Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4226

Appeal PA20-00031

Ministry of Colleges and Universities

January 17, 2022

Summary: This is an appeal from a decision of the Ministry of Colleges and Universities (the ministry) to grant partial access to records referred to in an identified Ontario Ombudsman letter and pertaining to the requester's apprenticeship under the mandatory exemption section 21(1) (personal privacy) and under the discretionary exemption in section 19 (solicitor-client privilege). During mediation, the ministry revised its decision and disclosed to the appellant some portions of the records that had been previously withheld. During adjudication, the appellant confirmed he was not seeking access to the personal information of the ministry's employees contained in the records, removing from the scope of this appeal the application of section 21(1). In this order, the adjudicator finds that the information remaining at issue in this appeal qualifies for exemption under section 49(a) (discretion to refuse requester's own personal information) read with section 19, and that the ministry exercised its discretion properly. She dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 19 and 49(a).

Orders and Investigation Reports Considered: Orders M-352, PO-2225 and PO-4147.

OVERVIEW:

[1] The Ministry of Colleges and Universities (the ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information that is referred to in an identified Ontario Ombudsman letter, as

well as information pertaining to the requester's apprenticeship.

[2] The ministry identified responsive records and granted partial access to them, relying on the exemptions in sections 19 (solicitor-client information) and 21(1) (personal privacy) to deny access to the portions it withheld.

[3] The requester (now the appellant) appealed the ministry's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] A mediator was assigned to explore the possibility of resolving the appeal. During mediation, the mediator raised the possible application of section 49(a) (discretion to refuse requester's own information) as an issue in the appeal because the records appeared to contain the appellant's personal information. The ministry also issued a revised decision, granting access to emails previously withheld under section 19. As set out in its revised decision, the ministry took the position that sections 19 and 21(1) still applied to the withheld portions of the records.

[5] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[6] An adjudicator was assigned to this appeal and he decided to conduct an inquiry. After his review of the records, he also decided to add the possible application of the section 49(b) (personal privacy) exemption as an issue in this appeal. The ministry submitted representations and a non-confidential version was shared with the appellant, in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant also submitted representations, which were shared with the ministry and confirmed that he is not seeking access to the personal information of the ministry's employees, removing the application of sections 21 and 49(b) and some records from the scope of this appeal. The adjudicator then sought and received reply representations from the ministry and sur-reply representations from the appellant.

[7] The appeal was then transferred to me to continue with its adjudication.[1] In this order, I find that the records contain the appellant's personal information. I also find that the information remaining at issue qualify for exemption under section 49(a), read with section 19, and that the ministry exercised its discretion properly. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[8] The records in this appeal can be summarized as follows:

[1] I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

Record number	Page number(s)
Record 1	425-428
Record 2	433-439
Record 3	444-449
Record 4	455-460

[9] Each of the records is an email string. I note that record 3 is a duplication of record 4, and that records 1 and 2 are subsets of the emails in the string in record 3. Each of the records was disclosed in part; however, the redactions applied to the emails within the records are the same. What remains at issue in this appeal are seven emails found within the email strings, and one attachment (information remaining at issue).

ISSUES:

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

B. Does the discretionary exemption at section 49(a), read with the section 19 exemption, apply to the information remaining at issue?

C. Did the ministry exercise its discretion under section 49(a), read with section 19? If so, should I uphold the exercise of discretion?

DISCUSSION:

Preliminary matters

[10] The appellant submitted extensive representations related to his concerns about the ministry's apprenticeship program and his complaint to the Ontario Ombudsman's Office against the ministry. It is not within my jurisdiction to deal with these concerns. I confirm for the appellant's benefit that the records do not contain the type of information referred to in his representations, such as information related to the verification of his ability to learn and demonstrate competencies required as part of his apprenticeship, his application for apprenticeship training or his apprenticeship training agreement, the ministry's investigation of his apprenticeship sponsor (his sponsor) and his complaint against the ministry to the Ontario Ombudsman's Office. Instead, the records contain correspondence between counsel for the ministry and ministry staff, who were formulating a response to the appellant relating to his application to change his sponsor.

[11] While I have read all of the appellant's representations, I have only summarized and considered them to the extent that they deal with the issues raised by this appeal and the records.

[12] As a further preliminary matter, in his representations, for the first time, the appellant seemed to raise concerns about the ministry's search for responsive records (section 24) and submitted representations that the records should be disclosed as they raise a public interest (section 23). He also seems to be requesting a correction to the ministry's records, by submitting that the appellant's "contemporaneous documentation" should be added to the ministry's file and that the ministry should "correct its findings".

[13] I note that these issues are not set out as issues in the Mediator's Report and they were raised as an issue for the first time at the inquiry stage. In the cover letter of January 12, 2021 to the Mediator's Report, the appellant was provided with an opportunity to advise the mediator of any errors or omissions in the report by January 22, 2021. I have no record of the appellant advising the mediator by this deadline of these issues being omitted from the report.

[14] In its reply representations, the ministry attempted to address these additional issues. It submits that it conducted a proper, thorough search for records responsive to the appellant's request and that there was no use of the phrase "unable to learn", or similar words to that effect, in any of the responsive records that were released to the appellant. It also submits that the public interest override in section 23 of the *Act* does not apply to override an exemption under section 19 of the *Act*,[2] and that if the appellant believes there is an error to be corrected in the ministry's records, he can file a correction request with the ministry.

[15] I make no findings on the issues of reasonable search or the correction request, as they were not at issue in this appeal and they are not issues before me in this inquiry. Accordingly, I will not be addressing these issues further in this order. I will address the possible application of the public interest override below.

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

[16] The ministry relied on the exemption at section 19 to deny access to the information remaining at issue. However, if a record contains the requester's own personal information, the correct exemption to consider is section 49(a) (discretion to refuse access to requester's own personal information), read with section 19, of the *Act*.[3] Therefore, it is necessary to decide whether the records contain the appellant's "personal information". That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

[2] Order PO-2147; *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association,* 2010 SCC 23.
[3] The distinction is important because, in exercising its discretion to withhold information under section 49(a), an institution must take into account the fact that the records contain the requester's own personal information.

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (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;

[17] 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.[4]

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

> (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

[4] Order 11.

> dwelling and the contact information for the individual relates to that dwelling.

[19] 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.[5] However, 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.[6]

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

Representations of the parties

[21] Neither the ministry nor the appellant provided representations on whether the records contain the appellant's personal information.[8]

Analysis and findings

[22] For the reasons below, I find that each of the records contains the "personal information" of the appellant, as that term is defined in section 2(1) of the *Act*.

[23] Order M-352 establishes that I need to determine whether each record as a whole contains the appellant's personal information, using a "record-by-record approach", where "the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record".[9] In PO-4147, Adjudicator An applied this approach to a number of emails and email chains, as a whole, in determining whether they contained an individual's own personal information.[10] I adopt this approach in my analysis. In other words, I must look at each of the records in its entirety, and not just the withheld portions of the record, to determine if the record contain the appellant's personal information.

[24] Based on my review of each record as a whole, it is my view that each one refers to the appellant and his request, and the ministry's response to his request, to change his sponsor for his apprenticeship, which is recorded information about him. I am of the view that the ministry's actions in preparing a response to the appellant's request

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[8] The appellant's representations seem to suggest that the records do not contain the personal information of the representative of his sponsor, which is not relevant given the nature of the records in this appeal.
[9] See Order M-352 at page 7.
[10] At paragraph 12.

reveals information about him, including that he is working to complete his apprenticeship, which is information about his education and employment history under subparagraph (b) of the definition of "personal information" in section 2(1) of the *Act*. My review of the records leads me to conclude that disclosure of them would reveal something of a personal nature about the appellant. Accordingly, I find that the records contain the appellant's personal information that falls within the definition of "personal information" in section 2(1).

[25] The records also contain information about the ministry's employees, including name, title, contact information and work product. All of this is professional information and some of it is caught by the exception to the definition of personal information in section 2(3) of the *Act*. Moreover, none of this information would reveal anything of a personal nature about the employees.[11] Accordingly, I find that such information is not personal information. Moreover, while there is also reference to another individual related to the appellant within the records, these portions of the records have already been disclosed to the appellant and are no longer at issue in this appeal.

[26] Having found that the records contain the personal information of the appellant, the correct exemption to consider is section 49(a), read with section 19, and not section 19 alone. Accordingly, I will now consider whether the information remaining at issue is exempt from disclosure under the discretionary exemption at section 49(a), read with section 19, of the *Act*.

Issue B: Does the discretionary exemption at section 49(a), read with the section 19 exemption, apply to the information remaining at issue?

[27] 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.

[28] 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. [Emphasis added]

[29] 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 personal information.[12] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it

[11] See Order PO-2225.
[12] Order M-352.

considered whether a record should be released to the requester because the record contains his or her personal information. I return to the ministry's exercise of discretion below under Issue C.

[30] In this appeal, the institution relies on section 19 of the *Act* to deny access to the information remaining at issue. This section states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[31] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law and encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. 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.

Representations of the parties

[32] The ministry submits that the information remaining at issue should be withheld under both the common law and the statutory solicitor-client privilege branches of section 19 of the *Act*.

[33] First, the ministry submits that the common law privilege relevant to this appeal is solicitor-client communication privilege. It submits that the purpose of solicitor-client privilege is to ensure that a client may confide in their lawyer on a legal matter without reservation. It also submits that a number of IPC orders have recognized that for a record to be covered by this type of privilege, it must be established that:

a. there is a written or oral communication,

b. the communication is of a confidential nature,

c. the communication is between a client (or their agent) and a legal advisor, and

d. the communication is directly related to seeking, formulating or giving legal advice.

[34] The ministry further submits that it has been recognized by the Ontario Divisional

Court,[13] and subsequently in IPC Order MO-2198, that solicitor-client privilege is a "class-based" privilege, which "protects the entire communication and not merely those specific items which involve actual advice."[14] Adjudicator Colin Bhattacharjee also wrote that, with the exception of any portions of a record that are "clearly unrelated to legal advice," a record that constitutes a communication to legal counsel for advice is "in its entirety" subject to solicitor-client communication privilege.[15]

[35] Secondly, the ministry submits that the statutory branch of communication privilege also applies. It submits that the IPC has indicated that "Branch 2 is a statutory exemption that is available in the context of Crown counsel […] giving legal advice […]."[16] The information remaining at issue is correspondence between ministry staff and Crown counsel, which ought to be protected by this privilege because it includes legal advice given by Crown counsel.

[36] The ministry refers to comments made by former Senior Adjudicator David Goodis that "In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice."[17] It also refers to the fact that many IPC orders have recognized that, based on the case of *Balabel v. Air India*, solicitor-client privilege applies to a "continuum of communications" between a solicitor and client.

> …[T]he test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client… Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the

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[13] *Ontario* (*Ministry of Finance*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [1997] OJ No 1465.
[14] Order MO-2198 at 4 [MO-2198].
[15] MO-2198, *Supra* note 33.
[16] Orders PO-2483 and PO-2484.
[17] Order-1851-F.

> client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.[18]

[37] Specifically, the ministry submits that the information remaining at issue is part of the continuum of communications between ministry staff (client) and ministry counsel (solicitors), and that the overarching purpose of these communications was to seek and obtain legal advice from counsel to the ministry. It also submits that the information remaining at issue contain correspondence between counsel for the ministry and ministry staff who were formulating a response to correspondence from the appellant relating to his apprenticeship. It further submits that the information remaining at issue contain a request for advice and both questions and comments from legal counsel and responses from ministry staff, their clients. Specifically, the ministry submits that this information is exempt from disclosure pursuant to section 19, based on the reasoning in *Descôteaux v. Mierwinski*.[19]

[38] The ministry identifies the counsel who provided legal advice and the page numbers where legal advice is reflected in the email conversations, acknowledging the duplication of several emails in the records.

[39] With respect to loss of privilege, the ministry submits waiver has been found to apply where:

- The record was disclosed to an outside party,
- The communication is made to an opposing party in litigation, or
- The document records a communication made in open court.[20]

[40] It submits that none of the information remaining at issue has been released by the ministry to an outside party and that the communications contained in this information are all internal to government.

[41] It also submits that there is no evidence to support an allegation that privilege has been waived with respect to the information remaining at issue, or that any action has been taken by or on behalf of the client (the ministry) that would negate the application of the section 19 exemption claim. The ministry specifically submits that waiver of privilege is not an issue in this appeal.

[42] The appellant submits[21] that the ministry identified a "grey area" in its apprenticeship policy related to approving sponsors when it reviewed and declined his application to change his sponsor. In doing so, the appellant notes that the ministry

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[18] *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).
[19] (1982), 141 D.L.R. (3d) 590 (S.C.C.) (*Descôteaux v. Mierzwinski*).
[20] Orders PO-2323 and PO-2509.
[21] As noted above, I have only summarized and considered the appellant's representations to the extent that they deal with the issue of solicitor-client privilege and the records remaining at issue.

required the expertise of nine ministry employees and three legal counsel to craft and edit the decision letter to decline his application.

[43] Moreover, the appellant seems to accept that the ministry should not disclose "any information related to the administrative conduct and deliberations concerning approval or dismissal of an apprentice candidate's application for apprenticeship training". He states:

> The [a]ppellant agrees that where [m]inistry…employees identified and discussed by email an apprenticeship policy 'grey area' as it pertains to his subsequent application for trade-skill training with a sponsor other than Sponsor ID [number redacted] and the [m]inistry decision to not approve same to protect the best interests of the [m]inistry and it is their lawful right to protect the discussion of those interests and guidance received from the three Legal Branch employees.

[44] If the ministry received legal advice from counsel and then provided the same advice to his sponsor, the appellant requests that he should also be added as a party with a common interest because he is a signatory to the registered training agreement between the ministry, himself and his sponsor. He also submits that if his sponsor is considered a client of the ministry, he should also be a client and should be considered as a party to the common interest or commercial interest of the ministry and his sponsor.

[45] In reply, the ministry submits that the appellant seems to be misunderstanding the concept of "common interest privilege", which can be relied upon in litigation. It confirms that there is no litigation in which the ministry, the appellant and his sponsor are engaged; even if there was, the ministry submits that it seems likely that the appellant would be a party in opposition to either or both of the ministry and his sponsor.

[46] In response to the appellant's submission that he is also a "client" for the purpose of the solicitor-client privilege that exists between ministry staff and government counsel, the ministry submits that while it is not uncommon for ministry staff to refer to members of the public who are receiving services from the ministry as "clients" of the ministry, this is separate from the solicitor-client relationship between government lawyers (solicitors) and government staff, like the employees of the ministry (the clients of the solicitors). It submits that government lawyers provide legal advice only to government staff; they do not and cannot provide legal advice to members of the public.

[47] Overall, the ministry submits that it sought and obtained legal advice from legal counsel and this is why section 19 applies to exempt the information remaining at issue.

Analysis and findings

[48] For the reasons explained below, I find that the discretionary exemption in section 49(a), read with section 19, applies to the information remaining at issue.

[49] Under common law, 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.[22] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[23] 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.[24]

[50] 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.[25] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[26]

[51] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel, or counsel employed or retained by an educational institution or hospital, "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[52] I find that the information remaining at issue falls within the scope of section 19 because disclosure of this information would reveal communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purposes of obtaining and giving professional legal advice, and aimed at keeping both informed so that advice can be sought and given. I am satisfied that the information remaining at issue is all part of the continuum of communication between the ministry's staff and counsel for the ministry for the purpose of giving and obtaining legal advice related to formulating a response to the appellant relating to his application to change his sponsor.

[53] Based on my review of the information remaining at issue and the representations, I also find that the privilege in this information has not been lost or waived. The appellant raises the application of the common interest exception to waiver of privilege. Generally, disclosure to outsiders of privileged information constitutes

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[22] *Descôteaux v. Mierzwinski*, cited above.
[23] Orders PO-2441, MO-2166 and MO-1925.
[24] *Balabel v. Air India,* [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[25] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[26] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)

waiver of privilege.[27] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[28]

[54] I find that the common interest exception to waiver of privilege is not relevant in the circumstances of this appeal. There is no evidence that the ministry disclosed the privileged communications to the appellant's sponsor, as the appellant implies. Even if it had, and if there were a common interest between the sponsor and ministry, such a finding would protect the privilege rather than negate it.

[55] What the appellant really seems to be arguing is that he should have the information remaining at issue because he thinks the sponsor has it and/or because he is a client of the ministry. However, I agree with the ministry that the fact that the appellant is a signatory to the registered training agreement does not make him a client of the ministry, as defined in the relationship of solicitor-client privilege.

[56] Therefore, I find that both the common law and statutory solicitor-client communication privileges in branches 1 and 2 are established for the information remaining at issue. This information contains confidential solicitor-client communications, which is privileged and has not been waived or lost. Accordingly, the information remaining at issue is exempt under section 49(a), read with section 19, subject to my review of the ministry's exercise of discretion.

[57] In his representations, the appellant raises the application of the section 23 public interest override in the circumstances of this appeal. Section 23 is not available to override the application of the section 19 exemption.[29] However, the ministry is required in its exercise of discretion under section 19 to consider the public interest. Therefore, I have not considered the appellant's public interest arguments in my determination of the application of the exemptions to the information remaining at issue.[30] I will consider the appellant's public interest concerns below in my review of the ministry's exercise of discretion under section 19.

Issue C: Did the ministry exercise its discretion under section 49(a), read with section 19? If so, should I uphold the exercise of discretion?

[58] The section 19 and 49(a) exemptions 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, the IPC may determine whether the institution failed to do so.

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[27] 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.).
[28] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[29] Section 23 of the *Act* states: An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
[30] *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

[59] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[60] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] It may not, however substitute its own discretion for that of the institution [section 54(2)].

[61] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[32]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

[31] Order MO-1573.
[32] Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

Representations of the parties

[62] The ministry submits that it exercised its discretion in good faith in determining that the interests protected by solicitor-client privilege outweighed the appellant's right to access his own information in this appeal.

[63] It submits that it considered all relevant factors in good faith and relied on the following in making its decision:

- The purposes of the *Act*, including the principles that:
    - information should be available to the public;
    - individuals should have a right to access to their own personal information; and
    - exemptions from the right of access should be limited and specific.
- the wording and content of the solicitor/client exemption and the interests it seeks to protect, as weighed against the appellant's right to access his personal information in the information remaining at issue; and
- the nature of the information and the extent to which it is significant to the institution, the requestor or any affected person.

[64] The ministry also submits that although the appellant's personal information is present in the information remaining at issue, it is not different from the appellant's personal information as contained in other documents that were released in response to the request. It submits that the appellant has been granted access to his own information, and the personal information included in the information remaining at issue are properly subject to exemption in order to protect the continuum of communications between solicitor and client. It also submits that the provision of legal advice within that relationship, which is generally a "class-based" exemption, would apply to qualifying records in their entirety, as noted in Order MO-2198. It further submits that this determination is very much based on the specific facts in this matter.

[65] The appellant submits that he has a reasonable apprehension of continuing bias and the lack of good faith conduct by the ministry regarding its preference for the interests of his sponsor and the ministry's self-interests at the expense of the appellant. He also submits that there is a public interest in disclosing the information remaining at issue by referencing findings made by the Ontario Auditor General about the ministry's apprenticeship program, and his understanding of the ministry's role as part of this program. He submits that disclosure of the information remaining at issue is necessary in order to protect the interests of current and prospective apprentices and the public.

Analysis and findings

[66] I find that the ministry exercised its discretion under section 49(a), read with section 19, in a proper manner.

[67] I accept that the ministry considered the appellant's right of access to his own personal information and the limited and specific nature of the exemptions from the right of access, in determining that the interests protected by solicitor-client privilege outweighed the appellant's right to access his own information in the information remaining at issue. In doing so, it decided to disclose other portions of the records not remaining at issue, in addition to other records, to the appellant, despite the class-based nature of the section 19 exemption. Further, I note that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association*.[33]

[68] Despite the appellant's argument that the ministry was biased against him and did not act in good faith regarding his sponsor, there is no evidence before me to reasonably conclude that the ministry exercised its discretion in bad faith or for an improper purpose in claiming section 19 in the circumstances of this appeal. Moreover, I am not persuaded by the appellant's representations that the ministry should have considered that there is a public interest in the disclosure of the information remaining at issue. Given the nature of the information remaining at issue, I do not believe that its disclosure would increase public confidence in the operation of the institution, nor would its disclosure protect the interests of current and prospective apprentices and the public, as submitted by the appellant. As noted above, the information remaining at issue contains correspondence between counsel for the ministry and ministry staff, who were formulating a response to the appellant relating to his application to change his sponsor.

[69] I am satisfied that the ministry considered the purposes of the *Act* in general and of the exemptions in sections 19 and 49(a), in particular. I am also satisfied that it took into account relevant considerations and did not take into account irrelevant considerations. Accordingly, I find that the ministry properly exercised its discretion under section 49(a), read with section 19, of the *Act*.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by
Valerie Silva
Adjudicator

January 17, 2022

[33] 2010 SCC 23; [2010] 1 S.C.R. 815.