Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4326

Appeal PA21-00179

Ministry of the Solicitor General

December 12, 2022

Summary: This is an appeal from a decision of the Ministry of the Solicitor General (the ministry) to deny access to a legal opinion under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The legal opinion was prepared by the Ministry of the Attorney General, for its client, the OPP and relates to a complaint initiated by the requester. The ministry withheld the legal opinion under the discretionary exemption at section 49(a) (discretion to withhold a requester's personal information), read with section 19 (solicitor-client privilege). The appellant alleged that solicitor-client privilege in the record had been waived by the OPP. In this order, the adjudicator upholds the ministry's decision, finding that the legal opinion is subject to solicitor-client communication privilege and that the exemption at section 49(a), read with section 19 applies. She finds that privilege has not been waived. She also finds that the ministry's exercise of discretion to deny access to the legal opinion under section 49(a) was appropriate and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F31, as amended, sections 2(1) (definition of "personal information"), 19 and 49(a).

Orders and Investigation Reports Considered: Orders MO-1172, PO-3804-I

Cases Considered: *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner),* [2004] O.J. No. 1854 (Div. Ct.); *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

OVERVIEW:

[1] This order resolves an appeal from the decision of Ministry of the Solicitor General (the ministry) to deny access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to a legal opinion letter prepared by the Ministry of the Attorney General for its client, the Ontario Provincial Police (the OPP).

[2] The ministry received an access request under the *Act* for access to a number of records related to a complaint filed with the OPP by the requester. Specifically, the requester sought access to:

- All reports associated to or linked to [a specified occurrence number] along with a list of events and persons associated with this report,
- all emails pertaining to me associated with this incident since my last request in 2015, and
- all notebook entries made by [OPP] members pertaining to this report or their entries on any associated documents since my last request in 2015.

[3] The ministry located records responsive to the request and issued a decision granting partial access to them. The ministry denied access to some information, claiming the application of the discretionary exemption at section 49(a) (discretion to refuse a requester's own information), read with section 14(1)(l) (facilitate commission of an unlawful act) and section 19 (solicitor-client privilege) and the application of the discretionary exemption at section 49(b) (personal privacy) of the *Act*. The ministry also advised the requester that some information was not responsive to the request.

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

[5] A mediator was assigned to attempt to facilitate a mediated resolution between the parties. During the mediation, the appellant raised the issue of reasonable search stating that he believed that additional responsive records should exist. The mediator relayed the appellant's position to the ministry and the ministry conducted a second search. Following the second search, the ministry issued a supplementary decision to the appellant advising that additional records were located and it was granting partial access to them, claiming the same exemptions as listed above.

[6] Following a review of the additional records identified during the second search, the appellant advised the mediator that he was specifically seeking access to one record, a five-page legal opinion, which the ministry withheld based on section 49(a), read with section 19, and section 49(b) of the *Act*.

[7] The appellant also advised the mediator that the ministry's second search resolved the issue of reasonable search. He also advised that he does not seek access

to the information withheld from the other records identified as responsive to the request. As a result, reasonable search, section 14(1)(l) and the information identified as not responsive are no longer at issue in this appeal.

[8] At the end of mediation, as a mediated resolution was not reached, it was confirmed that the issues remaining to be determined in this appeal are whether the five- page legal opinion sought by the appellant is exempt from disclosure under section 49(a), read with section 19, and/or under section 49(b) of the *Act*.

[9] The appeal moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the matter sought and received representations from both the ministry and the appellant. Representations were shared between the parties in accordance with the IPC's *Code of Procedure* and *Practice Direction 7.*

[10] In its representations, the ministry advised that it is no longer relying on the personal privacy exemption in section 49(b). As a result, the only issue that remains for me to determine is whether section 49(a), read with the exemption at section 19, applies to exempt the legal opinion from disclosure.

[11] Following the completion of the inquiry, the file was transferred to me to issue an order. I have reviewed the record and the representations submitted by the parties and have decided that I do not require further representations to conclude the adjudication of this appeal.

[12] In this order, I uphold the ministry's decision to deny access to the legal opinion and dismiss the appeal.

RECORD:

[13] The record at issue is a five-page legal opinion, labelled by the ministry as pages 000006 to 000010.

ISSUES:

A. Does the legal opinion contain "personal information" as defined in section 2(1) of the *Act* and, if so, whose personal information is it?

B. Does the discretionary exemption at section 49(a), allowing the ministry to refuse access to a requester's own personal information, read with the solicitor-client privilege exemption at section 19, apply to the legal opinion?

C. Should the ministry's exercise of discretion to refuse access to the legal opinion, under the exemption at section 49(a), read with section 19, be upheld?

DISCUSSION:

Issue A: Does the legal opinion contain "personal information" as defined in section 2(1) of the *Act* and, if so, whose personal information is it?

[14] I must first decide whether the legal opinion contains the appellant's "personal information." If it does, his access rights are greater than if it does not.[1]

[15] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, including paper and electronic records.[2]

[16] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[3]

[17] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[4] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[5]

[18] Section 2(1) of the *Act* gives a non-exhaustive list of examples of personal information.[6] Examples of personal information that are relevant to this appeal are set out below:

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

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[1] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies. When a record contains the requester's own personal information, the institution must take that into account in exercising its discretion.

[2] See the definition of "record" in section 2(1).

[3] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(3) and 2(4), which 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 dwelling and the contact information for the individual relates to that dwelling.

[5] Orders P-1409, R-980015, PO-2225 and MO-2344.

[6] Order 11. Other kinds of information can also be "personal information."

> …
>
> (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,
>
> …
>
> (h) the individual's name if 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.

Analysis and finding on personal information

[19] Neither the ministry nor the appellant provided submissions on this issue.

[20] Based on my review of the legal opinion, I find that it contains the appellant's personal information, as that term is defined in section 2(1) of the *Act*. The legal opinion contains recorded information about the appellant that, if disclosed, could identify him. It contains information relating to the appellant's medical and employment history (paragraph (b)) and it contains his name, together with other personal information about him (paragraph (h)).

[21] Accordingly, I will consider whether the discretionary exemption at section 49(a), read with section 19, applies to permit the ministry to refuse to disclose the appellant's own personal information to him.

Issue B: Does the discretionary exemption at section 49(a), allowing the ministry to refuse access to a requester's own personal information, read with the solicitor-client privilege exemption at section 19, apply to the legal opinion?

[22] The ministry claims that the legal opinion is exempt from disclosure under section 19 because it is privileged solicitor-client information. Having found that the legal opinion includes the personal information of the appellant, as explained above, I must consider whether the ministry can deny access to it under the discretionary exemption at section 49(a), read with the solicitor-client privilege exemption at section 19.

[23] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides some exemptions from this general right of access to one's own personal information.

[24] Section 49(a) of the *Act* 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, 15.1, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

[25] The discretionary nature of section 49(a) ("may" refuse to disclose) 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.[7]

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

[27] In this case, the ministry relies on section 49(a), read with section 19, to deny access to the legal opinion. Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states, in part:

> 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
> >
> > …[8]

[28] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[29] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in section 19(b), ("prepared by or for Crown counsel") contains statutory privileges created by the *Act*.[9]

[30] The institution must establish that at least one branch applies. Here the ministry claims that both branch 1 and branch 2 apply.

[31] Below I find that the legal opinion is exempt under branch 1, solicitor-client

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[7] Order M-352.
[8] Paragraph (c) of section 19 relates to records prepared by or for a counsel employed or retained by an educational institution or a hospital. It is not relevant to this appeal.
[9] The second branch also includes section 19(c), which refers to counsel employed or retained by educational institutions and hospitals.

communication privilege at common law. It is therefore not necessary for me to address branch 2, the statutory privilege.

Branch 1: Solicitor-client privilege at common law

[32] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In this appeal, the ministry submits that the legal opinion is subject to solicitor-client communication privilege of branch 1. As I explain below, I find that the common law solicitor-client communication privilege applies to the legal opinion. Therefore, it is not necessary for me to consider whether the litigation privilege component of common law solicitor-client privilege applies.

Common law solicitor-client communication privilege

[33] 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.[10] The rationale for this privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[11] 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.[12]

[34] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[13]

[35] 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.[14] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[15]

Loss of privilege at common law – waiver

[36] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[16]

[37] There may also be an implied waiver of solicitor-client privilege where fairness

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[10] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[11] Orders PO-2441, MO-2166 and MO-1925.
[12] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[13] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[14] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[15] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.).
[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[17]

[38] Generally, disclosure to outsiders of privileged information is a waiver of privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

Representations

The ministry's representations

[39] The ministry submits that the legal opinion was created by Crown counsel at the Ministry of the Attorney General for the purpose of communicating legal advice to an identified employee of the OPP, an inspector. The ministry submits that the legal opinion was created at the request of the OPP inspector who was seeking legal advice from their counsel. The ministry submits that this is clear from the content of the first two paragraphs of the legal opinion.

[40] The ministry also submits that the legal advice includes an interpretation of legislation based on specific facts, that the legal opinion explicitly states both in its subject heading and in the body of the text itself, that it is "confidential and privileged" and that there is no evidence to suggest that the privilege contained in the record has ever been waived.

[41] The ministry also notes that in *Ministry of Community and Social Services v. Ontario (Information and Privacy Commissioner),*[20] the Divisional Court stated:

> The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically …

[42] In conclusion, the ministry submits that for the reasons expressed above, the legal opinion is protected by solicitor-client privilege and is exempt from disclosure under the *Act*.

The appellant's representations

[43] The appellant's representations do not specifically address whether solicitor-client privilege applies to the record but instead focus on his view that any solicitor-client privilege that might have existed with respect to the legal opinion has been

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[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[18] 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.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[20] [2004] O.J. No. 1854 (Div. Ct.) (at paragraph 22).

waived by the OPP.

[44] The appellant submits that he met with two OPP inspectors, one of whom is a senior member of the OPP, to discuss his complaint. He submits that that the senior member of the OPP "was clearly in a position to understand the privilege but voluntarily waived it." To support his position the appellant provided an audio recording that he submits demonstrates that privilege in the legal opinion was waived by the OPP.

[45] The audio recording records a meeting between two OPP inspectors, the appellant and his wife. The duration of the meeting was one hour and 53 minutes. The appellant notes that after the one-hour point of the meeting, following the "outlining of evidence in [his] case," the conversation turns to the OPP inspectors' intention to speak to a Crown Attorney (Crown) about the matter. The appellant submits that the OPP inspectors "indicate that they take the case seriously and that they will discuss it with a Crown." The appellant further submits that in their discussion, one of the inspectors states clearly that they do not want to preclude or prevent the appellant from having full access to the Crown from whom they receive an opinion about the matter. The appellant submits that towards the end of the meeting one of the inspectors states that one of the two of them will let the appellant know which Crown they speak to and that they will contact the appellant again to discuss the matter further, once the identity of the Crown assigned to the matter is known.

[46] The appellant submits that it is clear from the audio of the meeting that solicitor-client privilege in the legal opinion was waived and demonstrates how and why he "came to understand that there would be nothing but transparency" about the matter. He submits that the recording of the meeting is "pretty convincing" to him that the inspectors intended that any solicitor-client privilege was being waived and disclosing legal advice provided by the Crown to him would be a non-issue. He submits that "if [the inspector] was not being truthful to [him], then the reputation of his [OPP department], along with the OPP would be severely tarnished."

The ministry's reply representations

[47] Replying to the appellant's representations on waiver, the ministry submits that the appellant's suggestion that the audio recording indicates that the OPP waived solicitor-client privilege "seems impossible." The ministry notes that the audio recording was prepared on April 25, 2019, while the legal advice was only sought after that meeting, on June 13, 2019, and then received even later, on July 17, 2019. The ministry submits that it does "not see how privilege could have been waived if the legal advice had not yet been sought, let alone received at the time the audio recording was prepared." The ministry submits that, on this basis, it continues to maintain that solicitor-client privilege was not waived. The ministry requests that:

> [T]he appellant point to the specific part of the close to two-hour audio recording where waiver has supposedly occurred, as this is entirety unclear to [the ministry].

[48] The ministry submits that the fact that an OPP inspector allegedly undertook to "talk further" to the appellant once they had spoke to a Crown about the matter does not mean that privilege in the advice that was being sought or received was waived.

The appellant's sur-reply representations

[49] In response to the ministry's request that he point to the specific parts of the audio recording where the waiver of solicitor-client privilege occurred he submits that the discussion in the entire last hour of the meeting led him to believe that solicitor-client privilege was being waived. He points to a number of comments made by the OPP inspector that he submits demonstrate his belief is accurate. In particular, he submits that the OPP inspector states:

- "I have no problem with you talking to the Crown."
- "I have no issue with you going meeting separately with that Crown if that's what you want to do but initially to get the Crown to even review it when our position is there is no RPG [reasonable probably grounds] to lay a charge." [SIC]
- "You are welcome to go an speak with that Crown but the initial contact to bring them that package will be from us. I'm going to call in some favours, that's why I was alluding to Crown Law because normally they wouldn't do this."
- "I don't want to preclude or prevent you from having full access to that Crown, certainly giving you the name, but he may say to us, you should do this and this and if they do, we're going to do it."
- [Other named inspector] or I will reach out and let you know which Crown we were speaking to."

[50] The appellant submits that he "can find nothing in the audio recording indicating that [the OPP] was going to deny [him] full access to that Crown Attorney that he was going to speak to." The appellant further submits that, as a result, it is his position that the OPP is "obligated to honour [the inspector's] promise to [him] by providing [him] with the information that [he] seek[s], as it is clear that [the inspector] was clearly waiving all solicitor-client privilege."

Analysis and finding

[51] Based on my review of the parties' representations, and my review of the record, I find that the legal opinion is subject to the solicitor-client communication privilege component of common law solicitor-client privilege under section 19(a) of the *Act*. I

also find that privilege in the legal opinion has not been waived.

Solicitor-client communication privilege

[52] The legal opinion that is at issue was prepared by Crown counsel at the Ministry of the Attorney General for its client, the OPP. From its content, it is clear that the legal opinion was prepared directly in response to a request for legal advice from the OPP. I am satisfied that it is a direct communication of a confidential nature between a lawyer and a client and that it was made for the purpose of receiving or giving legal advice.

[53] While not necessarily determinative to the issue, markings on the legal opinion clearly indicate that it was intended to be confidential, as the words "Confidential & Privileged Legal Advice" appear on its face. The content of the legal opinion also indicates that it consists of legal advice subject to solicitor-client privilege under section 19 of the *Act,* further indicating the parties' intention that the content of the legal advice be confidential and privileged.

[54] For these reasons, I find that the legal opinion is subject to the solicitor-client communication privilege component of the common law solicitor-client privilege portion of the exemption, found at section 19(a) of the *Act*.

Waiver of privilege

[55] Although I have found that the legal opinion is subject to solicitor-client communication privilege, the appellant argues that the OPP has waived its privilege in the record and that, as a result of that waiver of privilege, the legal opinion should be disclosed to him.

[56] For the reasons set out below, on the facts of the present appeal and having considered the audio recording submitted by the appellant, in its entirety, I am satisfied that the OPP did not explicitly or implicitly waive its solicitor-client privilege in the legal opinion.

[57] As noted above, an express waiver of privilege will occur where the holder of the privilege either knows the existence of the privilege and, voluntarily demonstrates an intention to waive the privilege.[21] In this case, the appellant argues that the holder of the privilege, the OPP, knew of the existence of the privilege and voluntarily demonstrated an intention to waive it. The appellant argues that this intention was made clear verbally during a meeting between himself and the investigators that occurred prior to those investigators seeking legal advice from the Crown Attorney who ultimately prepared the legal opinion. He submits that the audio recording of the meeting, which he provided with his representations, reveals that privilege was waived.

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

[58] As submitted by the appellant, and as it is clear from the audio recording, the OPP inspectors who met with the appellant advised him that they would seek legal advice from a Crown with respect to his complaint. It is also clear that the inspectors advised the appellant that, once they had spoken to a Crown about the matter, they would let the appellant know who it was and would not prevent the appellant from speaking to or meeting with that Crown to discuss the circumstances of his complaint. However, I do not accept that the OPP inspectors' statements to the appellant in this respect amount to an explicit waiver of privilege with respect to the legal opinion that was subsequently sought and received by the OPP.

[59] Prior orders issued by the IPC have found that, even where there is some disclosure of legal advice that may be necessary in the interest of transparency, if that disclosure is minimal, the holder of the privilege may be found not have waived it. Specifically, in Order MO-1172, the adjudicator upheld the City of Vaughan's decision to deny access to a confidential memorandum containing legal advice. The adjudicator rejected the appellant's argument that because a public report referenced a portion of the bottom line of the legal advice contained in the memorandum, privilege had been waived. The adjudicator noted that, public disclosure of bottom line information may be necessary in the interest of transparency but that it does not necessary demonstrate that there has been an express waiver of privilege. In that appeal, the adjudicator was satisfied that the minimal disclosure of legal advice in the public report did not amount to an explicit waiver privilege.

[60] Subsequent orders have adopted similar reasoning to uphold privilege where public disclosure of some information gave rise to claims of implied waiver.[22] Although, in this case, there has been no public disclosure of information contained in the legal opinion, because the appellant alleges that the OPP inspectors assured him that the Crown would discuss his complaint with him, in my view, the approach taken in those orders is relevant to my consideration of the circumstances in this appeal.

[61] In my view, there is a difference between the disclosure of record setting out the legal advice itself and a discussion with the Crown who prepared it. I accept that the OPP was willing to make the Crown who prepared the legal opinion for them and was therefore, familiar with the facts of the matter, available to the appellant to discuss his concerns or perspective about the case. However, that does not, in my view, mean that the OPP conveyed an intention to waive privilege of the entirety of the legal advice set out the legal opinion. While I accept that the inspectors were quite prepared to have the appellant speak to the Crown about the merits of his complaint and accept that during that discussion Crown may have been prepared to discuss the matter, and possibly even disclose some information about their views on the appellant's complaint, I do not accept that the evidence supports a conclusion that this demonstrates an explicit intention on the part of the OPP to waive their solicitor-client privilege with respect to the entire substance of the legal advice set out in the legal opinion.

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[22] Orders MO-2945-I, MO-2500, MO-2573-I and MO-1233.

[62] It is unclear to me, from the evidence, whether there was ever, in fact, a meeting between the appellant and the Crown who prepared the legal opinion. However, even if such meeting occurred and the appellant was verbally provided with the bottom line or a portion of a conclusion reached in the privileged legal opinion, in my view, such disclosure would be described as relatively minimal. There is no evidence before me to suggest that the appellant was provided access to the legal opinion itself or provided with the specific details of the content of the legal advice it provided.

[63] Additionally, it is clear from the date of the audio recording and the date of the legal opinion that any waiver of privilege that the appellant asserts may have occurred, occurred *prior* to the legal advice being sought and provided by Crown counsel. I do not accept that the OPP explicitly waived privilege in legal advice, the substance of which was neither in existence nor known to them at the time that the alleged waiver of privilege occurred.

[64] Finally, given the evidence on the face of the legal opinion, discussed above, which reveals that the Ministry of the Attorney General intended that the advice be privilege and that the OPP held a correlative belief with respect to the privilege in the legal opinion as communicated through the ministry in its representations, I accept that there is no evidence of an explicit intention on the part of the OPP to waive the solicitor-client privilege that it had with respect to the legal opinion.

[65] Accordingly, I find that there has been no explicit waiver of privilege by the OPP with respect to the legal opinion.

[66] I also find that there has no implied waiver of privilege with respect to the legal opinion. As noted above, waiver of solicitor-client privilege may also be said to have been implicit, where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[23]

[67] In *S & K Processors,* the decision that sets out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."[24] The court referred to the proposition that "double elements are predicated in every waiver – implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived."[25]

[68] In Order MO-1172, the circumstances of which are discussed above, the adjudicator was also satisfied that there had been no implicit waiver, as there was no basis for finding that fairness or consistency required disclosure. In that case, among

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[23] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[24] *S & K Processors*, cited above, at paragraph 6.
[25] Set out in Wigmore on evidence, cited in *S & K Processors,* at paragraph 10.

other factors, the adjudicator found that there was no evidence that the legal opinion was provided to anyone other than City of Vaughan officials and active steps were taken to preserve its confidentiality.

[69] First, considering whether there was an implicit intention to waive privilege in this case, for similar reasons to those expressed above, in my view, the fact that the OPP was willing to facilitate a discussion between the Crown who prepared the legal opinion and the appellant does not necessarily mean that the OPP implicitly conveyed an intention to waive privilege of the entirety of the legal advice set out the legal opinion.

[70] Second, on the facts of this appeal, I do not see how fairness or consistency require the disclosure of the legal opinion to the appellant in this case. In this respect, I have considered the appellant's submissions that suggest that disclosure of the legal opinion is fair and consistent with inspectors' offer to make the Crown available to the appellant or that disclosure of the legal opinion is necessary to further some public interest, specifically, to maintain the integrity of OPP investigations or to hold the inspectors assigned to his complaint to account. I do not find these submissions to be particularly compelling with respect to establishing a waiver of privilege, in this case. I do not accept that the evidence demonstrates that the OPP inspectors told the appellant that he would have unfettered access to any and all legal advice provided to them by Crown counsel with respect to the matter. As a result, I find that the appellant's argument in these regards have no merit.

[71] Accordingly, I find that it has not been established that, in this case, there was an implied intention on the part of the OPP to waive privilege and that fairness or consistency require it.

[72] In conclusion, having considered all of the circumstances, I find that there is insufficient evidence to suggest that solicitor-client privilege has been lost through waiver, be it explicit or implicit.

[73] As privilege has not been lost through waiver, I find that the legal opinion is subject to the solicitor-client communication privilege component of solicitor-client privilege, at common law, and is therefore exempt from disclosure at section 49(a), read with section 19(a). As section 49(a) is a discretionary exemption, my finding is subject to my review of the ministry's exercise of discretion, which I will consider now.

Issue C: Should the ministry's exercise of discretion to refuse access to the legal opinion, under the exemption at section 49(a), read with section 19, be upheld?

[74] The section 49(a) is a discretionary exemption (the institution "may" refuse to disclose), meaning that the ministry can decide to disclose information even if the information qualifies for exemption. The ministry must exercise its discretion. On

appeal, I must determine whether the ministry's exercise of discretion was appropriate.

[75] Through orders issued under the *Act*, the IPC has developed a list of considerations that may be relevant to an institution's exercise of discretion. Some examples of considerations that might be relevant to this appeal include:

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

[76] Not all these considerations will necessarily be relevant, and additional unlisted considerations may be relevant.[26]

[77] I may also find that the ministry erred in exercising its discretion if, for example, there is evidence that it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[78] If I determine that the ministry failed to exercise its discretion, or that it erred in exercising its discretion, I may send the matter back to the ministry for a re-exercise of discretion. However, I may not substitute my own discretion for that of the ministry.[27]

Representations

[79] The ministry submits that its exercise of discretion not to disclose a legal opinion prepared for the purpose of providing legal advice was appropriate. It submits that it is concerned that disclosure of this type of confidential communications between Crown counsel and its client, in this case the OPP, would defeat the purpose of solicitor-client privilege, both at common law and under the *Act*.

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[26] Orders P-344 and MO-1573.
[27] Section 54(2) of the *Act*.

[80] The appellant argues that the police acted in bad faith by refusing to disclose the legal opinion. He submits that he provided information about the matter to the OPP to be presented to the Crown Attorney on his behalf and the OPP did not investigate.

[81] The appellant submits that disclosing the legal opinion is important for maintaining public confidence in the OPP's operations. He submits that when the OPP says they are going to do something the public should be able to trust that they will "stand behind their promise." He submits that failing to disclose the legal opinion, especially in the face of the inspectors' agreement to make the Crown available to him to discuss his complaint, demonstrates that the OPP and the inspectors themselves exercised their discretion in bad faith or for an improper purpose.

[82] In reply, the ministry notes that it is clear that the appellant is not satisfied with the service that he received from the OPP and that perhaps he is "somehow conflating [his] dissatisfaction with the conduct of the OPP with the supposed waiver of privilege." The ministry submits that it is entitled to maintain solicitor-client privilege in a record even where someone takes issue with how the OPP investigated a matter and this does not mean its exercise of discretion not to disclose it was improper.

[83] The ministry states that if the appellant is dissatisfied with the OPP's response to his complaint he can file a complaint with the Office of the Independent Police Review Direction (OIPRD). It submits that a complaint before the OIPRD is the more appropriate recourse for the appellant to pursue instead of trying to obtain access to a record that is subject to legal privilege and protected under the *Act*.

[84] The appellant notes the ministry's suggestion that he file a complaint with the OIRPD with respect to the OPP's conduct in its investigation into the matter but submits that he has already submitted three complaints with the Ombudsman's office regarding the lack of investigation and "nothing happened as a result." He submits that he is of the view that proceeding by way of an access to information request for the information that he seeks is the most appropriate process for him and the ministry should exercise its discretion to disclose the legal opinion to him.

Analysis and finding

[85] Having considered the parties' representations, I find that in denying access to the legal opinion, the ministry properly exercised its discretion under section 49(a) of the *Act*, and I uphold it.

[86] It is evident that the ministry considered that the legal opinion contained personal information of the appellant, but determined that it would exercise its discretion not to disclose it, given the nature and content of the information in the record and the interests the solicitor-client privilege exemption seeks to protect, which are significant.

[87] Despite the appellant's position that the ministry acted in bad faith or for an

improper purpose by not disclosing the legal opinion, I disagree. There is no evidence before me to suggest that the ministry considered any irrelevant factors, acted in bad faith, or erred in its exercise of discretion. I am satisfied that the ministry considered that the legal opinion contained some personal information relating to the appellant but concluded that another factor weighed more heavily in favour of its decision not to disclose it, specifically, the importance of maintaining the integrity of solicitor-client privilege.

[88] For these reasons, I uphold the ministry's exercise discretion and its decision to deny access to the legal opinion under section 49(a) of the *Act*, read with section 19.

ORDER:

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

Original signed by: December 12, 2022

Catherine Corban
Adjudicator