

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3949

Appeal PA17-387

Ministry of the Solicitor General

April 29, 2019

Summary: The ministry received a request for all briefing materials prepared for it or its deputy minister for a specified time period pertaining to the death of a named individual and the resulting investigation. The ministry granted partial access, and relied on sections 13(1) (advice or recommendation), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* to withhold the remaining responsive records. In this order, the adjudicator upholds the ministry's decision under section 19.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 19, and 21(1).

Orders and Investigation Reports Considered: Order PO-3802.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyer's Association*, 2010 SCC 23, and *Criminal Lawyer's Association v. Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392.

BACKGROUND:

[1] The Ministry of the Solicitor General¹ (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the

¹ Formerly the Ministry of Community Safety and Correctional Services.

following information:

All briefing materials prepared for the minister or deputy minister from July 1, 2016 to date of receipt of this request pertaining to the death of [named individual and age], and to the resulting investigation.

[2] In its decision, the ministry granted partial access to the records, and relied on sections 13(1) (advice or recommendation), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act* to withhold the remaining responsive records. Some information was removed from the records as it was not responsive to the request.

[3] The requester, now the appellant, appealed the decision to this office.

[4] During mediation, the appellant confirmed that she was not pursuing access to the information deemed not responsive.

[5] As no further mediation was possible, this appeal was moved to the adjudication stage of the appeal process where an adjudicator conducts a written inquiry under the *Act*.

[6] During my inquiry, I sought and received representations from the parties. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a copy of the parties' representations (in their entirety) was shared with the other party.

[7] In this order, I uphold the ministry's decision under section 19. Due to my finding, it is not necessary for me to address the applicability of section 13(1) or 21(1) exemptions. I dismiss the appeal.

RECORDS:

[8] The records at issue consist of two email chains.

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:

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

[9] The ministry claims that the solicitor-client privilege exemption in section 19 of the *Act* applies to the records at issue.

[10] Section 19 of the *Act* states 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; 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. 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. In this case, as the ministry is only relying on Branch 1, I will not be discussing Branch 2.

[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 privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³

[13] 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 During this “continuum of communications” between the solicitor and a client, privilege will attach.⁵

[14] Confidentiality is an essential component of the privilege. Therefore, the ministry must demonstrate that the communication was made in confidence, either expressly or

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.) (*Descôteaux*).

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

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) (*Balabel*).

⁵ *Balabel*, *supra*.

by implication.⁶

[15] Under Branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.⁷ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁸ Waiver has been found to apply where, for example, the record is disclosed to another outside party; the communication is made to an opposing party in litigation; or the document records a communication made in open court.⁹

Representations

[16] In its representations, the ministry submits that section 19(a) applies to the records at issue. It submits that the records are a direct communication between the Director of Legal Services and his clients as they are all copied on the same email chains. As such, the ministry submits that the emails, which were exchanged in confidence, are part of a continuum of communications as the Director of Legal Services was copied on them for the purpose of giving legal advice. The ministry also submits that pages 9 and 10 of the records contain advice expressly referenced as legal advice. Finally, it submits that solicitor-client privilege has never been waived because there is no evidence to suggest that the email chains have ever been disclosed to anyone not named on the email except for the purposes of this appeal.

[17] Although the appellant provided representations, her representations did not address this issue.

Analysis and findings

[18] Having carefully reviewed the records and the parties' representations, I am satisfied that the records qualify for exemption under section 19(a) of the *Act*.

[19] The records at issue consist of two email chains and therefore contain some duplicate information amongst them. All of the recipients of these emails include ministry personnel and legal counsel. Based on my review, I am satisfied that the records either contain a response from legal counsel, or they were created to keep both ministry personnel and legal counsel informed so that legal advice may be sought and

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

⁹ Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.

provided as required. I find that these records contain confidential communications between legal counsel and his client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 19 of the *Act*.

[20] Based on my review of the records, I am satisfied that they contain information that would reveal the content of discussions between legal counsel and ministry personnel. I am also satisfied that disclosure of these records would indirectly reveal information exchanged between legal counsel and ministry personnel for the purpose of keeping both informed so that legal advice may be sought and given as required. Having regard to the content of these pages in the context of the records as a whole, I find that they form part of the "continuum of communication" which falls within Branch 1 of the solicitor-client privilege exemption at section 19 of the *Act*.

[21] With respect to waiver, the ministry submits that all of the individuals copied within the confidential email communications with legal counsel were in the employ of the ministry and involved in some manner with the issues contained in the email chains. As there is no evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the records.

[22] The appellant also raises the issue of the possible application of the public interest override in section 23 of the *Act*. She submits that there is extreme public interest in the release of the records relating to the named individual's death. On June 17, 2010 the Supreme Court of Canada issued a decision confirming the constitutionality of the public interest override section, and confirming that the solicitor-client privilege exemption should not be read into to the public interest override section.¹⁰ As such, I will not consider whether the public interest override in section 23 applies to the records. Any possible interest is, however, a relevant consideration in the ministry's exercise of discretion.

[23] As I have found that solicitor-client privilege applies to exempt the records at issue from disclosure, I will not be considering the application of sections 13(1) and 21(1) to the records at issue.

[24] Accordingly, I will turn to discuss the ministry's exercise of discretion in withholding the records under the section 19 exemption.

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

[25] The section 19 exemption is discretionary, and permits an institution to disclose

¹⁰ See *Ontario (Public Safety and Security) v. Criminal Lawyer's Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

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.

[26] 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.

[27] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[28] In its representations, the ministry submits that it properly exercised its discretion in not releasing the records at issue. It submits that it balanced the appellant's right of access and the importance of the exemption in section 19 by disclosing pages 1 to 4 of the responsive records. The ministry also submits that it considered the wording of the exemption and the interest it seeks to protect. It submits that it is important for ministry employees to be able to confide in the Director of Legal Services when seeking legal advice. The ministry states: "... Direct communications from client to solicitor are wholly related to the seeking and provision of legal advice, and are therefore intended to be protected from disclosure." Finally, the ministry submits that the records have been exempted in accordance with its usual practices.

[29] Although the appellant provided representations, her representations did not address this issue, other than asserting that there is a public interest in the disclosure of the records at issue.

[30] Having regard to the circumstances of this appeal, I find the ministry considered the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited; the wording of the exemption and the interests it seeks to protect; and the historic practice of the ministry with respect to similar information. I am satisfied that the ministry has not erred in its exercise of discretion with respect to its application of section 19 of the *Act*. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I find that the ministry took relevant factors into account and I uphold its exercise of discretion on this appeal.

¹¹ Order MO-1573.

ORDER:

I uphold the ministry's decision to deny access to the records at issue, and dismiss this appeal.

Original signed by _____
Lan An
Adjudicator

_____ April 29, 2019