Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4145

Appeal PA19-00347

Royal Ontario Museum

May 12, 2021

Summary: The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Royal Ontario Museum (ROM) for records related to an investigation into a human resources complaint that she had filed. The ROM denied access to the requested records claiming the exemption at section 49(b) (personal privacy) of the *Act*. During mediation of the appeal of ROM's decision, the appellant revised her request, reducing the number of responsive records. Also during mediation, the ROM claimed the application of the discretionary exemption at section 19 (solicitor-client privilege) to some of the records.

In this order, the adjudicator allows the ROM to raise the solicitor-client privilege exemption in section 19, despite the lateness of the claim. As the records contain the personal information of the appellant, the adjudicator finds that section 49(a) (discretion to refuse a requester's own information), read in conjunction with section 19, applies to the records for which section 19 was claimed. She also finds that section 49(b) applies to records 2 to 6 and portions of record 8 and upholds the ROM's decision to not disclose that information. She does not uphold the ROM's decision to deny access to record 1 and portions of record 8 under section 49(b), and orders it to disclose that information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O., c. F. 31, as amended, sections 2(1) (definition of "personal information"), 10(2), 19, 24, 49(a) and (b).

Orders and Investigation Reports Considered: Order MO-2070.

OVERVIEW:

[1] The Royal Ontario Museum (ROM) is an internationally renowned cultural

institution operating pursuant to the *Royal Ontario Museum Act*. It has a work force in excess of 400 employees. In addition, approximately 500 people provide services to the museum as volunteers. These individuals work with ROM's Department of Museum Volunteers (DMV).

[2] An individual who had been a volunteer at the ROM in a variety of different roles began the training process to become a French tour guide. After several weeks of training, the individual was advised by email that she would not be successful in becoming a French tour guide.

[3] The individual sought a retraction and an apology. The individual's complaint was brought to the attention of the ROM's Human Resources Department and it was asked to conduct an investigation. Upon conclusion of the investigation, the individual was provided with a document entitled "Recommendations from Complaint Investigation." Subsequently, the individual submitted a request to the ROM under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records created in connection with the investigation, including:

> …all records related to [the requester's] complaint concerning [a named individual's] behaviour, except:
>
> > (a) the binder of information [the requester] supplied to ROM Human Resources as evidence of her complaint; [and]
> >
> > (b) emails sent to [the requester];

[4] The ROM identified 18 responsive records and issued a decision denying access to them, claiming the application of the discretionary personal privacy exemption at section 49(b) of the *Act*.

[5] The requester, now the appellant, appealed the ROM's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolving the appeal.

[6] During mediation, the appellant revised the scope of the request for access to "…all records containing evidence of 'bad French' and/or 'inadequate French' on which the ROM relied to compose its communication to the Department of Museum Volunteers saying I had 'bad French' and/or 'inadequate French.'" The mediator conveyed the appellant's change of scope to the ROM and the records at issue were narrowed to records consisting of handwritten notes, a draft report and emails. The remaining records previously identified as responsive were deemed by the ROM to be not responsive to the appellant's revised request. The appellant did not dispute the ROM's position.

[7] Also during mediation, in response to the request for documentation from the IPC, the ROM provided an index of records in which it relied on the discretionary

exemption section 19 (solicitor-client privilege) to deny access to some of the records at issue. For the remaining records, it claimed the exemption at section 49(b), as set out in its decision letter.

[8] The appellant took issue with the ROM's claim that section 19 applies to some of the records as the ROM raised the application of the exemption beyond the 35 days in which the IPC *Code of Procedure* permits an institution to make a new discretionary exemption claim. The ROM's late raising of a new discretionary exemption was added as an issue to the appeal.

[9] The ROM confirmed that it maintains its position that the records remaining at issue are exempt from disclosure.

[10] As the parties did not reach a mediated resolution, the file was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[11] As the adjudicator assigned to the appeal, I reviewed the 18 records that were initially deemed to be responsive to the request and those that were identified as responsive to the appellant's modified request. I noted that it appeared that record 14 could be responsive to the appellant's modified request. As a result, I added the responsiveness of record 14 as an issue on appeal.

[12] I conducted an inquiry into the appeal by seeking representations on the facts and issues on appeal. Both parties submitted representations, which were shared in accordance with the sharing procedure set out in the IPC's *Code of Procedure* and *Practice Direction 7*.

[13] In this order:

- I allow the ROM's late raising of the discretionary section 19 exemption for solicitor-client privileged records;
- I find that the records for which the new discretionary exemption has been claimed are exempt from disclosure under section 49(a), read in conjunction with section 19;
- I find that the discretionary personal privacy exemption at section 49(b) applies to records 2 to 6 and portions of record 8; and
- I do not uphold the ROM's claim that section 49(b) applies to record 1 and page 1of record 8 and order it to disclose that information to the appellant.

RECORDS:

[14] The records remaining at issue in this appeal are records 1-6 (handwritten notes of interviews), 8 (a draft investigation report), 13, 14 and 18 (email chains, including

attachments).

ISSUES:

A. Should the ROM's new discretionary exemption claim be allowed?

B. Is the email chain at record 14 responsive to the request?

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

D. Does the discretionary exemption at section 49(a), read with section 19, apply to records 13, 14 and 18?

E. Does the discretionary exemption at section 49(b) apply to records 1 to 6 and 8?

F. Did the ROM exercise its discretion under sections 49(a) and/or 49(b)? If so, should the IPC uphold its exercise of discretion?

DISCUSSION:

Issue A: Should the ROM's new discretionary exemption claim be allowed?

[15] As noted above, during mediation the ROM raised, for the first time, the application of the discretionary exemption at section 19 to several responsive records, claiming they are subject to solicitor-client privilege and therefore exempt from disclosure. Previously, the ROM claimed that these records were exempt from disclosure under section 49(b).

[16] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[17] Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[18] The purpose of the policy is to provide a window of opportunity for institutions to

raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[1]

[19] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[2] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[3]

The parties' representations

[20] Despite being asked in the Notice of Inquiry to comment on its late raising of the discretionary exemption, the ROM did not specifically address the issue in its representations.

[21] The appellant takes the position that the ROM should not be permitted to raise a new discretionary exemption at the mediation stage of the appeal. She submits that there are no compelling reasons in this case to accept ROM's late exemption claim, which occurred during mediation, well after the 35-day deadline. The appellant also submits that her interests were prejudiced as a result of the ROM's late claiming of the new exemption. She submits that had the ROM claimed the exemption earlier in the process, it is possible that she might not have narrowed her request as she did.

The ROM's new discretionary exemption claim is allowed

[22] Despite its failure to provide representations on its late raising of the discretionary exemption at section 19 to several of the records at issue, for the reasons below, I allow the ROM to raise the discretionary exemption for solicitor-client privileged records at section 19.

[23] In Order MO-2070, I explained the purpose of the IPC's policy on the late raising of discretionary exemptions:

> Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to

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[1] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[2] Order PO-1832.
[3] Orders PO-2113 and PO-2331.

> establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject of course to a consideration of the particular circumstances of each case.
>
> The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage of the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced. This approach was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[4]

[24] While the appellant takes issue with the ROM's late raising of the discretionary exemption at section 19 outside of the 35-day period stipulated in the *Code*, the timing of the claim alone is not determinative of whether a discretionary exemption is permitted.[5] As noted above, in determining whether to allow an institution to claim a new discretion exemption outside the 35-day period, the adjudicator must consider the impact of the new discretionary exemption claim on the integrity of the appeals process and any extenuating circumstances. The adjudicator must also balance the relative prejudice to the institution and to the appellant.[6] The specific circumstances of each appeal must be considered in determining whether a discretionary exemption can be raised after the 35- day period.[7]

[25] For the reasons set out below, I am satisfied that the overall integrity of the appeal process has not been compromised. I am also satisfied that any prejudice to the appellant in allowing the ROM to raise the application of section 19 to some of the records at issue outside of the 35-day policy for the raising of additional discretionary exemptions has been minimal.

[26] Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if they deem it necessary, and gives them the opportunity to address the exemption claim.[8] In this particular appeal, the records for which section 19 was claimed late, had previously been identified as records that the ROM claimed were exempt from disclosure pursuant to section 49(b). The section 19 claim was raised at mediation, which gave the appellant the opportunity to consider its application to those records with the mediator and then address it in the representations that she provided to me, during my inquiry into this appeal. As a result, in the circumstances of this appeal, I find that the appellant was provided with

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[4] (21 December 1995) Toronto Docket 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.).
[5] See, for example, Order MO-4031-1.
[6] Orders MO-2070 and PO-1832.
[7] Orders PO-2113 and PO-2331.
[8] Order MO-2070.

sufficient time and opportunity, both in mediation and in adjudication, to respond to the ROM's claim that section 19 applied to a number of the responsive records. I am also satisfied that no additional delay was incurred by the late exemption claim. As a result, I find that any prejudice that may have been incurred by the appellant has been minimal.

[27] I have also considered the potential prejudice to the ROM if I do not allow it to claim the section 19 exemption to the withheld information. In doing so, I have taken into account the importance that the courts have attached to the principle of solicitor-client privilege. For example, in *Blank v. Canada (Minister of Justice),* in discussing the importance of solicitor-client privilege, Justice Morris Fish of the Supreme Court of Canada deemed the confidential relationship between solicitor and client to be "a necessary and essential condition of the effective administration of justice."[9] As a result, I find that, in the circumstances of this particular appeal, the ROM's claim that section 19 applies to some of the responsive records should be allowed to proceed.

[28] Balancing the potential prejudice to the parties in the specific circumstances of this appeal, I am satisfied that any prejudice to the appellant has be minimal and the integrity of the adjudication process will not be compromised if I allow the ROM to raise the application of the discretionary exemption at section 19 beyond the 35-day period. Therefore, I allow the ROM to claim section 19, and below I will consider whether it applies to the records for which it has been claimed.

Issue B: Is the email chain at record 14 responsive to the request?

[29] Following the appellant's revision of her request, the ROM took the position that a number of the records that had been identified as responsive to the appellant's original request were not responsive to the revised request. From my review of the records that the ROM claimed were no longer responsive to the request, I concluded that record 14 may, in fact, be responsive to the appellant's revised request and I added it as an issue to consider in my inquiry.

[30] 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;

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[9] 2006 SCC 39 (CanLII).

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (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).

[31] 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.[10]

[32] To be considered responsive to the request, records must "reasonably relate" to the request.[11]

[33] The ROM's representations do not address whether or not record 14 is responsive to the request. However, in the index of records attached to its representations, the ROM identifies record 14 as subject to the discretionary exemption for solicitor-client privileged records at section 19.

[34] The appellant also does not make submissions on whether record 14 is responsive to her revised request, which was for "…all records containing evidence of 'bad French' and/or 'inadequate French' on which the ROM relied to compose its communication to the Department of Museum Volunteers saying I had 'bad French' and/or 'inadequate French.'"

[35] Record 14 is described by the ROM in its index as a 3-page email from its legal counsel with respect to the appellant's complaint. From my review, record 14 "reasonably relates" to the appellant's revised request because, like records 13 and 18 which the ROM has identified as responsive to the appellant's request, it is a communication about the investigation that was undertaken as a result of the appellant's complaint. Additionally, considering the principle adopted in prior orders,[12] that in interpreting a request, institutions should adopt a liberal interpretation and should resolve any ambiguity in the requester's favour, I find that record 14 is responsive to the revised request.

[36] Despite taking the position that record 14 is not a responsive record, in its index of records the ROM claimed that it is a solicitor-client privileged record, exempt from

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[10] Orders P-134 and P-880.
[11] Orders P-880 and PO-2661.
[12] Orders P-880 and PO-2661.

disclosure under section 19. As I have found record 14 to be responsive to the request and the ROM has already claimed an exemption for it, I will consider it below.

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[37] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. If the records contain the appellant's personal information, any limits on her right of access to her own personal information must be determined under the discretionary exemptions at section 49, which give her a greater right of access than the exemptions from the right of access to general records found in Part 2 of the *Act*.

[38] Personal information is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> …
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> …
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual[.]

[39] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.[13]

[40] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[41] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[14]

[42] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[15]

[43] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[16]

The parties' representations

[44] In its initial submissions, the ROM did not specifically address whether the records contain personal information as described in section 2(1) of the *Act*. On reply however, the ROM submits that the information at issue falls within the definition of "personal information" as described in paragraphs (g) and (h) of the definition in section 2(1) of the *Act*.

[45] The appellant submits that she assumes that the records contain her own personal information as they were identified as responsive to her request. She also

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[13] Order 11.
[14] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[15] Orders P-1409, R-980015, PO-2225 and MO-2344.
[16] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

submits that to the extent that the records may consist of interviews with other individuals, she is not seeking access to their names, and that information can be severed.

The records contain personal information

[46] As the appellant seeks access to information about herself, any responsive records would contain her personal information. My review of the records confirms that all of them contain the appellant's personal information, including the views or opinions of other individuals about the appellant (paragraph (g)) and, the appellant's name where it appears with other personal information about her (paragraph (h)).

[47] Record 1 (handwritten notes of an interview with the appellant), records 2 to 6 (handwritten notes from witness' interviews) and record 8 (a draft investigation report that contains summaries of the interviews with the appellant and other witnesses), also contain information about other individuals. Specifically, they contain information belonging to individuals who work or volunteer at the ROM and were questioned during the investigation into the appellant's complaint.

[48] As noted above, section 2(3) states that information associated with an individual in a professional, official or business capacity s generally not considered to be "personal information" as it is not "about" the individual.[17] In this appeal, as the information in records 1 to 6 and 8 relates to these individuals in the context of their work (either paid or volunteer) with the ROM and relates to events that occurred in that workplace, I accept that it relates to them in a professional or official capacity. However, also as noted above, even if information relates to an individual in a professional or official capacity, it may still qualify as personal information if the information reveals something of a personal nature about them.

[49] From my review of the handwritten interview notes of record 1 to 6, and the summaries of those interviews set out in record 8, despite the fact that they relate to the individuals in a professional or official capacity, I find that they contain a considerable amount of personal information about the interviewees themselves. In particular, they reveal information about their education or their employment history (paragraph (b) of the definition of "personal information" at section 2(1)), their personal opinions or views that do not relate to another individual (paragraph (e)) and their names where they appear with other personal information relating to them (paragraph (h)). At times, the records also reveal the personal information of individuals who are neither the appellant nor the individual who is being interviewed, as the interviews contain the views and opinions of the individual who is being interviewed about another identifiable individual, who is not the appellant, within the meaning of

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[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

paragraph (g) of the definition of "personal information."

[50] Accordingly, even though the information in the interview notes that are records 1 to 6 and the summaries of those interviews in record 8 relates to individuals in a professional or official capacity, I find that it is information that would reveal something of a personal nature about them and therefore qualifies as their personal information.

[51] I note that the appellant states that she does not seek access to the names of the other individuals that appear in records 1 to 6 and 8 and suggests that the ROM disclose the records to her with the names severed. I will address the possibility of severing records 1 to 6 and 8 to remove the personal information of individuals other than the appellant, below, in my discussion of section 10(2) of the *Act*.

[52] Having found that all of the responsive records contain the personal information of the appellant, it is the application of the discretionary exemptions at section 49 that must be considered with respect to the information at issue. As a result, although the ROM has claimed that section 19 applies to records 13, 14 and 18, because these records contain the personal information of the appellant, the appropriate analysis is whether section 49(a), read in conjunction with section 19, applies to these records. With respect to records 1 to 6 and 8, the ROM has already claimed section 49(b) applies to them; I will consider whether they are exempt under that section.

Issue D: Does the discretionary exemption at section 49(a), read with section 19, apply to records 13, 14, and 18?

[53] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

[54] The language "*may* refuse to disclose" in section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their own personal information.

[55] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[56] Here, the ROM claims section 49(a) with Section 19 of the *Act*, which reads:

> A head may refuse to disclose record,

> (a) that its 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.

[57] 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. In this appeal, the ROM claims that common law solicitor-client privilege under Branch 1 applies.

Branch 1: common law privilege

[58] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here the ROM relies of solicitor-client communication privilege.

Solicitor-client communication privilege

[59] 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.[18] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[19] 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.[20]

[60] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[21]

[61] 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.[22] The privilege does not cover communications between a

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[18] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[19] Orders PO-2441, MO-2166 and MO-1925.
[20] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[21] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[22] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.[23]

Loss of privilege

Waiver

[62] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[24]

[63] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[25]

[64] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[26] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[27]

The parties' representations

[65] The ROM submits that records 13, 14 and 18 are communications between one of its representatives and ROM legal counsel with respect to the investigation during which period legal advice was sought and received.

[66] In her representations, the appellant reiterates her position that there is "no valid claim of solicitor-client privilege." She submits that the ROM cannot claim the solicitor- client privilege at section 19 because it did so beyond the 35-day window. I have addressed this above and have decided to allow the ROM to claim section 19 despite its late raising. The appellant also suggests that as the ROM stated in its access decision that the decision was based on legal advice, the ROM waived its solicitor-client privilege.

[67] On reply, the ROM submits that for it to have waived its solicitor-client privilege, there must have been a definitive act on its part, as the party entitled to the privilege, to waive it. It submits that, as no such waiver occurred in this case, the solicitor-client

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[23] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[24] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[25] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[26] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[27] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

privilege should be protected.

Records 13, 14 and 18 are subject to solicitor-client privilege

[68] I have reviewed the parties' representations and the contents of records 13, 14 and 18. For the reasons set out below, I accept that section 49(a), read in conjunction with section 19, applies to all three of the responsive records for which it was claimed, subject to my consideration of the ROM's exercise of discretion with respect to this information.

[69] Records 13, 14 and 18 are email communications sent to the ROM's legal counsel. I accept that these email communications were sent to legal counsel, in confidence, for the purpose of seeking or obtaining legal advice with respect to the investigation into the complaint filed by the appellant. From my review, it is clear that the information that they contain is information passing between them with a view to keeping both the ROM and its counsel informed about the status of the investigation to facilitate legal advice being sought and provided where required. As a result, the records are subject to solicitor-client communication privilege under Branch 1, and section 19 applies.

[70] I do not accept the appellant's position that the ROM waived its solicitor-client privilege, either expressly or implicitly, with respect to the email communications that are records 13, 14 and 18. There is no evidence before me that the ROM voluntarily demonstrated an intention, whether explicit or implicit, to waive its privilege with respect to the information in these records or that fairness requires waiver.

[71] Accordingly, subject to my consideration of the ROM's exercise of discretion, I find that section 49(a), read in conjunction with section 19, applies to exempt records 13, 14 and 18 from disclosure.

Issue E: Does the discretionary exemption at section 49(b) apply to records 1 to 6 and 8?

[72] Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. In this appeal, records 1 to 6 and 8 are claimed to be exempt under section 49(b).

[73] In considering whether section 49(b) applies, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations where disclosure would not be an unjustified invasion of personal privacy.

[74] Section 21(3) identifies a number of circumstances where disclosure of the information is presumed to be an unjustified invasion of personal privacy. Section 21(2)

lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[28]

[75] For records claimed to be exempt under section 49(b), this office will consider and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[29]

[76] In this case, the ROM claims that the presumption in section 21(3)(b) applies. That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]

[77] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[30] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[31]

[78] The presumption can apply to a variety of investigations, including those relating to by-law enforcement[32] and violations of environmental laws or occupational health and safety laws.[33]

[79] The ROM also claims that the factor weighing against disclosure at section 21(2)(h) applies. That sections reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider al the relevant circumstances including whether,
>
> > the personal information has been supplied by the individual to whom the information relates in confidence [.]

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[28] Order P-239.
[29] Order MO-2954.
[30] Orders P-242 and MO-2235.
[31] Orders MO-2213, PO-1849 and PO-2608.
[32] Order MO-2147.
[33] Orders PO-1706 and PO-2716.

[80] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[34]

The parties' representations

[81] The ROM submits that records 1 to 6 and 8 represent the notes of interviews of witnesses participating in an investigation under the museum's policy "Workplace Abuse, Harassment, Discrimination and Violence" (the Policy). The ROM attached a copy of the Policy with its representations.

[82] It submits that the disclosure of records 1 to 6 and 8 would be a presumed unjustified invasion of the privacy of the individuals whose personal information is contained in the records, as contemplated by section 21(3)(b) of the *Act*. It submits that the information in those records was compiled in connection with an investigation into an allegation of harassment in the workplace, protection from which is required by the *Occupational Health and Safety Act*.

[83] The ROM submits that its policy, "Workplace Abuse, Harassment, Discrimination and Violence," sets out the following confidentiality protections:

> HR [Human Resources] will provide the alleged offender with a copy of the written complaint; interview any witnesses and thoroughly investigate and document the situation. All material will be treated confidentially, subject to the *Freedom of Information and Protection of Privacy Act*, or other legal requirements, and will not be divulged to unauthorized persons. The HR investigator will then attempt to resolve the complaint between the two parties. (page 13 of 16)
>
> *Confidentiality*
>
> Strict confidentiality will be maintained throughout the process by those involved in order to protect any party against unsubstantiated claims which may result in harm or malicious gossip. (page 14 of 16)

[84] The ROM submits that the factor at section 21(2)(h) should be considered because under the Policy, all of the witnesses provided the information in confidence.

[85] The appellant submits that there is no evidence that an unjustified invasion of anyone's personal privacy would occur were the information disclosed. The appellant submits that the investigation into how it was established that she had "bad or

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[34] Order PO-1670.

inadequate French" cannot be said to have been conducted under the *Occupational Health and Safety Act*. She argues that the ROM's investigation into her bullying complainant was a separate investigation of harassment under the *Occupational Health and Safety Act*.

[86] The appellant submits that despite the ROM's submission that the Policy demonstrates that the witnesses had an expectation that the information that they provided during the course of the investigation would be kept in confidence, the excerpt from the policy "says the opposite." She also submits that "the policy does not apply anyway" and "there is no evidence any person supplied evidence in confidence."

[87] The appellant submits that the factors favouring disclosure at sections 21(2)(a) and (d) apply. Those sections read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > …
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[88] Addressing section 21(2)(a), the appellant submits that the ROM is a "large government institution that is disparaging, without providing evidence, of a volunteer's competency in an official language which she speaks as part of her volunteer activities." She submits that public scrutiny of the ROM is essential.

[89] Addressing section 21(2)(d), the appellant submits that she has "the right to pursue [her] interests free of disparagement by a powerful authority exposing [her] to shunning…and to not being considered for opportunities in French."

[90] In reply, the ROM disputes the appellant's claim that it conducted two separate investigations. It submits that there was no investigation conducted about the quality of the appellant's French language skills. It submits that the records at issue were created in the context of an investigation under the Policy, mentioned above.

The absurd result principle applies to record 1, in its entirety, and some of the information in record 8

[91] Where a requester originally supplied the information that she seeks access to, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent

with the purpose of the exemption.[35]

[92] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement,[36]
- the requester was present when the information was provided to the institution, or [37]
- the information is clearly within the requester's knowledge.[38]

[93] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[39]

[94] Record 1 is four pages of handwritten notes taken during an interview of the appellant during the course of the investigation into her complaint. In my view, although this information contains the personal information of other individuals as well as that of the appellant, this record is tantamount to the appellant's own witness statement. As she provided the information that it contains directly to the interviewer, it is clearly within her knowledge and to withhold the information from her would be absurd and inconsistent with the purpose of section 49(b).

[95] Record 8 is identified in the ROM's index of records as a "Report of Complaint Investigation" which is, in fact, a draft report that was not provided to the appellant. Portions of this draft report resulted in a document entitled "Recommendations from Complaint Investigation" which the ROM provided to the appellant and attached to its representations in this appeal, as Exhibit F. From my review of the record, all of the information on the first page of the report – the first paragraph that summarizes the complaint and all of the information under the heading "Allegation" – is a summary of the information that was provided to the ROM by the complainant during her interview, which is recorded in record 1. As with record 1, although this information contains the personal information of other individuals as well as that of the appellant, it is information that the appellant provided directly to the interviewer and is therefore, clearly within her knowledge. In my view, to withhold this information from the appellant would be absurd and inconsistent with the purpose of section 49(b).

[96] I do not have evidence to suggest, nor do I accept on my review of record 1 or

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[35] Orders M-444 and MO-1323.
[36] Orders M-444 and M-451.
[37] Orders M-444 and P-1414.
[38] Orders MO-1196, PO-1679 and MO-1755.
[39] Orders M-757, MO-1323 and MO-1378.

the information described above in record 8, that disclosure of the information that the appellant provided during the course of the investigation would be inconsistent with the purpose of the exception at section 49(b). Rather, non-disclosure of the information that the appellant provided to the ROM in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals access to records containing their own personal information unless there is a reason for non-disclosure.[40] As a result, I find that the absurd result principle applies to record 1, in its entirety, and the information on page 1 of record 8, and it is not exempt from disclosure under section 49(b). I will order the ROM to disclose it to the appellant.

Disclosure of records 2 to 6 and the remaining portions of record 8 would result in the unjustified invasion of the personal privacy of other individuals

[97] I have reviewed records 2 to 6 and the remaining portions of record 8 and I find that disclosure of the personal information of individuals other than the appellant that they contain would constitute an unjustified invasion of their personal privacy under section 49(b).

The presumption against disclosure at section 21(3)(b)

[98] Although the ROM claims that the presumption against disclosure in section 21(3)(b) is relevant as the personal information in the records was compiled as part of an investigation under the *Occupational Health and Safety Act*, I find that I am unable to conclude that it applies in this case. However, as a result of my finding below, it is not necessary for me to do so.

[99] Previous orders have required that for the presumption against disclosure at section 21(3)(b) to apply, the body conducting the investigation must be carrying out the function of enforcing or regulating compliance with a law.[41] In the circumstances before me, I accept that the ROM conducted an internal investigation into allegations of bullying because it has a duty under the *Occupational Health and Safety Act* to protect against workplace harassment. I do not accept, however, that in conducting the investigation into the allegation of workplace bullying, the ROM was performing a law enforcement function or that it carries enforcement or regulatory responsibility under the *Occupational Health and Safety Act.*

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[40] See for example, Orders M-444, M-1977, MO-1196, MO-1323, PO-1263 and PO-1819.

[41] For example, previous orders have considered investigations by the Office of the Fire Marshall (OFM) and concluded that they do not qualify as investigations into possible violations of law for the purpose of section 21(3)(b).This is because the OFM does not carry out the function of enforcing or regulating compliance with a law. If an OFM investigation points to the possibility of a Criminal Code offence (arson, for example), any such possible violation of law would be investigated by the police, which is an agency that carries out a law enforcement function for the purpose of section 21(3)(b). See Orders PO-2066, PO-2271 and PO-2339

[100] I acknowledge that this office has previously found that information collected in the course of investigations conducted by the Ministry of Labour under the *Occupational Health and Safety Act* qualifies as information compiled and identifiable as part of an investigation into a possible violation of law as contemplated by the presumption at section 21(3)(b).[42] However, what distinguishes these cases from the matter before me is that the investigations were conducted not by the employer itself but by the Ministry of Labour which clearly has the statutory authority to enforce or regulate compliance with the *Occupational Health and Safety Act*.

[101] In this case, for section 21(3)(b) to apply, the ROM must established that in the context of investigating an allegation of workplace harassment, it is engaged in a law enforcement role. In my view the ROM has failed to establish that the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Therefore, I am unable to conclude that the presumption in section 21(3)(b) applies.

The factor weighing against disclosure at section 21(2)(h) and the factors weighing in favour of disclosure at section 21(2)(a) and (d)

[102] The ROM also submits, and I agree, that the factor weighing against disclosure at section 21(2)(h) applies. I accept that the witnesses questioned in the course of the investigation provided the information with an expectation that it would remain confidential. Further, from my review of the terms of the ROM's policy "Workplace Abuse, Harassment, Discrimination and Violence," I am satisfied that this expectation was reasonably held.

[103] I have considered the appellant's submissions that the factors at sections 21(2)(a) and (d) weighing in favour of disclosure apply but find that they do not. With respect to section 21(2)(a), the appellant has not demonstrated that that the manner in which the ROM conducts its internal investigations, should be subject to public scrutiny at this time. In addition, given the content of the specific records at issue, I do not accept that their disclosure is desirable for a public scrutiny purpose, in any event.

[104] With respect to section 21(2)(d), I have not been provided with sufficient evidence to demonstrate that the personal information at issue is required for the fair determination of the appellant's rights. The appellant refers to the vague "right to pursue [her] interests." She has not referred to a legal right which is drawn from the concepts of common law or statute law. Moreover, there is no evidence that the right to which the appellant is alluding is related to an existing or contemplated proceeding or that the personal information has some bearing on the determination of the right in question and is required in order to prepare for such proceeding. As the four-part test

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[42] Orders P-1301, P-1519 and PO-1669.

for the factor in section 21(2)(d) is not met, I find that this factor does not apply.

[105] I have also considered whether any unlisted factors favouring disclosure may apply, but can identify none arising from the appellant's representations or the records themselves.

[106] I have found that the factor weighing against disclosure at section 21(2)(h) applies and no factors weighing in favour of disclosure have been established. Therefore, I find that the disclosure of records 2 to 6 and the information that remains at issue in record 8 would constitute an unjustified invasion of the personal privacy of individuals other than the appellant and as a result, subject to my findings regarding the ROM's exercise of discretion, that information is exempt from disclosure under section 49(b).

The records cannot be severed under section 10(2) of the Act.

[107] I have considered whether, as suggested by the appellant, severance of the names of the individuals other than the appellant in records 2 to 6 and 8 would permit disclosure of the remaining information. I find that it would not.

[108] Section 10(2) of the *Act* requires the ROM to disclose as much of the record as can be reasonably severed without disclosing information that falls under one of the exemptions. In other words, a record considered in its entirety may be exempt, but the same record, properly severed, may be eligible for release.[43] Consequently, in considering section 10(2) in this case, I must determine whether any of the records can be severed such that some of the information no longer meets the requirements of the personal privacy exemption at section 49(b) and can be disclosed.

[109] The appellant suggests that if the records are severed to remove the names of the witnesses who were interviewed during the ROM's investigation into her complaint, the remaining information, including the facts and observations made by the individuals involved in the investigation, can be disclosed to her without identifying the individual to whom the information relates.

[110] The ROM submits that it is not possible to sever the records in a manner that would protect the privacy of the individuals who were interviewed as witnesses in the investigation.

[111] I have considered the context of this appeal, as well as the content of records 2 to 6 and the information that remains at issue in record 8. I find that it is not reasonably possible for any of them to be severed in such a manner that disclosure of the remaining information would not also disclose personal information that is subject

[43] See Order 43.

to the exemption at section 49(b). Given the nature of the investigation to which these records relate, the personal information that the records contain is so closely intertwined with facts and observations that, in my view, it cannot be severed for the purposes of section 10(2) of the *Act.* Moreover, given the circumstances of the investigation, I am of the view that the individuals in question would be identifiable even if their names were withheld.

[112] Therefore, I find that even if the ROM were to sever records 2 to 6 and the remaining portions of record 8 to remove the names of the witnesses as suggested by the appellant, the remaining information still qualifies as the "personal information" of identifiable individuals, the disclosure of which would be an unjustified invasion of their personal privacy.

Issue F: Did the ROM exercise its discretion under sections 49(a) and 49(b)? If so, should the IPC uphold its exercise of discretion?

[113] The exemptions at sections 49(a) and (b) are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[114] In addition, I 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 consideration.

[115] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[44] I may not, however, substitute my own discretion for that of the institution.[45]

The parties' representations

[116] The ROM submits that it exercised its discretion not to disclose records 2 to 6 and 8 because there are strong policy reasons for not disclosing the identities of the witnesses interviewed during the investigation and the comments that they made in the course of the investigation. With respect to its denial of access to records 13, 14 and 18, the ROM reiterates that these records contain information that is subject to solicitor-

[44] Order MO-1573.
[45] Section 54(2).

client privilege for which privilege has not been waived.

[117] The appellant suggests that the ROM has exercised its discretion in bad faith, or for an improper purpose. She submits that the ROM disparaged her abilities without evidence and that she should be provided with all background information that the ROM relied upon to do so.

The ROM's exercise of discretion is upheld

[118] Considering all of the circumstances, I am satisfied the ROM exercised its discretion to withhold information under section 49(a) and (b) in good faith and for a proper purpose, taking into account all relevant factors.

[119] Above, I found that records 2 to 6 and the information remaining at issue in record 8 were subject to the personal privacy exemption at section 49(b). I accept that in exercising its discretion not to disclose this information the ROM balanced the appellant's right to her own personal information against the importance of maintaining the personal privacy of the individuals who were contacted as witnesses in the investigation into the appellant's complaint. For records 13, 14 and 18, which I found were solicitor-client communication privileged records that qualify for exemption under section 49(a), read in conjunction with section 19, I am satisfied that the ROM balanced the appellant's right to her own personal information, against the purpose of the exemption and the interests it seeks to protect.

[120] Additionally, I note that at the conclusion of the investigation, the ROM provided the appellant with a document entitled "Recommendations from Complaint Investigation." This document sets out a brief summary of the conclusion that was reached and the recommendations that were made.

[121] In light of the ROM's representations, the purpose of the exemptions that were claimed and taking into account the nature of the information that was withheld, as well as that which was disclosed, I accept that the ROM exercised its discretion to deny access to the information in good faith, for a proper purpose, taking into account all relevant factors. As a result, I find its exercise of discretion was appropriate and I uphold it.

ORDER:

1. I order the ROM to disclose the following information to the appellant by **June 9, 2021**:
    - record 1; and,
    - page 1 of record 8.

2. I uphold the ROM's decision not to disclose the remaining records to the appellant.

3. In order to verify compliance with order provision 1, I reserve the right to require the ROM to provide me with a copy of the records disclosed to the appellant.

4. The timeline noted in order provision 1 may be extended if the ROM is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

Original signed by: May 12, 2021

Catherine Corban
Adjudicator