

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4139

Appeal PA19-00223

Ministry of Natural Resources and Forestry

April 16, 2021

Summary: The appellant seeks access to records that contain response, analysis, assessment or commentary of *Haida Nation v. British Columbia (Minster of Forests)*, a 2004 decision of the Supreme Court of Canada on the Crown's duty to consult Aboriginal peoples in relation to land rights and claims. The ministry located a number of records and issued a decision to the appellant, denying her access to them in full. The ministry identified a number of pages as not responsive to the request and withheld other pages of the records under the mandatory exemption in section 12(1) (Cabinet records) and the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The appellant appealed the ministry's decision. In this order, the adjudicator upholds the ministry's decision, in part. The adjudicator finds the majority of the records identified as not responsive to the request to be not responsive. However, the adjudicator orders the ministry to issue an access decision regarding one page of the records, which the adjudicator finds to be responsive to the appellant's request. The adjudicator upholds the ministry's section 13(1) and 19 claims.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O., c. F. 31, as amended, section 13(1), 19 and 24.

Orders and Investigation Reports Considered: Order PO-2787.

Cases Considered: *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 and *Trillium v. Cassels Brock & Blackwell et al*, 2013 ONSC 1789.

OVERVIEW:

[1] The appellant filed an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ministry of Natural Resources and Forestry (the ministry) for

All records, including internal reports, memos, briefing notes and emails that offer response/analysis/assessment/commentary to the Supreme Court of Canada decision, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 311 – in particular, any policy changes, policy assessments and evaluations, and any other mechanisms designed or adapted to respond to implications of the legal decision to the Ministry.

[2] *Haida Nation v British Columbia (Minister of Forests) (Haida Nation)*¹ is the leading decision from the Supreme Court of Canada that confirms the Crown's duty to consult and accommodate Aboriginal peoples where a government decision may have adverse effects on Aboriginal rights and claims. Specifically, the ministry states *Haida Nation* confirmed and defined the fundamental approach to consultation with respect to asserted rights or title claims where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect those rights that have not been proven.

[3] The ministry located responsive records and issued an access decision to the appellant denying her access to them, in full. The ministry withheld the records under the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor- client privilege) of the *Act*. The ministry also advised the appellant that portions of the records are not responsive to her request.

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

[5] During mediation, the ministry issued a revised access decision claiming the application of the mandatory exemption in section 12 (Cabinet records) to most of the records subject to its section 13(1) claim. The ministry also continued to rely on the exemptions claimed in its original access decision. However, the ministry advised the appellant that some of the information it had previously identified as non-responsive was, in fact, responsive to the original request and exempt under section 19 of the *Act*. The appellant confirmed her interest in obtaining access to the records.

[6] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. The adjudicator originally assigned to this file began the inquiry by inviting the

¹ 2004 SCC 73.

ministry to submit representations in response to a Notice of Inquiry, which summarized the facts and issues under appeal. The ministry submitted representations. The appellant was then invited to submit representations in response to the Notice of Inquiry and the ministry's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant did not submit representations.

[7] The appeal was then transferred to me to complete the inquiry. In the discussion that follows, I uphold the ministry's decision, in part. I find the majority of the records identified as not responsive to the request to be not responsive. However, I order the ministry to issue an access decision regarding page 24 of the records, which I conclude is responsive to the appellant's request. I uphold the ministry's section 13(1) and 19 exemption claims and its exercise of discretion regarding the application of sections 13(1) and 19. Given this finding, it is not necessary for me to consider the application of section 12(1) to the records claimed by the ministry to be exempt under that exemption.

RECORDS:

[8] The records at issue are emails, a memorandum, a briefing slide deck and a case summary document with related reference materials. The exemptions the ministry claimed are as follows:

Page Numbers	Description	Exemption(s) Claimed
1-5	Email attaching preliminary rough draft briefing note	12, 13(1)
6-7	Memorandum dated February 21, 2006	12, 13(1)
8-10	Two emails exchanged between ministry staff	12, 13(1)
11-13, 15-16, and 18-24	Briefing slide deck, dated March 7, 2005 with handwritten notes	Not responsive
14	Page from briefing slide deck dated March 7, 2005	13(1)
17	Page from briefing slide deck dated March 7, 2005	12, 13(1)
25-58, 64-72, and 74-96	Reference materials and	Not responsive

	case summaries	
59-63, 73, and 97-99	Reference materials and case summaries	19

ISSUES:

- A. What is the scope of the request? Are pages 11-13, 15-16 and 18-24 of the briefing slide deck and pages 25-58, 64-72, and 74-96 of the reference materials and case summaries responsive to the request?
- B. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the emails, memorandum and portions of the briefing slide deck at pages 1-5, 6-7, 8-10, 14 and 17?
- C. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to pages 59-63, 72, and 93-99 of the reference materials and case summaries?
- D. Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: What is the scope of the request? Are pages 11-13, 15-16 and 18-24 of the briefing slide deck and pages 25-58, 64-72, and 74-96 of the reference materials and case summaries responsive to the request?

[9] The ministry takes the position that pages 11-13, 15-16, 18-24, 25-58, 64-72, and 74-96 are not responsive to the appellant's request. These pages are found within two records the ministry otherwise identified as responsive: (1) a briefing slide deck and (2) reference materials and case summaries.

[10] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[11] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.² To be considered responsive to the request, records must *reasonably relate* to the request.³

[12] The appellant's request reads as follows:

All records, including internal reports, memos, briefing notes and emails that offer response/analysis/assessment/commentary to the Supreme Court of Canada decision, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 311 – in particular, any policy changes, policy assessments and evaluations, and any other mechanisms designed or adapted to respond to implications of the legal decision to the Ministry.

[13] The ministry submits that pages 25-58, 64-72, and 74-96 are not responsive to the appellant's request. The ministry states these pages are portions of a reference document prepared by the previous Native Affairs Unit (now the Indigenous Policy Section) with input from the ministry's Legal Services. The majority of the document consists of case summaries of legal decisions and is not responsive to the request with the exception of pages 59-63, 73, and 97-99, which are subject to the ministry's section 19 exemption claim. The ministry submits the reference document was created as a general guide and summary of significant Aboriginal case law. The ministry says it was not created as a result of *Haida Nation* and, with the exception of the pages withheld under section 19, does not contain any response, analysis, assessment or commentary with respect to *Haida Nation*.

[14] In addition, the ministry submits that pages 11-13, 15-16, and 18-24 are not responsive to the request. These pages are portions of a Minister's Briefing slide deck, dated March 7, 2005, with handwritten notes. The ministry submits the slide deck contains a "general high-level summary of Ministry initiatives at the time and was not developed as a response to the *Haida* decision."

[15] I have reviewed pages 11-13, 15-16, 18-24, 25-58, 64-72, and 74-96 of the records and find the majority of them are not responsive to the appellant's request.

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

Specifically, I find pages 11-13, 15-16, 18-23, 25-58, 64-72, and 74-96 are not responsive to the request. The appellant clearly identified the information she seeks access to in her request. Specifically, the appellant seeks access to all records offering “response/analysis/assessment/commentary” to the *Haida Nation* decision. I reviewed the pages the ministry withheld as not responsive to the request and agree the majority of these pages do not contain information offering response, analysis, assessment or commentary to *Haida Nation*. Further, these pages do not contain any policy changes, assessments or evaluations, or any other mechanisms designed or adapted to respond to the legal implications of *Haida Nation*. As the ministry states, pages 25-58, 64-72, and 74-96 are portions of a larger reference document summarizing significant Aboriginal case law. These pages relate to other significant Aboriginal cases and not *Haida Nation*. Similarly, pages 11-13, 14-16 and 18-23 are parts of a Minister’s Briefing slide deck and do not contain discussion relating to *Haida Nation*. Rather, these pages contain general information regarding the ministry’s initiatives.

[16] However, I find that page 24 of the records is responsive to the appellant’s request. Page 24 is a part of a briefing slide deck and clearly addresses the *Haida Nation* decision and provides some commentary and analysis on the decision. Based on my review of page 24, I find the information contained therein is *reasonably related* to the appellant’s request.

[17] In conclusion, I find pages 11-13, 15-16, 18-23, 25-58, 64-72, and 74-96 are not *reasonably related* to the appellant’s request and are not responsive to the request. However, I find page 24 is responsive to the appellant’s request. The ministry did not claim an exemption for page 24 of the records. I will order the ministry to issue an access decision regarding page 24 to the appellant.

Issue B: Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the emails, memorandum and portions of the briefing slide deck at pages 1-5, 6-7, 8-10, 14 and 17?

[18] The ministry claims pages 1-5, 6-7, 8-10, 14 and 17 are exempt from disclosure under section 13(1). Section 13(1) of the *Act* states,

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[19] In *John Doe v. Ontario (Finance)*,⁴ the Supreme Court of Canada held that the purpose of section 13(1) is to preserve an effective and neutral public service by

⁴ 2014 SCC 36. (*John Doe*)

ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁵

[20] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to materials that relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[21] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of actions to be accepted or rejected in relation to a decision to be made, and the public servant's identification and consideration of alternative decisions that could be made. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁶

[22] Advice or recommendations may be revealed in two ways: (1) the information itself consists of advice or recommendations; (2) the information, if disclosed would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁷

[23] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁸

[24] Section 13(1) covers earlier drafts of materials containing advice or recommendations, even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).⁹

[25] Examples of the types of information found *not* to qualify as advice or recommendations include factual or background information,¹⁰ a supervisor's direction

⁵ *Ibid.*, at para 43.

⁶ *Ibid.*, at paras 26 and 47.

⁷ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), affirmed [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO- 1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁸ *John Doe*, *supra* note 6 at para 51.

⁹ *Ibid.*, at paras 50-51.

¹⁰ Order PO-3315.

to staff on how to conduct an investigation,¹¹ and information prepared for public dissemination.¹²

[26] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. These mandatory exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.¹³

[27] The ministry submits the records for which it claims section 13(1) include briefing notes and comments on suggested policy that contain advice or recommendations within the meaning of section 13(1).

[28] Specifically, the ministry submits that pages 1-5 are an internal ministry email with the author's comments about the attached draft of a Deputy Minister's Information Briefing Note regarding the Provincial Approach to Consultation. The ministry submits this email reflects the internal staff discussion and comments on the briefing note as part of the deliberative process of government policy and decision making. The ministry submits this record contains the advice and recommendations that were provided to the Ontario Native Affairs Secretariat (ONAS) with respect to the *Haida Nation* decision and should, therefore, be exempt under section 13(1). The ministry submits any factual information that may be included in pages 1-5 was included as part of the evaluative analysis by the ministry and ONAS and is inextricably intertwined with the advice and recommendations in the record.

[29] I reviewed pages 1-5 and am satisfied they contain advice or recommendations within the meaning of section 13(1). Page 1 is the covering email to a draft briefing note at pages 2-5. Both of these records, the covering email and briefing note, contain advice, recommendations or policy options or information that would allow one to accurately infer the advice or recommendations. Further, I find the record represents part of the deliberative process that is leading to a final decision.

[30] Pages 6-7 of the records is a memorandum from the Assistant Deputy Minister to ONAS Assistant Secretary. The ministry states the memorandum contains ministry-recommended changes to ONAS's draft Cabinet Submissions on Aboriginal Policy and includes advice and recommendations on the proposed approach to the development of this policy.

[31] I reviewed pages 6-7 and am satisfied they contain advice and recommendations within the meaning of section 13(1). The memorandum clearly contains advice and

¹¹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/91 (Ont. Div. Ct.).

¹² Order PO-2667.

¹³ *John Doe*, *supra* note 5 at para 30.

recommendations from the Assistant Deputy Minister to the ONAS Assistant Secretary in the form of proposed changes to the draft Cabinet Submissions and highlights the rationale behind the proposed changes. Therefore, I find the record is exempt under section 13(1).

[32] Pages 8-9 is an internal email between ministry staff. The ministry submits the record contains information relating to "the basis for making a decision or formulating a policy." If disclosed, the ministry submits the record would reveal the ministry's position and advice with respect to an impending decision as well as information that would reveal the substance of the advice of other affected ministries within the deliberative process. The ministry takes the position the disclosure of the record would reveal the foundation, support and/or basis for the decision and the public servant's views on the policy options being considered.

[33] I reviewed the email at pages 8-9 of the records and find it is exempt under section 13(1) of the *Act*. The record contains advice or recommendations within the meaning of section 13(1). As stated by the ministry, the email contains a summary of advice and discussion exchanged regarding a future decision between a number of different ministries and their staff. The information at issue would, if disclosed, reveal or permit the drawing of accurate inferences as to the nature of the advice or recommendations given during this discussion and to be provided in the future Cabinet meeting. Therefore, I find the email at pages 8-9 is exempt from disclosure under section 13(1), subject to my review of the ministry's exercise of discretion below.

[34] The ministry submits the email exchange at page 10 is part of the deliberative process of policy development and government decision-making. The ministry claims the disclosure of this email would reveal the internal discussions of government and contain advice and recommendations regarding the decision at issue. The record also includes a number of policy options and recommendations.

[35] I reviewed page 10 and agree the record contains advice or recommendations within the meaning of section 13(1) of the *Act*. The email clearly contains advice or recommendations provided by ministry staff regarding the decisions to be made regarding a specific issue. I am satisfied the email represents part of the deliberative process leading to a final decision on the specific issue identified in the record.

[36] Page 14 is a slide from a briefing slide deck dated March 7, 2005. The ministry submits it should be withheld under section 13(1) because disclosure could reveal the advice the ministry provided to the ONAS.

[37] I reviewed page 14 of the records and am satisfied it contains information which, if disclosed, would permit the drawing of accurate inferences as to the nature of the advice or recommendations given during the Minister's Briefing. Page 14 is part of a slide deck, which contains advice or recommendations to the Minister regarding the ONAS's approach to Aboriginal Affairs. The slide deck includes advice or recommendations regarding this new approach and identifies the issues to be

considered by the Minister. Based on my review, I find page 14 identifies the issues and principles to be considered by the Minister in relation to ONAS's approach to Aboriginal Affairs and contains advice regarding this approach. Furthermore, in light of the context of the entire slide deck, I find one could make an accurate inference as to the type of advice or recommendations provided if page 14 was disclosed.

[38] Finally, the ministry submits page 17, a slide from the same briefing deck, contains advice provided by the ministry to ONAS. The ministry states page 17 contains information with respect to the ministry's position and recommendations to ONAS.

[39] I agree with the ministry and find page 17 of the records clearly contains advice or recommendations from the ministry to the ONAS regarding a specific issue and the manner in which ONAS will proceed with this issue. Upon review of page 17, I find it contains advice or recommendations within the meaning of section 13(1) of the *Act*.

[40] I have reviewed the exceptions to the section 13(1) exemption enumerated in section 13(2) and find none apply. I agree with the ministry that certain discrete portions of the records contain factual information. However, I find that this factual information is inextricably intertwined with the advice or recommendations in the records.

[41] In addition, I have considered section 10(2) of the *Act*, which requires a read to disclose as much of the record as can be reasonably severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.¹⁴

[42] I reviewed the pages I found exempt under section 13(1). I find there are certain portions of the records that could be severed from the advice or recommendations. However, this information, which includes an individual's signature block on page 3 and an unexecuted Approval Sheet on page 4, cannot reasonably be severed as this would lead to the disclosure of "worthless" or "meaningless" information.

[43] Therefore, I find pages 1-5, 6-7, 8-10, 14 and 17 are exempt from disclosure under section 13(1) of the *Act*, subject to my review of the ministry's exercise of discretion below under Issue D.

¹⁴ Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

Issue C: Does the discretionary exemption at section 19 (solicitor-client privilege) apply to pages 59-63, 72, and 93-99 of the reference materials and case summaries?

[44] The ministry withholds pages 59-63, 72 and 93-99 of the records on the basis of the discretionary solicitor-client privilege exemption in section 19 of the *Act*. These pages are case summaries and commentary relating to *Haida Nation*.

[45] Section 19 states, in part,

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;

[46] 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.¹⁵ 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 advice.¹⁶ The privilege covers the document containing the legal advice, the request for legal advice, and the information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁷ Confidentiality is an essential component of the privilege. Therefore, the ministry is required to demonstrate the communication was made in confidence, either expressly or by implication.¹⁸

[47] The ministry submits these pages are exempt from disclosure under section 19 because they reflect confidential communications in which legal advice is sought and provided. The pages subject to the ministry's section 19 claim are part of a reference document created by the previous Native Affairs Unit (now the Indigenous Policy Section) with input and guidance from the ministry's Legal Services. The ministry submits pages 59-63, 72, and 93-99 reflect communications between ministry counsel and staff for the purpose of providing legal advice regarding Aboriginal law cases, generally, and specifically the *Haida Nation* decision and the implications of those cases for the ministry. The documents refer to legal advice provided by the ministry's legal

¹⁵ 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.

¹⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

¹⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

counsel prior to and after *Haida Nation* was released. In particular, the ministry submits the section marked "Implications" on pages 62, 63, 98 and 99 clearly refer to legal advice provided by the ministry's legal counsel regarding Aboriginal consultation.

[48] The ministry acknowledges the information in the case summary document indicates it was not "approved" by legal. In any case, the ministry affirms the information contained in the document includes references to advice provided by the ministry's legal services branch and reflects the advice provided by the ministry's legal counsel with respect to the implications of *Haida Nation*. The ministry stresses the disclosure of the record would reveal the substance of the legal advice provided by the ministry's legal counsel.

[49] Based on my review of pages 59-63, 72, and 93-99 of the records and the ministry's representations, I find they qualify for exemption under section 19(a) of the *Act*. Pages 59-63, 72, and 93-99 are part of a larger reference document prepared by the ministry's Native Affairs Unit with consultation from the ministry's legal counsel containing case summaries and commentary of Aboriginal law cases. The case summaries and commentary are not merely factual, but contain information such as the implications these decisions have on the ministry's policies. Based on my review of the information at issue in pages 59-64, 72 and 93-99 of the records, I find that they contain more than general summaries and commentary of the cases. Rather, they offer the ministry's perspective on the *Haida Nation* decision and insight into the ministry's evolving legal policy regarding Aboriginal rights. This is particularly true when considering the entire case summary document, which identifies and summarizes the leading Aboriginal law cases and provides insight into the manner in which Aboriginal law has evolved over time.

[50] I find support for this finding in *Trillium v. Cassels Brock & Blackwell et al.*¹⁹ which defined legal advice as

...advice that is given with respect to the client's legal rights and duties and is given on the understanding that it may be followed. It depends on the individual circumstances of the recipient and consists of a much more personalized opinion on the way the law would apply in a particular case or about the particular decision that should be made in the circumstances. Legal advice involves the interpretation of legal principles "to guide future conduct or to assess past conduct."

I agree with and adopt this explanation of legal advice for the purposes of this analysis. While the case summaries do not relate to a particular case or situation before the ministry, I find the information subject to the ministry's section 19 claim does provide

¹⁹ 2013 ONSC 1789.

advice with respect to the ministry's legal duties in relation to Aboriginal groups, specifically in relation to the duty to consult. The information in pages 59-63, 72 and 93- 99 provides guidance as to legal issues ministry staff is to consider in light of the *Haida Nation* decision. Upon review of pages 59-63, 72, and 93-99, I find they reflect communications of a confidential nature between ministry legal counsel and ministry staff, or solicitor and client, within the meaning of section 19(a) of the *Act*.

[51] I note that not all documents that reflect information provided by legal counsel or that were subject to review by legal counsel are solicitor-client privileged. The Federal Court of Appeal considered solicitor-client privilege and the meaning of legal advice in *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*.²⁰ Relevant to my analysis here, the Federal Court of Appeal held,

In some circumstances, however, the end products of legal advice do not fall within the [protected solicitor-client communication] continuum and are not privileged. For example, many organizations develop document management and document retention policies and circulate them to personnel within the organization. Often these are shaped by the advice of counsel. However, such policies are usually disclosed, without objection, because they do not form part of an exchange of information with the object of giving legal advice. Rather, they are operational in nature and relate to the conduct of the general business of the organization.

I have reviewed pages 59-63, 72 and 93-99 and find these pages, while part of a general case summary and reference document, is not "operational in nature." Rather, the information subject to the ministry's section 19 claim reflects the advice and position of the ministry's legal counsel regarding the ministry's policies and issues to consider in relation to *Haida Nation*. I find the record is not merely a summary of the *Haida Nation* decision but reflects the perspective, insight and advice of the ministry's legal counsel. Due to the nature and contents of this specific record, I find section 19 applies to exempt pages 59-63, 72 and 93-99 from disclosure.

[52] I have considered whether the information contained in pages 59-63, 72, and 93- 99 may be severed in accordance with section 10(2) of the *Act*. I have reviewed these pages and find they cannot reasonably be severed without disclosing the information that is solicitor-client privileged. Given the nature of the information contained in pages 59- 63, 72 and 93-99 and the legal issues identified, I find that portions of these pages cannot reasonably be severed and disclosed without revealing legal advice.

²⁰ 2013 FCA 104.

[53] Therefore, I find that pages 59-63, 72, and 93-99 are exempt under the solicitor-client privilege in section 19, subject to my review of the ministry's exercise of discretion below.

Issue D: Did the ministry exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[54] The exemptions in sections 13(1) and 19 are discretionary and permit an institutions 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.

[55] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ However, this office may not substitute its own discretion for that of the institution.²²

[56] The ministry submits it exercised its discretion properly in its application of section 13(1). The ministry submits it took several factors into account, including: the circumstances of the request, the purposes of the *Act*, the nature of the exemptions claimed, the solicitor-client relationship, the preservation of the confidentiality of communications in the course of obtaining and providing legal advice, and whether disclosure would impede the ability of staff to freely and frankly provide advice to senior management.

[57] The ministry submits it exercised its statutory discretion and did so in good faith and for purposes consistent with the intention of the exemptions. The ministry submits it also took into account relevant considerations and did not base its decision on irrelevant considerations. The ministry asks that I uphold its exercise of discretion.

[58] Based on my review of the ministry's representations, I am satisfied the ministry properly exercised its discretion under sections 13(1) and 19 in deciding to withhold pages 14, 59-63, 73, and 97-99 from disclosure. I find the ministry considered the nature of the information in the records and the interests the claimed exemptions seek to protect, which are significant. In addition, I find the ministry considered a number of other relevant factors including the purposes of the *Act*, the need to protect the frank and free flow of advice and recommendations between staff, and the need to protect the solicitor-client relationship. I am also satisfied the ministry acted in good faith and

²¹ Order MO-1573.

²² Section 54(2) of the *Act*.

did not consider irrelevant considerations.

[59] Therefore, upon review of the records and the ministry's representations, I find the ministry exercised its discretion under sections 13(1) and 19 appropriately and I uphold its exercise of discretion.

ORDER:

1. I find page 24 of the records to be responsive to the request. I order the ministry to issue an access decision regarding this page, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*. I uphold the ministry's decision to withhold pages 11-13, 15-16, 18-23, 25-58, 64- 72, and 74-96 as not responsive to the request.
2. I uphold the ministry's application of sections 13(1) and 19 of the *Act* to the remainder of the records at issue.

Original Signed by: _____

Justine Wai
Adjudicator

April 16, 2021