

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3961

Appeal PA18-77

Ministry of the Attorney General

June 5, 2019

Summary: The appellant filed an access request under the *Act* with the ministry for records relating to a review of criminal cases involving evidence produced at the Motherisk Drug Testing Laboratory. The ministry located four records responsive to the appellant's request and denied her access to them, in full. The ministry claimed the application of the exemptions in sections 13 (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* to withhold the records. The appellant appealed the ministry's decision. In this order, the adjudicator finds that the records are exempt under section 19 and upholds the ministry's decision. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(2), 19(a) and (b).

OVERVIEW:

[1] The appellant filed an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ministry of the Attorney General (the ministry). The appellant sought access to

All briefings, memos, audits and reports related to the review conducted by the Ontario Criminal Convictions Review Committee of criminal cases involving evidence produced at the Motherisk Drug Testing Laboratory.

[2] The Motherisk Drug Testing Laboratory (Motherisk) was the focus of a scandal involving flawed hair and alcohol drug testing performed by experts at the Hospital for Sick Children. The evidence produced at the laboratory was used in many child

protection cases and criminal cases across Canada, including criminal cases in Ontario.

[3] In late 2014, the ministry appointed former Justice Susan Lang to conduct an independent review of the adequacy and reliability of Motherisk's hair-testing evidence in legal proceedings. Justice Lang's review produced a report in which she found that Motherisk's evidence "did not meet internationally recognized forensic standards" and was "inadequate and unreliable" for use in court.¹ In January 2016, former Justice Judith Beaman led the independent Motherisk Commission, which reviewed the role of Motherisk's testing in specific child protection cases and provided assistance to affected families. The ministry conducted an internal review of seven criminal cases involving Motherisk's hair-testing. The appellant seeks access to records relating to this internal review conducted by the ministry.

[4] After locating four responsive records, the ministry issued a decision denying the appellant access to the records. The ministry claimed the application of the discretionary exemptions in sections 13 (advice or recommendations) and 19 (solicitor-client privilege) and the mandatory personal privacy exemption in section 21(1) of the *Act* to withhold the records.

[5] The appellant appealed the ministry's decision.

[6] During mediation, the appellant confirmed her interest in pursuing access to the records. The appellant also raised the possible application of the public interest override in section 23 of the *Act* to the records.

[7] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry into the issues under appeal. The adjudicator originally assigned to the appeal began the inquiry by inviting the ministry to respond to a Notice of Inquiry, which set out the facts and issues under appeal. The ministry submitted representations. The adjudicator then invited the appellant to submit representations in response to the ministry's representations, which were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. The adjudicator then sought and received reply representations from the ministry.

[8] The appeal was then transferred to me to complete the inquiry. In the discussion that follows, I find that the records are exempt from disclosure under section 19 of the *Act*. I dismiss the appeal.

¹ Susan Lang, *Motherisk Hair Analysis Independent Review* (December 2015).

RECORDS:

[9] There are four records at issue, totalling 64 pages. The records are a report and three briefing notes with related attached documents.

ISSUES:

- A. Does the discretionary exemption at section 19 apply to the records?
- B. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 apply to the records?

[10] Section 19 of the *Act* states,

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; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 19 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law and is set out in section 19(a). Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege and is set out in sections 19(b) and (c). In this appeal, the ministry submits that both branches of section 19 apply to the records at issue.

[12] 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.² The rationale for this

² *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

privilege is to ensure that a client may freely confide in her lawyer on a legal matter.³ 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.⁴ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵ 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.⁶

[13] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel "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.

The parties' representations

[14] The ministry submits that all four documents "clearly, and unequivocally, represent legal advice" as required under section 19 of the *Act*. The ministry states that the report and briefing notes were prepared by the Criminal Conviction Review Committee (the Committee). The ministry describes the Committee as

... a permanent committee within the Criminal Law Division that provides expert leadership and advice to Crowns across the province. It is chaired by the Director of the Crown Law Office – Criminal and has the benefit of expert advice from six experienced criminal trial and appellate Crown counsel, as well as the Honourable Christopher Speyer, retired Justice of the Ontario Superior Court of Justice. This Committee provides a process for reviewing cases where miscarriages of justice are alleged and for taking the appropriate steps to ensure that justice is served.

[15] The ministry submits that the Assistant Deputy Attorney General (ADAG) of the Criminal Law Division approved the records for consideration by the Attorney General (AG) and/or Deputy Attorney General (DAG). The ministry submits that the contents of the records relate directly to the administration of justice and include privileged information about various criminal cases, their inherent legal issues, legal tests, legal analyses, information relating to the exercise of prosecutorial discretion, and legal recommendations and advice. Specifically, the ministry submits that the records contain or refer to

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng. CA).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

- Privileged communications;
- Advice/recommendations from Crown counsel that certain actions be taken and/or comments about inherent legal risks and liabilities;
- Background information which frames the legal advice provided by Crown counsel; and
- Crown counsel's comments, positions, and analyses, in relation to legal matters of fundamental importance to the proper administration of justice.

[16] The ministry submits that all of the records were kept confidential as between lawyer⁷ and client⁸ and came into existence as a result of previous or potential litigation. Referring to Branch 2 of section 19, the ministry states that the records contain information or communications between its employees and staff in the form of legal advice about the conduct of litigation or potential litigation and the strategies contemplated by Crown counsel. The ministry submits that the records inform the persons to whom they were addressed about the background of a matter and the strengths and weaknesses in the Crown's case, explain how and why certain actions were deemed to be appropriate, and/or were created in order to advise and receive instructions from the AG or DAG. Given the nature and contents of these records, the ministry submits that they fall under section 19 because they contain privileged information and represent a *continuum of communications* between solicitor and client.

[17] The ministry submits that section 19 applies to the four records in their entirety. Finally, the ministry submits that waiver is not an issue in this matter.

[18] The appellant submits that she cannot comment on the application of section 19 to records she has not reviewed. However, the appellant refers to section 10(2) of the *Act* which requires the institution to disclose as much of any responsive records as reasonably possible without disclosing exempt material.

Analysis and findings

[19] Having reviewed the parties' representations and the records, I agree with the ministry that the records are exempt under both sections 19(a) and (b) of the *Act*. I accept the ministry's submissions that the report was prepared by the Committee in their capacity as legal advisors for use in providing legal advice and/or recommendations to the Attorney General and/or Deputy Attorney General. On its face, the report is a direct confidential communication addressed to the Attorney General,

⁷ Here, I take the ministry to be referring to the Committee.

⁸ In this case, I take the ministry to be referring to the Attorney General, Deputy Attorney General and/or the Assistant Deputy Attorney General.

who sought legal advice and analysis from the Committee on cases involving evidence produced at the Motherisk Drug Testing Laboratory. According to the ministry, the Committee is chaired by the Director of the Crown Law Office-Criminal and includes six criminal trial and appellate Crown counsel as well as a retired Justice of the Ontario Superior Court of Justice. The ministry states that the Committee provides a process for reviewing cases where miscarriages of justice are alleged and for taking the appropriate steps to ensure that justice is served. In addition, the Committee provides advice and guidance to Crowns across the province in dealing with some of the issues relating to potential miscarriages of justice. Given the nature of the Committee, I find that the Committee served as a legal advisor to the Attorney General in conducting its review of the Motherisk program.

[20] Furthermore, based on my review of the records, I find that the report contains confidential legal advice and recommendations, formulated by the Committee, relating to the criminal cases under review, the administration of justice and the exercise of prosecutorial discretion. For similar reasons, I find that the briefing notes, which reflect the information contained in the report, are also solicitor-client privileged. Upon review, I agree with the ministry that the four records contain background information on the legal issues relating to the criminal cases under review and the strengths and weaknesses of the Crown's case, and explain the appropriateness of certain actions taken by the Crown. In addition, I find that the records were created to provide legal advice and receive instructions from the Attorney General and/or the Deputy Attorney General. Given these circumstances, I find that the records are exempt from disclosure under sections 19(a) and (b) of the *Act*.

[21] The appellant raised the application of section 10(2) to the records, which requires an institution to "disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." In its representations, the ministry submits that section 19 applies to the records in their entirety. Based on my review of the records, I agree with the ministry that the records cannot be reasonably severed without disclosing the information that is solicitor-client privileged. Given the nature of information contained in the records and the legal issues considered by the Committee, the Attorney General and the Deputy Attorney General, I find that portions of the records could not reasonably be severed and disclosed without revealing the resulting legal advice or recommendations.

[22] Therefore, I find that the records are subject to solicitor-client communication privilege, both at common law (Branch 1) and pursuant to section 19(b) (Branch 2). I find, therefore, that the records are exempt under section 19(a) and (b) of the *Act*, subject to my review of the ministry's exercise of discretion below. I note that the public interest override in section 23 cannot be applied to information exempt under

section 19.⁹ However, the public interest in disclosure is a relevant factor in the ministry's exercise of discretion, which I will discuss next.

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

[23] 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 discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its decision 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.

[24] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ However, this office may not substitute its own discretion for that of the institution.¹¹

[25] In its representations, the ministry recognizes that, in general, access to information should be granted except when the ministry is required to withhold such information under the *Act* or where it remains in the public interest to deny such access. In this case, the ministry submits it exercised its discretion to not release the records pursuant to section 19 in good faith, with full appreciation of the relevant facts on appeal, and on a proper application of the relevant principles of law. The ministry states it considered the following factors in its exercise of discretion:

- The interests within the section 19 exemption;
- The appellant's interest in gaining access to the records as a member of the media;
- The sensitive nature of the records' contents and the privileged/confidential context behind their creation;
- The ability of legal counsel to provide advice/recommendations that are aimed toward administering justice in a fair, equitable and effective manner;

⁹ Section 23 of the *Act* states, "An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

¹⁰ Order MO-1573.

¹¹ Section 54(2) of the *Act*.

- That disclosure of the records could impede the frankness and candour of the advice provided by Crown counsel which could thereby undermine the ministry's role in the proper administration of justice;
- That there has already been broad public coverage of this matter in the media;
- The protection of prosecutorial discretion and the legal decision-making attached to such discretion; and
- That the ministry took the law and principles stated by the IPC and various levels of court in consideration when exercising its discretion not to disclose the records that were clearly solicitor-client privileged.

[26] The appellant submits that the ministry exercised its discretion for "the improper purpose of protecting itself." The appellant refers to a comment made by a criminal lawyer in which he raised a concern "that the government has shielded themselves from public scrutiny under the blanket of solicitor-client privilege." The appellant also submits that the ministry failed to take into account the relevant consideration that the information should be made available to the public to ensure that the decisions made in relation to Motherisk were appropriate.

[27] The ministry does not agree with the appellant's argument that it failed to take into account the importance of having the information made available to the public. The ministry states that certain information has already been made public. However, with regard to the records at issue, the ministry submits that this consideration fails to usurp other important reasons for non-disclosure, including the need to protect content that is solicitor-client privileged and the necessity of following the law as provided for by the courts, including the Supreme Court of Canada.

[28] Based on my review of the parties' representations, I am satisfied the ministry properly exercised its discretion under section 19 in deciding to withhold the report and briefing notes in their entirety. I find the ministry considered the nature of the information in the records and the interests the solicitor-client privilege exemption seeks to protect, which are significant. In addition, the ministry considered a number of other relevant factors including the fact that there has been broad coverage of this matter in the media, the need to protect the legal decision making process, current laws and principles articulated by the IPC and the courts and the ability of legal counsel to provide frank and effective legal advice.

[29] Therefore, upon review of the records and the parties' representations, I find that the ministry exercised its discretion under section 19 appropriately and I uphold its exercise of discretion.

ORDER:

I uphold the ministry's decision to withhold the records under section 19 and dismiss the appeal.

Original Signed By _____

Justine Wai
Adjudicator

_____ June 5, 2019