

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4484

Appeal PA23-00052

Ministry of Tourism, Culture and Sport

February 22, 2024

Summary: The Ministry of Tourism, Culture and Sport (the ministry) received a request for records related to a specified grant application. The ministry located responsive records and granted partial access to them, with portions withheld under sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege).

In this order, the adjudicator finds that the withheld records are exempt from disclosure under sections 13(1) and 19 and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 13(1) and 19.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] A request was made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Tourism, Culture and Sport (the ministry) for records relating to a specified grant application, including records relating to the grant's approval, when it was later turned down by the ministry, and who was involved.

[2] The ministry located records responsive to the request and issued a decision to the requester granting partial access to them. The ministry withheld parts of the records under the discretionary exemptions in sections 13(1) (advice or recommendations) and

19 (solicitor-client privilege) of the *Act*. The ministry also withheld some portions as not responsive.

[3] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the appellant stated that he was not seeking access to non-responsive information but confirmed his interest in accessing the rest of the records. The ministry maintained its sections 13(1) and 19 exemption claims.

[4] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator previously assigned to the appeal sought and received representations from the ministry and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*. The appeal was then transferred to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek further representations.

[5] For the reasons that follow, I uphold the decision of the ministry and dismiss the appeal.

RECORDS:

[6] The records at issue consist of email chains and drafts of correspondence. They are identified as records 1-16, 18-21, 23-30, 32-37, and 39-47 in the index of records provided to the appellant.

ISSUES:

- A. Does the discretionary exemption at section 19 for solicitor-client privilege apply to the records?
- B. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?
- C. Did the ministry exercise its discretion under sections 19 and 13(1), as applicable?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 for solicitor-client privilege apply to the records?

[7] The ministry submits that records 1-16, 18-21, 23-30, 32-37, and 39-47, either in their entirety or portions thereof, are exempt under section 19 of the *Act*.

[8] 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:

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.

[9] 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 at least one of the branches applies.

[10] Solicitor-client communication privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.¹ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.²

[11] The branch 2 exemption is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons. As discussed below, as I have found that the first branch applies to the records at issue, I will not discuss the second branch further.

[12] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³

[13] 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.⁴ There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² *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.

³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁴ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.⁵ Generally, disclosure to outsiders of privileged information is a waiver of privilege.⁶ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁷

Representations

[14] The ministry provided confidential representations on the application of the section 19 exemption, including the legal advice sought or received in the withheld records, as well as the underlying context of the advice. The ministry submits that the solicitor-client communication privilege, contained in section 19(a) of the *Act*, applies to the records outlined above. It states that the withheld information was communicated in confidence between the ministry's Crown counsel and its staff, and that this is the expectation and norm for all communication containing legal advice between Crown counsel and ministry staff. It states that the information subject to section 19(a) covers a continuum of communications between Crown counsel and the ministry or the client, laying out relevant legal considerations and providing legal advice to the ministry regarding the issues underlying the access request.

[15] The appellant's representations consisted mostly of background information related to the issues underlying the access request. While the representations outline his concerns about the ministry's conduct during the events preceding the access request, they are not relevant to whether the information at issue should be disclosed pursuant to the *Act*, and I have not summarized them here. He did not provide specific representations on whether the withheld information was exempt under section 19.

Analysis and finding

[16] The common law solicitor-client communication privilege aspect of section 19(a) protects direct communications of a confidential nature between lawyer and client, or their agents and employees, made for the purpose of obtaining or giving legal advice. Based on my review of the records, which consist of email chains and attachments, they are on their face direct communications of a confidential nature between ministry legal counsel and ministry staff for the purpose of obtaining or giving legal advice.

[17] While I understand that the appellant is concerned about the ministry's conduct in the events preceding the access request, this does not change the fact that the records reflect legal advice that was sought and received by ministry staff in response to various issues related to these events. Furthermore, I agree with the ministry's position that while the portions withheld under section 19 contain background information, they cannot be severed in a manner that provides any meaningful disclosure while protecting solicitor-

⁵ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁶ 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.).

⁷ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

client privilege.

[18] Additionally, there is no evidence before me that the ministry waived solicitor-client communication privilege for these emails, and the appellant has not submitted that this occurred. As such, I find that the records are exempt from disclosure under section 19(a) in their entirety. I will review the ministry's exercise of discretion to withhold these records below.

[19] Having found that the records are exempt under section 19(a), I do not need to determine if they are also exempt under section 19(b).

Issue B: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the records?

[20] The ministry has claimed section 13(1) of the *Act* for portions of records 39, 40, 41, 43, 44, and 47. Records 11, 12, 13, 23, and 24 contain portions where section 13(1) and section 19 were claimed for the same redaction, but as I have already found that these records are exempt under section 19, I will not address if they are exempt under section 13(1).

[21] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁸

[22] Section 13(1) states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

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

[24] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁹

[25] "Advice" involves an evaluative analysis of information. Neither "advice" nor

⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43 (*John Doe*).

⁹ See above at paras. 26 and 47.

“recommendations” include “objective information” or factual material.

[26] Section 13(1) applies if disclosure would “reveal” advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁰

[27] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information,¹¹
- a supervisor’s direction to staff on how to conduct an investigation,¹² and
- information prepared for public dissemination.¹³

[28] Sections 13(2) and (3) create a number of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). None of these exceptions were argued, or in my view apply, in the circumstances of this appeal.

Representations

[29] The ministry submits that section 13(1) is intended to protect the ability of public servants to provide advice and make recommendations, within the deliberative process of government decision and policy making. It refers to *John Doe v. Ontario (Finance)*¹⁴, where the Court of Appeal held that decision makers are entitled to confidential policy advice, which may or may not include explicit recommendations as to what the persons report to them believe is the preferred course of action. They state that the Court held that advice “encompasses material that permits the drawing of inference with respect to a suggested course of action, but which does [not] itself make a specific recommendation.”¹⁵

[30] The ministry submits that all portions of the records for which section 13(1) was claimed in the appeal contain advice or recommendations, whether or not accompanied

¹⁰ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹¹ Order PO-3315.

¹² Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹³ Order PO-2677

¹⁴ *John Doe*, *supra* note 8.

¹⁵ The ministry quoted the Court as saying at paragraph 22 “...which does itself make a specific recommendation.” This is a misquote of the decision and is corrected above.

by evaluative analysis and are exempt under section 13(1).

[31] It submits that records 39 and 40 are emails between staff in the Deputy Minister's Office and the Minister's Office and contain advice relating to the Reconnect Ontario program, a program for funding certain events, while records 43, 44, and 47 are similar emails conveying the same information as records 39 and 40. It submits that the portions for which section 13 is claimed contain the advice and recommendations of ministry staff with respect to the appellant's application for funding to the Reconnect Ontario program.

[32] The appellant's representations consisted mostly of background information related to the issues underlying the access request. He did not provide specific representations on whether the withheld information was exempt under section 13(1).

Analysis and finding

[33] Records 39, 40, 43, 44, and 47 contain identical information, consisting of a single sentence in an email chain between ministry staff regarding the issues underlying the request. I find that this sentence is not a "recommendation" within the meaning of section 13(1), but it is "advice."

[34] The sentence does not specify a particular course of action for the email recipients to consider, but it does provide subjective context for the rest of the information in the email chains present throughout the rest of the records, both the disclosed portions and portions withheld under section 19. I find that it is substantively more than just background or factual information when considered with information that was already disclosed. The information in the sentence is evaluative in nature and speaks to the outcome of the incident underlying the request, providing some detail about why certain events transpired when considered with other information about the incident. I find that this constitutes "advice" as described in *John Doe* and therefore find that the sentence is exempt under section 13(1).

[35] Accordingly, I uphold the decision of the ministry to withhold these records, subject to my review of their exercise of discretion, below.

Issue C: Did the ministry exercise its discretion under sections 19 and 13(1), as applicable?

[36] As described above, I find that the records are exempt from disclosure under sections 19 and 13(1) of the *Act*.

[37] The sections 13(1) and 19 exemptions are discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[38] 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; or
- it fails to take into account relevant considerations.

[39] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ The IPC cannot, however, substitute its own discretion for that of the institution.¹⁷

Representations, analysis and finding

[40] The ministry submits that it considered the purpose and wording of the claimed exemptions and the interests each one seeks to protect. It states that the section 13(1) exemption is intended to protect the ability of public servants in the ministry to provide advice and make recommendations regarding the operational and policy decisions within the minister's/ministry's mandate.

[41] It states that in this appeal, the relevant government decision-maker was the minister, who makes decisions on funding to be provided by the ministry for eligible applications. The ministry took the view that the minister was entitled to receive confidential operational advice and recommendations from the public servants in his ministry regarding all the circumstances surrounding the application for funding.

[42] For section 19, the ministry submits that the purpose of the exemption is to protect direct communications of a confidential nature between a lawyer and their client, or their agents or employees, made for the purpose of obtaining or giving legal advice. It states that the exemption recognizes that confidentiality is an essential component of solicitor-client communication privilege. It states that it considered the balancing of the appellant's interests in disclosure of the records with the importance of the solicitor-client relationship.

[43] The ministry further states that it considered the nature of the information the exemptions were applied to and the historic practice of the institution regarding similar information. It states that solicitor-client privileged information must be protected to preserve confidence in the solicitor-client relationship and internal information on funding application evaluations is not typically disclosed.

[44] The ministry further submits that it considered whether the appellant has a sympathetic or compelling need to receive the information, and that it is of the view that he does not. It also states that disclosure of the withheld information would not increase

¹⁶ Order MO-1573.

¹⁷ Section 54(2).

public confidence in the operation of the ministry and that it exercised its discretion in good faith, took all relevant considerations into account, and did not take irrelevant considerations into account.

[45] The appellant did not provide specific representations on the ministry's exercise of discretion.

[46] I have reviewed the considerations relied upon by the ministry and I find that it properly exercised its discretion in response to the access request. Based on its representations, it considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the records with the purposes of the section 13(1) and 19 exemptions.

[47] I find that the ministry did not exercise its discretion to withhold the information for any improper purpose or in bad faith, and that there is no evidence that it failed to take relevant factors into account or that it considered irrelevant factors. Accordingly, I uphold the ministry's exercise of discretion in denying access to the records.

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original Signed By: _____
Chris Anzenberger
Adjudicator

February 22, 2024 _____