6)3 as being used by the ministry as briefing materials in relation to medical liability insurance or medical malpractice liability for physicians in Ontario.

[45] I find that the remaining records all concern the overall cost of physicians' medical liability insurance and coverage in general and do not contain information about the negotiation with the OMA about the amount of the subsidy that the ministry pays for medical liability insurance for physicians in Ontario.

[46] The unit of analysis for the application of the exclusion is the entire record, not one word, a sentence or even a paragraph.[23] Specifically, I do not accept that each of these remaining records relates, as a whole, to the subsidy that the ministry provides to physicians, but find instead that they relate to the overall cost of physicians' medical liability insurance and coverage. In my view, any connection that these records have to labour relations between the ministry and the OMA is too remote to be considered "some connection" for the purposes of section 65(6)3.

[47] Therefore, I find that the remaining records do not relate to labour relations in which the ministry has an interest and that the third part of the test under section 65(6)3 is not satisfied. Since all three parts of the test for exclusion under section 65(6)3 are not met, I find that the remaining records are not excluded from the *Act*. I will, however, consider whether these records are otherwise exempt from disclosure by reason of the exemptions the ministry has claimed for them.

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[23] For discussion of the "whole record" approach to reviewing the exclusion, see Orders PO-3572 and PO-3926.

Issue B: Does the mandatory Cabinet records exemption at section 12(1) apply to Records 1 and 2 from the CSD Index?

[48] The ministry relies on the introductory wording in section 12(1) for CSD-1 and CSD-2. It also relies on section 12(1)(a) for Record CSD-2 and section 12(1)(b) for Record CSD-1.

[49] Section 12(1) reads in part:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
> >
> > (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

Section 12(1): introductory wording

[50] The ministry states that Record CSD-1 is a record that it submitted to Treasury Board/Management Board of Cabinet. The ministry submits that Record CSD-1 is exempt under the opening words of section 12(1) as its disclosure would reveal the substance of Treasury Board's deliberations

[51] The ministry states that Record CSD-2 is a ministry report to the Treasury Board, and a copy of a minutes extract is appended to it. The ministry, therefore, submits that Record CSD-2, in its entirety, is exempt under the opening words of section 12(1) because it reveals the substance of Treasury Board's deliberations and is a record of its decision on the subject matter within this record.

Analysis/Findings on section 12(1) introductory wording

[52] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).[24]

[53] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[25]

[54] In order to meet the requirements for exemption under the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[26]

[55] Concerning the introductory wording of section 12(1), I note that previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[27] and
- "substance" generally means more than just the subject of the meeting.[28]

[56] In Order P-131, former Commissioner Sidney B. Linden, in referring to section 12(1), stated:

> "Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (Black's Law Dictionary, 5th ed.), or "essential nature; essence or most important part of anything" (Oxford Dictionary). Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means".

[57] In Order 72, former Commissioner Linden considered the wording of section 12(1) and stated:

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[24] Orders P-22, P-1570 and PO-2320.
[25] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[26] Order PO-2320.
[27] Order M-184.
[28] Orders M-703 and MO-1344.

> Can records that are incorporated into a Cabinet submission or records that are used as a basis for developing a Cabinet submission, if disclosed, reveal the "substance of deliberations" of the Cabinet or its committees? In my view, it would only be in rare and exceptional circumstances that a record which had never been placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet, as required by the wording of subsection 12(1). Documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary exemption provided by subsection 13(1) of the *Act*.

[58] Treasury Board is a Cabinet committee of the Executive Council.[29]

[59] Both of the records at issue consist of a report. The report in Record CSD-1 is a detailed document seeking a specific Treasury Board Order. Record CSD-2 is a report back detailing the request for the Treasury Board Order and the outcome of the ministry's request for this order. Based on my review of Records CSD-1 and CSD-2, I find that disclosure of them would reveal the substance of Treasury Board's deliberations about the requested Treasury Board Order.

[60] As such, I find both Record CSD-1 and Record CSD-2 are exempt by reason of the introductory wording of section 12(1). In making this finding, I considered, but have concluded that the exceptions to section 12(1) in section 12(2) do not apply.[30]

[61] As I have found both records at issue are exempt under the introductory wording of section 12(1), it is not necessary for me to also consider whether they are also exempt under sections 12(1)(a) or (b). Nor do I need to consider whether Record CSD-1 is exempt under section 13(1).

[62] I will now consider whether the remaining records at issue, Records LSB-1 to LSB-7 and LSB-9, are exempt from disclosure by reason of section 19.

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[29] Section 1.0.1 of the *Financial Administration Act*, R.S.O. 1990, CHAPTER F.12.

[30] Section 12(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Issue C: Does the discretionary solicitor-client privilege exemption at sections 19(a) or (b) apply to the records in the LSB Index (other than Record LSB-8)?

[63] Section 19 of the Act states, in part, as follows:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

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

[65] The ministry states that the records at issue were prepared by or for Crown counsel for use in giving legal advice and are therefore solicitor-client privileged. It describes the record as emails between and among Crown counsel from the legal services branch at the ministry and other Government of Ontario ministries.

[66] The ministry submits that the records are exempt under sections 19(a) and (b) because they contain confidential legal advice, information and instructions obtained or requested from Crown counsel for use in giving legal advice.

[67] The ministry states that the records at issue all contain legal advice and opinions provided by Crown counsel, which have been communicated among and between counsel for multiple government ministries for the sole purpose of providing and sharing confidential legal advice. It points out that many of the attachments are identified on their face as "privileged and confidential" or "confidential", thereby reinforcing the ministry's description of these records as solicitor-client privileged.

Analysis/Findings

[68] Solicitor-client communication privilege at common law 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.[31] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[32] The privilege covers not only the document containing the

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

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.[33]

[69] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[34]

[70] 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.[35] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[36]

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

[72] In this case, I find that the Branch 2 statutory solicitor-client communication privilege in section 19(b) applies to the records at issue. The records were prepared by or for Crown counsel for use in giving legal advice. I agree with the ministry that the records at issue consist of solicitor-client privileged communications. On my review of the records at issue, I am satisfied that all of them are confidential emails with attachments exchanged between Crown counsel at MAG or at the ministry, as the solicitor, and staff at various ministries, as the client. All of the records at issue contain information as to the seeking, or the provision, of legal advice.

[73] I also find that the statutory privilege in section 19(b) has not been lost through waiver.

[74] Therefore, Records LSB-1 to 9 (except for LSB-8) are exempt under section 19(b), subject to my review of the ministry's exercise of discretion. As I have found that section 19(b) applies to the records at issue, it is not necessary for me to also consider whether section 19(a) also applies to them.

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

[75] The section 19 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its

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[33] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[34] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[35] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[36] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[76] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[77] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38]

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

- 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
    - 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

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[37] Order MO-1573.
[38] Section 54(2).
[39] Orders P-344 and MO-1573.

- 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.

[79] With respect to its exercise of discretion under section 19, 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 to and from government legal counsel confidential.

[80] The ministry submits that it took the law and principles, as stated by the Supreme Court in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*,[40] into consideration in exercising its discretion not to disclose the records in this appeal that are clearly solicitor-client privileged. Specifically, it took into account the court's determination in that case that:

> …solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[81] The ministry states that it determined that the public interest in maintaining the integrity of the privilege, and thus not disclosing the records, should be protected.

Analysis/Findings

[82] Based on the ministry's representations, I find that in denying access to the records at issue, the ministry exercised its discretion under section 19 in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[83] Accordingly, I uphold the ministry's exercise of discretion and find that Records LSB-1 to LSB-7 and LSB-9 are exempt under section 19.

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[40] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, [2010] 1 SCR 815.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed By: February 26, 2019
Diane Smith
Adjudicator