

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4502

Appeal PA20-00565

Ministry of the Attorney General

March 28, 2024

Summary: The appellant submitted a request under the *Act* to the ministry for records relating to an ethics complaint he filed with the Alcohol and Gaming Commission (the AGCO). The AGCO granted the appellant partial access to the responsive records. The AGCO withheld some of the records under the solicitor-client privilege exemption in section 19 of the *Act*. The appellant appealed the AGCO's decision and claimed additional responsive records ought to exist. In this decision, the adjudicator upholds the AGCO's decision in part. She finds some of the records are exempt from disclosure under the solicitor-client privilege exemption but orders the AGCO to disclose the remainder to the appellant. The adjudicator upholds the AGCO's search for responsive records as reasonable.

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, 24, and 49(a).

Orders and Investigation Reports Considered: Order MO-3357.

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

OVERVIEW:

[1] By way of background, the Alcohol and Gaming Commission (the AGCO) is a regulatory agency operating under the *Alcohol and Gaming Commission of Ontario Act, 2019*. The AGCO is part of the Ministry of the Attorney General (the ministry). The ministry administers access requests made under the *Freedom of Information and Protection of*

Privacy Act (the *Act*) on behalf of the AGCO.

[2] The appellant submitted a request under the *Act* to the ministry for the following records:

- a. Any evidence acquired during the investigation of my complaint to the [AGCO's] Ethics Executive pertaining to my complaint of Breach of Privacy under Ontario Regulation 381/07
- b. Any notes made during said investigation; and
- c. The final outcome of the investigation and review of my complaint.

[3] The ministry issued a fee estimate of \$26.70 and a final decision regarding access. The ministry advised the appellant it would grant him partial access to sixteen pages of records and access to the remaining records would be denied on the basis of sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The ministry also withheld some information as not responsive to the request. The appellant paid the fee and the ministry disclosed some of the records to him, in accordance with its access decision.

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

[5] During mediation, the appellant confirmed his interest in obtaining access to the withheld records. The appellant did not indicate he wished to pursue the non-responsive information and I removed it from the scope of the appeal. The appellant also claimed there should be emails between the AGCO's former legal counsel and the College of Veterinarians of Ontario, thereby raising reasonable search as an issue.

[6] As the records appeared to contain information that would qualify as the appellant's personal information, the mediator raised the issues of the possible application of section 49(a) and (b), which are exemptions relating to records containing the personal information of the appellant.

[7] 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 under the *Act*. The adjudicator originally assigned to this appeal began an inquiry by inviting representations from the ministry in response to a Notice of Inquiry. The AGCO submitted representations because the appellant seeks access to records relating to the AGCO.

[8] The appeal was then transferred to me to continue the inquiry. I sought and received representations from the appellant and then reply representations from the AGCO.

[9] In the discussion that follows, I uphold the AGCO's decision in part. I find the majority of the records are exempt under section 19 of the *Act* and uphold the AGCO's exercise of discretion to withhold them. However, I find some records are not exempt under section 19 and order the AGCO to disclose them to the appellant. Finally, I uphold the AGCO's search for responsive records as reasonable.

RECORDS:

[10] There are 37 records at issue, consisting of emails, correspondence and other documents. They are identified in the AGCO's Index of Records as follows:

Record	Exemption(s) claimed
Record 2 (pages 2-4)	NR; sections 13(1) and 19(a)
Record 3 (pages 5-7)	section 19(a)
Record 4 (pages 8-9)	section 19(a)
Record 5 (page 10)	section 19(a)
Record 6 (page 11)	section 19(a)
Record 7 (page 12)	section 19(a)
Record 8 (page 13)	section 19(a)
Record 9 (pages 14-17)	sections 13(1) and 19(a)
Record 10 (pages 18-19)	section 19(a)
Record 11 (pages 20)	section 19(a)
Record 12 (page 21)	section 19(a)
Record 13 (pages 22-24)	section 19(a)
Record 14 (page 25)	section 19(a)
Record 15 (page 26)	section 19(a)
Record 16 (pages 27-28)	section 19(a)
Record 17 (page 29)	section 19(a)
Record 18 (page 30)	section 19(a)

Record 19 (page 34)	sections 13(1) and 19(a)
Record 30 (pages 35-50)	section 19(a)
Record 31 (pages 51-70)	section 19(a)
Record 32 (pages 71-74)	section 19(a)
Record 33 (pages 75-77)	section 19(a)
Record 34 (pages 78-81)	section 19(a)
Record 35 (pages 82-84)	section 19(a)
Record 36 (pages 85-86)	section 19(a)
Record 37 (pages 87-88)	section 19(a)
Record 38 (pages 89-92)	section 19(a)

ISSUES:

- A. Do the records contain personal information as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption for solicitor-client privileged information at section 19 or section 49(a), allowing an institution to refuse access to a requester's own personal information, read with section 19, apply to the information at issue?
- C. Did the AGCO conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain personal information as defined in section 2(1) and, if so, whose personal information is it?

[11] In order to decide which sections of the *Act* may apply, the IPC must first decide whether the records contain personal information and, if so, to whom it relates. It is important to know whose personal information is in the records. If the records contain the requester's personal information, the requester's access rights are greater than if they

do not and access to the records will be considered under Part III of the *Act*¹ Also, if the records contain the personal information of other identifiable individuals, one of the personal privacy exemptions might apply.² The term *personal information* is defined in section 2(1) a “recorded information about an identifiable individual.”

[12] 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* an individual.³

[13] 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.⁴

[14] To qualify as personal information, it must be reasonable to expect an individual will be identified if the information is disclosed.

[15] The AGCO submits some of the records may contain information that qualifies as the appellant’s personal information. However, the AGCO argues that records 2 to 18 contain information relating primarily to the ethics complaint filed by the appellant rather than the appellant himself. The AGCO submits records 30 to 34 were retrieved by legal counsel as part of their review of the appellant’s complaint. While the AGCO does not elaborate on records 30 to 34 in this context, the AGCO presumably means these records relate to the appellant’s complaint rather than the appellant himself. Finally, the AGCO submits record 35 does not contain information relating to the appellant.

[16] In addition, the AGCO submits some of the records contain personal information belonging to other identifiable individuals. Specifically, the AGCO submits records 2, 9, 12, 13, 16, 17, and 18 contain information such as an individual’s birth date (considered personal information in paragraph (a) of section 2(1)), individuals’ personal views or opinions (paragraph (e)), and other recorded information about the individuals per the introductory wording of section 2(1).

[17] The appellant submits the records at issue contain personal information relating to him.

[18] Based on my review of the records, I find they all, with the exception of record 35, contain the personal information of the appellant. Specifically, I find the records contain recorded information about an identified individual, i.e. the appellant, pursuant to the introductory wording of the definition in section 2(1). I note the AGCO takes the position

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.

² See section 21(1) of the *Act*.

³ See sections 2(3) and (4) of the *Act* and Orders P-257, P-427, P-1621, R-98005, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

the records relate more to the appellant's ethics complaint filed against the AGCO rather than the appellant himself. However, the complaint filed by the appellant was done so in his personal capacity and the fact that he filed an ethics complaint against the AGCO is information relating to the appellant in a personal manner. Furthermore, the records contain the opinions of individuals about the appellant, which is personal information as contemplated by paragraph (g) of the definition of that term in section 2(1). The records also contain the appellant's contact information (paragraph (c)), the appellant's own views or opinions (paragraph (e)), information relating to the appellant's criminal or employment history (paragraph (b)), and his name where it appears with other personal information relating to him (paragraph (h)). Upon review of the records as a whole, I find the AGCO took too narrow an approach in finding the records do not contain the appellant's personal information because they relate to his complaint rather than himself.

[19] I find record 35, which is a Memorandum of Understanding between the Ontario Racing Commission and the College of Veterinarians of Ontario, does not contain the appellant's or any other identifiable individual's personal information.

[20] In addition, I find some of the records at issue contain the personal information belonging to other identifiable individuals. Specifically, I agree with the AGCO that records 2, 9, 12, 13, 16 and 18 contain these individuals' personal views or opinions and other recorded information about them (paragraphs (e) and (h) of the definition of personal information in section 2(1) of the *Act*). While the AGCO claims that record 17 contains the personal information of identifiable individuals, I find it does not.

[21] In conclusion, I find all the records, with the exception of record 35, contain personal information belonging to the appellant and other identifiable individuals. As these records contain personal information belonging to the appellant, I will consider whether he is entitled to access to them under Part III of the *Act*. As record 35 does not contain any personal information, I will consider whether the appellant is entitled to it under Part II of the *Act*.

Issue B: Does the discretionary exemption for solicitor-client privileged information at section 19 or section 49(a), allowing an institution to refuse access to a requester's own personal information, read with section 19, apply to the information at issue?

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

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.

[23] The AGCO relies on section 19 to withhold the records at issue from disclosure. However, because all the records, with the exception of record 35, contain the appellant's personal information, I will consider whether these records are exempt under section 49(a), read with section 19. I will consider whether record 35 is exempt under section 19, only, because it does not contain the appellant's personal information.

[24] 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. The relevant portions of the section state,

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;

[25] In previous decisions, the IPC has referred to the different exemptions in section 19 as making up two branches. The first branch, referred to as branch 1, is found in section 19(a) (subject to solicitor-client privilege) and is based on common law. The second branch, or branch 2, is found in section 19(b) (prepared by or for Crown counsel) and contains statutory privileges created by the *Act*. The AGCO relies on both branches of the exemption to withhold the records from disclosure.

[26] The AGCO must establish that at least one branch applies. I will first consider whether the records or parts of the records are exempt from disclosure under the solicitor-client communication privilege in branch 1, found in section 19(a).

Solicitor-client communication privilege

[27] At common law, solicitor-client privilege itself contains two types of privilege: solicitor-client communication privilege and litigation privilege.

[28] 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.⁵ Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a lawyer and a party on the other side

⁵ *Descôteaux v Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

of a transaction.⁷

[29] Litigation privilege, the second type of common law privilege, protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.⁸

[30] Under common law, a client may waive privilege. An express waiver of privilege happens where the client knows of the existence of the privilege and voluntarily demonstrates an intention to waive it.⁹ There may also be an implied waiver of solicitor-client privilege 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.¹⁰ Generally, disclosure to outsiders of privileged information is a waiver of privilege.¹¹

Parties’ representations

[31] The AGCO submits the records are exempt under section 19(a) of the *Act* because they were prepared for the purpose of seeking or conveying legal advice and form part of a “continuum of communications” between legal counsel and staff at the AGCO.

[32] As background, the AGCO states the appellant submitted the ethics complaint referred to in his request to the AGCO Chief Executive Officer in a letter dated April 11, 2020. The AGCO submits records 2 to 19 and 30 to 38 are exempt from disclosure as they were prepared or gathered for the purposes of providing legal advice in relation to the complaint. The AGCO submits these records are also communications in which legal advice was provided and this information is also protected by solicitor-client privilege and should not be disclosed.

[33] The AGCO submits records 36 to 38 were “gathered” by the AGCO’s legal counsel as part of the investigation into the appellant’s complaint. The AGCO submits these records comprise internal email correspondence between or amongst its legal counsel, external litigation counsel and staff members.

[34] The AGCO also submits that record 34 forms a part of the continuum of communications between solicitor and client.

[35] With regard to records 30 to 33 and 35, the AGCO submits these records were “gathered” by the AGCO’s in-house counsel to form part of legal advice. As such, these records are part of the continuum of communications towards providing legal advice to

⁷ *Kitchener (City) v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁸ *Blank v Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁹ *S. & K. Processors Ltd. v Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (C.A.).

¹⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹¹ 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.).

the internal AGCO client.

[36] In his representations, the appellant acknowledges some of the records identified in the AGCO's index may be subject to solicitor-client privilege. However, the appellant submits some of the records, such as notes or final decisions, should not fall into this category.

[37] The appellant submits the AGCO's representations do not offer sufficient detail to assess whether each record contains solicitor-client privileged information. The appellant also notes the AGCO did not address whether the information was shared on a confidential basis.

[38] In its reply submissions, the AGCO submits it properly withheld the records at issue under the solicitor-client privilege exemption because they contain legal advice that was sought and provided. The AGCO reiterates that legal advice is protected by solicitor-client privilege through the common law and as provided for by the *Act*. The AGCO submits the records at issue form part of the continuum of communications between solicitor and client.

[39] The AGCO submits there was no waiver of the privilege. It confirms it never waived solicitor-client privilege and there is nothing to suggest that waiver occurred.

Analysis and Findings

[40] I have reviewed the records and the parties' representations. For the reasons that follow, I uphold the AGCO's decision, in part.

[41] In *Descôteaux v Mierzwinski*¹², the Supreme Court of Canada held that solicitor-client communication privilege rests on three requirements: (1) the communication is between solicitor and client; (2) it involves the seeking or giving of legal advice, and (3) it is intended to be confidential. Based on my review, I find all three requirements are present in the case of the email records 2 to 6, 8 to 16, 18, 37 and 38. I find these email records are correspondence between solicitor and client in which legal advice was either provided or requested. Furthermore, while there is no explicit indication on the records themselves indicating the communications were confidential, it is clear both from the contents of the records and the nature of the relationship between the correspondents that the communications are confidential. Given these circumstances, I find these records are exempt under the solicitor-client communication privilege exemption in section 19(a), subject to my review of the AGCO's exercise of discretion below.

[42] In addition, I find record 19, which is a draft correspondence is exempt under the solicitor-client communication privilege exemption in section 19(a).

¹² [1982] 1 S.C.R. 860 at 888, and *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at paragraph 15, and *Solosky v The Queen*, [1980] 1 S.C.R. 821.

[43] I also find record 34 is exempt under the solicitor-client communication privilege exemption in section 19(a). I agree with the AGCO that this record contains legal advice sought by the AGCO.

[44] Therefore, I find a majority of the records at issue to be exempt under section 19(a) of the *Act*. However, I find a number of records are not subject to the solicitor-client privilege exemption.

[45] First, I find email records 7, 17, and 36 do not involve the seeking or providing of legal advice; rather, these records are administrative in nature and do not contain any information that would be construed to be part of the continuum of communications between solicitor and client. Given the nature of records 7, 17 and 36, I find they do not fit within either branch of the solicitor-client privilege exemption. I have reviewed the three records and they do not contain personal information of any individuals other than the appellant nor has the AGCO claimed any other discretionary exemption to withhold them. As a result, I will order the AGCO to disclose these records to the appellant.

[46] In addition, I find records 30 to 33 and 35 are not exempt under section 19 of the *Act*. According to the AGCO, these records were "gathered" by legal counsel to form part of the legal advice. As such, the AGCO submits these records are part of the continuum of communications towards providing legal advice to the internal AGCO client. Record 30 is a Statement of Defence filed by Ontario Racing Commission in response to a Statement of Claim filed by the appellant. Record 31 is a Statement of Claim filed by the appellant against the Ontario Racing Commission. Record 32 is a Summary of Discipline Committee Hearing prepared by the College of Veterinarians of Ontario. Record 33 is Decision from the College of Veterinarians of Ontario Complaints Committee Panel. Finally, record 35 is a Memorandum of Understanding between the Ontario Racing Commission and the College of Veterinarians of Ontario.

[47] While the AGCO submits these records were "gathered" by legal counsel to form part of their legal advice, the records themselves do not contain any legal advice. For example, the records do not contain annotations or other notes made by legal counsel with advice or communications to the client in relation to the provision of legal advice. Furthermore, these records are either publicly available¹³ or were publicly filed with a court. In addition, the appellant was involved in the matters that resulted in records 30 to 33. As such, it is likely the appellant already possesses copies of these records. In Order MO-3357, the adjudicator considered the application of section 19 to publicly available information filed with a court which the appellants in that appeal already possessed. The adjudicator found those "records lack the necessary confidentiality to be subject to privilege." I agree with and adopt this analysis. I find records 30 to 33 do not fit under either branch of the solicitor-client privilege exemption and I will order the AGCO to disclose these records to the appellant.

¹³ Record 32 is available online on the College of Veterinarian's [website](#).

[48] As stated above, record 35 is a Memorandum of Understanding between the Ontario Racing Commission and the College of Veterinarians of Ontario. The Ontario Racing Commission was a regulatory agency tasked with administering the *Racing Commission Act, 2000*. On April 1, 2016, the Ontario Racing Commission merged with the AGCO, and the AGCO assumed the Ontario Racing Commission's previous responsibility for the regulation of horse racing under the *Horse Racing License Act, 2015*,¹⁴ which replaced the *Racing Commission Act, 2000*.¹⁵ Given these circumstances, the Memorandum of Understanding between the Ontario Racing Commission and the College of Veterinarians of Ontario is no longer valid. The AGCO did not make any submissions regarding the application of section 19 to record 35 beyond stating the record was "gathered" by legal counsel to form part of legal advice. I have reviewed record 35 and find it does not contain any information that would reveal legal advice. Therefore, I find record 35 is not exempt under either branch of the solicitor-client privilege exemption in section 19. The AGCO did not claim any other exemption to this record and I will order it to disclose it to the appellant.

[49] In conclusion, I find that records 2 to 6, 8 to 16, 18, 19, 34, 37 and 38 are exempt under section 49(a), read with section 19, of the *Act*, subject to my review of the AGCO's exercise of discretion, below. However, I find records 7, 17, 30 to 33, and 36 are not exempt under section 49(a), read with section 19. I also find record 35 is not exempt under section 19.

[50] Given these findings, I do not need to consider whether the records I found to be exempt under section 49(a), read with section 19, are also exempt under sections 49(a), read with section 13(1), or 49(b). I note the ministry did not claim any other exemptions to withhold records 7, 17, 30 to 33, 35 and 36. Accordingly, I do not need to consider whether these records are exempt under any other exemption. I will order the AGCO to disclose records 7, 17, 30 to 33, 35 and 36 to the appellant.

Exercise of Discretion

[51] The section 49(a) and 19 exemptions are discretionary and permit an institution to disclose information even though it could withhold it. The institution must exercise its discretion when determining whether to disclose information in response to a request. On appeal, although it cannot substitute its discretion for the institution's, the IPC may determine whether the institution failed to exercise its discretion properly.

[52] The AGCO submits it exercised its discretion to withhold records 2 to 6, 8 to 16, 18, 19, 34, 37 and 38 under section 49(a), read with section 19, properly. The AGCO submits it considered the following factors in exercising its decision:

- 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

¹⁴ S.O. 2015, Chapter 38, Schedule 9.

¹⁵ S.O. 2000, Chapter 20. Repealed on April 1, 2016.

personal information, and exemptions from the right of access should be limited and specific;

- the wording and content of the solicitor-client privilege exemption and the interests it seeks to protect weighed against the appellant's interest in the records relating to the complaint he filed;
- whether the disclosure of the records will increase public confidence in the operation of the institution;
- whether there was any public interest in disclosure of the records;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the request or any affected person;
- the age of the information; and
- the AGCO's historic practice regarding similar information.

[53] The AGCO submits records 2 to 6, 8 to 16, 18, 19, 34, 37 and 38 are subject to solicitor-client privilege and should not be disclosed. The AGCO submits the courts and the IPC have recognized that solicitor-client privilege cannot be overridden because this privilege enables the full, free and frank communications between legal counsel and client. The AGCO submits it considered the appellant's personal interest in the records; nonetheless, the AGCO submits the interests the solicitor-client privilege exemption seeks to protect are significant. The AGCO submits that the disclosure of these records would not lead to an increase in public confidence in its operations.

[54] The appellant submits the AGCO exercised its discretion but did not consider the relevance of this request in relation to other matters he filed with the College of Veterinarians of Ontario. The appellant submits the AGCO did not properly consider all the relevant considerations.

[55] I find the AGCO exercised its discretion properly. I find the interest in protecting the need to allow for the provision and receipt of confidential legal advice was a relevant consideration. I am also satisfied the AGCO considered the appellant's interest in the records and the circumstances involving his request. I am satisfied that in exercising its discretion the AGCO balanced the interests of the appellant with the interests the exemption in section 19 was created to protect. Finally, I find the AGCO did not exercise its discretion in bad faith or for an improper purpose, or that it relied on irrelevant considerations.

[56] I uphold the AGCO's exercise of discretion and its decision to deny the appellant access to records 2 to 6, 8 to 16, 18, 19, 34, 37 and 38 under section 49(a) read with section 19(a) of the *Act*.

Issue C: Did the AGCO conduct a reasonable search for records?

[57] Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24.¹⁶ If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[58] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.¹⁷ To be responsive, a record must be "reasonably related" to the request.¹⁸

[59] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹⁹ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁰

[60] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²¹

Parties' representations

[61] The AGCO submits it conducted a reasonable search for records. The AGCO submits the request was sufficiently described and the appellant provided supporting materials which enabled the AGCO to conduct a search for responsive records. Given these circumstances, the AGCO states it did not need to clarify the subject matter of the request or confirm the types of records the appellant sought access to.

[62] The AGCO provided an affidavit sworn by its then-Manager of Information Management and Analytics (the manager), who was responsible for overseeing the search. The manager submits that, following receipt of the appellant's request, she determined the Acting Chief Corporate Relations Officer and Corporate Secretary, AGCO Senior Counsel and AGCO Legal Counsel should have the records responsive to the appellant's request given their direct role in reviewing and handling the appellant's complaint. The manager submits these individuals searched their record holdings and provided the responsive records in their custody or control. The manager submits she

¹⁶ Orders P-85, P-221 and PO-1954-I.

¹⁷ Orders P-624 and PO-2559.

¹⁸ Order PO-2554.

¹⁹ Orders M-909, PO-2469 and PO-2592.

²⁰ Order MO-2185.

²¹ Order MO-2246.

believes these individuals provided all responsive records in their custody or control at the time they conducted their searches.

[63] The manager also submits the ministry's Access and Privacy Office (which received and administers freedom of information requests made to the AGCO) contacted the appellant to confirm the end date for his request. The manager submits the appellant confirmed an end date of June 25, 2020.

[64] The manager affirms the searches conducted by the Acting Chief Corporate Relations Officer and Corporate Secretary, AGCO Senior Counsel and AGCO Legal Counsel for records responsive to the appellant's request were reasonable.

[65] In his representations, the appellant submits the AGCO's search ought to have located investigative records, specifically "a record of investigation." The appellant submits the AGCO produced no evidence to demonstrate it made a reasonable effort to locate a record of investigation.

[66] The AGCO submits it explained and described the process and circumstances in interpreting the appellant's request and in carrying out the search for responsive records. The AGCO submits it sought clarification from the appellant and provided a detailed affidavit from the manager describing the searches conducted by the individuals principally involved with reviewing and handling the ethics complaint. The AGCO acknowledges that the appellant takes the position the AGCO did not conduct a reasonable search because there was no reference to a "record of investigation" in the index. Nonetheless, the AGCO submits it conducted a reasonable search for responsive records.

Analysis and findings

[67] I have reviewed the parties' representations and the manager's affidavit. Upon review, I find the AGCO conducted a reasonable search for records responsive to the appellant's request. Specifically, I find AGCO employees knowledgeable in the subject matter of the appellant's request, namely the Acting Chief Corporate Relations Officer and Corporate Secretary, AGCO Senior Counsel and AGCO Legal Counsel who handled and responded to the appellant's complaint, expended a reasonable effort to locate records responsive to the appellant's request.

[68] Furthermore, I find the appellant did not provide a reasonable basis for his belief that additional responsive records exist. The appellant refers to a "record of investigation" but offers no evidence to support why he believes a record with that name would reasonably exist in the AGCO's record holdings. In other words, while the appellant identified record he believes should exist, he did not support this claim with any evidence. For example, the appellant did not identify a reference to that term in any AGCO correspondence or in the complaint records he filed. The appellant provides no other representations to support his claim that additional responsive records ought to exist. In

the absence of any evidence to support his position, I find the appellant has not established a reasonable basis for his belief that additional responsive records ought to exist.

[69] Therefore, I find the AGCO conducted a reasonable search for responsive records and I uphold it.

ORDER:

1. I uphold the AGCO's decision to withhold records 2 to 6, 8 to 16, 18, 19, 34, 37 and 38 under section 49(a), read with section 19, of the *Act*.
2. I order the AGCO to disclose records 7, 17, 30 to 33, 35 and 36 to the appellant by **April 18, 2024**.
3. I uphold the AGCO's search as reasonable.
4. In order to verify compliance with Order provision 2, I reserve the right to require the AGCO to provide me with a copy of any records disclosed to the appellant.

Original Signed by: _____
Justine Wai
Adjudicator

_____ March 28, 2024