Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4103

Appeal PA18-373

Ministry of the Attorney General

January 20, 2021

Summary: In this order, the adjudicator finds briefing notes prepared for the Assistant Deputy Attorney General, Criminal Law regarding the Debwewin First Nation Jury Review Implementation Committee exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Freedom of Information and Protection of Privacy Act.* She upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F. 31, as amended, section 19.

Orders and Investigation Reports Considered: Order PO-3961.

OVERVIEW:

[1] After the release of the *First Nation Representation on Ontario Juries Report* written by the Honourable Mr. Frank Iacobucci in 2013 (the Report),[1] the Ontario government established the Debwewin Committee[2] to review issues surrounding the under-inclusion of Indigenous people on the province's jury roll. The Debwewin

[1] The Iacobucci report on First Nation jury representation in Ontario reviews the systemic exclusion and underrepresentation of Indigenous people, particularly those living on-reserve, from the jury roll.
[2] The full name of the committee is the Debwewin First Nation Jury Review Implementation Committee. Debwewin means "truth" in the Anishinaabe language.

Committee was tasked with providing advice to the Deputy Attorney General on the implementation of the Report's recommendations. This order under the *Freedom of Information and Protection of Privacy Act* (the *Act*) addresses a media request for records of the Ministry of the Attorney General (the ministry) related to the Debwewin Committee's work and finds that the records are exempt from disclosure under the discretionary solicitor-client privilege exemption in section 19 of the *Act.*

[2] This appeal arises from the request submitted by a member of the media to the ministry of the Attorney General under the *Act* for access to the following records:

> All briefing notes to the Asst. Deputy Attorney General of Criminal Law, from [a named Crown counsel] (or authored by her staff on her behalf) with respect to the Debwewin Committee and its work.

[3] The timeframe for the requested records was February 13, 2013 to July 18, 2018.[3]

[4] The ministry found two records, a November 2017 briefing note that had attached to it an earlier briefing note on the same subject from October 2016, and issued a decision denying access in full. The ministry relied on sections 13(1) (advice or recommendations), 15(a) and (b) (relations with other governments) and 19 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed that decision to Information and Privacy Commissioner (the IPC) and a mediator was appointed to explore a possible resolution.

[5] During mediation, the ministry provided the appellant with a written explanation of its position and the reasons for denying access to the briefing notes. As this explanation did not satisfy the appellant, and no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry. I began an inquiry by seeking representations from the ministry in response to a Notice of Inquiry.[4] In those submissions, the ministry withdrew its reliance on section 15 as a basis for denying access and also provided additional records that it explained were attachments to the briefing notes at issue.[5]

[6] I sent a copy of the ministry's representations to the appellant, along with a

---

[3] According to public media reports, the Report was issued on February 13, 2013 and the Debwewin Committee issued its final report on July 18, 2018.

[4] In the Notice of Inquiry sent to both parties, I included the public interest override in section 23 as an issue. I noted that although section 23 cannot be applied to override section 19, it could apply to override section 13(1), and could therefore be relevant if section 19 were found not to apply, and section 13(1) found to apply.

[5] The ministry confirmed that its exemption claims for these attachments were the same as for the briefing notes themselves, and noted that its representations had been prepared by legal counsel on the assumption that the attachments had already been provided to the IPC earlier in the appeal.

Notice of Inquiry to invite the appellant's representations. The appellant provided brief representations in response.

[7] In this order, I find the briefing notes and their attachments exempt under the discretionary solicitor-client privilege exemption in section 19 and uphold the ministry's exercise of discretion in denying access to them. Given my finding that the records are exempt under section 19, it is not necessary for me to review the possible application of section 13(1) to them. As the public interest override in section 23 cannot apply to section 19, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[8] The records at issue are two briefing notes and attachments (36 pages total). The briefing note that is record 1 is dated November 2017 and is an update to an earlier briefing note at record 2, dated October 2016, which is attached to it. The three attachments to record 2 consist of a 10-page table (record 3) and a two-page email (record 4) that is itself a cover to a 13-page draft memo (record 5), all dated October 2016.

ISSUES:

A. Does the discretionary solicitor-client privilege exemption in section 19 apply to the records?

B. Should the ministry's exercise of discretion under section 19 be upheld?

DISCUSSION:

Issue A. Does the discretionary solicitor-client privilege exemption in section 19 apply to the records?

[9] The ministry withholds the records at issue on the basis of the discretionary solicitor-client privilege exemption in section 19, which protects privileged records from disclosure under the *Act*. Section 19 states, in part, as follows:

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

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation[.]

[10] The solicitor-client privilege in section 19(a) (Branch 1) is based on the common law, while the privilege in section 19(b) (Branch 2) is statutory.[6] Under section 53 of the *Act*, the ministry bears the burden of proof to establish that either section 19(a) or (b) applies to the records.

[11] The privilege in both sections 19(a) and (b) encompasses solicitor-client communication privilege, which protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[7] The privilege covers the document containing the legal advice, the request for advice, and the information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[8] Confidentiality is an essential component of the privilege. Therefore, the ministry is required to demonstrate that the communication was made in confidence, either expressly or by implication.[9]

Representations

[12] The ministry submits that the records are subject to both the Branch 1 and Branch 2 solicitor-client communication privilege. According to the ministry, the briefing notes and their attachments were prepared by an identified Crown Counsel for both her Director and the Assistant Deputy Attorney General (ADAG) of the ministry's Criminal Law Division. The ministry states that it is common for briefing notes, and their related content, to "be passed along further up the chain to advise and inform the Deputy Attorney General and/or the Attorney General." The ministry relies on Order PO-3961, where the adjudicator found a briefing note exempt under section 19 on the basis that it was a confidential communication prepared by legal advisors to provide legal advice and recommendations to the Attorney General and/or Deputy Attorney General. The ministry also maintains that the IPC has upheld the exemption, under section 19, of other types of records such as memos and correspondence passed between ministry counsel.

[13] The ministry stresses that the records were not shared with the members of the Debwewin Committee, and instead consist of confidential legal review, advice, and recommendations that were used to update and advise the ADAG, who was not a

---

[6] There is also section 19(c) of the *Act*, which protects records "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." This section has no application in the circumstances.
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

member of the Debwewin Committee. Regarding the matters addressed in the records, the ministry submits that they relate to:

> … litigation issues such as the independence of prosecutors, their prosecutorial discretion, legislation within the Criminal Code of Canada, Crown policies, and the enforcement of By Laws. Additionally, other legal issues relating to employment, hiring, legal policy development, and the education of Ministry staff were addressed. Most importantly, the record contained advice and recommendations in relation to the business and operations of the Criminal Law Division. It included privileged information about legal issues, Crown policy, the conduct of criminal trials, and the exercise of Crown discretion.

[14] The ministry continues that the records contain or reference privileged communications, recommendations by Crown counsel that certain actions be taken, comments about "inherent legal risks and liabilities," matters/issues that required monitoring, contextual information that framed the legal advice provided by Crown counsel and counsel's comments, positions, and analyses.

[15] The ministry maintains that there has been no waiver of the privilege under section 19 because the Head has not waived the section 19(b) statutory privilege or taken any steps otherwise that would constitute waiver in respect of the records.

[16] Regarding the possibility of severance under section 10(2), the ministry argues that severance is not reasonable or possible because section 19 makes no distinction between portions of a record that are factual in nature and those that form part of the legal advice. The ministry submits that section 19 applies to the briefing notes and all attachments, because those portions were specifically chosen by the author, using their legal expertise.

[17] The appellant's representations do not directly address the section 19 solicitor-client privilege exemption or the ministry's position that the records are exempt on that basis. The appellant focuses instead on consideration of the public interest, which, he says, ought to be determined by the public, "not the government or trusted legal advisors who are looking for reasons to withhold information instead of making it public."

Analysis and findings

[18] Based on my review of the five related records that are at issue in this appeal, together with the ministry's representations, I find that the records qualify for exemption under 19(a) and 19(b) of the *Act* for the reasons given below.

[19] I accept the ministry's description of the content of these records and relationship between the author of the records, who was employed by the ministry as General Counsel, Crown Law Office – Criminal, and the intended recipients, and I note

that these communications bear clear markings of confidentiality. I have also considered the draft nature of the records and the connection between these communications and certain legal issues arising from the work of the Debwewin Committee as it made progress towards the issuing of its final report in 2018.

[20] Therefore, I find that the author of the records was operating within a confidential solicitor-client relationship in preparing the briefing notes and related attachments for the Division's director and the ADAG, and that she provided legal advice, directly and in draft form, through these records and within the continuum of communications. As noted above, solicitor-client privilege covers the document containing the legal advice, the request for advice, and information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.

[21] As I am satisfied that the records consist of direct communications of a confidential nature between a solicitor and client, or their agents or employees, and I am satisfied that these records were prepared and sent for the purpose of obtaining or giving professional legal advice, as required for the Branch 1 solicitor-client communication privilege under section 19(a) to apply.[10]

[22] For similar reasons to those given above, I am also satisfied that the records were prepared by or for Crown counsel for use in giving legal advice and, further, that the records were subject to the requisite confidentiality to establish the application of the statutory solicitor-client privilege in section 19(b).[11]

[23] Although solicitor-client privilege may be waived under the common law where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege,[12] there is no evidence of express waiver of the privilege in the circumstances. There is similarly no evidence of any implied waiver of solicitor-client privilege by reason of voluntary conduct by the privilege holder supporting it. Nor, in my view, does fairness require it.[13] There also being no evidence before me to support waiver of statutory solicitor-client privilege, I find that the privilege endures.

[24] I have also considered whether the records at issue can be severed and any non-exempt portions provided to the appellant. The IPC has generally considered direct solicitor-client communications relating to the seeking or receiving of legal advice by an

---

[10] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[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.

institution to be subject to a class-based privilege.[14] In any event, I find that the records cannot reasonably be severed without disclosing information that I have found to fall within the scope of section 19.

[25] Although the appellant argues that the public interest in disclosure supports a finding that the ministry's claim of the solicitor-client privilege exemption should be overridden, the *Act* does not allow it. Section 19 is not covered by the public interest override in section 23. However, the ministry is required in its exercise of discretion under section 19 to consider the public interest,[15] and I will canvas the appellant's public interest concerns below in my review of the ministry's exercise of discretion under section 19.

Issue B: Should the ministry's exercise of discretion under section 19 be upheld?

[26] 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 IPC may determine whether the institution failed to do so. In addition, the IPC 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.

[27] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] However, I may not substitute my own discretion for that of the institution.[17]

Representations

[28] The ministry states that it is aware that access to information should generally be granted except when it is required to withhold the information under the *Act* or where it is in the public interest to deny such access. The ministry submits that it has exercised its discretion not to disclose under 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.

[29] The ministry submits that it took the law and principles, as stated by the IPC and various levels of court, into consideration when exercising its discretion not to disclose

---

[14] As noted in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997) 102 O.A.C. 71. See also Orders MO-3409 and MO-2198.
[15] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Criminal Lawyers' Association*).
[16] Order MO-1573.
[17] Section 54(2) of the *Act*.

records that were clearly solicitor-client privileged. It says it also considered: the interests that section 19 seeks to protect; the appellant's interest in gaining access to the records as an investigative reporter; the sensitive nature of the context behind the records' creation; the importance of Crown counsel providing candid legal advice and the potential for disclosure to undermine the frankness of the advice; the broad public coverage of the matter in the media; and the protection of prosecutorial discretion and the legal decision- making associated with such discretion.

[30] The appellant challenges the ministry's position that there is no compelling public interest in disclosure because there has allegedly already been widespread media coverage of the matter and some information is available online. The appellant suggests that a relevant factor for the ministry to have considered is that disclosure to him as a member of the media would permit greater public scrutiny of what are "wider and possibly systemic issues." Such scrutiny is warranted, the appellant submits, as long as such issues persist. The appellant emphasizes that it is the public that is in the best position to decide what is in their interest, not government or Crown counsel who may be looking for reasons to withhold information instead of disclosing it.

Analysis and finding

[31] As the ministry correctly notes, an institution's exercise of discretion must be made in full appreciation of the facts of the appeal, and upon proper application of the applicable principles of law. In this appeal, it is my responsibility to ensure that the ministry's exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the ministry to re-exercise its discretion.

[32] Based on my review of the parties' representations in this appeal, I am satisfied that the ministry properly exercised its discretion under section 19 of the *Act*. Although the appellant's representations suggest bad faith on the part of the ministry in the form of "looking for reasons to withhold information," there is no evidence before me to support a finding that the ministry exercised its discretion in bad faith or took into account irrelevant considerations. I am also not persuaded that the ministry was withholding the information for any collateral or improper purpose.

[33] Rather, I am satisfied that the ministry considered relevant factors, including preserving the ability of Crown counsel to provide frank and effective legal advice. I am also satisfied that the ministry considered the nature of the information in the records and the significant interests the solicitor-client privilege exemption seeks to protect. Finally, the ministry's exercise of discretion to deny access to the records at issue under section 19 in this appeal is consistent with its historic practice with respect to similar information. For these reasons, I uphold the ministry's exercise of discretion under section 19.

[34] As I have found the records to be exempt in their entirety under section 19, I do not need to consider the possible application of section 13(1) to them.

ORDER:

I uphold the ministry's decision to deny access under section 19 and dismiss the appeal.

Original signed by
Daphne Loukidelis
Adjudicator

January 20, 2021